

Comparing Two Decisions On Lawyer Disqualification

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This is a review of two law suits with virtually identical facts but with strikingly different results. Both cases deal with lawyer disqualification in conflicts between former and current clients. The first was decided by the Court of Appeals. The second was decided recently by Southern District Senior Judge Whitman Knapp.

Tekni-Plex v. Meyner & Landis, etc.

In Tekni-Plex, 89 N.Y.2d 123 (1996), defendant Tang was the sole stockholder, president and CEO of Tekni-Plex, Inc. (old Tekni-Plex). The law firm of Meyner & Landis represented old Tekni-Plex in many matters, including the firm's environmental permits and compliance. Tang agreed to sell his stock to Acquisition Corp. under an agreement which provided for the merger of old Tekni-Plex into Acquisition and a name change by Acquisition into Tekni-Plex, Inc. (new Tekni-Plex). The agreement contained representations by Tang concerning environmental matters.

Following the closing, new Tekni-Plex began an arbitration proceeding against Tang, alleging breach of his representations. Tang retained the Meyner firm. New Tekni-Plex moved to disqualify Meyner. The litigation eventually reached the Court of Appeals.

The Court relied on DR 5-108(A). Under DR 5-108(A), the party seeking disqualification must show: 1) the existence of a prior attorney/client relationship between it and opposing counsel; 2) that the matters involved in both relationships are substantially related; and 3) that its interests are materially adverse from those of counsel's present client. If these three criteria are met, there is an "irrebuttable presumption of disqualification."

The Court found that new Tekni-Plex was a "former client" of Meyner. Acquisition Corp. was only a shell, created solely for the purpose of acquiring old Tekni-Plex. "Following the merger, the business of old Tekni-Plex remained unchanged, with the same products, clients, suppliers and non-managerial personnel." To protect its rights under the contract, new Tekni-Plex was entitled to gain access to any relevant pre-merger legal advice by Meyner to old Tekni-Plex.

The Court also found that Meyner's representation of old Tekni-Plex was substantially related to its representation of Tang in the arbitration. Also, Tang's interests were materially adverse to the interests of new Tekni-Plex. Meyner's representation of Tang in the arbitration would enable Meyner to use confidential information gained prior to the sale concerning the very environmental compliance matters now in dispute between the parties.

Russell-Stanley Holdings, Inc. v. Buonanno

In *Buonanno* (NY Law Journal, June 5, 2002), Southern District Senior Judge Whitman Knapp refused to disqualify Edwards & Angell from representing the defendant Buonanno. Except for two variants, the facts of *Buonanno* are virtually indistinguishable from the facts in *Tekni-Plex*. The two variants are: 1) in *Tekni-Plex*, the old corporation was merged into the acquiring corporation, while in *Buonanno*, the old corporation remained an active subsidiary of the acquiring corporation; and 2) in *Tekni-Plex*, the lawyers for the old corporation performed no services for the acquiring corporation after the closing, while in *Buonanno*, Edwards and Angell continued to do some work for the old corporation as a subsidiary of the acquiring corporation after the closing. In representing the subsidiary, they took direction from Buonanno, who also paid their fees under the indemnity provisions of the purchase agreement. (They stopped representing the subsidiary when the acquiring corporation threatened litigation against Buonanno for breach of contract and fraud.)

Judge Knapp denied the plaintiff's motion to disqualify Edwards and Angell. Rejecting plaintiff's reliance on *Tekni-Plex*, Judge Knapp said:

"Although that decision (*Tekni-Plex*) granted a motion to disqualify on similar facts, the facts before us have one very important distinction. In that case, it was clear that the law firm represented exclusively the company regarding environmental compliance matters that were related to the later arbitration, of which there was the potential to use the company's attorney client information, to which the defendant there had not necessarily been privy...Here, it seems obvious that defendant was privy to all potential attorney client information since he retained Edwards and Angell pursuant to his agreement to indemnify plaintiff and he further directed the representation of the company and paid their legal fees... Furthermore, plaintiff retained its own attorneys to represent it in environmental matters, which demonstrates that it thought its interests should be represented by counsel other than Edwards and Angell. This...demonstrates that plaintiff knew to whom Edwards and Angell owed its loyalty."

In a footnote to his decision, Judge Knapp acknowledged that his approach as a Second Circuit judge might be different from the approach of his colleagues on the Court of Appeals. "It is further noted that the Second Circuit is less inclined than the state courts to disqualify counsel based on conflicts of interest." (Judge Knapp cited *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (1979) and *Commercial Union Ins. Co.*, 75 F.Supp.2d at 110.)