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## *Interviewing an Adversary's Former Employees: The Ax to Grind and the Ax to Avoid*

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Seminar Topic: The course law will discuss model rule 4.2 and comment 7 with respect to interviewing former employees of adversarial parties.

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



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Disclaimer: The views expressed herein are not a legal opinion. Every fact situation is different and the reader is encouraged to seek legal advice for their particular situation.

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As a member of the Professional Responsibility Committee, he chaired a subcommittee that drafted an amicus brief for the Association concerning the disqualification of a law firm, and he has had both trial and appellate experience in the New York state courts. He has also assisted at trial in New York Federal courts.

Mr. Fuchs has been a fellow at Yale University, the John Carter Brown Library, the Folger Shakespeare Library, and the Hebrew University of Jerusalem.

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## Timed Agenda:

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Time	Description
00:00:00	Program Start
00:00:19	Introduction
00:01:28	Interviewing an Adversary's Former Employees: The Ax to Grind and the Ax to Avoid
00:04:58	Model Rule 4.2: Communications with Person Represented by Counsel
00:06:04	Comment on Rule 4.2
00:08:16	Helene Tomasian v. C.D. Peacock, Inc., and, Jewelcor, Defs, 2012
00:24:10	The Thorn Case
00:30:40	Orlowski v. Dominick's Finer Foods, Inc
00:34:01	EEOC v. University of Chicago Medical Center
00:37:42	Siebert v. Intuit
00:49:01	Suggestions for Practice
01:12:35	Program End

# Interviewing an Adversary's Former Employees: The Ax to Grind and the Ax to Avoid

## COMMUNICATIONS WITH FORMER EMPLOYEES

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### Model Rule 4.2: Communications with Person Represented by Counsel

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#### *Transactions with Persons other than Clients*

#### **Rule 4.2 Communications with Persons Represented by Counsel**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

#### **Comment on Rule 4.2**

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[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or mission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.  
*See* Rule 4.4.

## **Model Rule 4.4: Respect for Right of Third Persons**

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### ***Transactions With Persons Other Than Clients***

#### **Rule 4.4 Respect For Rights Of Third Persons**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

### ***1. Helene Tomasian v. C.D. Peacock, Inc., and, Jewelcor, Defs, 2012***

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#### ***A. Facts of Case***

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- 1.** The plaintiff, Helene Tomasian, alleged sex discrimination, sexual harassment, national origin discrimination, religious discrimination, violations of the Equal Pay Act, and retaliation.
- 2.** Plaintiff was employed by Defendants from September 5, 1995 until February 27, 2008.
- 3.** Ms. Luciew was C.D. Peacock's Human Resources Manager from November 3, 1993 until February 25, 2008, at which point Defendants terminated Ms. Luciew's employment. The two employees left C.D. Peacock within two days of each other.
- 4.** When Ms. Luciew's employment ended, she signed a confidential separation agreement containing provisions stating that she would not disclose privileged and/or confidential information about defendants, and would not voluntarily participate in litigation against defendants.
- 5.** Ms. Luciew, as Human Resources Manager, addressed employee complaints, which sometimes involved privileged and confidential discussions with defendants' general counsel and outside counsel.
- 6.** Ms. Tomasian alleged that, at times during her employment, she had complained of discrimination and harassment, at the hands other employees, to C.D. Peacock's Human Resources Department, which she alleges ignored her complaints.

7. Defendants contended that Ms. Luciew was personally involved with the investigation of these complaints.
8. Plaintiff's lawyer, Mr. Hunt, first spoke to Ms. Luciew in February and May, 2010, after Defendants moved to stay and compel arbitration. Mr. Hunt alleges that he contacted Ms. Luciew in order to inquire about her availability to be deposed, in that Ms. Luciew was Defendants' only HR employee at the time that Plaintiff was asked to sign the arbitration agreement.
9. At that time, Mr. Hunt informed Ms. Luciew that he represented the Plaintiff, but he stated that he would represent Ms. Luciew at the May 2010 deposition, if Defendants threatened her with a civil action or accused her of breaching a confidentiality agreement.
10. Ms. Luciew and Plaintiff agreed to this arrangement.
11. During the May 13, 2010 deposition, Defendants' attorney questioned Ms. Luciew concerning the extent of her communications with Mr. Hunt. Mr. Hunt objected to that line of questioning.
12. Ms. Luciew testified that she and Mr. Hunt had discussed whether Ms. Luciew had been deposed before and whether she had heard from anyone at C.D. Peacock before or after receiving the subpoena for her deposition.
13. The parties disagreed concerning whether Mr. Hunt represented Ms. Luciew during that deposition in 2010. Mr. Hunt stated that he did so for purposes of protecting Ms. Luciew's interests in the event the Defendants were to claim that Ms. Luciew had violated her separation agreement. Defendants asserted that there was no representation at that time.
14. Whether Mr. Hunt represented Ms. Luciew at that deposition "was obscured by the antagonistic conduct of the lawyers during the deposition (Mr. Hunt for plaintiff and Amanda Helm Wright for defendants), which suggested that they were more interested in unprofessional exchanges than in obtaining necessary information. "
15. Ms. Luciew stated, in her declaration, that Mr. Hunt represented her at the deposition not generally, but only to the extent that there was an effort by Defendants to establish that she had violated the separation agreement. Ms. Luciew also stated that she felt that this agreement had been invoked by the defense counsel's questioning.
16. Mr. Hunt did not announce, at the outset of the deposition, that he would be representing Ms. Luciew if it appeared that Defendants were attempting to establish that Ms. Luciew had violated the separation agreement.
17. Mr. Hunt also did not announce that he was representing Ms. Luciew when the questioning entered into that realm. Rather, he told defense

counsel that if defense counsel were trying to establish that Ms. Luciew had breached the agreement, “then have the professional courtesy to the witness to be upfront, tell her that is what you believe, *give her an opportunity to get counsel . . .*” (emphasis in original).

**18.** This suggests that Ms. Luciew did not have counsel sitting beside her.

**19.** In the wake of Mr. Hunt's statement, defense counsel asked whether Mr. Hunt represented Ms. Luciew at the deposition, but did not wait for an answer before continuing.

**20.** Mr. Hunt claimed that defense counsel cut him off, and the Court did not believe him. Nor did the Court believe that he “forgot” to state that he was representing Ms. Luciew.

**21.** The Court found that, while Ms. Luciew might have thought that Mr. Hunt would represent her in the event that certain questioning arose, neither she nor Mr. Hunt did anything to put Defendants on notice of that representation, either prior to or during the Luciew deposition in 2010.

**22.** The Court also found that there was no reason for Mr. Hunt to have informed the Defendants of any such representation.

**23.** On February 5, 2012, Mr. Hunt provided Defendants' counsel with a list of nine witnesses that he wished to depose, including Ms. Luciew.

**24.** On February 23, 2012, Mr. Hunt issued a notice for her deposition.

**25.** Six days later, on February 29, 2012, Mr. Hunt advised Defendants' counsel that he “represent[ed] Pat Luciew and she is available on the date in the Notice.”

**26.** On March 5, 2012, defense counsel stated in a letter that they “have very serious concerns regarding the propriety of [his][Mr. Hunt's] representation of Ms. Luciew, who may have been involved in privileged discussions with in-house counsel and senior management at C.D. Peacock during her tenure with the company.”

**27.** Defense counsel noted Ms. Luciew's separation agreement.

**28.** On March 8, 2012, defense counsel advised Mr. Hunt that his dual representation of the Plaintiff and Ms. Luciew would violate ABA Model Rule 4.2, Comment 7, and Canons 5 and 9 of the ABA Model Code of Professional Responsibility because of Ms. Luciew's position at C.D. Peacock and her dealings with company counsel regarding internal employee complaints, including those of the plaintiff.

**29.** Mr. Hunt did not respond to defense counsel's letters.

**30.** Defendants moved to disqualify Mr. Hunt and sought a protective order.

**31.** At the time that they filed the motion, Defendants believed that Mr. Hunt had continued to represent Ms. Luciew since February 20, 2012.

32. Ms. Luciew, in a declaration filed on April 13, 2012, stated, and Mr. Hunt confirmed, that Mr. Hunt was no longer representing her.

### ***B. Procedural Developments***

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1. Defendants moved, *inter alia*, to disqualify the Plaintiff's counsel, and moved for a protective order that would bar Ms. Luciew, who, again was a former Human Resources Manager of Defendant, from testifying. The Court denied Defendants' motions.
2. The Court held that, in general, the proper party to bring a motion to disqualify counsel, based on a conflict of interest, is that attorney's client or former client.
3. A party may have standing to bring a motion to disqualify the opposing party's attorney, if he or she can show that the opposing counsel's representation has personally harmed or injured him or her in some way.
4. The Court held that, because the Defendants brought their motion to disqualify, at least in part, on the basis that Mr. Hunt might have obtained "Defendants' confidential or privileged information through his contact with—and representation of—Ms. Luciew, and because the Defendants contended that Mr. Hunt might improperly use this information in the litigation, Defendants had adequately alleged a risk of injury personal to Defendants that gave them standing to bring the disqualification motion.
5. The Defendants argued more broadly that Mr. Hunt should be disqualified because he represented both the Plaintiff and Ms. Luciew; and they had conflicting interests. Defendants conceded that purported conflict between the Plaintiff and Ms. Luciew did not form the basis for the Defendants' motion. Moreover, clients jointly represented by an attorney may waive potential conflicts of interest, and Ms. Luciew and the Plaintiff had agreed to the dual representation.
6. Disqualification is a drastic measure, and the moving party bears a heavy burden.
7. Defendants argued that Mr. Hunt's disqualification was warranted, because Mr. Hunt's conduct violated the rules of professional conduct: specifically, Northern District of Illinois Local Rules 83.53(a)(1); 83.53.3(a)(8); 83.52.2; ABA Model Rule 4.2; and ABA Model Code of Professional Responsibility Canons 5 and 9.
8. However, Local Rules 83.50.1 through 83.58.4 were repealed in their entirety on June 2, 2011. These rules were replaced by Local Rule 83.50,

which adopts the American Bar Association's Model Rules of Professional Conduct ("ABA Model Rules").

**9.** Local Rule 83.50 states that:

Applicable disciplinary rules are the Model Rules adopted by the American Bar Association. On any matter not addressed by the ABA Model Rules for which the ABA Model Rules are inconsistent with the Rules of Professional Conduct in the state in which the lawyer's principal office is located, any lawyer admitted to practice in Illinois is governed by the Illinois Rules of Professional Conduct; any lawyer not admitted to practice in Illinois is bound by the Rules of Professional Conduct for that state in which the lawyer's principal office is located.

**10.** Former Northern District of Illinois Rules of Professional Conduct were patterned after the ABA Model Rules of Professional Conduct.

**11.** Defendants argued that Mr. Hunt violated Model Rule 4.2 by agreeing to represent Ms. Luciew, and, even absent representation, by having *ex parte* discussions with her.

**12.** Again, Model Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

**13.** The Court notes that Ms. Luciew was no longer employed by Defendants, and defense counsel could not, and did not, argue that they represented her, merely because they represented the Defendants. Nor did the Defendants claim that Defendants' counsel were separately engaged to represent Ms. Luciew at the time of Mr. Hunt's contact with her.

**14.** The Defendants' counsel had relied upon Comment 7, to the Model rules, which states:

communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or mission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

*Consent of the organization's lawyer is not required for communication with a former constituent.* If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining

evidence that violate the legal rights of the organization. *See* Rule 4.4. (ABA Model 4.2, Comment 7) (emphasis added).

**15.** The Court noted that the Defendants had omitted the highlighted language, and that the omission was probably not inadvertent. The quoted language undermines Defendants' contention that Rule 4.2 categorically bars all *ex parte* contacts with persons who, like Ms. Luciew, are former employees of a corporation. Defendants did not have to endorse Mr. Hunt's *ex parte* communications with Ms. Luciew.

**16.** Preliminary draft of the Restatement imposes a no-contact rule with regard to current and former employees "whom the lawyer knows to have been extensively exposed to confidential information of another party interested in the matter. *Camden v. Maryland*, 810 F. Supp. 115, 1121 (D.Md. 1006); and *Zachair, Ld. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997). But *see Davidson Supply Co., Inc. v. P.P.E., Inc.*, 986 F. Supp. 956, 958-59 (D.Md. 1997) (rejecting *Camden's* and *Zachair's* adoption of proposed Restatement language and applying plain language of Model Rule 4.).

## ***II. The Thorn Case***

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**1.** No courts in Illinois' District have adopted the *Camden* and *Zachair* approach, and one court has explicitly rejected it. *Thorn v. Sunstrand Corp.*, No. 96 C 5099, 1997 U.S. Dist. LEXIS 15761, WL 627607 at \*3 (N.D. Ill. Oct. 10, 1997).

**2.** *Thorn* involved a complaint against a corporation that alleged age discrimination and disability discrimination, as well as breach of contract. During discovery, the corporation's employee gave sworn testimony. Approximately two years after the individuals filed suit, the employee retired; and one of the individuals' counsel contacted and interviewed him. Prior to speaking to the former employee, the counsel established that he was no longer with the corporation, and that he was unrepresented by counsel. In addition, counsel warned him not to disclose any privileged information.

**3.** The court affirmed the Magistrate's decision, and held that, at the time that the counsel contacted the former employee, the former employee was unable to make admissions that bound the corporation, pursuant to the Rules of Professional Conduct for the Northern District of Illinois. Rule 4.2. In addition, it was not known that the communications in question induced a breach of the corporation's attorney-client privilege.

4. The Defendant had appealed the Magistrate Judge's denial of Defendant's motion for a protective order, and to strike and bar the testimony of Rod Dickmann, a former employee of Defendant.
5. Dickman was a management employee, who gave sworn testimony during discovery. Approximately two years after the onset of the case, he retired. After his retirement, one of the plaintiffs' counsel, Attorney Wardell, contacted and interviewed Dickmann, on one or more occasions, without notifying Defendant's counsel beforehand.
6. Prior to speaking to Dickmann, Attorney Wardell established that Dickmann was no longer employed by defendant; and that Dickmann was unrepresented by counsel. Attorney Wardell also identified herself as an attorney for plaintiff, advised Dickmann of his right to retain an attorney, explained the nature of the attorney-client privilege, and warned Dickmann not to disclose any privileged information.
7. During the interview, Attorney Wardell made written notes regarding her questions and Dickmann's responses. Plaintiff's counsel had resisted disclosure of the notes on work product grounds.
8. Defendant filed a motion for a protective order and to strike and bar Dickmann's testimony.
9. The Magistrate Judge found that Rule 4.2 of the Rules of Professional Conduct for the Northern District of Illinois does not encompass communications with former employees. The Magistrate also found that Attorney Wardell had taken adequate precautions against disclosure of privileged information; and that there was no evidence that Dickmann had disclosed privileged information.
10. The Defendant had argued that Rule 4.2 of the Rules of Professional Conduct for the Northern District of Illinois should be interpreted as prohibiting counsel from communicating with former employees of an adverse party, if those former employees were in the employ of the adverse party at the time that the lawsuit was commenced. Defendant argued that there was a substantial need to investigate whether its attorney-client privilege had been breached.
11. Defendant wanted access to Attorney Wardell's notes, and claimed that no substantial equivalent exists, which might inform Defendant as to whether such a breach occurred.
12. Defendant faulted the Magistrate for not having inspected the notes *in camera*, and for failing to recognize that, during the subsequent deposition, Dickmann allegedly exhibited a lack of understanding of the nature of the attorney-client privilege.

**13.** Plaintiffs had contended that there was a general rule that counsel can communicate with former employees, provided that they are unrepresented by counsel.

**14.** Defendants argued that the point of the rule was to disallow attorney contact with persons who could legally bind an adverse party.

**15.** Plaintiffs claimed that Plaintiffs' counsel had promptly asserted the work-product privilege to protect the contents of Attorney Wardell's notes; and that the work-product privilege applies, because the notes contain opinion. Also, the Defendant did not have a substantial need for the notes to further its defense against discrimination claims. Defendant had access to a substantial equivalent through its subsequent deposition of Dickmann.

**16.** Defendant alleged that Dickmann, as a management employee, had extensive exposure to confidential information while working for Defendant, and that Plaintiffs' counsel should not be allowed to talk to him simply because he had become a former employee. Defendant claimed this exception to the general rule regarding *ex parte* communications with former employees on the basis that the exception would lower the risk for breaches of the attorney client privilege often implicated in communications between opposing counsel and former employees.

**17.** The Magistrate noted that, while the rule does not itself specifically address the case of an organization or corporation as a party, the comment does provide guidance. The comment applies to persons having managerial responsibilities within an organization or corporation and to persons whose statements, as agents, may constitute admissions on the part of the organization's corporation. Thus, an opposing attorney is precluded from *ex parte* communications with management level employees or employees that can legal bind a party in a suit.

**18.** Neither Rule 4.2 nor the comment affects former employees. Courts have agreed that former employees do not constitute parties "represented by another lawyer," and counsel is not restricted from communicating with an adverse party's former employees pursuant to Rule 4.2. The fact that the comment specifically includes those employees whose statements may constitute admissions within the purview of Rule 4.2, suggests to the courts that former employees, whose statements can no longer legally bind a former employer, are not covered by the rule. *Athern v. Board of Educ of the City of Chicago*, 1995 U.S. Dist. LEXIS 16982 (N.D. Ill. Nov. 14, 1995).

**19.** Attorney Wardell contacted Dickmann after his retirement from Defendant. As a retiree, Dickmann was a former employee, who could no longer make statements legally binding upon Defendant. The Court therefore held that Attorney Wardell’s communication with Dickmann did not subvert the objectives of Rule 4.2, and should not be barred on that basis.

**20.** To be sure, former employees are barred from discussing privileged information to which they are privy. *Ostrowsky*, 937 F. Supp. At 728.

**21.** Determining whether a breach of the attorney-client privilege occurred requires independent analysis apart from an examination of the scope of Rule 4.2.

**22.** In this case, Dickman had access to privileged information while working as an employee of Defendant. Therefore, the *ex parte* communications between Attorney Wardell and Dickman raise concerns regarding a possible breach of Defendant’s attorney-client privilege.

**23.** In evaluating, the Magistrate Judge determined that Attorney Wardell had taken adequate precautions against disclosure of privileged information. The Magistrate Judge found no evidence to suggest that Dickman had disclosed privileged information.

**24.** The Court found that the Magistrate Judge’s conclusion that Attorney Wardell’s *ex parte* communications did not entail a breach of the Defendant’s attorney-client privilege, was not clearly erroneous.

**25.** The Court held that an *in Camera* review might be advisable, but did not insist upon it.

**26.** The Court also held that the Maryland District Court, which had come to the opposite conclusion concerning former employees, had inappropriately injected the attorney-client privilege at the core of its analysis of Rule 4.2, rather than centering its analysis on the baseline factor articulated in the comment to Rule 4.2: namely, to disallow attorney contact with persons who could legally bind an adverse party. The Court held that the Maryland District Court had failed to recognize the overarching nature of the attorney client privilege, which makes an analysis of the privilege within the context of Rule 4.2 superfluous.

**27.** The Court further held that the standard that the Maryland court had set to disallow communications with former employees, who have been “extensively exposed to . . . confidential client information of another party interested in the matter,” is elusive to quantify or define. Such a standard would be difficult to apply.

**28.** Again, at the time that Attorney Wardell contacted Dickmann, he was a former employee, who was unable to make admissions binding on his

former employer, Defendant. Thus, contact between Attorney Wardell and Dickman falls beyond the purview of Rule 4.2.

29. The Court noted that, in addition, Defendant pointed to no evidence, including anything in Dickmann's subsequent deposition, suggesting that the communications at issue induced a breach of Defendant's attorney-client privilege.

### *III. Orlowski*

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1. *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723 (N. Dist. Ill. 1996) **is the one published Illinois case.** The case involves a class action suit in which female employees alleged sexual discrimination.

2. The Defendant filed a motion for a protective order, seeking to preclude the employees and their counsel from communicating with the employer's present and former managers, relying upon U.S. Dist. Ct., N.D. Ill. R. Prof. Conduct 4.2, and the Court's discovery order.

3. In this case, the defendant employer had been required to turn over information that provided the identities of potential class members, again in a sex discrimination class action case.

4. Counsel for the employees sent a letter to potential class members, inadvertently contacting some who were current managers of the employer.

5. The Court denied the employer's motion, because Rule 4.2 did not encompass former employees; and communications with current assistant managers, department managers, and supervisors did not violate Rule 4.2.

6. The Court granted the motion in part to require that counsel would not then offer any statements obtained as admissions by party-opponents against the employer.

7. Dominick's had been required to turn over to Plaintiffs data base information, including the name, sex, race, and educational background and employment status of each Dominick's employee. This information provided the identities of approximately 5,000 potential class members (female employees of Dominick's), to which Plaintiffs' counsel sent a form letter apprising them of the pending lawsuit. The letter stated the nature of the suit and requested that individuals with information pertaining to Dominick's' alleged discriminatory practices contact Plaintiffs' attorneys.

8. As a result of this letter, many women contacted Plaintiffs' counsel, indicating that they were subjected to the described acts of discrimination.

Plaintiffs' counsel communicated only with those women who responded to the letter.

**9.** Some of the women who received the letter, and who subsequently contacted the attorneys, were current managers. Plaintiffs asserted that these contacts were inadvertent and that their counsel did not intend to direct the letter to female managers.

**10.** The letter explained to the women that, if they felt they had been subjected to discrimination by being steered into jobs from which they generally were not promoted and in which women typically received fewer hours of work than men, they should contact the Plaintiffs' lawyers. Therefore, if women felt that they had been passed over for promotion because of sex, been given reduced hours, or required to work part-time, when comparable men had been given full-time work, when less qualified men had been promoted, or when women were told certain jobs were not appropriate because of their sex, they should contact the Plaintiffs' lawyers.

**11.** Upon discovering that some managers had received Plaintiffs' letter, Dominick's brought its motion for a Protective Order, claiming that Plaintiffs' counsel violated the Northern District of Illinois' Rule of Professional Conduct 4.2.

**12.** Dominick's sought to preclude Plaintiffs and their counsel from engaging in communications with Dominick's present and former managers, unless express consent of Dominick's, or authorization from the Court, were obtained. Dominick's argued that, since all of these managers were represented by Dominick's counsel, Plaintiffs' counsel was barred from any, and all, *ex parte* communications with them.

**13.** Dominick's also requested that the Court order Plaintiffs to turn over to Dominick's all originals and copies of every communication made with present and former managers.

**14.** The request also included present and former co-managers, present assistant managers, present depart managers, and present supervisors.

**15.** The Court ordered Plaintiffs to turn over to Dominick's all *ex parte* communications with current managers and current co-managers. The Court also ordered that Plaintiffs may not use any of these communications as admissions against Dominick's.

**16.** The Court noted that the purpose of Rule 4.2 is to protect the attorney client relationship with a corporate client.

**17.** The Court also referred to the comment, and notes: *e.g.*, that the Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on

behalf of the organization, and with any other person whose acts or omission, in connection with that matter, may be imputed to the organization for purposes of civil or criminal liability, or whose statement may constitute an admission on the part of the organization.

**18.** Dominick’s argued that all of its managerial positions (including current and former managers, current co-managers, current assistant managers, current department managers, and current supervisors) are covered under Rule 4.2. Dominick’s accordingly argued that Plaintiffs’ counsel was barred from communicating with any of these individuals, without the consent of counsel.

**19.** The Court found that former employees, including former managers, are not encompassed by Rule 4.2, and may freely engage in communications with Plaintiffs’ counsel. Neither Rule 4.2, nor the Comment, makes any reference to former employees, or implies that former employees constitute parties “represented by another lawyer.”

**20.** Although the Seventh Circuit has not specifically held that former employees are excluded from Rule 4.2, most courts addressing this issue have concluded that Rule 4.2 “does not encompass a defendant organization’s former employees.” *Ahern v. Board of Educ. Of City of Chicago*, 1995 U.S. Dist. LEXIS 16982 (N.D. Ill. Nov. 14, 2005); *Shamlin v Commonwealth Edison Co.*, 1994 U.S. Dist. LEXIS 5018 (N.D. Ill. Apr. 20, 1994) (finding that Rule 4.2 does not preclude a lawyer from contacting a corporation’s former employees, despite the lack of the corporation’s consent).

**21.** The Court in *Dominick’s* noted that, in *Ahern*, the court determined that expanding Rule 4.2 to include former employees would be problematic, because it “would unduly hinder an attorney’s ability to conduct informal discovery in cases with employer party opponents.” *Ahern*, 1995 U.S. Dist. LEXIS 7985 at \*2.

**22.** The Court in *Dominick’s* also noted that, in *Oak Industries*, the court concluded that affording former employees the protection of Rule 4.2, and “requiring the formal consent of an employer’s counsel prior to contacting former employees [,] will only increase the costs of litigation and possibly decrease the willingness of former employees to provide information.” *Oak Indus.*, 1998 U.S. Dist. LEXIS 16982, at \*2.

**23.** Moreover, the Court in *Dominick’s* commented that the possibility that former employees may reveal damaging information, which may give rise to a corporation’s liability, is insufficient to implicate Rule 4.2. *Ahern*, 1995 U.S. Dist. LEXIS 16982 at \*1-2.

**24.** Additionally, former employees are outside the scope of the Rule, because, unlike current employees, they “cannot bind the corporation in the sense that an agent binds a principal.”

**25.** Thus the Court in *Dominick’s* found that communications between Plaintiffs’ counsel and any former employees (including former managers) will not violate Rule 4.2.

**26.** The Court nonetheless reminded the Plaintiffs that former and current managers, or any former or current employees for that matter, are barred from discussing with Plaintiffs any privileged information to which they have been privy.

**27.** The Court rejected Dominick’s argument that collective bargaining employees could hold managerial positions.

#### ***IV. Continuation of Tomasian***

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**1.** Comment 7 does not bar a lawyer from contacting a former employee, but requires that, in the event of any contact, the lawyer “must not use methods of obtaining evidence that violate the legal rights of the organization.”

**2.** In this case (*Tomasian*), the Court found that there was no violation of that requirement.

**3.** The Defendants had contended that, even if it were not improper for Mr. Hunt to have *ex parte* communications with Ms. Luciew, Mr. Hunt’s conduct, in taking on Ms. Luciew as a client, is “significantly more egregious,” and warrants disqualification.

**4.** The Defendants likewise contended that “it is presumed that Mr. Hunt has interviewed Luciew, discussed legal strategies with Luciew, and obtained confidential and privileged information from Luciew that is directly relevant to this case.”

**5.** The Defendants therefore presumed that Mr. Hunt would use privileged information obtained from Ms. Luciew to further Plaintiff’s case, and might advise Ms. Luciew “to give testimony that violates Luciew’s confidential separation agreement and/or mischaracterizes her work for Defendants in order to further Luciew’s or Plaintiff’s personal interests and bind the Defendants with her statements and allegations.”

**6.** The Defendants also asserted that the risk that Ms. Luciew had discussed privileged information necessitated that Mr. Hunt be disqualified to “remove the taint of Mr. Hunt’s representation of and communications with Luciew,” and ensure that Defendants would not face

trial with the risk that their confidential information would be used against them.

**7.** The Court, quoting *Orlowski*, noted that the purpose of Rule 4.2 is to protect the attorney-client relationship with a corporate client.

**8.** As the Court noted, this is not a case in which a lawyer was representing two clients with opposing interests.

**9.** Most cases ruling on disqualification, based on Rule 4.2, address a situation in which an attorney represents a party in a matter in which the adverse party is that attorney's former client. The attorney, in that case, will be disqualified, if the subject matter of the two representations is "substantially related," because it will be irrebuttably presumed that the attorney had access to the confidential information.

**10.** There was no such presumption in this case, in which the attorney's client is a former employee of the adverse party-corporation.

**11.** Again, however, former employees are barred from discussing privileged information to which they are privy.

**12.** Nonetheless, former employees may "freely engage in communications" with opposing counsel, as long as they do not divulge privileged information.

**13.** The Court held that the evidence submitted by the Plaintiff showed that Mr. Hunt did not seek, nor receive, privileged or confidential information belonging to Defendants as a result of his conversations or engagements with Ms. Luciew.

**14.** Ms. Luciew had made a statement that she had not had any conversation or communication with Mr. Hunt, or with any of his staff, in which she disclosed, or was asked to disclose, any confidential or privileged information or any facts concerning her employment at C.D. Peacock or her involvement with HR there. Nor had she revealed any communications with management; and nor had Mr. Hunt asked her to do so.

**15.** Mr. Hunt had never interviewed her about the case, or about the Plaintiff. Her communications with Mr. Hunt's law firm had been limited to communications directly with Mr. Hunt, and even then only regarding the dates on which her deposition could be scheduled; and whether Mr. Hunt would represent her at her deposition, in the event that C.D. Peacock were to take an adversarial position with her, or accuse her of somehow violating her agreement with Peacock or any of her legal obligations to them.

**16.** Further, Ms. Luciew had not revealed to Mr. Hunt or to anyone else from his firm any confidential or privileged communications. Mr. Hunt

made it clear that he would not be discussing with her, outside of the formal deposition, any of the facts of Plaintiff's case or any facts surrounding her communications with C.D. Peacock's lawyers, or her involvement in the HR of C.D. Peacock.

**17.** In short, she had never discussed with Mr. Hunt matters relating to the Plaintiff's lawsuit, nor her communications with management or any lawyer acting on behalf of C.D. Peacock. Nor had she discussed with Mr. Hunt any matters related to her involvement with HR.

**18.** The Court found that these statements show that Mr. Hunt's short lived representation of Ms. Luciew was to protect her interests in the event that the Defendants sought to accuse her of violating her separation agreement. The court was satisfied that Mr. Hunt did not obtain from Ms. Luciew confidential or privileged information belonging to Defendants, in violation of Rule 4.2.

**19.** Nothing about Mr. Hunt's limited representation of Ms. Luciew made it necessary or inevitable that Ms. Luciew would reveal to Mr. Hunt confidential or privileged information belonging to Defendants that would be used to damage the Defendants in this case—at least without the consent of her current attorney.

**20.** Again, statements of former employees are not binding on the defendant corporation, even though their sworn statements may be used as evidence. *Keck Garrett & Assocs., Inc. v. Nextel Communications, Inc.*, (N.D. Ill. Jan. 24, 2007), *aff'd*, 517 F.3d 476 (7<sup>th</sup> Cir. 2008).

**21.** As the Court explained, Rule 4.2 is not a vehicle for a Defendant to conceal information that—while not confidential or privileged—may be harmful to that Defendant's litigation interests.

**22.** Despite Defendant's suspicions, the Court found that Ms. Luciew had not revealed confidential or privileged information to Mr. Hunt.

**23.** The Court noted that courts in the Court's district have repeatedly held that "[t]he possibility that former employees may reveal damaging information is insufficient to implicate Rule 4.2." *UCMC*, 202 U.S. Dist. LEXIS 53298, \*3-4; *Ahern*.

**24.** As the Court noted, in *Thorn*, the district court upheld a magistrate judge's denial of the defendant's motion to strike and bar the testimony of a former managerial employee of the Defendant, who had *ex parte* communications with the Plaintiff's attorney.

**25.** The district court stated that the communications raised concerns of a possible breach of the defendant's attorney-client privilege, because of the former employee's exposure to confidential information while working for the defendant.

**26.** The Court in *Tomasian* explained, however, that the district court nonetheless affirmed the magistrate judge’s determination that the communications did not breach the Defendant’s attorney-client privilege, because the Plaintiffs’ attorney had taken adequate precautions against disclosure of privileged information; and there was no evidence to suggest that the former employee disclosed privileged information. These precautions included advising the former employee of his right to retain an attorney, explaining the nature of the attorney-client privilege, and warning the former employee not to disclose any privileged information during the interview.

**27.** The *Tomasian* Court also commented that the court in *Thorn* denied the Defendant’s request to review the written notes that the Plaintiff’s attorney had made during her interview with the former employees.

**28.** The *Tomasian* Court further noted that the district court had not found fault with the magistrate judge’s decision not to inspect the notes *in camera*.

**29.** The *Tomasian* Court thus held that, absent the presumption that applies to traditional conflict of interest cases, and absent any precedent outside the District of Maryland for disqualifying a Plaintiff’s attorney for having had *ex parte* communications with— and/or for briefly representing—a defendant corporation’s former management employee, this argument must fail.

**30.** As the Court further explained, Maryland courts base their ruling on a rule different from Rule 4.2, and do not constitute persuasive authority for the proposition that Mr. Hunt had violated Model Rule r.2. According to the *Tomasian* Court, he had not.

**31.** The *Tomasian* Court further held that the Defendant’s position that Mr. Hunt should be disqualified, based on Canons 5 and 9 of the ABA Model Code of Professional Responsibility, is also without merit.

**32.** As the Court explained, Canon 5, EC 5-14 and EC 5-15, to which the Defendants referred, caution an attorney against representing two or more clients who may have different, inconsistent, or conflicting interests.

**33.** The corresponding disciplinary rules, which the Defendants omitted, states that discipline should be imposed on a lawyer who accepts or continues employment when the interests of another client may impair the independent professional judgment of the lawyer. Model Code of Professional Responsibility, Canon 5, DR 5-104.

**34.** The Court explained that the Defendants contended that Mr. Hunt should be disqualified, because the Plaintiff and Ms. Luciew have inconsistent interests. Plaintiff has testified concerning the alleged failings

of Defendant's handling of HR matters, for which Ms. Luciew was directly responsible.

**35.** As the Court observed, any potential violation of Canon 5 was not for the Defendants to raise. The issue pertains to an attorney's clients, and the Defendants conceded that they lacked standing.

**36.** The Court thereby held that there was no precedent for granting a defendant corporation's motion to disqualify a plaintiff's attorney under Canon 5 for representing a former management employee of the defendant.

**37.** The Defendant had cited a case in which a criminal defendant had alleged that he had received ineffective assistance of counsel, because of the conflict of interest caused by his attorney's having represented the government's chief witness against him in an unrelated civil matter.

**38.** In that case, the Seventh Circuit held that an evidentiary hearing was needed to determine if the defense attorney's representation of the criminal defendant was influenced by his desire to protect his relationship with the government's chief witness.

**39.** But, explained the Court, where a corporate "bears a heavy burden of proving facts required for disqualification" because of communications its former employees had with the plaintiff's counsel during civil discovery, *see RMB Fasteners*, 2012 U.S. Dist. LEXIS 8715, it is different than in a case in which a criminal defendant makes a constitutional, ineffectiveness of counsel argument, predicated on a conflict of interest, and that the criminal defendant was therefore entitled to a presumption of prejudice

**40.** The Court further noted that, in other cases cited by the Defendant, the attorney had represented a client in a matter substantially related and adverse to the position held by the attorney's former client.

**41.** The evidentiary record establishes that both Plaintiff and Ms. Luciew were aware of the dual representation and agreed to it. To the extent that this dual representation may have created a conflict, those individuals were entitled to waive it. "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents to the disclosure."

**42.** Mr. Hunt had withdrawn from representing Ms. Luciew without obtaining information from her that Defendants say would create a conflict.

**43.** Canon 5 does not support Mr. Hunt's disqualification.

**44.** Canon 9, which is broader, warns attorneys to avoid even the appearance of impropriety with regard to ethical violations. Canon 9 states that an attorney should be disciplined for failing to avoid “even the appearance of impropriety.” Model Code of Professional Responsibility, DR 9-101.

**45.** This would apply to lawyer’s representation of clients that creates a conflict of interest.

**46.** Defendants had contended that Mr. Hunt could not avoid the appearance of impropriety, because he could not shield himself from the information that he had already received from his clients.

**47.** Nevertheless, as the Court concluded, as with Model Rule 4.2 and Canon 5, the cases suggesting that disqualification might be the proper remedy for a Canon 9 violation address the traditional conflict of interest situation, where an attorney will be disqualified because of the presumption that attaches when an attorney represents a client in a matter that is substantially related and adverse to a position held by the attorney’s former client. In those cases, “[t]he evidence need only establish the scope of the legal representation and not the actual receipt of the allegedly relevant confidential information.” This presumption does not apply where Mr. Hunt briefly represented Ms. Luciew, a former management employee of Defendants.

**48.** The Court found that the evidentiary record undermines Defendants’ predicate assumption that withdrawal from the representation of Ms. Luciew could not cure Mr. Hunt’s dual representation, on grounds that he could not shield himself from information that he improperly obtained from Ms. Luciew. There is affirmative evidence that he did not improperly obtain information.

**49.** Further, the Court stated, Mr. Hunt’s continued representation of the Plaintiff, and not Ms. Luciew, does not tarnish the public image of this Court or the attorneys who practice here.

**50.** The Court found further that, even if Ms. Luciew had revealed confidential or privileged information to Mr. Hunt, the Court did not believe that this would disqualify her from providing relevant information.

**51.** Nor would Mr. Hunt’s comments to Ms. Luciew disqualify her as a witness. While Mr. Hunt’s short-lived representation of Ms. Luciew might expose her to impeachment that might not otherwise have been available, that would affect only the weight of her testimony. It is not a basis for excluding the testimony.

**52.** The Court also noted that, even in the absence of a subpoena, Ms. Luciew’s appearance would not be voluntary, if a subpoena were the alternative.

**53.** Private parties by contract cannot make a witness, who may possess relevant information, out of bounds at trial or in a pretrial deposition.

### ***V. EEOC v. University of Chicago Medical Center***

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**1.** In *Equal Employment Opportunity Commission v. University of Chicago Medical Center*, 2012 U.S. Dist. LEXIS 53298 (N.D. Ill. April 16, 2012), the University of Chicago Medical Center (“UCMC”), in response to a subpoena by the Plaintiff, did not want to disclose contact information for two former employees, who were the Employee/Labor Relations Manager and the Director of the Recruitment and Nursing Career Center, respectively.

**2.** One of them had conferences with in-house and outside counsel regarding UCMC’s disability and leave policies and practices. She had sought legal advice on how to handle specific employees’ leave situations. The other employee oversaw requests from employees to return from leave and evaluated their qualifications to do so.

**3.** At issue was a ruling that a district court must enforce an administrative subpoena “[a]s long as the investigation is within the agency’s authority, the subpoena is not too indefinite, and the information sought is reasonably relevant. But, an agency’s subpoena power is not limitless.

**4.** The EEOC was asserting a privilege under federal law, the ADA, so federal law applied.

**5.** Again, ABA model rule 4.2, Comment 7, states that “represented party” means “employee with the authority to obligate the organization with respect to the matter, or whose act or omission, in connection with the matter, may be imputed to the organization for purposes of civil or criminal liability.”

**6.** Consent of the organization’s lawyer is not required for communication with a former client. If a constituent of the organization is represented in the matter by his or her counsel, the consent by the counsel will be sufficient for purposes of this Rule.

**7.** The UCMC had argued that ABA Model Rule of Professional Conduct 4.2 places a bar on *ex parte* communications with former managers about their past managerial decision making conduct, which could be imputed onto UCMS for liability purposes.

8. UCMC also argued that compliance with the subpoena created a potential risk of disclosure of information protected by the attorney-client privilege.
9. UCMC did not dispute that the subpoena was within the Agency's power.
10. UCMC also agreed compliance would not impose an undue burden on UCMD.
11. The dispute between the parties centered upon the applicability of Rule 4.2 to former employees of UCMC.
12. While the Seventh Circuit has not addressed the issue of whether former employees are excluded from the protections of Rule 4.2, the Seventh Circuit has adopted the three-part test set out by the ABA in its commentary to the Model Rules for determining whether a current employee is within the scope of the rule. *Weibrech v. Southern Illinois Transfer, Inc.*, 241 F.3d 875, 881 (7th Cir. 2001).
13. Courts in this District have held that the protections of Rule 4.2 do not attach to former employees, even those in managerial positions. *See Thorn*, 1997 U.S. Dist. LEXIS 15761; *Orlowski*, 937 F. Supp. 728; *Shamlin v. Commonwealth Edison Co.*, 1994 U.S. Dist. LEXIS 5018 at \*3 (N.D. Ill. Apr. 20, 1994) ("In addition, the majority of courts that have addressed the issue of the application of Rule 4.2 to former employees of a corporate party, have held that Rule 4.2 permits counsel to communicate with and interview any former employees of a corporate adversary").
14. The Court noted that a number of opinions from other districts confirm that this is now the "majority view."
15. Among the decisions cited is *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398, 416 (S.D.N.Y. May 2, 2011) ("A lawyer may have *ex parte* contact with the opposing party's former employees").
16. The Court held that the possibility that former employees may reveal damaging information is insufficient to implicate Rule 4.2.
17. Former employees are outside the scope of Rule 4.2, because, unlike current employees, former employees cannot bind the corporation.
18. Rule 4.2 does not prevent a plaintiff's lawyer from contacting former employees without the consent of the organization's lawyer, because the statements by former employees can no longer constitute admissions of the corporation or acts binding on the corporation; since they are no longer agents of the corporation. *See Shamlin*, 1994 U.S. Dist. LEXIS 5018.
19. The Court therefore concluded that the EEOC could contact former managers *ex parte* for the purposes of an administrative investigation, prior to the potential commencement of a lawsuit.

20. However, former employees are barred from discussing with the EEOC any privileged information to which they might be privy. (citing Orłowski).

## ***VI. The Comparative New York Case: Siebert v. Intuit***

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1. The comparative New York case: *Muriel Siebert & Co. v. Intuit, Inc.*, 32 AD3d 284 (May 8, 2007).
2. Muriel Siebert & Co, Inc., is a discount brokerage firm, which entered into a “strategic alliance” agreement with defendant Intuit Inc., a manufacturer of financial software, to create jointly, and to operate, an Internet brokerage service.
3. The relationship became strained, when Siebert asserted that Intuit had failed to promote the Internet brokerage service to its customers.
4. In September 2003, Siebert commenced an action against Intuit for, *inter alia*, breach of contract and breach of fiduciary duty in failing to promote Siebert’s business interests.
5. Nicholas Dermigny, Executive Vice President and Chief Operating Officer for Siebert, was an important participant in the events at issue and a member of Siebert’s litigation team, after the lawsuit began. He participated in the negotiations of the Siebert-Intuit agreement and discussions with Intuit relating to its implementation.
6. Mr. Dermigny also assisted in drafting the complaint and responses to interrogatories, and was privy to discussions concerning Siebert’s litigation strategy He was engaged in privileged and confidential communications with Siebert’s counsel.
7. In May 2005, Dermigny took a leave of absence to negotiate the terms of his impending separation and eventual termination from Siebert.
8. Counsel for Siebert sought to continue representing Dermigny at his scheduled deposition, but Dermigny refused.
9. Siebert’s counsel informed an attorney for Intuit that Siebet could not produce Dermigny for the deposition, because it no longer had control over him.
10. Therefore, Intuit subpoenaed Dermigny for a deposition rescheduled for September 26, 2005.
11. Dermigny was terminated by Siebert on September 6, 2005.
12. Upon learning of Dermigny’s termination, Intuit’s attorneys contacted him without Siebert’s knowledge and arranged for an interview.

- 13.** 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.
- 14.** Dermigny was further cautioned that if, during the interview, he were asked a question that could potentially lead to the disclosure of such information, he should so advise Intuit’s attorneys, and decline to answer the question.
- 15.** Intuit’s attorneys then questioned Dermigny about the underlying facts of the case, but did not elicit any privileged information. Nor did they inquire about Siebert’s litigation strategy.
- 16.** Days later, Siebert’s counsel, upon learning of the interview, moved to disqualify Intuit’s attorneys from the case, enjoining them from using any information provided by Dermigny, and moving also to stay Dermigny’s deposition.
- 17.** The New York Supreme Court granted Siebert’s motion, disqualified Intuit’s attorneys, Quinn Emanuel Urquhart Oliver & Hedges, LLP, and ordered the destruction of all notes from their interview with Dermigny; enjoined them from communicating the information they learned during the interview to others; and struck the notice of deposition for Dermigny, until such time as Intuit obtained new representation. The Supreme Court specifically noted that it was not basing its disqualification determination on DR 7-104 (a) (1) of the Code of Professional Responsibility, and acknowledged that the rule did not apply; because Dermigny was not a Siebert employee at the time of the interview.
- 18.** Rather, the Supreme Court held that the disqualification of Intuit’s attorneys was warranted, because there was an “appearance of impropriety,” based upon the possibility that privileged information had been disclosed during the interview.
- 19.** DR 7-104 (a)(1) provides that:
- (a) During the course of the representation of a client a lawyer shall not:
    - (1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the consent of the lawyer representing such other party or is authorized by law to do so.
- 20.** The Appellate Division reversed, holding that the disqualification was not justified, because Intuit’s attorneys had advised Dermigny not to

disclose privileged information; and, based on the record, no such information had been disclosed. 21 AD 3rd 284, 286 (1<sup>st</sup> Dep't 2006).

**21.** In so holding, the Appellate Division had noted the New Court of Appeals opinion in *Niesig v. Team I* (76 NY2d 363 (1990)) “makes it clear that *ex parte* interviews of an adversary’s former employee are neither unethical nor legally prohibited” (32 AD2rd at 285).

**22.** Pursuant to CPLR 5713, the Appellate Division granted Siebert’s application for leave to appeal to the New York Court of appeals, and certified the question: “Was the order of this Court, which reversed the order of Supreme Court, properly made?”

**23.** The New York Court of Appeals affirmed, and answered the certified question in the affirmative.

**24.** In *Niesig*, the Court of Appeals had held that DR 7-104 (a)(1) applies only to certain current employees of a party. The Court of appeals had made clear that *ex parte* communications with nonmanagerial employees are permitted, but adversary counsel are prohibited from directly communicating with 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.

**25.** The view of the Court of Appeals is that it had 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, which have the potential of streamlining discovery and fostering the prompt resolution of claims.

**26.** The policy reasons articulated in *Niesig* concerning the importance of informal discovery underlay the Court of Appeals holding in *Siebert*, that, as 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.

**27.** The Court of Appeals noted that there is no disciplinary rule prohibiting such conduct.

**28.** The Court of Appeals added that, at the time of the interview, Dermigny 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.

**29.** The Court of Appeals concluded that disqualification of Intuit’s attorneys is not warranted, merely because Dermigny was at one time privy to Siebert’s privileged and confidential information.

**30.** The Court of Appeals explained however, that this does not mean that the right to conduct *ex parte* interviews is a license for adversary counsel to elicit privileged or confidential information from an opponent's former employee. That is, counsel must still conform to all applicable ethical standards when conducting such interviews.

**31.** The Court referred to the Code of Professional Responsibility DR 1 102[a][5] [22 NYCRR 1200.3 (a)(5); *Niesig*, 76 NY2d at 376; *Merill v. City of New York*, 2005 US Dist LEXIS 26693, \*3-4 (S.D.N.Y. Nov. 4, 2005) (adversary counsel prohibited from asking former employee about privileged communications); *Wright v. Stern*, 2003 US Dist. LEXIS 23335, \*3 (S.D.N.Y. Dec. 30, 2003) (adversary counsel must refrain from seeking to elicit attorney-client communications from an opponent's former employee); ABA Comm on Ethics and Prof Responsibility Formal Op 91-359 (1991) (adversary counsel may interview former employees of an opponent but must not disclose their role in the matter and whom they represent, and must not induce former employees to disclose privileged communications).

**32.** The Court of Appeals concluded that Intuit's attorneys had properly advised Dermigny of their representation and interest in the litigation, and directed Dermigny to avoid disclosing privileged or confidential information.

**33.** Intuit's attorneys also directed Dermigny not to answer any question that would lead to the disclosure of such information.

**34.** Dermigny stated that he understood the admonitions, and, on the record, no such information was disclosed.

**35.** The Court of Appeals therefore concluded that there is no basis for disqualification.

**36.** The Court of Appeals therefore confirmed the order of the Appellate Division, with costs, and the certified question was answered in the affirmative.

## ***VII. Suggestions for Practice***

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- 1.** In any *ex parte* interview, the interviewing attorney should begin by explaining to the witness whom the interviewing attorney represents.
- 2.** The interviewing attorney should also explain to the witness the matter at hand. As an example, you can say: My name is James Fuchs, and I represent Henry March against the Department of State concerning an alleged hostile work environment.

3. The explanation can be as general as that.
4. You should also note that the participation is voluntary, and that the employee should not feel intimidated by the fact that you are an attorney.
5. You should make clear that you are simply investigating the facts.
6. You should answer any and all questions that the former employee may have concerning the litigation and your role in representing your client.
7. You should bear in mind that, pursuant to DR-7-104(A)(2), you may not give legal advice, other than to advise the employee to secure counsel.
8. Before you proceed to ask questions, you should clearly direct the former employee to avoid disclosing any privileged or confidential information.
9. In doing so, it would be useful to have a prepared script that you could show a court on some subsequent occasion. You need not read off a piece of paper, which may intimidate the witness. However, you should probably commit the script to memory, so that you can refer to an exact script later on, if necessary.
10. To be even more cautious, you might want to read off of the prepared script, which you could then, if necessary, present to a court. However, the script would detract from eye contact, in addition to possibly intimidating the witness. This would be a matter of personal preference.
11. In the prepared script, you should also explain to the former employee that the former employee is not to answer any questions that could lead to the disclosure of privileged or confidential information.
12. Bear in mind that most people, even sophisticated business executives, do not understand what is meant by “privileged and confidential information.” You should therefore explain what this means. You can simply state something to the effect that “privileged information” means information that was obtained in discussions with the company’s lawyers, or in memos or other communications written to or from the lawyers for the company.
13. Explain that “confidential information” includes trade secrets or any other proprietary information that the company has forbidden its employees from disclosing.
14. The explanation should be simple, so that you avoid providing legal advice. Still, you do need to advise the former employee not to disclose privileged or confidential information. On the other hand, some former employees may have a more difficult time understanding this than others, so, in some cases, you may have to flesh out the information a bit more.
15. Point out to the former employee that if the former employee finds that you have inadvertently asked a question that may lead to the disclosure of

privileged or confidential information, the former employee should both let you know, and not answer the question.

**16.** Make certain that the former employee understands the directive. If there seems to be any confusion, you should repeat the directive.

**17.** If the former employee should appear confused about the identify of whom you represent, rectify that confusion immediately.

**18.** If you should learn, at any time, that the former employee is represented by counsel, conclude the interview immediately. Pursuant to DR-7-104(A)\_ (1), you may not talk to a represented party unless you are authorized to do so (by virtue of having the consent of the former employee's attorney or by virtue of being a prosecutor.

**19.** As long as the litigation is in Illinois, these rules apply, irrespective of where the interview should take place, or where the attorney is admitted.