Pillsbury
Winthrop
Shaw
Pittman LLP

1540 Broadway
New York,
NY 10036-4039

Tel 212.858.1000
Fax 212.858.1500
www.pillsburylaw.com

December 22, 2006

ROBERT T. WESTROM
MANAGING ATTORNEY
Phone: 212.858.1665
robert.westrom@pillsburylaw.com

BY FEDEX

State of New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207
518-455-7700

Re: MURIEL SIEBERT & CO., INC., v. INTUIT INC.,

Dear Clerk:

I have enclosed for filing:

1. An original and copy of the Notice of Motion of the Association of the Bar of the City of New York for Leave to File Brief of Amicus Curiae,

2. An original and 24 copies of the Brief of Amicus Curiae, The Association of the Bar of the City of New York,

3. Original Affidavit of Service of the Notice of Motion and Three Copies of the Amicus Brief on all counsel,

4. Check in the amount of $45.00 in payment of the motion fee.

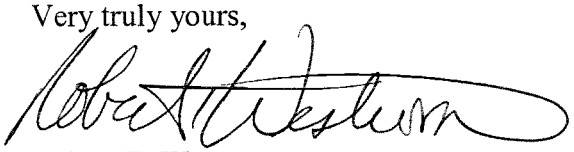
Pillsbury Winthrop Shaw Pittman LLP
Robert T. Westrom
robert.westrom@pillsburylaw.com

Please note the filing date on the enclosed copies and return them to me in the postage paid First Class Mail envelope provided.

Call me at the above listed number if you have any questions regarding this matter.

Thank you for your assistance.

Very truly yours,



Robert T. Westrom

Enclosures

STATE OF NEW YORK
COURT OF APPEALS

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MURIEL SIEBERT & CO., INC.,

Plaintiff-Appellant

-against-

INTUIT INC.,

Defendant-Respondent.

New York County Clerk's Index No. 602942/03

NOTICE OF MOTION OF THE ASSOCIATION THE BAR OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

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PLEASE TAKE NOTICE that, upon the annexed affidavit of David G. Keyko, sworn to on the 22nd day of December, 2006, the accompanying proposed brief, and upon all the pleadings and prior proceedings had herein, movant The Association of the Bar of the City of New York, by its attorneys Pillsbury Winthrop Shaw Pittman LLP, will move this Court at a term thereof to be held at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 8th day of January 2007, at the opening of this Court on that day, or as soon thereafter as counsel can be heard, for an order pursuant to Section 500.23(a) of the New York Court Rules granting movant leave to file the accompanying brief as *amicus curiae*, in the above-titled appeal from the decision and order of the Appellate Division, First Department, entered August 17, 2006, together with such other and

further relief as the Court may deem just and proper.

Dated: New York, New York
December 22, 2006

Respectfully submitted,

PILLSBURY WINTHROP
SHAW PITTMAN LLP

By: _____
David G. Keyko
1540 Broadway
New York, New York 10036-4039
Telephone: (212) 858-1000
Facsimile: (212) 858-1500

Attorneys for Amicus Curiae
The Association of the Bar of the
City of New York

TO: INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI LLP
250 Park Avenue
New York, New York 10177
Telephone: (212) 907-9600

Attorneys for Plaintiff-Appellant
Muriel Siebert & Co., Inc.

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000

Attorneys for Defendant-Respondent
Intuit Inc.

STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
Telephone: (212) 806-5400

Attorneys for Defendant-Respondent
Intuit Inc.

STATE OF NEW YORK
COURT OF APPEALS

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MURIEL SIEBERT & CO., INC.,

Plaintiff-Appellant

-against-

INTUIT INC.,

Defendant-Respondent.

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New York County Clerk's
Index No. 602942/03

AFFIDAVIT OF DAVID G. KEYKO IN SUPPORT OF MOTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

DAVID G. KEYKO, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before the courts of the State of New York, and I am a member of Pillsbury Winthrop Shaw Pittman LLP, attorneys for movant The Association of the Bar of the City of New York ("the Association"). I also serve as Chair of The Association's Professional Responsibility Committee (the "Committee").

2. I am fully familiar with the facts and circumstances set forth herein, and submit this affidavit in support of the Association's motion for leave to file a brief prepared by the Committee as *amicus curiae* in the above-referenced appeal. A copy of the movant's proposed brief accompanies this affidavit.

3. Section 500.232(a)(4)(i-iii) of the New York Civil Rules of Court provides that a movant requesting leave to appear as *amicus curiae* must demonstrate:

> i the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency;
>
> ii the *amicus* could identify law or arguments that might otherwise escape this Court's consideration; or
>
> iii the proposed *amicus curiae* brief otherwise would be of assistance to the Court. 22 N.Y.C.R.R. Section 200.23(a)(4)(i-iii) (2005).

4. The Association submits this *amicus curiae* brief in support of its position that (i) this Court should determine that DR 7-104(A)(1) does not apply to former employees, (ii) the vague "appearance of impropriety" standard in Canon 9 should not govern, and (iii) the applicable Disciplinary Rule, DR 1-102(A)(5), would not be violated if the lawyer did not seek or elicit attorney-client information during the interview.

5. This Court held in its landmark decision in *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990), that, under DR7-104(A)(1), former employees do not fall within the definition of "party," and thus may be contacted by opposing counsel without notice to the corporate party's attorney. The Association believes that the Court should not alter this simple, bright line rule that has guided New York lawyers for more than fifteen years.

6. The Association also notes a trend across the nation—in state and federal court decisions and in bar opinions—away from an "appearance of impropriety" standard for lawyer disqualifications. Further, in its own recent Bar opinions, the Association has made clear that unwarranted invasion of the attorney-client privilege by opposing counsel constitutes conduct "prejudicial to the administration of justice" under DR 1-102(A)(5). The Association submits that this Disciplinary Rule – not DR 7-104 or the vague "appearance of impropriety" standard set forth in Canon 9 and improperly relied upon by the trial court – should govern this Court's analysis of the conduct at issue here.

7. The trial court's imposition of an irrebutable presumption in favor of disqualification, the Association believes, will make *ex parte* interviews of former employees ethically untenable, unless the lawyers conducting the interviews obtain prior approval from their adversaries or the court. This irrebutable presumption will eradicate the vital informal discovery process that this Court endorsed in *Niesig*, The Association also believes that this irrebutable presumption assumes conduct on the part of lawyers that is contrary to the ethical standards that, up until now, have been held to govern lawyers' actions on a daily basis.

8. The Association members have a strong interest in the issues raised in this appeal. Founded in 1870, the Association is a professional

organization of more than 22,000 attorneys. Through its standing committees, including the Committee, the Association educates the bar and the public about legal issues relating to professional responsibility, including the ethical issues that should inform a court's decision to disqualify a party's law firm, and the ethical issues that govern a lawyer's conduct throughout the course of litigation. This Court's decision will be of great significance to the Bar, both here in New York and across the country. It will also be of interest to the public. The Association is uniquely situated to offer a broader prospective than the litigants on the issues which this appeal presents. The Association believes that this Court would be aided by hearing from the Association about the potential impact on the Bar of changing the standard for disqualification of attorneys and for communication with former employees of a corporate party.

WHEREFORE, Movant, The Association of the Bar of the City of New York respectfully requests that this Court grant its motion for leave to file the accompanying proposed brief as *amicus curiae*.

David G. Keyko

Sworn to before me this
22nd day of December, 2006

Notary Public

ROBERT T. WESTROM
Notary Public, State of New York
No. 01-WE4919195
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires Feb. 28, 2010

New York County Clerk's Index No. 602942/03

Court of Appeals

STATE OF NEW YORK

MURIEL SIEBERT & CO., INC.,

Plaintiff-Appellant,

—against—

INTUIT INC.,

Defendant-Respondent.

BRIEF OF *AMICUS CURIAE*, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Pillsbury Winthrop Shaw Pittman LLP
Attorneys for Amicus Curiae
The Association of the Bar of the
City of New York
1540 Broadway
New York, NY 10036
Telephone: (212) 858-1000
Facsimile: (212) 858-1500

Date Completed: December 22, 2006

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PRELIMINARY STATEMENT

The Committee on Professional Responsibility of the Association of the Bar of the City of New York (the "Association") respectfully submits this brief as *amicus curiae*. The instant case provides this Court with an opportunity to elucidate further the appropriate balance between protecting the integrity of the corporate attorney-client relationship under DR 7-104 and the need to permit informal discovery of at least some corporate employees. In particular, this case requires the Court to determine whether a corporate "party" within the context of DR 7-104 includes a former employee who had access to attorney-client information about the matter in dispute. In its landmark decision, *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990), this Court determined that former employees do *not* fall within the definition of "party," and thus may be contacted by opposing counsel without notice to the corporate party's attorney. The Association believes, for the reasons stated below, that the Court should not alter this simple, bright line rule that has guided New York lawyers for more than fifteen years.

The Association also recognizes the important need to protect the attorney-client privilege from unwarranted invasion by opposing counsel. In recent, analogous Bar opinions, the Association has made clear that unwarranted invasion of the attorney-client privilege by opposing counsel constitutes conduct

"prejudicial to the administration of justice" under DR 1-102(A)(5). *See, e.g.*, N.Y. City Op. 2003-04 (2003). This Disciplinary Rule – not DR 7-104 or the vague "appearance of impropriety" standard set forth in Canon 9 and improperly relied upon by the trial court – should govern this Court's analysis of the conduct at issue here. Reliance on DR 1-102(A)(5) requires the Court to focus on what the lawyers conducting the interviews actually did, and what the employees being interviewed actually told them. Given that, in this case, the Appellate Division found that the interviewing attorneys neither requested nor elicited attorney-client information, the Appellate Division concluded that those attorneys did nothing improper, and no basis for disqualifying them exists.

I. LIMITING THE NO-CONTACT RULE IN NEW YORK TO PRESENT EMPLOYEES APPROPRIATELY BALANCES THE NEED TO PROTECT THE INTEGRITY OF THE ATTORNEY-CLIENT RELATIONSHIP FROM ADVERSARIAL INTERFERENCE WITH THE NEED TO PRESERVE INFORMAL DISCOVERY PROCEDURES.

Disciplinary Rule 7-104(A) of the Lawyers' Code of Professional Responsibility, 22 N.Y.C.R.R. Section 1200.35 ("DR 7-104(A)"), often known as the "no-contact rule," prohibits a lawyer from communicating with a party that the lawyer knows to be represented by another lawyer without the opposing lawyer's consent. Disciplinary Rule 7-104 thus states:

A. During the course of representation of a client a lawyer shall not:

1. 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 prior consent of the lawyer representing such other party or is authorized by law to do so.

2. Give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

In *Niesig v. Team 1*, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990), this Court determined how DR 7-104 (A)(1) should be applied when the represented "party" is a corporation or similar entity. This Court held that adversary counsel are prohibited from communicating solely with those corporate officials: "[1] who have the legal power to bind the corporation, [2] who are responsible for implementing the advice of the corporation's lawyer, or [3] whose own interests are directly at stake in a representation." *Id.* at 374, 559 N.Y.S.2d at 498.

Just as importantly, the *Niesig* Court made clear that DR 7-104 applies to prohibit communications only with *current* employees and not former employees. *Id.* at 369, 559 N.Y.S.2d at 495. This holding flowed from the Court's understanding that the underlying purpose of the no-contact rule was to prevent lawyers from deliberately taking advantage of represented parties:

> DR 7-104 (A)(1), which can be traced to the American Bar Association Canons of 1908, fundamentally embodies principles of fairness. 'The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact.' By preventing lawyers from deliberately dodging

> adversary counsel to reach—and exploit—the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions.

Id. at 370, 559 N.Y.S.2d at 495-496 (citations omitted).

This Association and the American Bar Association have written, and New York federal courts have similarly held, that the purpose of DR 7-104 (A) is to protect the integrity of an existing attorney-client relationship from interference by adverse counsel. *See Tylena M. v. HeartShare Human Serv's*, No. 02 Civ.8401 (VM)(THK), 2004 WL 1252945 (S.D.N.Y. June 7, 2004) (denying motion to disqualify plaintiff's attorney who had conducted ex parte communication with defendant's in-house counsel because "[t]he communication was not intended to, nor did it, solicit any potential admissions or other evidence from in-house counsel, which could be utilized by Plaintiffs to Defendants' detriment"); *Miano v. AC&R Advert., Inc.*, 148 F.R.D. 68, 75 (S.D.N.Y. 1993) (holding that the no-contact rule protects the integrity of the attorney-client relationship, prevents a lawyer from taking advantage of people without counsel and protects a client from unwittingly disclosing privileged or damaging information); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990) (ABA Model Rule 4.2 and NY DR 7-104(A)(1) prevent lawyers from circumventing opposing counsel and using superior skills and training to obtain "unwise statements" from opposing party, preserve the integrity of the attorney-client relationship by preventing the

disclosure of privileged information, and facilitate settlements by allowing lawyers skilled in negotiating to conduct discussions.); N.Y. City Bar Op. 2005-04 (2004) (The purpose of DR 7-104 is to protect the attorney-client relationship from interference by adverse counsel and to protect clients against overreaching by adverse counsel, in addition to protecting clients from inadvertent disclosure of confidential and privileged information and protecting clients from admissions against interest.); ABA Formal Opinion 95-396 (ABA Model Rule 4.2 is equivalent to DR 7-104.).

These decisions and ethics opinions are consistent with the concerns raised by this Court in *Niesig*. In determining the three groups of corporate employees covered by the no-contact rule, this Court emphasized evidentiary and practical considerations that flowed from the fact that the members of these groups were all current employees of a current client, and speaking with them could or would directly impact the ongoing attorney-client relationship or the course of the ongoing litigation. The Court identified the three groups to which the no-contact rule applies by adopting an "alter ego" test for determining the scope of DR 7-104(A)(1):

> The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that *defines 'party' to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or imputed to the corporation for purposes of its liability, or employees implementing*

> *the advice of counsel. All other employees may be interviewed informally* ... In practical application, the test we adopt thus would prohibit direct communication by adversary counsel 'with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation.'

Niesig, 76 N.Y.2d at 374, 559 N.Y.S.2d at 498 (emphasis added).

The notion that the employees covered by the rule are those whose words or actions could bind the corporate "party" in the ongoing litigation, or who would "implement" the advice of corporate counsel, underscores that the Court was referring to current employees.

Moreover, excluding former employees from the coverage of the Rule promotes the Court's goal of having a "clear test that will become even clearer in practice." *Niesig*, 76 N.Y.2d at 373, 559 N.Y.S.2d at 497. In this difficult area, there is genuine value in having a bright line rule. This benefit is evident from the fact that this issue has generated so little controversy since 1990, when *Niesig* was decided.

II. *NIESIG* PROPERLY BALANCES PROTECTING THE ATTORNEY-CLIENT PRIVILEGE AND PRESERVING ACCESS TO VITAL INFORMATION BY PERMITTING A LAWYER TO INTERVIEW CERTAIN EMPLOYEES OF ADVERSARY CORPORATIONS AND FORMER EMPLOYEES

A. This Court Has Endorsed the Importance of Informal Discovery

Excluding former employees from the no-contact rule comports with the policy, emphasized in *Niesig*, of preserving "vital informal access to facts." *Id.* at

371, 559 N.Y.S.2d at 496. In *Niesig*, this Court endorsed informal discovery procedures, including a lawyer's interviewing the employees of a corporate adversary:

> Most significantly, the Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes. Foreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions. 'A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witness' knowledge, memory and opinion – frequently in light of information counsel may have developed from other sources.'

Niesig at 372, 559 N.Y.S.2d at 497 (citing *International Bus. Mach. Corp. v. Edelstein*, 526 F2d 37, 41 (citing *Hickman v Taylor*, 329 US 495 (1945))).

This Court explained that "costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information." *Niesig* at 372, 559 N.Y.S.2d at 497. Moreover, interviews of most corporate employees do not pose significant risks to the integrity of the corporation's attorney-client relationship or the fact-finding process in general:

> Nor, in our view, is it necessary to shield all employees from informal interviews in order to safeguard the corporation's interest. Informal encounters between a lawyer and an employee-witness are not – as a

> blanket ban assumes – invariably calculated to elicit unwitting admissions; they serve long-recognized values in the litigation process. Moreover, the corporate party has significant protection at hand. It has possession of its own information and unique access to its documents and employees; the corporation's lawyer thus has the earliest and best opportunity to gather the facts, to elicit information from employees, and to counsel and prepare them so that they will not make the feared improvident disclosures that engendered the rule.

Id. at 372-373, 76 N.Y.2d at 497.

This Court accordingly "conclude[d] that the values served by permitting access to relevant information require that an effort be made to strike a balance." *Id.* And these important values are enhanced by allowing former employees, who are no longer agents of the corporate "party," who can no longer bind the corporation or make admissions on its behalf, and who are no longer subject to its blanket control, to be freely interviewed by opposing counsel, as long as other applicable ethical constraints, discussed more fully below, remain in force.

To be sure, in this particular case, the law firm of Quinn Emanuel Urquhart Oliver & Hedges, LLP ("Quinn Emanuel") perhaps took a significant risk because, even with a bright line rule, the disclosure of privileged information by the witness during the interview could have resulted in the firm's disqualification. Thus, the facts of this case present the outer limits of permissible contact. Nonetheless, in addition to the Appellate Division's findings that (i) Quinn Emanuel adhered to its ethical obligations by instructing the witness not to reveal privileged information and (ii) no privileged information was revealed, *Muriel Siebert Co., Inc. v. Intuit*

Co., 32 A.D.3d 284, 287, 820 N.Y.S.2d 54, 56 (1st Dep't 2006), we believe, for the reasons discussed below, that the advantages of a bright line rule allowing *ex parte* interviews with former employees far outweigh the occasional, if not anomalous, instances in which the former employee's position within the corporation was such that a lawyer who interviews the former employee runs the risk of implicating the policies of DR 7-104(A)(1).

Especially under such circumstances, the appropriate standard for scrutinizing the lawyer's conduct is DR 1-102(A)(5), which requires the court to focus on what the lawyers conducting the interviews actually did, and what the employees being interviewed actually said. In the instant case, the Appellate Division held that the interviewing attorneys neither requested nor elicited privileged attorney-client information.

B. New York Law and Ethics Opinions Concerning the No-Contact Rule Since Niesig Have Not Upset the Niesig Balance by Extending the No-Contact Rule to Former Employees

In the sixteen years since *Niesig* was decided, the bar and the public have been well served by the "alter ego" test used in determining whether a corporate employee will be deemed to be a "party represented by counsel" for DR 7-104 purposes. Moreover, until the trial court acted here, no New York state or federal court had extended the no-contact rule to former employees, and those addressing the issue had refused to do so. For example, in *Merrill v. City of New York*, 04

Civ. 1371 (RWS) (MHD), 2005 U.S. Dist. LEXIS 26693 (S.D.N.Y. November 4, 2005), the court cited *Niesig* in allowing plantiff's attorney to communicate with a former New York City police officer who had reportedly policed the demonstration at which the plaintiff was arrested:

> Defendants' argument fails at several levels. First, the pertinent authority addresses contact by a litigant's counsel with employees of a represented party who are in a position to bind the defendant entity. Indeed, that is the precise focus of the New York Court of Appeals in *Niesig*. As a police officer, Mr. Fichter was not in a position to bind the City, much less the other defendants in this case, in recounting what he observed at a police demonstration.

Id. at *3.

In *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990), the court identified the "strong reasons why it would be unwise to expand the definition of a corporate party beyond its present contours" to apply to former employees:

> First, any shift away from informal information gathering toward formal discovery increases costs and reduces judicial efficiency. Second, and more important, it would act as a deterrent to the disclosure of information. Former employees often have emotional or economic ties to their former employer and would sometimes be reluctant to come forward with potentially damaging information if they could only do so in the presence of the corporation's attorney. Whatever the right of the corporation to 'barricade' against *ex parte* contact those potential witnesses who are current employees, **former employees are outside the ramparts.**

Id. at 628 (citations omitted and emphasis added).

New York State ethics opinions have followed suit. Thus, in addition to concluding that "[w]hen the party is an organization, the bar against communication covers anyone whose act 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," *see* N.Y. State Bar Op. 656 (1993), the New York State Bar association, citing *Niesig*, opined that an attorney opposing a party represented by counsel may interview an accountant who had been working for the corporation as an independent contractor (and not as a current employee), "[i]f the accountant has not personally retained counsel in the matter and is not considered to be represented by the corporation's counsel under the *Niesig* standard." N.Y. State Bar Op. 735 (2001).

The American Bar Association's Standing Committee on Ethics and Professional Responsibility has followed *Niesig* and consistently opined that the no-contact rule does not apply to former employees. In analyzing Model Rule 4.2, the equivalent of New York's DR 7-104(A)(1), the Committee concluded in ABA Formal Ethics Op. 91-359 (1991):

> While the Committee recognizes that persuasive policy arguments may be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employees, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information

about one's case, the Committee is loath, given the text of Model Rule 4.2 and its comment, to expand coverage to former employees by means of liberal interpretation.

Four years later, in ABA Formal Ethics Op. 95-396 (1995), the Committee wrote: "Rule 4.2 does not prohibit contact with former officers or employees of a represented corporation, even if they were in one of the categories in which communication was prohibited while they were employed." Indeed, as part of the February 2002 revisions to Model Rule 4.2, the ABA revised Comment 7 to state that "consent of the organization's lawyer is not required for communication with a former constituent" (Comment 7, 2004).[1]

In short, the New York courts, the New York Bar opinions, and the American Bar Association have spoken with one voice: the no-contact rule does not shield corporate parties from direct contacts with former employees.

III. THIS COURT'S HOLDING IN *NIESIG* SHOULD NOT BE MODIFIED BECAUSE OTHER PROVISIONS OF THE NEW YORK CODE PROTECT AGAINST THE INVASION OF THE ATTORNEY-CLIENT PRIVILEGE IN INTERVIEWS WITH FORMER EMPLOYEES

As set forth above, in *Niesig*, this Court articulated the standard by which the employees of a corporate party will be considered "parties" within the meaning of

[1] A majority of state and federal courts, as well as state bar ethics committees, have followed *Niesig* and the ABA, and concluded that the no-contact rule does not apply to former employees. *See, e.g., Brown v. St. Joseph County,* 148 F.R.D. at 253 (and citations therein) (N.D. Ind. 1993); Roy Simon, Simon's New York Code of Professional Responsibility Annotated, 1066 (2006 Edition).

the no-contact rule of DR 7-104(A)(1). The policies underpinning the *Niesig* decision were expressly designed to protect a present and existing attorney-client relationship. Those policies, however, are separate and distinct from those that govern the propriety of an attorney's contact with a party's former employee who may have information protected by some privilege belonging to the party. As explained below, rules guarding against invasion of an adversary's attorney-client privilege exist in the Code and in common law, and these rules should apply here. This Court should not extend the no-contact rule to cover former employees, even when such former employees are in possession of attorney-client information regarding the matter in controversy.

Where a lawyer seeks to speak with a corporation's former employee, such attorney-contact is not covered by *Niesig*, as has been noted above, because there is no attorney-client relationship to protect. However, where the former employee possesses information subject to some privilege owned by the corporation (*e.g.*, attorney-client communications, litigation strategy or other attorney work-product), there are separate and independent ethical rules and public policies that regulate the attorney's contact with such an employee. These rules, as interpreted by courts and Bar ethics committees, make clear that a lawyer may not: (i) affirmatively solicit the disclosure of unauthorized communications; (ii) exploit the willingness

of others to reveal privileged communications; or (iii) knowingly make use of the inadvertent disclosure of confidential information.

For example, in *Wright v Stern*, No. 01 Civ.4437(DC)(MHD), 02 Civ.4699(DC)(MHD), 2003 WL 23095571 (S.D.N.Y. Dec. 30, 2003), Magistrate Judge Dolinger established a procedure designed to protect against the disclosure of attorney-client privileged material or other unfair prejudice by directing that plaintiff's counsel, in speaking with current employees, "refrain from seeking to elicit from any present *or former* [Parks] Department employee any attorney-client communication. In addition, when arranging for an interview with Department employees, plaintiff's counsel is to advise the employee that he or she is free to decline to respond." *Id.* at *1 (emphasis added).

In addition, New York Bar opinions have concluded that an attorney may informally interview a corporate adversary's former employee, even one in possession of privileged attorney-client information, provided that the attorney does not attempt to discover that information: "Assuming that the witness here is not already represented by a lawyer, the contact by the inquirer with a former employee of a corporate adversary would not be prohibited." N.Y. Cty. Lawyers Op. 729 (2000) (citing *Niesig*). "However, the lawyer may not seek to discover privileged communications of the corporate adversary to which the former employee was privy through the interview of the former employee." *Id.*

The doctrinal basis for prohibiting lawyers from exploiting the attorney-client communications of their adversaries can be found in opinions dealing with two analogous contexts: inadvertent disclosure and metadata disclosure. In Formal Opinion 2003-04, a committee of this Association examined the situation in which an attorney receives hard or electronic communications under circumstances where it is clear that the communications were sent by mistake. *See* Assoc. Bar City of N.Y. Op. 2003-04 (2003). The committee concluded that the attorney is obligated to notify the sending attorney, refrain from further viewing the communication, and return or destroy it, as requested (although, under limited circumstances, the attorney may submit the communication for *in camera* review by a tribunal). In rendering this opinion, the committee relied largely on the mandate of DR 1-102(A)(5), which prohibits conduct "prejudicial to the administration of justice." In crucial language, the committee made clear:

> The Committee believes that this tension [between the duty to preserve client confidences and secrets under DR 4-101 and the duty to zealously represent a client under DR 7-101(A)] can be resolved by focusing the issues presented by inadvertent disclosure through the lens of DR 1-102(A)(5), which prohibits 'engaging in conduct that is prejudicial to the administration of justice.'

Assoc. Bar City of N.Y. Op. 2003-2004. Both failing to notify the sender of an inadvertent disclosure, and reading beyond the extent necessary to determine the privileged nature of the communication, "would deprive the sending attorney of

the opportunity to seek appropriate protection for the disclosed information and thereby prejudice the administration of justice."

The New York State Bar, in N.Y. State Bar Op. 749 (2001), similarly cited DR 1-1-2(A)(5), as well as DR 1-102(A)(4), in opining that a lawyer may not ethically use available technology surreptitiously to examine e-mail and other electronic documents produced by an adversary in order to discover metadata within the documents not intended to be disclosed by the producer. The opinion noted that "[t]he Code prohibits a lawyer from engaging in conduct 'involving dishonesty, fraud, deceit or misrepresentation,' DR 1-1-2(A)(4) and 'conduct that is prejudicial to the administration of justice.' DR 1-102(A)(5)." The opinion stressed that "[o]ur Code carefully circumscribes factual and legal representations a lawyer can make, people a lawyer may contact, and actions a lawyer can take on behalf of a client. Prohibiting the intentional use of computer technology to surreptitiously obtain privileged or otherwise confidential information is entirely consistent with these ethical restraints on uncontrolled advocacy."[2]

Both the Association's committee, in N.Y. Op. 2003-04, and the New York State Bar Association, in State Bar Op. 749, referenced the New York State Bar Association's Opinion 700 (1998), cited above, which stated that unsolicited

2 But see, ABA Formal Op. 06-442 (2006) (concluding that it is ethically permissible under Model Rules for lawyer to examine metadata produced to lawyer).

receipt of privileged information from a paralegal working for opposing counsel was ethically impermissible. The committee opinion stated: "the conduct that the State Bar ethics committee considered to be prejudicial to the administration of justice shares vital characteristics with the conduct considered here. In each instance, an attorney has reviewed information that the opposing party and their counsel do not want the receiving attorney to see; and in each, the receiving attorney has gained access to the information without the opposing party's knowledge or intent." Assoc. Bar City of N.Y. Op. 2003-04.

Importantly, the Association's Opinion also addressed the availability of other protections afforded to a party wishing to protect against the use of unauthorized disclosure of confidential information: "Nothing in this opinion, however, should preclude a sending attorney from seeking relief before a tribunal to prevent a receiving attorney from using inadvertently disclosed confidential information. Although ethical rules may not preclude use, governing law, rules of evidence, or other principles may limit or preclude use." *Id.* *See also* N.Y. Cty. Lawyers Ass'n Ethics Op. 730 ("In the Committee's view, it is appropriate that all lawyers share responsibility for ensuring that the fundamental principle that client confidences be preserved—the most basic tenet of the attorney-client relationship – is respected when privileged information belonging to a client is inadvertently disclosed.").

Each of the above precedents relies upon rules other than the no-contact rule set forth in DR 7-104(A)(1) and *Niesig*. Where, as in the instant case, the question concerns the propriety of an attorney's contact with a corporation's former employee, it is these precedents – designed to protect the attorney-client privilege – that should govern the attorney's conduct.

Reliance on DR 1-102(A)(5) has other advantages. It will require courts to focus on the factual context of each contact between opposing counsel and former employees to determine whether the former employees had access to confidential information while at their former job, whether opposing counsel sought to elicit such information, and whether such information actually was obtained.

Indeed, that is exactly what the Appellate Division did in this case. The First Department noted that after opposing counsel, Ingram Yuzek Gainen Carroll & Bertolotti, LLP, notified Quinn Emanuel that Mr. Dermigny was no longer within its control, "both attorneys agreed that it would be appropriate for defense counsel to subpoena the witness for deposition. Before that deposition was held, defense counsel conducted a pre-deposition interview of the witness for approximately three hours. At the commencement of the interview, defense counsel's colleague warned [Dermigny] to be careful not to disclose any privileged information, including any legal strategies or communications with plaintiff's counsel. *Here, the facts show that defense counsel warned the former employee*

that he must not disclose privileged information, and insofar as the record shows, no such information was disclosed." *Muriel Siebert & Co. Inc. v. Intuit Inc.*, 32 A.D.3d 284, 285-286, 820 N.Y.S.2d 54, 55 (1st Dep't 2006) (emphasis added).

Such a fact-based analysis more specifically addresses the concerns posed by contacts with former employees than a blanket rule insulating from informal discovery all former employees, or even former employees who actually or potentially had access to confidential information. Such a blanket rule would exacerbate the imbalance of resources between powerful corporate defendants and impecunious plaintiffs, further limit the scope of informal discovery, and distort the New York Code by extending the protections afforded "clients" under DR 7-104(A)(1) to those who are, in fact, no longer clients.[3]

IV. THE LOWER COURT'S USE OF AN "APPEARANCE OF IMPROPRIETY" STANDARD UNDERCUTS RECENT NEW YORK CASE LAW AND RUNS COUNTER TO THE EMERGING NATIONAL TREND OF ELIMINATING THE "APPEARANCE OF IMPROPRIETY" STANDARD FROM PROFESSIONAL RESPONSIBILITY CODES.

A. The Trial Court's Opinion Conflicts With New York State Case Law

The trial court's decision to disqualify Quinn Emanuel solely on the basis of an "appearance of impropriety" conflicts with the opinions of New York federal

[3] This brief is not intended to address the practice of many lawyers representing corporate defendants of claiming they represent "all employees," "all current and former employees," and the like. This practice, intended to extend the protections of the no-contact rule to those not otherwise covered by *Niesig*, also raises important concerns under the Rule.

and state courts alike, which have held that an appearance of impropriety does not, without more, provide a basis for disqualifying a law firm. As recently stated by the Third Department, "in the absence of actual prejudice or a substantial risk thereof, the appearance of impropriety alone is not sufficient to require disqualification." *In re Stephanie X*, 6 A.D.3d 778, 780, 773 N.Y.S.2d 766, 767 (3d Dep't 2004) (citing *People v. Herr*, 86 N.Y.2d 638, 641, 635 N.Y.S.2d 159 (3d Dep't 1995)).

The "appearance of impropriety" standard, upon which the trial court relied, appears in New York Code of Professional Responsibility as Canon 9. Canon 9 provides that a lawyer has a duty "to strive to avoid not only professional impropriety but also the appearance of impropriety." New York Code of Professional Responsibility, EC 9-6. That admonition, as held by the court in *Stephanie X*, is by itself insufficient to justify disqualification.

New York federal courts, in fact, have cautioned that motions to disqualify attorneys on the basis of the "appearance of impropriety" standard have served as weapons to subvert, rather than as tools to reinforce, the other ethical canons. *See, e.g., International Elec. Corp. v. Flanzer*, 527 F.2d 1288, 1294 (2d Cir. 1975) ("Therefore, Canon 9 'should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules.'"); *Bennett Silverstein Assocs. v. Furman*, 776 F.

Supp. 800, 806 (S.D.N.Y. 1991) ("Canon 9 does not confer a roving moral commission to disqualify attorneys based on conduct specifically treated in other Canons.").

These rulings recognize that Canon 9, like the other Canons, is a "statement of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, the legal system, and with the legal profession." New York Code of Professional Responsibility, Preliminary Statement. Disciplinary Rules such as DR 1-102(A)(5) and 7-104(A)(1) are, on the other hand, "mandatory in character." The trial court's invocation of Canon 9 to contradict or supersede applicable Disciplinary Rules is troubling, and, if upheld, would undercut the predictability the Bar and the public are entitled to expect from the Code.

B. <u>The Trial Court's Opinion Rejects The Recent Trend Across The Nation To Reject The "Appearance Of Impropriety" Standard for Disqualification</u>

The ABA and many individual states have each rejected the "appearance of impropriety" standard in promulgating the new Model Rules. As was stated in Comment [5] to the pre-Ethics 2000 version of Rule 1.9:

> This rubric [the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility] has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the

> former client. Second, since 'impropriety' is undefined, the term 'appearance of impropriety' is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

State bars across the nation have followed the ABA's lead in rejecting the "appearance of impropriety" as a standard for their Rules of Professional Conduct. New Jersey, for instance, rejected such a standard, in accordance with the findings of a New Jersey commission appointed by the Supreme Court of New Jersey to review the Rules of Professional Conduct:

> The appearance of impropriety provisions in the RPC's seek to reduce the risk of improper conflicts. Because of their vagueness and ambiguity, those provisions, however, are not appropriate as ethics standards.

State v. Davis, 366 N.J. Super. 30, 43, 840 A.2d 279, 297 (2004).

Minnesota similarly rejected the appearance of impropriety standard in developing its Model Rules of Professional Conduct by eliminating Canon 9. With respect to this change, a commentator on the new rules stated: "[T]he rule for discipline or disqualification of a lawyer should [never] be simply the 'appearance of impropriety.' That standard is too vague for fair application and was accordingly dropped from the Model Rules." *Carlston v. Fredrikson & Byron, P.A.*, 475 N.W.2d 883, 889 (Minn. Ct. App. 1991) (citing G. Hazard & W. Hodes, *The Law of Lawyering: A Handbhook on the Model Rules of Professional Conduct,* Sec. 1.7:101, at 219 (2d ed. 1990)).

Federal and state courts across the nation have similarly rejected the appearance of impropriety standard. *See In re Entm't, Inc.*, 225 B.R. 412 (N.D. Ill. 1998) (holding that the appearance of impropriety is a "vague concept of disqualification" and not applicable in the Northern District of Illinois); *Adoption of Erica*, 426 Mass. 55, 686 N.E.2d 967 (Mass. 1997) (citing favorably the opinion of *Law of Lawyering* that the appearance of impropriety has been described as a "nebulous standard" which has been "rejected by most Courts as a sole basis for disqualification"); *Golias v. King*, No. 09-95-157 CV,1995 WL 517222 (Tex. App. Beaumont Aug. 31, 1995, no writ) (concluding that the "appearance of impropriety was eliminated from the new Disciplinary Rules of Professional Conduct because of vagueness"); *Halligan v. Blue Cross and Blue Shield of North Dakota*, Civ. No. A3-93-117, 1994 WL 497618 (N.D. Jan 24, 1994) (rejecting, along with other courts, "vague standard of an appearance of impropriety as a basis for requiring withdrawal").

C. The Trial Court's Decision Assumes Unethical Conduct By Attorneys Inconsistent With The Daily Ethical Standards Expected Of Them

The trial court held that the Quinn Emanuel's attorneys' zealousness in representing their client impeded their ability to prevent a witness from revealing communications that are protected by either the attorney-client privilege or the work product doctrine. That holding is at odds with the notion that lawyers are expected to comply with their ethical obligations in their practices on a daily basis,

including their obligation not to invade their adversary's attorney-client communications. For example, as noted above, New York State Bar Opinion 749 (2001) advises that a lawyer may not ethically use available technology surreptitiously to examine e-mail and other electronic documents produced by an adversary in order to discover metadata within the documents that was not intended to be disclosed. And even when the other side has erred and has inadvertently produced a privileged email or some other privileged document, the attorney receiving the document is expected to return it. *See Delta Fin. Corp. v. Morrison*, 13 Misc.3d 1229(A), 2006 WL 3068853 (Nassau Cty. Sup. Ct. 2006) (holding that inadvertently produced e-mail was a "communication cloaked with attorney-client privilege, which has not been waived, and therefore, shall be afforded all the protections thereof").

The trial court's suggestion that lawyers interviewing former employees cannot be trusted to obey basic ethical tenets is wrong. We urge the Court to reject this analysis, and to focus, as DR 1-102(A)(5) requires, on what the Quinn Emanuel attorneys actually did and did not do. The Appellate Division concluded, from its factual analysis, that the Quinn Emanuel attorneys acted exactly as they were supposed to, zealously representing their client without seeking to invade their adversary's attorney-client privilege.

D. A Party Seeking Disqualification Based on Disclosure of Confidential and Privileged Information has the Burden of Identifying the Specific Confidentiality Breached

As the Appellate Division stated below, "A party seeking disqualification of an attorney based on the disclosure of confidential information previously made to the attorney, usually in course of previous representation, has the burden of identifying the 'specific confidential information imparted to the attorney'" *Muriel Siebert & Co.*, 32 A.D.3d at 286, 820 N.Y.S.2d at 56 (citations omitted) (citing *Safter v. Government Empls. Ins. Co.*, 95 A.D.2d 54, 57 (1st Dep't 1993), and *Bank of Tokyo Trust Co. v. Urban Food Malls*, 229 A.D.2d 14, 30 (1st Dep't 1996). In *Bank of Tokyo Trust Co.*, the court stated that "[g]eneral allegations of confidential information receiving ... will not do." *Bank of Tokyo Trust Co.*, 229 A.D.2d at 31 (citations omitted).

In *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (N.Y. 1992), cited by the Appellate Division in the instant matter, this Court provided a lengthy summary of the attorney-client privilege and noted in dictum that "the attorney-client privilege [should] not be used as a device to shield discoverable information." The Court opined:

> The CPLR directs that there shall be 'full disclosure of all evidence material and necessary in the prosecution or defense of an action.' (CPLR 3101 [a].) 'The test is one of usefulness and reason.' The statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise...The

> burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity.

Spectrum Sys., 78 N.Y.S2d at 378, 575 N.Y.S.2d at 813.

E. The Lower Court's Irrebuttable Presumption of Disqualification Will Prompt Uncertainty and Havoc with Respect to Ex Parte Interviews

Notwithstanding the rule in New York State and across the nation that disqualification should be a last resort, the trial court created an irrebuttable presumption of disqualification when a lawyer alleges that her adversary has interviewed a witness who possessed some unspecified amount of privileged information. In the trial court's view, a lawyer can never conduct an *ex parte* interview of a former employee because of the possibility that the witness will be deemed untouchable as a consequence of possessing some degree of privileged information. Attorneys will either cease to conduct *ex parte* interviews altogether, or will do so only with advance notice to opposing counsel or possibly the court. Further, disqualification will, in many instances, become a tactical tool, in the event that the opposing lawyer is displeased with an adversary's *ex parte* interview or is simply seeking a pretext to disqualify. *See International Elec. Corp. v. Flanzer*, 527 F.2d 1288, 1297 (2d Cir. 1975). Whatever the motive, however, the trial court's ruling, if adopted, would threaten to turn disqualification into a first resort. The ultimate effect would be to overturn *Niesig* entirely by making *ex parte* interviews ethically untenable.

CONCLUSION

For the above-stated reasons, the Association respectfully submits that the Court should determine that DR 7-104(A)(1) does not apply to former employees, that the vague "appearance of impropriety" standard in Canon 9 should not govern, and that the applicable Disciplinary Rule, DR 1-102(A)(5), was not violated because, according to the Appellate Division's ruling, Quinn Emanuel did not seek or elicit attorney-client information during the interview.

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Respectfully submitted,

PILLSBURY WINTHROP SHAW
PITTMAN LLP

By: _____
David G. Keyko
1540 Broadway
New York, New York 10036-4039
Telephone: (212) 858-1000
Facsimile: (212) 858-1500

Attorneys for Amicus Curiae
The Association of the Bar of the City of New York