

Legal Updates & News

Bulletins

NY Court Affirms Right to *Ex Parte* Interviews of Adversary's Former Employees

May 2007

by [Joel C. Haims, Rachel Quitkin](#)

NY Court Affirms Right to *Ex Parte* Interviews of Adversary's Former Employees

In a decision issued on May 8, 2007, the New York Court of Appeals, New York's highest court, held that *ex parte* interviews of an adversary's former employee are not unethical or legally prohibited. The decision, written by Judge Pigott, permits such *ex parte* interviews where the witness is both advised of counsel's representation and interest in the litigation and warned against disclosing confidential or privileged information.

The decision, *Muriel Siebert & Co., Inc. v. Intuit, Inc.*, No. 48, grew out of a contract dispute between Siebert and Intuit. Siebert's Chief Operating Officer and Executive Vice President, Nicholas Dermigny, was an important participant in the events at issue in the case and provided key assistance to Siebert's attorneys after the lawsuit began. In the midst of the case, Dermigny left Siebert and Intuit's attorneys arranged to interview him without notifying Siebert's counsel. At the start of the interview, Intuit's attorneys informed Dermigny that he should not divulge any privileged or confidential information and that he should refrain from answering any question that could potentially lead to the disclosure of confidential information. Though the interview yielded only unprivileged information, Siebert moved to disqualify Intuit's attorneys from the case and to enjoin Intuit from using any informative obtained during the interview.

The trial court held that disqualification was appropriate because the interview was tainted by "an appearance of impropriety." The appellate court reversed, holding that Intuit had followed proper procedure in cautioning Dermigny not to reveal confidential or privileged information. The Court of Appeals affirmed, holding 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." The Court reiterated the policy interest in promoting informal discovery, while recognizing the need for protection of privileged information. The Court also drew upon its previous decision in *Niesig v. Team I*, 76 N.Y. 2d 363 (1990), which clarified that Disciplinary Rule 7-104(a)(1) of the Code of Professional Responsibility bars contact only with certain *current* employees of an adversary; those non-managerial employees who do not have the power to bind the corporation, are not charged with carrying out the advice of the corporation's attorneys, or are not considered organizational members possessing a share in the representation.

© 1996-2007 Morrison & Foerster LLP. All rights reserved.