

Court Permits Firm To Oppose Current Client

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In a case with a somewhat unusual factual background, U.S. District Court Judge Lewis A. Kaplan has denied a motion to disqualify a law firm which participated in an action against a current client. The law firm, Goodell, Devries, Leech and Dann ("Goodell"), has its offices in Baltimore. Its current client was Stryker Corporation ("Stryker"), a manufacturer of medical products. In 1998, Stryker entered an agreement to buy stock and assets of a subsidiary of Pfizer, Inc. ("Pfizer") which manufactured artificial knee joints.

The agreement provided that Pfizer and Stryker would cooperate to defend against product liability claims and that each would provide the other and its attorneys with access to documents and records relevant to any claims. Pfizer assumed primary responsibility for pre-closing claims and Stryker for post-closing claims.

Prior to the sale, Goodell had represented Pfizer for many years in hundreds of product liability cases. Following the sale, Stryker and Pfizer were joined as defendants in several product liability cases brought in Virginia. Other cases were brought against Stryker alone. The cases involved both pre- and post-sale claims. Pfizer agreed to indemnify and defend Stryker against pre-closing claims and authorized Goodell to appear for Stryker in two pre-sale actions.

"Days after" Goodell appeared for Stryker in Virginia, it "acted for Pfizer" in bringing an action by Pfizer against Stryker in New York's Southern District. Stryker moved to enjoin Goodell from representing Pfizer in New York. Goodell responded by filing a notice of intent to withdraw its appearance as co-counsel to Stryker in the Virginia actions. Judge Kaplan characterized this as an attempt "to drop one of its clients like the proverbial 'hot potato'."

Because Goodell had not applied for pro hac vice admission in the New York action, although "concededly actively involved in the prosecution of this case," Judge Kaplan treated the motion for an injunction as a motion to disqualify under the Code of Professional Responsibility.

Stryker relied on *Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). Pfizer argued that disqualification was not justified because Stryker had no reasonable expectation of confidentiality or loyalty by Goodell in defense of claims in which its long-time client Pfizer was also involved, that Goodell did not have a traditional attorney-client relationship with Stryker, and that there was no serious risk of "trial taint" from the firm's representation of Stryker.

Judge Kaplan recalled his own reluctance to grant disqualification motions.

They may deprive a party of the counsel of its choice and otherwise delay the resolution of the

underlying legal dispute. Moreover, professional disciplinary bodies are available to police the behavior of counsel.

Accordingly, in the Second Circuit, disqualification is appropriate in most cases only if a violation of the Code gives rise to "a significant risk of trial taint." Because Stryker gave no confidential information to Goodell and no information that it expected to share with Pfizer in Goodell's defense of both companies in the Virginia actions, there was no serious risk of trial taint in these circumstances. Stryker always viewed Goodell as Pfizer's attorney. At bottom, Stryker's argument is that disqualification is warranted under *Cinema 5 and Glueck v. Jonathan Logan, Inc.* (652 F.2d 746, (2nd Cir 1981)) "solely and unequivocally upon the Goodell firm's suing...a current client...in breach its duty of loyalty...under Canon 5."

Judge Kaplan found Stryker's argument "overly broad." Trial taint occurs when a court is unable to reach a just result. This can occur when the attorney's incentive to act vigorously on behalf of the client is impaired, or when the client in the second suit (here, Pfizer) is given an unfair advantage over the client in the first suit (Stryker) by getting access to the confidences of its adversary.

As this court recognized in *Commercial Union (Commercial Union Ins. Co. v. Marco Int'l Corp., 75 F.Supp. 2d 108 (S.D.N.Y. 1999))*, however, there are unusual instances in which the nature of the first attorney-client relationship will be such as to eliminate any risk of trial taint. Where this is so, a rule of per se disqualification would serve only to enforce the attorney's duty of loyalty to the client. It would not protect the integrity and accuracy of the court's decision-making.

Judge Kaplan denied Stryker's motion to disqualify Goodell. He found no risk of trial taint which would impair the Court's ability to decide the issues accurately and with integrity. Further, "the Court would reach the same decision under *Cinema 5* because it is satisfied that the Goodell firm has shown 'that there will be no actual or apparent conflict in loyalties or diminution in the vigor of [its] representation.'"

However, Judge Kaplan reminded Goodell that he was not condoning its actions in suing a current client.

The question whether those actions threaten this Court's processes is quite distinct from the question whether they breached the Code and the Disciplinary Rules and therefore should be subjected to professional discipline. That is a matter for another body.