

# Judge Casey's Primer On Lawyer Disqualification

BY LAZAR EMANUEL

Occasionally, a judge's well-reasoned opinion serves as a primer on essential principles of professional responsibility. The opinion of Judge Richard C. Casey (Southern District, New York) in *Crudele v. New York City Police Department* (NYLJ, September 13, 2001) is such an opinion. It instructs us on the matters that a judge is required to review when one side in litigation makes a motion to disqualify the lawyers for the other side on the ground that they have hired away a lawyer, especially a government lawyer, who took an active role in the litigation on behalf of the moving party.

The facts in *Crudele* are relatively simple. The law firm of Leeds, Morelli and Brown filed a total of sixteen actions in the Southern District, all challenging the constitutionality of the sick leave policies of various New York City agencies. Another similar lawsuit was started by the firm in New York State Supreme Court against the New York City Fire Department. Twelve of the federal cases were resolved before the motion to disqualify was brought before Judge Casey. The remaining four federal cases and the Supreme Court case were consolidated by Judge Casey solely for the purpose of deciding the motion to disqualify.

All the cases brought by the Leeds law firm were defended by the City's Corporation Counsel. The lead Assistant Corporation Counsel was John F. Wirenius. Wirenius participated actively in the conduct of the defense. Among other things, he conducted pre-trial discovery, participated in settlement discussions, prepared and argued a motion for summary judgment, answered a complaint, responded to interrogatories, and took the deposition of one of the plaintiffs.

## Lawyer Moves To Opposing Side

In September, 1999, while the actions were still pending, Wirenius transferred from the General Litigation Division of the Corporation Counsel's office to its Legal Counsel Division. He assigned the sick leave cases to other lawyers within the office. In November 2000, Wirenius applied for a job at the Leeds firm. Before he left, he told several of his supervisors within the Corporation Counsel's office that he intended to leave for the Leeds firm. None of the supervisors objected, though they were aware of Wirenius' work on the sick leave cases.

Wirenius joined Leeds in January 2001. The Leeds firm has fifteen lawyers and forty-five staff members distributed over three offices. Wirenius was assigned to work in the firm's

Long Island office, where Rick Ostrove, the partner responsible for the sick leave litigation also worked. Ostrove told Wirenius that he should not speak about or participate in the sick leave matters. The sick leave files were placed in a locked storage room to which Wirenius had no access; and the computer files were available only on Ostrove's computer by use of a password which Wirenius did not know. Except for three unrelated complaints drafted by Wirenius for Ostrove, the two did not work together on any matter and their contact was limited to 10-15 minutes per day.

Two months after Wirenius moved to Leeds, the Assistant Corporation Counsel assigned to the remaining sick leave cases heard about the move and consulted Daniel Connolly, Special Counsel to the New York City Law Department. Connolly was responsible for conflicts of interest issues. Connolly asked the Leeds firm to withdraw from all matters on which Wirenius had worked while in the Corporation Counsel's office. The firm refused and the motion to disqualify resulted.

Judge Casey considered and resolved a number of issues arising from the move by Wirenius to the Leeds firm.

### **The Principles Governing Disqualification Motions**

Disqualification motions are generally disfavored in the Second Circuit because they cause unnecessary delay and are often used by lawyers for tactical advantage. The party seeking disqualification "must meet a high standard of proof." However, when the moving party "has made a substantial showing that a conflict of interest exists and cannot be adequately remedied, the Court must resolve any doubts in favor of disqualification." *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir., 1980); *Red Ball Interior Demolition Corp. v. Palmadessa*, 908 F. Supp. 1226 (S.D.N.Y. 1996).

The relevant Disciplinary Rules are DR 9-101(B) and DR 5-105(D). DR 9-101(B) says simply that a former government lawyer shall not represent a private client in connection with a matter in which the lawyer participated "personally and substantially" as a public employee, unless (1) the disqualified lawyer is effectively screened from direct or indirect participation in the matter and receives no part of the resulting fee, and (2) unless there are no other circumstances in the matter that create an appearance of impropriety. The Rule applies also to all other lawyers in the firm with which the disqualified lawyer is presently associated. DR 5-105(D) says that no lawyer associated in a law firm with a lawyer who is personally disqualified by a conflict of interest in a particular matter shall knowingly accept or continue employment in that matter.

These provisions create a presumption that client confidences are exchanged and shared by the lawyers in a law firm, and that disqualification is necessary when a lawyer who participated on one side of a matter joins the adversary.

### **Screening Against Conflicts In A Small Law Firm**

The efforts by the Leeds firm to screen Wirenius from the sick leave cases must meet the tests imposed by a line of cases in the Second Circuit upon small law firms such as the Leeds firm. In *Cheng*, supra, one of the lawyers in the firm representing the defendant had previously worked in the Legal Services office representing the plaintiff. The firm assigned the lawyer to a different division from the one handling the litigation and told him not to work on or discuss the case. The Circuit Court found the steps were

ineffective because the firm was relatively small (35 lawyers), the matter was still active, and there was a continuing risk of inadvertent disclosure and the appearance of impropriety.

Other courts have followed Cheng in finding screening efforts by small law firms inadequate. In one leading case the court said, "[in] smaller, more informal settings the imputation of knowledge as a matter of law is necessary to protect the client and avoid the appearance of impropriety." *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 610 N.Y. 2d 128 (1994). "The courts are concerned that the disqualified lawyer, in his day-to-day contacts with his new associates, may unintentionally transmit information learned in the course of the prior representation." (Judge Casey.)

Here, the danger of disclosure and the appearance of impropriety were clear enough to require disqualification. Both Wirenius and Ostrove worked in the same office. They worked on some matters together. They shared 10-15 minutes every day. The Court was concerned about the risk of unintentional breaches of client confidences and the appearance of impropriety.

### **The Appearance of Impropriety In This Case**

Wirenius' involvement in these cases during his employment with the Corporation Counsel created a greater appearance of impropriety than the actions of the lawyer in the Cheng case. In Cheng, the disqualified lawyer had merely participated in discussions with his associates and had never personally represented the plaintiffs. Here, Wirenius was the lead attorney and played a substantial role in the litigation. The Court "would be hard-pressed to explain to a lay person how it was proper for a lawyer who was substantially involved to switch sides in the middle of the action" (quoting the court in *Yaretsky v. Blum*, 525 F. Supp. 24 (S.D.N.Y. 1981).

### **Prejudice To The Client Of The Disqualified Firm**

The Court must balance the factors favoring disqualification against the resulting prejudice to the client of the disqualified firm. Here, the Leeds firm argues that it has special expertise in these matters, that it has been involved in these matters for many years, and that the clients will sustain prejudicial expense in retaining new counsel.

The firm also argues that the New York City Law Department failed to raise the conflict issue in a timely matter.

These arguments are not persuasive. Indeed, it is even questionable whether the balancing test is appropriate when the Court is confronted by a small law firm and the appearance of impropriety. The firm may have expertise in the issues surrounding sick leave cases, but the Court does not believe that other comparable attorneys would be unable to grasp the legal issues involved. A new firm would have available the record in the similar cases that have been disposed of, including the written opinions of the courts which disposed of them.

The City's Law Department did not "tacitly approve" Wirenius' decision to join the Leeds firm. Nor is the Department's motion to disqualify "untimely." Untimeliness is not generally a defense to disqualification in the Second Circuit. Even if it were, the record does not show that the Law Department knew of the conflict when Wirenius applied to the Leeds firm for employment. Nor is there any indication that Leeds sought the consent of the Corporation Counsel before hiring Wirenius. The courts have held that if a law

firm wishes to avoid disqualification, it must ask the incoming lawyer 's former firm whether it has any objection to the potential conflict residing in the new hire. When the City's Law Department became aware of the conflict, it moved promptly to inform both the Court and the plaintiffs of its objections.

Judge Casey granted the motion to disqualify the Leeds firm from further representation of the plaintiffs.

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