

NEW YORK COURT OF APPEALS ROUNDUP:

INTERVIEWING FORMER EMPLOYEES, AMENDING LAW FIRM PARTNERSHIP WITHDRAWAL PROVISIONS, PUNITIVE DAMAGES, AND VIDEOTAPED INCONSISTENT STATEMENTS

ROY L. REARDON AND MARY ELIZABETH MCGARRY*
SIMPSON THACHER & BARTLETT LLP

JUNE 6, 2007

The Court of Appeals stated recently that, "so long as measures are taken to steer clear of privileged or confidential information," counsel may conduct an ex parte interview of an adversary's former employee, even a high-ranking officer who had been privy to privileged information concerning the litigation.

This month we discuss that decision, as well as the Court's decision upholding amendment of a law firm partnership agreement by majority vote to affect payments to departing partners. We also discuss a decision in a wrongful adoption action in which the Court reaffirmed the high standard for punitive damages, and explained when a defendant may be equitably estopped from raising the statute of limitations defense.

Finally, we note the Court's decision not to resolve whether a videotape of a prior inconsistent statement should be admitted into evidence because it provides additional relevant information beyond what can be established by cross-examining the witness with a transcript; the Court found that the issue had not been preserved for review.

Interviewing Former Employees

While the issue of a litigant's freedom to interview employees of an adversary without facing attorney disqualification appeared to have been broadly resolved in the Court's 1990 opinion in *Niesig v. Team I*, 76 NY2d 363, the Court was called upon again to review the issue, prompted by two detailed opinions filed by the Motion Court in *Muriel Siebert & Co. v. Intuit Inc.*

The dispute arose out of the parties' agreement to jointly create and operate an internet brokerage service. When the venture did not succeed, Siebert sued Intuit for breach of contract and breach of fiduciary duty. The executive vice president and chief operating officer of Siebert, who had been deeply involved in the brokerage venture, as well as the lawsuit that followed its

* Roy L. Reardon and Mary Elizabeth McGarry are partners at Simpson Thacher & Bartlett LLP.

failure, had been placed on leave prior to his scheduled deposition. Siebert's counsel advised the opposing side that the witness was no longer under Siebert's control and could be subpoenaed for the deposition. The witness was then terminated by Siebert, and within days was interviewed by Intuit's counsel.

Learning of the interview of its former employee, Siebert made a motion to disqualify Intuit's counsel, which was granted. A fact critical to the ultimate outcome of the appeal in the Court of Appeals was the warning issued to the witness at the time of his interview.

Both in its decision on the motion to disqualify, and in its decision on the motion by Intuit to reargue, the Motion Court stated that its concern was not only with the appearance of impropriety by reason of the witness' position and the "range of information" to which he had been privy, but more importantly with the high risk for actual prejudice and the need to protect Siebert's attorney-client privilege. The Motion Court also clearly stated that its decision did not seek to overrule *Niesig*, which held that DR 7-104 (a)(1) applied only to certain current employees of an adversary.¹

The Appellate Division, First Department, unanimously reversed the order of disqualification and granted Siebert leave to appeal to the Court of Appeals pursuant to CPLR 5713 on the certified question of whether its reversal of the Motion Court was correct.

Upon review, a unanimous Court, in an opinion by Judge Eugene F. Pigott Jr., affirmed the Appellate Division's order and answered the certified question in the affirmative. In doing so, the Court reviewed its holding in *Niesig*, that ex parte communications by counsel with employees of an adversary are permitted, except with respect to current employees who can bind a corporate party in a lawsuit, are charged with carrying out the advice of the corporation's attorney, or are considered the corporation's organizational members with a stake in the dispute. The Court explained that its decision in *Niesig* sought to strike a balance between the importance of protecting parties represented by counsel from making imprudent disclosures, and the benefit of quickly developing facts relevant to a dispute in informal ways - such as ex parte interviews - in order to streamline discovery and resolve claims.

The Court made clear that, while the fact that Siebert's former employee had been privy to privileged and confidential information did not automatically justify disqualification, interviewing counsel was obligated to comply with all ethical standards and did not have a license to elicit such information. In affirming the Appellate Division, the Court found that Intuit's counsel had directed the witness not to disclose privileged or confidential information, or answer questions that would lead to such disclosures, and therefore had complied with its obligations. It also noted that the witness had told Intuit's counsel that he understood the admonitions, and that there was no record evidence of improper disclosure.

Partnership Disputes

In *Bailey v. Fish & Neave*,² the Court considered the propriety of an amendment to a law firm partnership agreement affecting compensation to withdrawing partners. The Court

unanimously held, in a decision by Judge Theodore T. Jones Jr. (Judge Robert S. Smith took no part in the decision), that the agreement had been properly amended because, even though it contained no specific amendment provision, the agreement contained a provision that unambiguously permitted all questions relating to partnership business to be decided by a majority vote of the partners.

The plaintiffs were former equity partners at Fish & Neave, which merged into Ropes & Gray on Jan. 1, 2005. Prior to the merger, and while plaintiffs were still active partners, Fish & Neave passed an amendment to its partnership agreement by majority vote that, among other things, changed the amount and timing of payments to withdrawing partners.

Plaintiffs subsequently withdrew from the partnership and received payments based upon the amended provision. They thereafter filed a breach of contract lawsuit against Fish & Neave, as well as Ropes & Gray, seeking withdrawal payments based on the former provision, claiming that the amendment was invalid and violated New York Partnership Law §40(8), which requires, absent an agreement otherwise, unanimous consent for any act in contravention of a contract among partners.

The Court found that the agreement made clear that all questions related to the partnership, including dissolution, may be decided by majority vote, unless specifically provided otherwise. As the partnership agreement's withdrawal provision contained no exception to majority rule, the Court held, only a majority vote was necessary to amend that provision, and §40(8) therefore was inapplicable. In so holding, the Court relied upon and upheld the well-settled principles that partners are free to fix their partnership rights and duties by agreement, and that the Court will not imply provisions of N.Y. Partnership Law into the contract to override terms to which the parties had agreed.

Punitive Damages/Equitable Tolling

Ross v. Louise Wise Services Inc. arose out of a 1961 adoption. The defendant agency informed the plaintiff couple that an infant was available. Although asked about the health of the child and his biological family, the agency did not reveal that the infant's father and maternal grandfather suffered from schizophrenia. The agency defended this omission by explaining that, during the 1960s and 1970s, it had a policy of not disclosing information about a birth family's medical history if it was unsure whether the information related to a hereditary condition, for fear that would cause the adoptive parents to form a negative attitude toward the child. The agency also maintained that, at that time, it was unclear that schizophrenia was hereditary, an assertion that plaintiffs and their expert disputed.

The adoption went forward. Unfortunately, the boy's behavior became more and more troublesome over time. At various points between 1970 and 1994, the plaintiffs, as well as a professional treating the child, asked the agency for additional background information. Repeatedly, the agency failed to disclose the birth family history of schizophrenia. That history was learned only when the plaintiffs obtained their son's medical records in 1999. Plaintiffs alleged that, while they loved their son, had they been provided with his full family history

they would not have adopted him, and further, that if the history of schizophrenia had been disclosed earlier, it might have resulted in different psychiatric treatment for the child. Their suit challenged the defendant's statements and omissions prior to adoption, not the subsequent failures to disclose.

The first issue before the Court was whether plaintiffs could seek punitive damages on their claim for wrongful adoption, a cause of action that requires proof of the essential elements of common law fraud and a "deliberate act of misinforming" the prospective parents, not simply silence by an adoption agency. (Citation and quotation omitted.)

The opinion, by Chief Judge Judith S. Kaye for a unanimous Court, reiterated that punitive damages are available only where the conduct at issue is "reprehensible," "has the character of outrage frequently associated with crime," or is "malicious[], wanton[], . . . [or] vindictive[]." (Citations and quotations omitted.) Punitive damages serve two purposes, to punish and to deter. As to the former, the Court concluded that although the defendant admitted intentional misconduct in concealing the infant's background, the record did not demonstrate such misconduct was motivated by malice. As to the latter purpose, the Court observed that the defendant no longer places children for adoption, and that due to a 1983 statute, New York agencies now must disclose medical and psychological histories to adoptive parents upon request; accordingly, an award of punitive damages in this action would not serve a deterrent purpose. The award summary judgement dismissing the claim for punitive damage was affirmed.

Also affirmed was the dismissal of plaintiffs' remaining causes of action for negligence and intentional infliction of emotional distress, under the statute of limitations. Plaintiffs argued that the agency should be equitably estopped from asserting such defense. The Court disagreed. Equitable estoppel is triggered by affirmative conduct other than the initial wrongdoing, not simply by silence or failure to disclose the wrongdoing. Defendant's concealment at the time of the 1961 adoption, therefore, could not justify application of the doctrine. Because the statute of limitations on these two causes of action had run by the time plaintiffs contacted the agency in 1970, the defendant's continued concealment did not induce plaintiffs to refrain from timely asserting the claims.

Impeachment by Videotape

The defendant in *People v. Paul Person*, argued that the trial court had erred in refusing to admit videotapes of prior inconsistent statements by two prosecution witnesses, because unlike the transcripts of those inconsistent statements, the videotapes would have provided the jury with additional information relevant to the witnesses' credibility. The Court unanimously ruled, in a memorandum decision, that the argument had not been preserved for review, finding that defense counsel had urged the trial court to admit the videotapes as proof of the content of the statements, not as relevant to credibility. It is unfortunate that an important open issue of New York evidence law remains unresolved due to the lack of preservation.

Mr. Person was incarcerated at the time of the brutal and much-publicised robbery and murder

of Ernst & Young executive, Thierry Matheron, which was perpetrated by Mr. Person's girlfriend, Nakia Shannon, and Oliver Johnson, a former employee and romantic partner of the victim. When Ms. Shannon was arrested, she denied that Mr. Person had any involvement in the crime. When Mr. Johnson was arrested, he admitted that robbing Mr. Matheron had been his idea. Both of those individuals later entered into plea agreements, and at trial testified that Mr. Person had directed them to rob and kill Mr. Matheron. Mr. Person's counsel cross-examined the cooperating witnesses with transcripts of their videotaped confessions. Both Ms. Shannon and Mr. Johnson acknowledged their prior statements concerning Mr. Person's lack of involvement.

Defense counsel sought to have the relevant portions of the videotapes admitted into evidence. The People objected, and the trial court concluded that, because the witnesses had admitted to the fact and content of these prior inconsistent statements, it was precluded from admitting the statements themselves into evidence. The jury never saw the videotapes. Mr. Person's conviction was upheld by the Appellate Division, First Department, which concluded that because the witnesses had admitted the inconsistencies, putting the statements into evidence was unnecessary, and that because the prior statements could not be admitted for the truth of the matter asserted, the witnesses' demeanor on the videotapes was irrelevant. Judge Albert M. Rosenblatt granted the defendant permission to appeal to the Court of Appeals. Judge Rosenblatt had retired from the Court by the time the case was argued and decided, however.

The defendant pointed out to the Court of Appeals that the prosecution had raised Ms. Shannon's and Mr. Johnson's demeanor on the stand in urging the jury to find their trial testimony credible. In addition, Mr. Johnson had sought to explain his earlier statement as a product of fear. Thus, the witnesses' demeanor while making their prior inconsistent statements on the key issue was highly relevant to the credibility of their trial testimony. The People countered that this argument had not been made to the trial court, which had instead been asked to admit the videotapes as proof of inconsistency.

The defense urged the Court of Appeals to adopt a rule permitting a trial court to exercise its discretion to admit an audiotaped or videotaped prior statement of witnesses "where it provides additional relevant information beyond the mere fact that a prior inconsistent statement was made, absent significant prejudice arising out of the admission of such statement."³

Conclusion

Indeed, it is hard to imagine that a videotape of a witness making a prior inconsistent statement would not be more informative than the cold written transcript to jurors attempting to assess the credibility of a witness now disavowing the truth of his earlier statement. Whether New York will modify the standards for admitting prior inconsistent statements for those preserved on audio and video recordings must be resolved in another case, however, because the Court concluded that the issue had not been preserved for review.

Endnotes:

- ¹ In its order of disqualification, the Motion Court directed the destruction of interview notes taken by Intuit's counsel, and thereafter denied Intuit's application for a stay of the destruction order pending appeal or, in the alternative, to allow for the preservation of the notes pending appeal. The Appellate Division then issued a stay pending the expedited perfection of the appeal.
- ² Simpson Thacher & Bartlett LLP, of which the authors of this column are partners and an associate, represented the defendants in *Bailey v. Fish & Neave*.
- ³ Brief for Defendant-Appellant.