

Court Rejects Disqualification For Unauthorized Contact

BY LAZAR EMANUEL

Attorney David Lansner, counsel for plaintiff Tyleno, telephoned Mia Higgins, in-house counsel for defendant Heartshare. *Tyleno M. v. Heartshare Human Services*, SDNY (NYLJ June 18, 2004, p. 21). **Defendant Heartshare** was represented in the litigation by the law firm of Murphy & Higgins LLP. (Mia Higgins is not related to anyone in the Murphy firm.)

Lansner reminded Higgins that the firm of Murphy and Higgins was being paid by Heartshare's insurance company to defend Heartshare, that the firm's interest in resolving the dispute "may be adverse" to Heartshare's, and that the interests of plaintiff and of Heartshare "may be aligned." Defendant Heartshare moved to disqualify Lansner under DR 7104 for initiating contact with an opposing client, and asked for sanctions.

DR 7104(A)(1) provides:

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

Communicate or cause another to 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.

The motion to disqualify was referred to SDNY Judge Katz. One of the arguments made by Lansner in opposition to the motion was that in-house counsel Higgins was not a "party" to the action as required by DR 7104. Lansner also argued that his call to Higgins was justified by his concern that Murphy and Higgins had manifested its loyalty to the carrier by failing to challenge the carrier's denial of coverage for Heartshare, "in contravention to their duty to Heartshare"; and that the call "did not raise any of the concerns which DR 7104 seeks to address."

In considering whether in-house counsel Higgins was a "party" under DR 7104, Judge Katz recognized that individual parties must be treated differently from corporate parties.

Where the represented party is an individual, application of the ethical rule is straightforward. Here, however, the 'represented party' is a corporate entity, and the parties dispute whether DR 7104's prohibition applies to communications with its in-house counsel.

But Judge Katz decided he could dispose of the disqualification motion without resolving whether in-house counsel should be treated as a party: "...even if Mr. Lansner's unauthorized communication with Ms. Higgins ran afoul of DR 7104, it is nevertheless insufficient to warrant the drastic remedy of disqualification."

Judge Katz relied on the general reluctance of federal courts to grant disqualification motions. "...disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and...disqualification motions are often interposed for tactical reasons." *Board of Education of the City of New York v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979).

The party moving for disqualification bears a heavy burden. Defendant Heartshare has not met this burden. Defendant has not shown that Lansner's call to Higgins tainted the trial. His only statement to her related to the law firm's failure to challenge denial of coverage by defendant's carrier. This statement did not relate to any of the substantive issues in the litigation and did not prejudice the defense.

Furthermore, Lansner and his firm have invested a great deal of time and resources in pretrial activity, and disqualification would be unfair to the Lansner firm. Also, substitution of new counsel after more than a year of representation by Lansner will result in delay and in further expense to the client.

Court Resists Taking Any Disciplinary Action

Judge Katz refused to consider any disciplinary action against Lansner for violation of DR 7104.

Generally, courts are reluctant to resolve disputes over ethical violations that arise during the course of litigation. As the Second Circuit has explained: "The business of the court is to dispose of litigation and not to act as the general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it. See, *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976).

This is not to say that defendants may not raise the ethical issues presented by Lansner's call to Higgins. Defendants are free to take their complaint to the Southern District's Committee on Grievances under Local Civil Rule 1.5, or to "the appropriate state disciplinary body."

Judge Katz also denied the motion for sanctions against Lansner. He concluded that the issue of sanctions would be more appropriately raised before a disciplinary body. In denying sanctions, Judge Katz said, "...however, the Court does not intend to suggest that it condones Mr. Lansner's communication with Heartshare's in-house counsel."

The decision by Judge Katz avoided the issue raised by Lansner whether Mia Higgins was a "party" under the terms of DR 7104. The term "party" as used in DR 7104 has been the subject of much discussion and of considerable litigation. Definition of the term is especially difficult when one side in litigation is a corporation or organization. Most commentators argue that the Rule was not intended to prohibit all contact or communication between opposing counsel and every employee of a corporation. Are all corporate employees "represented by counsel" of the corporation and therefore off-limits?

Court of Appeals Defines Who Is A Party

The Court of Appeals proposed an answer this question in *Neisig v. Team 1*. 76 N.Y.2d 363 (1990).

The test 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 liabilities, or employees implementing the advice of counsel. All other employees may be interviewed informally.

Professor Roy Simon observes that this test is not easy to apply (*Simon's New York Code of Professional Responsibility Annotated*). But the test does make it clear that a lawyer investigating the facts of a case may interview most employees of an opposing corporation without the consent of the corporation's lawyer. "However, if a corporate employee retains his or her own personal lawyer in a matter, then that employee is off limits under DR 7104(A)(1) even if the employee does not fall within the forbidden group described in *Niesig*."

We have not found any case which considered whether in-house corporate counsel would be considered a "party" for purposes of DR 7104.

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