

Chinese Wall Fends Off Disqualification in First Department

BY ROY SIMON

In *Kassis v. Teacher's Ins. & Annuity Ass'n*, (1998 N.Y. App. Div. LEXIS 6968), the First Department affirmed a trial court's refusal to disqualify a law firm that hired one of the opposing party's lawyers in the middle of the case. The losing side has asked the Court of Appeals to hear the case, and the petition was still pending when this article went to press. I personally think the decision is wrong — I'll explain why below — but until the Court of Appeals overturns the decision, *Kassis* is the law in the First Department.

Background

Thurm & Heller, a 26-lawyer firm, was defending TIAA and others against a personal injury suit brought by Kassis. One of the lawyers representing Kassis was a young man one year out of law school named Charles Arnold. Arnold had personally taken five depositions in the *Kassis* case, had reviewed the plaintiff's confidential documents, had spoken to the lead plaintiff's lawyer about litigation strategy, and had spoken to the plaintiff numerous times. During a deposition in the case, Thurm & Heller learned that Mr. Arnold was looking for a new job. Shortly afterwards, Thurm & Heller offered Arnold a job.

Less than two weeks later, before Arnold began working at Thurm & Heller, the lead partner on the plaintiff's case wrote to Thurm & Heller asking about "the safeguards and precautions, i.e., the erection of a Chinese Wall, which your firm will institute to ensure that Mr. Arnold will have no contact ... or involvement in the above-referenced litigation." One of the attorneys at Thurm & Heller responded, listing the following precautions that the firm planned to take:

1. The entire file which presently consists of 15 redwells will be kept in my office in lieu of our general filing area.
2. Mr. Arnold's office will be at a substantial distance from my office.
3. Mr. Arnold upon commencement of his employment with the firm on March 3, 1997 will be instructed not to touch the Kassis file nor to discuss the Kassis matter with any partner; associate or staff member of the firm.
4. There will be no meetings, conferences or discussions in the presence of Mr. Arnold concerning the Kassis litigation.
5. All future associates who may work on the Kassis matter with me in preparation for trial will be instructed not to discuss this file with Mr. Arnold.

At a deposition a few days later, Thurm & Heller showed the plaintiff's lead lawyer the physical set-up at its office. The plaintiff's lawyer did not object to the proposed safeguards or seek to delay the deposition, but within a week the plaintiff moved to disqualify Thurm & Heller. The trial court denied the motion based on (a) Arnold's "limited involvement in the case," (b) the failure of plaintiff's counsel to suggest "any deficiencies in the precautions undertaken by Thurm & Heller," (c) the court's own finding that

those steps were “adequate to assure Arnold’s non-involvement in the case,” and (d) the prejudice that the defendants would suffer if Thurm & Heller were disqualified.

First Department Affirms

The First Department affirmed by a 3-2 vote. Initially, the majority noted that courts ordinarily disqualify a law firm that seeks to oppose a former client in a substantially related matter without the former client’s consent. The purpose of this rule, the court said, was to protect client confidences and secrets and avoid the appearance of impropriety. However, the court emphasized that disqualification is not automatic. In *Solow v. W.R. Grace & Co.*, 83 NY2d 303, 308 (1994), the Court of Appeals cautioned that a *per se* disqualification rule would (a) impinge upon a client’s right to be represented by counsel of his choice, (b) restrict an attorney’s ability to practice his or her profession, (c) present “significant hardships when the chosen attorney is disqualified,” and (d) inflict hardship on the current client and delay upon the courts by “forcing disqualification even though the client’s attorney is ignorant of any confidences of the prior client.”

The majority rejected plaintiff’s argument that Thurm & Heller was like the firm disqualified in *Cardinale v. Golinello*, 43 NY2d 288 (1977), a firm characterized by “informality,” “constant cross-pollination,” and a “cross current of discussion and ideas” among all attorneys regarding every matter the firm handled. In light of the screening mechanisms in place at Thurm & Heller, the problems at the firm in *Cardinale* were “altogether absent here.” The First Department bolstered its view by citing federal cases recognizing that screening devices “can be effective to protect client confidences” provided the challenged law firm “proves, inter alia, that the former client’s confidences have not been shared with others at the law firm and that the firm has established screening mechanisms effectively to insulate against any future disclosure of confidences by the quarantined attorney to the firm.”

Safeguards Reduce Risks

The court also noted that Thurm & Heller had handled the defense ever since the case was filed five years earlier. Therefore, disqualification might give the plaintiff an “undue advantage,” cause a “lengthy delay,” and subject defendants to “significant financial hardship.” As for the dissent’s concerns about the “continuing danger” that the disqualified attorney might “unintentionally transmit information gained from the prior relationship,” the court believed that the “carefully constructed safeguards employed by Thurm & Heller” eliminated any such danger. Indeed, the plaintiff’s firm had given “no explanation or suggestion as to why these measures are inadequate to isolate Arnold from the file and any discussion of the case in a firm consisting of 26 lawyers.” Accordingly, the motion to disqualify appeared to be “an obvious litigation ploy calculated to give Kassis an unwarranted advantage.” Accordingly, the First Department affirmed the trial court’s denial of the motion.

In a separate opinion, two judges strongly dissented. They were concerned primarily about a “clear appearance of impropriety.” The dissenters said: “Thurm & Heller created this situation for themselves when they hired Arnold while this matter was still in the process of being litigated, knowing that he had worked on this case for plaintiff’s counsel. [U]nmitigable impropriety appears to be inherent in the entangled relationships in this case.”

Decision Runs Against The Grain

The *Kassis* majority went against the grain of state and federal decisions discussing screening devices. For example, in *Trustco Bank of New York v. Melino*, 625 N.Y.S.2d 803, 164 Misc.2d 999 (Sup. Ct. Albany Cty 1995), the court said:

[T]he maintenance of the “Chinese Wall” would require periodic hearings to assure the wall was not being breached. In effect, what this means is that the parapets of the Chinese Wall would have to be manned by the judiciary, and the judiciary does not have sufficient resources to take on this added duty. Nor is the impermeability of a Chinese Wall an attainable concept. Even the original “impermeable” Chinese Wall was overrun by the barbarians.

In *Aversa v. Taubes*, 194 A.D.2d 579 (2d Dep’t 1993), the court affirmed disqualification of a law firm defending a medical malpractice action because a lawyer in the defense firm had previously worked for the law firm representing the plaintiff and had personally submitted a motion to depose one of the defendants. In *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), the court did not question the disqualified lawyer’s “integrity or his sincere efforts to disassociate himself from the Cheng case,” but the court was uncertain “how disclosures, admittedly inadvertent, can be prevented throughout the course of this representation.” The court therefore granted the former client’s motion to disqualify the entire law firm. Moreover, DR 5-105(D) — the Code provision that disqualifies every lawyer in a firm if any one lawyer in the firm is disqualified due to a former client conflict — contains no exception for Chinese Walls.

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