

# Interviewing a Former Officer Of Your Adversary

BY ROY SIMON

**M**ay a lawyer who is litigating in New York courts freely interview an adversary's former employees? Based on case law and commentary interpreting New York's "no-contact" rule, DR 7-104(A), virtually everyone thought the answer to this question was yes. But in December, Judge Richard B. Lowe, III of the Commercial Division of the New York County Supreme Court issued a decision in *Muriel Siebert & Co. Inc. v. Intuit Inc.* (published only in the New York Law Journal) that has the legal world buzzing. Judge Lowe disqualified the law firm of Quinn Emanuel Urquhart Oliver & Hedges, LLP ("Quinn Emanuel") from defending Intuit (makers of the highly popular Quicken software) against a suit brought by the discount broker Muriel Siebert & Co. The basis of the disqualification was that Quinn Emanuel had interviewed Siebert's former Executive Vice President and Chief Operating Officer after he left his position at Siebert. Why did Judge Lowe disqualify Quinn Emanuel for interviewing an adversary's former employee? Was he right to do so?

## Factual background

One unusual feature of *Muriel Siebert & Co. Inc. v. Intuit Inc.* is that Judge Lowe issued two opinions, one on November 3rd and another on December 29th. (The November opinion was originally issued under seal for reasons I do not know, but has since been unsealed.) The December opinion does not provide the facts, but I have gleaned them from the November opinion which someone sent to me. (The November opinion has not been published anywhere – even in the New York Law Journal – as far as I know.)

The witness at issue, Nicholas P. Dermigny, served as Executive Vice President and Chief Operating Officer of Siebert from 1989 to September 6, 2005. From November 8, 1990 until his termination from Siebert, Dermigny also served as a Director of Siebert Financial Corporation, Siebert's parent corporation.

Dermigny was not an attorney, but he was "intimately involved in the decision-making process at Siebert with regards to Intuit." He presided over "all of the activities in which Siebert engaged in connection with its dealings with Intuit," including participating in negotiations for a Memorandum of Understanding that the parties signed in February 2002 and a Strategic Alliance Agreement that the parties executed in April 2002.

More pertinent to Judge Lowe's ruling in this case was the following:

[S]ince Siebert retained counsel in the summer of 2003 in anticipation of litigation with Intuit, Dermigny participated in countless privileged communications with counsel, working closely with counsel in investigating the case, formulating the legal theories on which Siebert's claims are based, and drafting the Complaint. Dermigny reviewed and commented on numerous drafts and approved the final Complaint filed. As recently as July 25, 2005, Dermigny provided comments to draft interrogatory responses and discussed damage calculations with counsel.

In August 2005, Siebert's counsel (the firm of Ingram Yuzek Gainen Carroll & Bertolotti) learned that Dermigny was negotiating a separation agreement with Siebert. Ingram Yuzek contacted Dermigny and asked him if he would still work with the firm to prepare for his deposition, which was scheduled for early August. Dermigny responded that he would not cooperate with Ingram Yuzek unless and until he worked out a suitable severance package with Siebert. Ingram Yuzek then contacted Quinn Emanuel to let them know that Dermigny was in the process of separating from Siebert, and that Ingram Yuzek could not control Dermigny, or represent him in connection with his deposition, or facilitate his appearance. With Ingram Yuzek's blessing, Quinn Emanuel soon served Dermigny with a third-party subpoena for production of documents and for a deposition in late September.

Dermigny was terminated by Siebert on September 6, 2005. Only eight days later, on September 14, 2005, Dermigny went to Quinn Emanuel's offices for a "pre-deposition informal interview" that lasted approximately three hours. Quinn Emanuel informed Dermigny "not to disclose any privileged information during the course of the interview, including communications with Siebert's counsel or his knowledge of Siebert's legal strategy," and Quinn Emanuel "cautioned Dermigny not to answer questions that might lead to the disclosure of confidential information."

Shortly before Dermigny's deposition was scheduled to take place, Siebert discovered that Quinn Emanuel had met informally with Dermigny. Siebert then moved to disqualify Quinn Emanuel. At a court conference regarding the motion, Quinn Emanuel offered to let Ingram Yuzek depose Dermigny on the subject of his communications with Quinn Emanuel, but Siebert rejected the offer. Ingram Yuzek then argued that Quinn Emanuel should be disqualified because it "may" have been exposed to "Siebert's confidential privileged information, including Ingram Yuzek's work product and confidential information." Quinn Emanuel countered that its interview with Dermigny was proper under DR 7-104.

### **Judge Lowe's November opinion**

In the November 3, 2005 decision, the court sided with Ingram Yuzek and disqualified Quinn Emanuel. Citing Canon 9 and several cases, the court said that the "guiding principle in any disqualification motion is that a lawyer should *avoid any suggestion or even the mere appearance of impropriety.*" (Emphasis by the court.) Here, it was "undisputed that Dermigny was privy to confidential and privileged information while he was Executive Vice President and Chief Operating Officer of Siebert," and it was "uncontroverted that Dermigny was actively and personally involved with the litigation at issue." Therefore, "the only question before the court is whether opposing counsel may communicate ex parte with a former senior employee of the opposing party, one who is privy to intimate attorney-client information that may affect the potential outcome of a case."

The court began by analyzing DR 7-104(A)(1), which provides as follows:

- (A) During the course of his representation of a client a lawyer shall not:
  - (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

As the Court of Appeals explained in *Niesig v. Team I*, 76 N.Y.2d 363, 369 (1990) (Kaye, J.), DR 7-104(A)(1) “applies only to current employees, *not to-former employees.*” (Emphasis by Judge Lowe.) Dermigny was no longer employed by Siebert when Quinn Emanuel interviewed him. Therefore, Judge Lowe said, “DR7-104(A)(1) does not apply and, accordingly, there is no violation of the Code of Professional Responsibility and disqualification is unwarranted on this ground.” That was the alpha and omega of Judge Lowe’s “no-contact” analysis, and it seems to me that he got it right. Quinn Emanuel did not violate DR 7-104(A)(1) by interviewing a former employee.

But that was not the end of the decision. The problem was “the protection of the attorney-client privilege.” An *ex parte* meeting between a law firm and “an individual of managerial status, with personal and intimate knowledge of the facts and litigation strategies” of the opposing party presents a threat to the attorney-client privilege. Judge Lowe quoted GEOFFREY C. HAZARD, JR. & WILLIAM HODES, *THE LAW OF LAWYERING*, in which Professor Hazard cautioned attorneys as follows:

[S]ome former employees continue to personify the organization even after they have terminated their employment relationship. An example would be a managerial level employee involved in the underlying transaction, who is also conferring with the organization’s lawyer in marshalling evidence on its behalf. ... This kind of former employee is undoubtedly privy to privileged information, including work product, and an opposing lawyer is not entitled to reap a harvest of such information without a valid waiver by the organization, or according to narrow exceptions in the discovery and evidence rules.

Here, Dermigny was “part and parcel of the litigation.” Because Intuit’s counsel spoke to him without notice that the conversation was going to take place, “appearances of impropriety pervade.” Quinn Emanuel sought to rebut the charge of misconduct by arguing that it had warned Dermigny before engaging in the *ex parte* interview, “not to disclose any privileged information during the course of the interview, including communications with Siebert’s counsel or his knowledge of Siebert’s legal strategy.” The court found this argument “unpersuasive,” saying:

[T]he burden is on the attorney to understand the intricacies of and decide what is privileged communication, not on the non-attorney non-party witness. In addition, the court questions Dermigny’s ability to provide only factual, non-privileged information, given that Dermigny is not an attorney ... and given his current enmity against Siebert. ... The appearance of impropriety permeates this *ex parte* communication, and that is what the court finds extremely troubling.

In sum, Judge Lowe concluded that “the facts of the underlying motion, the subject matter and range of information Dermigny has and was privy to, Dermigny’s interest in this matter, the defendant’s stake in this litigation, and the appearance of impropriety, whether or not Quinn Emanuel has received privileged information, all require disqualification.”

### **Judge Lowe’s December opinion**

Intuit soon moved for reconsideration, and presented an expert affidavit from Professor Hazard himself to rebut the court’s reading of his treatise in its November decision. Professor Hazard opined in his affidavit that “contact with and interview of former employees, even high-ranking ones, is permissible ... as long as inquiry is not made into a protected category.” Judge Lowe countered with another citation to

Professor Hazard's treatise stating that disqualification is warranted "where it is evident that the interview was conducted for the very purpose of obtaining confidential information, or where it entails a high risk that such information will be disclosed." THE LAW OF LAWYERING §38.7 (3d ed. 2005) (emphasis by Judge Lowe). The court was still not persuaded that Dermigny knew the "intricacies of" privileged information or had the ability to "decide what is privileged communication." Nor could Quinn Emanuel decide the privilege issues because it was zealously representing Intuit. Thus, "defendant's counsel misses the point in the court's decision to disqualify counsel: it was the potential for actual prejudice to the plaintiff that arose from the high risk that confidential information was divulged that required disqualification."

Intuit also argued that (a) there was no "appearance of impropriety," (b) in any event there was no "independent basis for disqualification" based on the mere "appearance of impropriety," and (c) the appearance of impropriety was "too vague and subjective" a standard for a court to use. The court disagreed. The court acknowledged that "the appearance of impropriety alone is 'not sufficient to require disqualification,'" but said the court could nonetheless disqualify a firm where there is "the potential for actual prejudice arising from the conflict of interest or a substantial risk of an abuse of confidence." Here, the court disqualified counsel based not only on its perception of impropriety, but also on the fact that Quinn Emanuel had pursued a path "fraught with attorney-client and work product privilege problems ...." Professor Hazard's affidavit expressed his view that there was no appearance of impropriety, but that was "inapposite and irrelevant" because the court had already found that "the appearance of impropriety pervades this communication."

In its final effort to change Judge Lowe's mind, Intuit asserted that creating "this new category ... effectively overrules *Niesig* and opens the door to a potential flood of disqualification motions." The court again disagreed. First, the court did not disqualify Quinn Emanuel based on DR 7-104(A)(1), which applies to "current employees, not to former employees." In addition, the *Niesig* decision directly addressed only "ex parte interviews with nonmanagerial witnesses employed by a corporate defendant." Finally, and "most importantly," the Court of Appeals requires courts to "look to the rules as guide-lines to be applied with due regard for the broad range of interests at stake" and to "make our own decision in the interests of justice to all concerned." Here, the court said it had taken into account the broad range of interests at stake and "the high risk that this ex parte communication divulged privileged information." Accordingly, the court denied the motion for leave to reargue and renew, and let the disqualification of Quinn Emanuel stand.

### **Who is right?**

If Judge Lowe had held that DR 7-104(A)(1) flatly prohibits lawyers from conducting ex parte interviews with any of an adversary's former employees – or even any specific category of former employees, such as the "control group" – I would vehemently disagree with the decision. Similarly, if Judge Lowe had held that the appearance of impropriety alone was ordinarily a sufficient basis for disqualifying a law firm, I would also disagree. But Judge Lowe's ruling was much more subtle, and the problem he addressed is perplexing.

Judge Lowe was trying to determine the point at which the risk of intrusion upon the adversary's attorney-client privilege and work product outweighs the advantages of allowing unrestricted access to an adverse party's former employees. The advantages of unrestricted access include (a) allowing inexpensive, informal investigation to substitute for costly depositions, (b) stating an easy-to-apply,

bright-line rule that provides certainty for litigants and saves time for courts, and (c) minimizing or eliminating the frequency of disqualifications resulting from improper interviews with an adversary's former employees (and all of the delays, disruptions, and expenses that accompany disqualifications).

That balance is not easy to strike, and defies easy definition. Yet courts often strike a similar balance when a former client moves to disqualify opposing counsel in a substantially related matter based on DR 5-108(A)(1). In those matters, the law firm facing disqualification nearly always argues that it has erected a "screen" or "Chinese Wall" around the personally disqualified lawyer (i.e., the lawyer who knows the adversary's confidential information) that will prevent any of the former client's confidential information from migrating to other lawyers in the firm. For example, when a lawyer moves laterally from a law firm representing Company X to a law firm opposing Company X, the firm hiring the lateral lawyer typically builds a screen around the lateral lawyer to isolate the lawyer from any contact with lawyers who are working on matters against Company X.

Most of the time, the courts grant motions to disqualify despite these screens. See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), vacated on other grounds, 450 U.S. 903 (1981) (disqualifying firm that had hired a lawyer from the opposing firm); *Mitchell v. Metropolitan Life Insurance Co.*, 2002 WL 441194 (S.D.N.Y. 2002) (disqualifying small branch office of a firm that did not promptly erect a screen after hiring a lawyer from the opposing firm); *Kassis v. Teacher's Insurance and Annuity Association*, 93 N.Y.2d 911 (1999) (disqualifying 26-lawyer firm representing defendant despite an elaborate ethics screen because the firm hired an associate who had actively represented plaintiff). The overall theme is that policing such screens – and overcoming public skepticism about them – is simply too difficult. Disqualifying the conflicted law firm is much easier.

Nevertheless, the courts occasionally permit screens to overcome a former client's objections. For example, in *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, 1996 U.S. Dist. LEXIS 1624 (S.D.N.Y. 1996) (McKenna, J.), the court denied a motion to disqualify even though an associate had spent 800 hours working on the Bank Brussels case and related matters before moving from Proskauer (counsel for Ernst & Young in the litigation) to Milbank, Tweed (counsel for Chase). "Disqualification is a case-by-case determination," the court said, and "the Court is convinced that the screening procedures proposed by Milbank ... will adequately safeguard any confidence of Ernst, or Proskauer as Ernst's counsel ...." In the more recent case of *Hempstead Video, Inc. v. Incorporated Village Of Valley Stream*, 409 F.3d 127 (2d Cir. 2005) (Leval, J.), the Second Circuit allowed a screen to avoid imputed disqualification when a firm's "of counsel" lawyer was simultaneously representing an opposing party in an unrelated matter. The court said:

*The closer and broader the affiliation of an "of counsel" attorney with the firm, and the greater the likelihood that operating procedures adopted may permit one to become privy, whether intentionally or unintentionally, to the pertinent client confidences of the other, the more appropriate will be a rebuttable imputation of the conflict of one to the other. Conversely, the more narrowly limited the relationship between the "of counsel" attorney and the firm, and the more secure and effective the isolation of nonshared matters, the less appropriate imputation will be. ... [Emphasis added.]*

Isn't that analogous to the approach Judge Lowe took in the Muriel Siebert case? The former officer of Muriel Siebert who was interviewed by Quinn Emanuel (Dermigny) had been one of the highest ranking officers in the company – the former Executive Vice President and Chief Operating Officer. He had not

only been involved in all of the underlying agreements regarding Intuit but had also communicated frequently with Siebert's counsel and had been intimately involved in this very litigation, "working closely with counsel in investigating the case, formulating the legal theories on which Siebert's claims are based," reviewing and commenting on draft complaints, approving the final Complaint, commenting on draft interrogatory responses, and discussing damage calculations with counsel. Moreover, Quinn Emanuel interviewed him only eight days after he left the company, and Dermigny was "at war" with Siebert over his termination, giving him a strong motive to inflict damage on Siebert. (Why else would he have agreed to meet with Quinn Emanuel at all?) Quinn Emanuel correctly cautioned him not to reveal privileged information, but Dermigny was not a lawyer and could not be expected to know precisely which communications were privileged and which were not.

In sum, Dermigny had a close and broad relationship not only with Siebert but with Siebert's counsel, and the "operating procedures" designed to guard against the misuse of Siebert's confidential information (Quinn Emanuel's warnings to Dermigny not to disclose privileged communications) were not sufficient to eliminate the likelihood that Dermigny would reveal privileged information, "whether intentionally or unintentionally" (to borrow from *Hempstead Video*).

## **Conclusion**

When a court disqualifies a law firm, it is exercising its inherent authority to supervise the lawyers and the litigation before it. The exercise of inherent authority is not susceptible to clear-cut rules or easy litmus tests. The "appearance of impropriety" is not a satisfactory standard for deciding routine motions to disqualify, but in the circumstances of the Muriel Siebert case, I think Judge Lowe was correct that the dangers were too great to permit Quinn Emanuel to continue as counsel. He did not overrule *Niesig* or alter the scope of the no-contact rule in New York. He merely recognized that not all former employees are equal, and that in rare situations the appearance of impropriety is too great to tolerate.

---

*Roy Simon is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law and annually writes SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED.*