

Interviewing an Adversary's Former Executives: A Clear Rule At Last

BY ROY SIMON

For any of you who have regularly read my columns in NYPRR, this column will be déjà vu all over again. In August 2001, my article, entitled "Communicating With An Adversary's Former Employees," began as follows:

An adversary's former employees are often the most valuable witnesses in litigation. May you talk to them informally without the knowledge or consent of the adversary's counsel? ...

[A]re an adverse party's former employees embraced within the protection afforded by DR 7-104(A)(1) (numbered Rule 4.2 in most states)? Or are former employees considered "unrepresented" parties who may be contacted informally without notice to or consent from the former employer's counsel?

In March 2006, another of my columns was entitled "Interviewing a Former Officer Of Your Adversary." It began this way:

May 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 ... *Muriel Siebert & Co. Inc. v. Intuit Inc.* [NYLJ January 2006], Judge Lowe disqualified the law firm of Quinn Emanuel Urquhart Oliver & Hedges, LLP ("Quinn Emanuel") [because] 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?

In 2006, the First Department reversed Judge Lowe's decision in *Muriel Siebert*, but the Court of Appeals granted review. Many people speculated that the Court of Appeals had granted review in order to reinstate the disqualification order and revive the old fashioned appearance-of-impropriety standard. On May 8, 2007, however, in *Muriel Siebert & Co. Inc. v. Intuit Inc.*, 8 N.Y.3d 506 (2007), a unanimous Court of Appeals affirmed the First Department and provided clear guidance about interviewing an adversary's former employees. In this column I will briefly review the background of the Court's *Muriel Siebert* opinion, summarize the opinion itself, and provide some practical advice for lawyers seeking to conduct or prevent ex parte interviews with former employees.

Background: Three Lower Court Opinions

Discount broker *Muriel Siebert & Co* entered into a "strategic alliance" agreement with defendant Intuit Inc., the maker of Quicken, Quickbooks, and other popular financial software, to jointly create and operate an internet brokerage service. The alliance worked well for awhile, but in September 2003, Siebert sued Intuit for failing to promote Siebert's business interests. A prominent member of Siebert's "litigation team" was Nicholas Dermigny, Siebert's Executive Vice President and Chief Operating Officer. He had participated in the negotiations leading up to the Siebert-Intuit agreement and had helped implement the

agreement. When litigation commenced, Dermigny assisted Siebert's lawyers in drafting the complaint and responses to interrogatories. He also was privy to discussions concerning Siebert's litigation strategy, and engaged in privileged and confidential communications with Siebert's counsel.

The relations between Dermigny and Siebert began to deteriorate, and in May 2005, he took a leave of absence from Siebert. When Intuit's counsel (Quinn Emanuel) noticed Dermigny's deposition, Siebert's counsel informed Quinn Emanuel that Siebert could not produce Dermigny for the deposition because it no longer had control over him. Therefore, Intuit subpoenaed Dermigny for his deposition.

Siebert terminated Dermigny's employment on September 6, 2005. As soon as they learned that Dermigny had been discharged, Quinn Emanuel attorneys contacted him without Siebert's knowledge and arranged for an interview. Before commencing the interview, Intuit's attorneys advised Dermigny that he should not disclose any privileged or confidential information, including any conversations with Siebert's counsel, or offer any information concerning Siebert's legal strategy. Quinn Emanuel also cautioned Dermigny that if they asked any question during the interview that might lead to the disclosure of privileged or confidential information, he should advise Quinn Emanuel and refuse to answer the question. Quinn Emanuel then questioned Dermigny about the underlying facts of the case, but did not elicit any privileged information or inquire about Siebert's litigation strategy.

When Siebert's counsel learned about the interview, they moved to disqualify Quinn Emanuel from representing Intuit. Judge Lowe granted the motion, explaining his reasoning in a sealed, unpublished opinion. Intuit moved for reconsideration. The drama was high because in his initial opinion, Judge Lowe had quoted from a treatise co-authored by Professor Geoffrey Hazard, one of the country's most experienced and respected ethics experts. In support of its motion for consideration, Quinn Emanuel had retained Professor Hazard to submit an affidavit asserting that Judge Lowe had quoted his treatise out of context. The New York Law Journal story about Judge Lowe's decision on reconsideration began with a wonderful analogy:

In his film "Annie Hall," Woody Allen settles an argument with a pompous academic over the work of media theorist Marshall McLuhan by pulling the real-life Mr. McLuhan onto the screen.

"I heard what you were saying," says Mr. McLuhan to the dumbstruck academic. "You know nothing of my work."

But a similar tactic produced a less satisfying result for Quinn Emanuel Urquhart Oliver & Hedges, which failed to sway Manhattan Supreme Court Justice Richard Lowe with a supporting affidavit from the prominent legal ethics scholar the judge cited in disqualifying the firm.

Judge Lowe's reasoning in his second opinion (the only published opinion) focused on the appearance of impropriety. Judge Lowe acknowledged that the appearance of impropriety alone was insufficient to require disqualification, but he said the court will 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." Professor Hazard's expert affidavit stated that interviewing "former employees, even high-ranking ones, is permissible . . . as long as inquiry is not made into a protected category," but Professor Hazard's treatise - from which Judge Lowe quoted again on reconsideration - states 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."

Judge Lowe perceived that the risk of disclosure was high because Dermigny (the former Siebert employee) was not a lawyer. Quinn Emanuel, Judge Lowe said, had pursued a path "fraught with attorney-client and work product privilege problems" that was "disconcerting to the court." Judge Lowe was not persuaded that Dermigny "either knew the 'intricacies of' privileged information or had the ability to 'decide what is privileged communication,' nor could counsel decide the same issues of privilege because of its zealous representation of the defendant." The potential for prejudice to Siebert arose from "the high risk that confidential information was divulged," thus requiring Quinn Emanuel's disqualification. Taking a final slap at Professor Hazard, Judge Lowe said: "That Professor Hazard 'does not in his view' believes there was any appearance of impropriety is inapposite and irrelevant, as the court has already found that the appearance of impropriety pervades this communication."

The Aftermath of Judge Lowe's Decision

Personally, I agreed with Judge Lowe's disqualification order. Generally, under the governing standard stated 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. Judge Lowe had expressly recognized this by holding that Quinn Emanuel's interview with Dermigny did not violate the no-contact rule. But Judge Lowe had also recognized that Dermigny was not just a run-of-the-mill former employee. Rather, Dermigny had been one of the highest ranking executives at Muriel Siebert (its Executive Vice President and Chief Operating Officer). He was brimming with confidential information gleaned in discussions with Siebert's counsel about pleadings, interrogatory answers, and litigation strategy, and he had a motive to share some of that information because he had left Siebert on hostile terms.

I had no doubt that Quinn Emanuel had given Dermigny a sincere warning at the outset of the ex parte interview not to divulge any confidential information, but I agreed with Judge Lowe that an angry non-lawyer could not separate privileged information from non-privileged information even if he did his best to obey the warning. And who would ever know if Dermigny did let slip a few nuggets of information protected by the attorney-client privilege? I therefore concluded my March 2006 article as follows:

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.

On appeal to the First Department, the New York State Trial Lawyers' Association and the National Employment Lawyers Association/New York submitted amicus briefs urging the First Department to reverse. In *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 32 A.D.3d 284, 820 N.Y.S.2d 54 (1st Dep't 2006), in a two-page decision, a unanimous panel sided with Intuit and the amici. The court agreed with Judge Lowe that the restrictions in DR 7-104(A) do not apply to former employees, but held that Judge Lowe had erroneously disqualified Quinn Emanuel on account of the perceived appearance of impropriety. "At the

commencement of the interview," the First Department noted, "defense counsel's colleague warned the executive to be careful not to disclose any privileged information, including any legal strategies or communications with plaintiff's counsel ... and insofar as the record shows, no such information was disclosed." A party seeking to disqualify an attorney based on the disclosure of confidential information has the burden of identifying the "specific confidential information imparted to the attorney," and Siebert had not met that burden.

The Court of Appeals Decision

Even though the First Department's decision was unanimous, the Court of Appeals agreed to review the Siebert case. The New York State Trial Lawyers' Association and the National Employment Lawyers Association/New York again submitted amicus briefs criticizing Judge Lowe's disqualification order, this time joined by a powerful new amicus brief from the New York City Bar.

The main argument of the City Bar's amicus brief was that the "appearance of impropriety" standard was too vague to provide adequate guidance. The case gave the Court of Appeals an opportunity to "elucidate further the balance between protecting the integrity of the relationship between corporate counsel and their clients under DR 7-104 and permitting informal discovery of at least some corporate employees." In *Niesig*, the Court of Appeals had determined that former employees do not fall within the definition of "party" in DR 7-104(A), leaving opposing counsel free to contact them without notice to the corporate party's attorney. The City Bar urged the court not to alter "this simple, bright-line rule, which has guided New York lawyers for more than fifteen years."

Still, the City Bar recognized the important need to protect the attorney-client privilege from unwarranted invasion by opposing counsel. Analogous bar association ethics opinions (such as N.Y. City Bar 2003-4) had made clear that unwarranted invasion of the attorney-client privilege by opposing counsel constitutes conduct "prejudicial to the administration of justice" under DR 1-102(A)(5). *See, e.g.*, N.Y. City Op. 2003-04 (2003). The City Bar urged that DR 1-102(A)(5) - not the vague "appearance of impropriety" standard set forth in Canon 9 and relied upon by Judge Lowe -- should govern the court's analysis of the conduct at issue in *Muriel Siebert*. Relying on DR 1-102(A)(5) requires a court to focus on what the lawyers who conducted the interviews actually did, and what the employees being interviewed actually told them, the City Bar said. Here, given that the interviewing attorneys "neither requested nor elicited attorney-client information, those attorneys did nothing wrong, and no basis for disqualifying them exists."

The Court of Appeals agreed with the New York City Bar and unanimously affirmed the First Department. In a short opinion written by Judge Pigott, who had joined the court in September 2006, the court began by reviewing the *Niesig* case and the policies underlying that decision. In *Niesig*, the court had held that DR 7-104(A)(1) "applies only to certain current employees of a party" and that adversary counsel may directly communicate ex parte with a corporate party's nonmanagerial employees other than "employees who have the power to bind the corporation in litigation, are charged with carrying out the advice of the corporation's attorney, or are considered organizational members possessing a stake in the representation." That holding "struck a balance between protecting represented parties from making imprudent disclosures, and allowing opposing counsel the opportunity to unearth relevant facts through informal discovery devices, like ex parte interviews, that have the potential to streamline discovery and foster the prompt resolution of claims."

Those same policy reasons supported a holding here that "so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee." No disciplinary rule prohibits such conduct. Moreover, at the time Quinn Emanuel interviewed Dermigny, he "no longer had the authority to bind Siebert in the litigation, was no longer charged with carrying out the advice of Siebert's counsel, and did not have a stake in the representation." The court concluded that disqualification of Intuit's attorneys was not warranted "merely because Dermigny was at one time privy to Siebert's privileged and confidential information."

But the court immediately added a caution: the right to conduct ex parte interviews is not "a license for adversary counsel to elicit privileged or confidential information from an opponent's former employee." Counsel must still conform to all applicable ethical standards - including DR 1-102(A)(5) - when conducting ex parte interviews. In particular, adversary counsel (a) must disclose their role in the matter and whom they represent, (b) must not ask former employee about privileged communications, and (c) must not induce former employees to reveal such communications.

Here, the Court of Appeals said, Intuit's attorneys "properly advised Dermigny of their representation and interest in the litigation, and directed Dermigny to avoid disclosing privileged or confidential information." They also directed Dermigny not to answer any questions that would lead to the disclosure of such information. For his part, Dermigny stated that he understood the admonitions, and nothing in the record suggested that privileged or confidential information was disclosed. Thus, the Supreme Court had no basis for disqualification, and the Court of Appeals affirmed the First Department.

That was it. That was the whole opinion except for the facts. No nuances, no extraneous factors, no subtlety, no case-by-case analysis - just a bright-line rule applicable in all cases to all former employees, no matter how high or low, no matter how much privileged or confidential information they possess.

Practical Advice

The bright-line rule set down by the Court of Appeals should make interviews with an adversary's former employees ethically risk free for attorneys in litigation pending in New York courts as long as they adhere to a few simple points:

1. When inviting an adversary's former employee for an *ex parte* interview, begin by telling the former employee whom you represent and what the matter is about. For example, begin by saying, "My name is Roy Simon. I represent Intuit in its lawsuit against Muriel Siebert concerning the failed joint project to create and operate an internet brokerage service. I'm investigating the facts." Nothing more elaborate is required, but you should of course answer any questions the former employee may have about the litigation or your role in it. You may state your client's position, but keep in mind that DR 7-104(A)(2) prohibits you from giving any legal advice to the former employee other than the advice to secure counsel.
2. Before asking any questions, direct the former employee to avoid disclosing any privileged or confidential information, and direct him not to answer any questions that would lead to the disclosure of such information. Since many laymen do not understand the concept of privileged and confidential information, you may want to briefly explain what this means. For example, you could say, "Please don't

tell us anything that is privileged or confidential. We really mean that. Privileged information is any information you learned in confidential discussions with the company's lawyers or in memos or other documents written by the lawyers. Confidential information includes things like trade secrets or other proprietary information that the company prohibits employees from disclosing. And if we inadvertently ask you any questions that would lead you to disclose privileged or confidential information, please let us know and do not answer those questions." (In my view, you may explain the general meaning of terms like "privileged" and "confidential" without violating the prohibition on giving legal advice to an unrepresented person.) To ensure a complete warning - and to ensure uniform warnings to all ex parte witnesses, by all lawyers in your firm - you should reduce your planned warning to a written script before the interview and read the warning directly from the script. That will also serve as a record of what was said, in case of a future dispute.

3. Confirm that the former employee understands your admonitions. If not, repeat them. For even greater protection, ask the former employee to sign the warning you have read after a sentence that says, "I understand and agree to these terms."

4. If at any time the former employee seems confused about whom you represent, clear up the confusion immediately. (This advice is based on Rule 4.3 of the ABA Model Rules of Professional Conduct, which provides: "When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." New York does not have a similar rule, but I believe New York courts would agree with the concept.) For example, if the former employee thinks you represent her former employer but you really represent the adverse party, or the former employee thinks you are a neutral government investigator rather than a partisan advocate, you should correct the mistake at once.

5. If at any time you learn that the former employee is represented by counsel (whether because she has engaged her own personal counsel or has accepted an offer to be represented by the corporate party's counsel), stop on a dime. If the former employee is represented by counsel, then the former employee falls squarely within DR 7-104(A)(1) and you must not talk to her unless you are authorized by law to do so (you almost certainly are not, unless you are a prosecutor) or you have the consent of the former employee's counsel. All that *Niesig* and *Muriel Siebert* held is that *unrepresented* former employees are not within the scope of the no-contact rule.

6. Finally, if you litigate in other jurisdictions, keep in mind that the rule of *Muriel Siebert* may not apply. Under New York's DR 1-105(B)(1), for "conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the [ethics] rules to be applied shall be the rules of the jurisdiction in which the court sits" In other words, whether you may ethically interview an adversary's former employee without seeking consent from the adversary's counsel depends on the rules of the jurisdiction where the litigation is pending, not on the rules of the jurisdiction where the interview takes place, or where the former employee lives, or where you are permanently admitted, or where you principally practice. See, *In re Prudential Insurance Company of American Sales Practices Litigation*, 911 F.Supp. 148, (D.N.J. 1995) (New Jersey Rules of Professional Conduct govern ex parte interviews with former Prudential sales agents even if interviews take place outside New Jersey).

Not every jurisdiction has followed *Niesig*, and not every jurisdiction will follow *Muriel Siebert*. For

example, New Jersey Rule 1.13 provides: "Former agents and employees who were members of the litigation control group [a defined term] shall presumptively be deemed to be represented in the matter by the organization's lawyer" A Maryland federal district court case law extended the reach of the no-contact rule to former employees "whom the lawyer knows to have been extensively exposed to relevant trade secrets, confidential client information, or similar confidential information of another party interested in the matter" (though another federal court opinion from the same district disagreed). A West Virginia federal court case barred interviews with former employees where plaintiffs' counsel informed the court that it sought to speak to the former employees because plaintiffs "believe that they can impute liability upon [the defendant] through the statements, actions or omissions of these former employees." Pennsylvania courts have adopted a multi-factor, case-by-case test regarding ex parte interviews with former employees. Federal courts in New York will most likely follow Muriel Siebert, but they are not bound to do so. And so on. Accordingly, you will need to research the law of each jurisdiction in which you are admitted to litigate to find out whether former employees fall inside or outside the protection of the no-contact rule.

Conclusion

In his classic book WALDEN, the great Henry David Thoreau urged: "Simplicity! Simplicity! Simplicity!" In *Muriel Siebert & Co. Inc. v. Intuit Inc.*, the New York Court of Appeals took Thoreau's advice and set out a simple, bright-line rule governing ex parte communications with an adversary's former employees. Lawyers litigating in the courts of New York State (and probably in New York's federal courts) may freely interview an adversary's former employees as long as they (the lawyers) adhere to a few simple guidelines. Lawyers who litigate in courts outside of New York, however, must carefully research the propriety of communicating with an adversary's former employees because not every state has taken Thoreau's advice to heart.

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