

A Trend Against Motions To Disqualify

BY ROY SIMON

Is there a growing trend against granting motions to disqualify opposing counsel? Three cases may not make a trend, but three cases decided in the Southern District this year suggest that federal courts are very skeptical about disqualification motions. The courts hesitate to find conflicts; dislike granting a motion to disqualify when the moving party has not clearly suffered damage; look beneath the surface of a motion to determine if it is “tactical”; and will sometimes refuse to disqualify lawyers even when they are clearly violating the conflict rules.

My first exhibit in proving the trend against disqualification is *Rocchigiani v. World Boxing Council*, 82 F. Supp.2d 182 (S.D.N.Y. 2000). In 1998, during a dispute with the World Boxing Council (“WBC”), a German boxer named Graciano Rocchigiani entered into an exclusive promotional agreement with Cedric Kushner Promotions, Ltd. (“CKP”). In exchange, CKP agreed to arrange several fights for Rocchigiani and to “commence and pay for legal proceedings against the WBC... for the purpose of establishing Rocchigiani as the sole recognized champion in the light heavyweight class... .” Under a “joint litigation agreement” that was part of the promotional agreement, Rocchigiani signed a document stating that attorney Scott Gelfand had been “retained by CKP” pursuant to the Memorandum Agreement and that “Gelfand may act on Rocchigiani’s behalf in connection with [] the Litigation, including, but not limited to, appearing as counsel of record for Rocchigiani in the Litigation.” Gelfand commenced a lawsuit against the WBC on behalf of Rocchigiani and CKP seeking a declaration that Rocchigiani was the undisputed WBC Light Heavyweight Champion. The Complaint identified Gelfand as attorney for both Rocchigiani and CKP.

After the commencement of the lawsuit against the WBC, the relationship between Rocchigiani and CKP soured. Early in 1999, while the joint litigation was pending, Gelfand wrote to Rocchigiani’s German attorney, saying CKP had learned that Rocchigiani was negotiating for bouts “without CKP’s knowledge and involvement [,]” which was “in derogation of CKP’s rights” under their agreement. The German attorney faxed a reply to Gelfand’s letter the next day, questioning the validity of the agreement. Another German law firm soon wrote to Gelfand stating that it had consulted New York counsel, Ross & Hardies, and determined that the agreement did not preclude Rocchigiani from negotiating for future bouts without CKP, that CKP had failed to perform its own obligations under the agreement, and, in any event, that Rocchigiani was formally terminating the agreement.

Gelfand then demanded that Rocchigiani cease negotiating to arrange fights without CKP’s involvement and stated that this was the “final warning” to Rocchigiani. The German law firm rejected a settlement offered by Gelfand and notified him that Ross & Hardies had been selected to replace him as Rocchigiani’s attorneys in the underlying action against the WBC. (By this time, Gelfand had joined a new law firm, Meister, Seelig & Fein, referred to as “MS & F.”) Ross & Hardies and Gelfand exchanged letters regarding

the terms of Gelfand's withdrawal, and the court ultimately issued an order substituting Ross & Hardies as counsel for Rocchigiani.

On behalf of CKP, Gelfand then moved for: leave to file a Supplemental Complaint against Rocchigiani, realignment of the parties to reflect the Supplemental Complaint, and to enjoin Rocchigiani from agreeing to any boxing matches without CKP's consent. Rocchigiani moved to disqualify Gelfand as counsel for CKP.

In motions to disqualify counsel, courts must balance "twin tensions" — "a client's right freely to choose his counsel" and "the need to maintain the highest standards of the profession." With rare exceptions, "disqualification is appropriate only in two kinds of cases: (1) where an attorney's conflict of interests undermines the Court's confidence in the vigor of the attorney's representation of his client, or, more commonly, (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation." In either of these circumstances, an attorney's conduct would "taint the underlying trial" and disqualification is therefore "necessary to preserve the integrity of the adversary process." Apart from these two scenarios, however, the Second Circuit has "shown considerable reluctance to disqualify attorneys despite misgivings about the attorney's conduct." This reluctance stems from "the problems inherent in disqualification, including separation of a client from his chosen counsel, the delay in the proceedings invariably created by such motions, and because they are often interposed merely for tactical reasons."

Here, Rocchigiani argues that Gelfand is "per se" disqualified under DR 5-105(A) for taking an adverse position against Rocchigiani while still representing him. Specifically, Rocchigiani alleges that Gelfand "investigated and began preparations for the injunction proceedings which are now before the Court" before Ross & Hardies replaced Gelfand as Rocchigiani's counsel. "In contrast to cases of successive representation, such a conflict touches less upon any confidences that may have been imparted in the prior representation, but instead on the duty of undivided loyalty which an attorney owes to each client... ." However, Gelfand did not sue Rocchigiani while he was a client of the firm. The "conflict" occurred between Rocchigiani's repudiation of the CKP contract and Ross & Hardies' substitution as his counsel. One letter written by Gelfand in this time frame threatened legal action against Rocchigiani, but the letter alone did not warrant disqualification because it "only demonstrates posturing, albeit in inflammatory language... ." "Unlike in *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 756 F.Supp. 789 (S.D.N.Y.1991), "no actual preparation for litigation against Rocchigiani occurred until after Ross & Hardies was substituted as counsel."

Even though adverse concurrent representation is "*prima facie* improper," an attorney may avoid disqualification by showing that there is "no actual or apparent conflict in loyalties or diminution in the vigor of his representation." During the period between Rocchigiani's repudiation of the contract and the substitution of Ross & Hardies as his counsel, "the interests of Rocchigiani and CKP remained aligned with respect to the action against the WBC" because a favorable ruling against the WBC would make Rocchigiani the WBC World Light Heavyweight Champion. The Court was thus confident of Gelfand's vigor in its prosecution of the action against the WBC on behalf of both Rocchigiani and CKP. "Indeed, Rocchigiani has not contested the quality or determination of MSF's representation of Rocchigiani prior to the substitution of Ross & Hardies."

Rocchigiani also argued that Gelfand had failed to comply with DR 5-105(C) because he “failed to disclose the nature and implications of the joint representation and failed to obtain Rocchigiani’s consent to the representation when he first took Rocchigiani as a client and later when Rocchigiani repudiated” his contract. However, the conflict between Rocchigiani and CKP did not exist from the outset of their common representation; their interests were the same with respect to the action against the WBC. Moreover, the conflict did not arise until Rocchigiani repudiated the Agreement. “Thus, the Court is not confronted with an attorney who failed to investigate and identify potentially serious diverging interests between commonly represented parties that were in existence from the start of the representation.”

Contrary to Rocchigiani’s assertions, “an attorney is not always required to advise and obtain the consent of his clients under DR 5-105(C) prior to undertaking joint representation. The language of the Rule itself belies this assertion.” DR 5-105(C) applies only when in an attorney’s “independent and professional judgment” his common representation is “likely to involve him in representing differing interests.”

Of course, a “reasonably prudent attorney” should follow the advice and consent provisions of DR 5-105(C) whenever he engages in common representation of parties to a lawsuit, especially where the client is a layperson. In a footnote, the court said: “Indeed, one commentator has suggested that the advice and consent under DR 5-105(C) is required whenever an attorney represents two parties in a litigation matter.” (The court cited the 1999 edition of SIMON’S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED.) “The reasons for doing so are legion, but the foremost reason would be to avoid a motion to disqualify by a dissatisfied former client, such as the one being considered here.”

Disqualification based on the actual conflict which surfaced when Rocchigiani repudiated the CKP agreement is also inappropriate. Although DR 5-105(B) “obligates an attorney to continually monitor the circumstances underlying common representation and to avail himself of the advice and consent provisions of DR 5-105(C) should such a conflict arise,” the conflict here “was created by Rocchigiani himself and the nature of the conflict was such that it was clear to both MS & F and Rocchigiani’s counsel.” More importantly, “nothing significant occurred prior to the substitution of Ross & Hardies with respect to the underlying litigation against the WBC that would ‘taint the underlying trial.”

However, the court said that Gelfand’s actions prior to the substitution of Ross & Hardies did not “demonstrate a model of professional conduct. To the contrary, with his caustic letter to Rocchigiani’s German counsel he has come close to disqualification under Cinema 5. Moreover, Gelfand’s refusal to withdraw from representing Rocchigiani after Rocchigiani demanded that he do so falls short of what is expected of lawyers in this Court.” Nevertheless, because the Court found “no taint to the underlying litigation,” it considered disqualification to be inappropriate.

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