Client Advisory

KELLEY DRYE

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New York Law Permits *Ex Parte* Communications with Former and Non-Managerial Employees[1]

In *Muriel Siebert & Co., Inc. v. Intuit, Inc.*, 2007 WL 1319261, Slip Op. 03956 (N.Y. May 8, 2007), the New York Court of Appeals recently held that an *ex parte* communication with an adversary's former employee did not violate ethical or legal standards. Rather, attorneys may conduct interviews of both former employees and non-managerial, current employees as long as counsel takes measures to avoid the disclosure by such employees of privileged or confidential information.[2]

I. Summary of *Siebert* Decision

The underlying dispute in *Siebert* arose out of a failed "strategic alliance" agreement between Muriel Siebert & Co., Inc. ("Siebert") and Intuit, Inc. ("Intuit") to establish an internet brokerage service. Nicholas Dermigny, the Executive Vice President and Chief Operating Officer of Siebert, helped to negotiate the original agreement with Intuit and played an active role on Siebert's litigation team by helping draft the complaint and Siebert's interrogatory responses.

Siebert terminated Mr. Dermigny while the parties were engaged in discovery. After Siebert's counsel could not produce Mr. Dermigny for a deposition, Intuit subpoenaed Mr. Dermigny directly. Following Mr. Dermigny's termination, and before the deposition date, Intuit's attorneys conducted an *ex parte* interview of Mr. Dermigny without informing Siebert.

Upon learning of the interview, Siebert moved to disqualify Intuit's attorneys, to enjoin Intuit from using any information gained from the interview and to stay the deposition. The trial court granted the motion and disqualified Intuit's counsel. The court reasoned that the ex parte interview raised an "appearance of impropriety" because of the mere possibility that privileged or confidential information could have been disclosed. The Appellate Division for the First Department reversed because Intuit's counsel had advised Mr. Dermigny not to disclose such information, and because Mr. Dermigny had not, in fact, disclosed any such information. *See Muriel Siebert & Co., Inc. v. Intuit Inc.*, 820 N.Y.S.2d 54, 55 (N.Y. App. Div. 2006).

The Court of Appeals affirmed, noting that Disciplinary Rule 7-104(a)(1) did not apply to

1 The assistance of Melissa Byroade, Esq., an associate in Kelley Drye's Litigation Department, is gratefully acknowledged.

2 The text of the *Siebert* opinion is available at: http://www.courts.state.ny.us/REPORTER/3dseries/2007/2007_03956.htm

former employees of an adversary.[3] Relying on its prior opinion in *Niesig v. Team I*, 76 N.Y.2d 363 (1990), the Court of Appeals held that New York law permits *ex parte* interviews with non-managerial and former employees of a party who cannot bind the corporation in litigation, are not charged with carrying out advice of the corporation's counsel, and do not hold a stake in the representation. *See Siebert* at 3. *See also Niesig*, 76 N.Y.2d at 374. Such employees, like Mr. Dermigny, are not considered a "party" for purposes of the disciplinary rules. The fact that Mr. Dermigny was at one time privy to Siebert's privileged information did not warrant the disqualification of Intuit's attorneys. *Siebert* at 4. Because Intuit's attorneys took safeguards against the disclosure of privileged information, Mr. Dermigny understood these warnings, and no such information was disclosed, the *Siebert* Court concluded that no basis existed on which to disqualify counsel.

II. Lessons from *Siebert*

For counsel interested in gathering information from current, non-managerial or former employees of an adversary, *Siebert* is good news. It reinforces the New York rule that permits *ex parte* interviews of such employees provided that counsel give the necessary prophylactic warnings to prevent the employee's disclosure of privileged or confidential information. *Siebert* reminds counsel to advise the witness of their representation and interest in the litigation, direct the witness not to disclose any privileged information, and instruct the witness to refrain from answering any questions that could lead to the disclosure of such information. *Siebert* at 4. Counsel should also make sure that the employee cannot bind the corporation and does not have a stake in the litigation. Obviously, counsel should terminate the interview if they learn that an attorney represents the employee in the action. Counsel must also avoid giving legal advice to the employee. See DR 7-104(a)(2). And, of course, counsel should memorialize all of the above warnings in case a dispute arises over the *ex parte* interview.

Parties wishing to avoid a scenario similar to that faced by Siebert should consider taking practical, preventative measures:

- Keep open lines of communication with former employees and urge them to contact you if an adverse party's attorney seeks to interview them. Consider adopting guidelines, in an employee handbook or elsewhere, that direct employees not to communicate with *any* counsel prior to clearance with the corporation's in-house counsel. *See* Thomas W. Hyland & Molly Craig, *Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting*, 62 Def. Couns. J. 553, 557 (1995).
- A company should consider the possible adverse consequences of firing key employees involved in litigation while such litigation is pending. An adversary generally has less access to a current employee, even one in a non-managerial role, than it does to a former employee.
- Consider representing both the former or non-managerial employee in addition to the corporation, which will necessarily

3 DR 7-104(a)(1) provides that a lawyer shall not communicate with a party the lawyer knows to be represented by counsel, without prior consent.

avoid any *ex parte* communications with the employees. Keep in mind that such "dual" representation must satisfy the "disinterested lawyer" test of DR 5-105(c) and other ethical standards in order to avoid a conflict of interest between the corporation and the employee, and possible disqualification. Counsel should consider obtaining a prospective waiver from the employee that would allow the attorney to continue representing the corporation should a conflict arise.[4]

- If an *ex parte* communication occurs, test whether the adversary's attorney gave appropriate prophylactic warnings. If the adversary's attorneys failed to do so, you may have a basis for a disqualification motion.

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4 *See generally* ABCNY Committee on Professional and Judicial Ethics, *Representing Corporations and Their Constituents in the Context of Governmental Investigations*, Formal Opinion 2004-02 (June 2004), available at: http://www.abcny.org/Publications/reports/show_html.php?rid=240