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Lawyers as Witnesses - Civil and Criminal Cases

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In February's NYPRR, I provided a general overview of DR 5-102, the so-called "advocate/witness" rule. This article examines how the state and federal courts have interpreted that rule in deciding disqualification motions in civil and criminal cases. DR 5-102 does not specifically distinguish between civil and criminal cases. On its face, it applies to all contemplated or pending litigation. The courts' decisions must be analyzed separately, however, because different public policies come into play in civil and criminal cases. A lawyer who indiscriminately invokes all decisions interpreting DR 5-102 is unlikely to persuade a court of the merits of his position, whether he's moving for his adversary's disqualification or opposing his own disqualification.

In studying disqualification decisions in civil cases, a lawyer should keep in mind four general "realities" that regularly serve as the backdrop to a motion's merits. First, the courts regard a motion for disqualification based on DR 5-102 as a "drastic measure" and consequently "subject to strict scrutiny." *E.g., A.V. By Versace, Inc. v. Gianni Versace, S.p.A.,* 160 F. Supp.2d 657, 663 (S.D.N.Y. 2001). The reason for the courts' hostility is not hard to fathom. Too often, a party files a motion to disqualify solely to delay or derail a litigation, not to vindicate a legitimate interest protected by the rule. Second, the moving party bears a heavy burden. The weight is justified by the importance that the courts attach to a party's right to the counsel of her choice. Only serious threats to the integrity of the judicial process or to such fundamental values as confidentiality can justify separating a lawyer from her client. Third, the courts are reluctant to decide disqualification motions until it is absolutely necessary to face them. Thus, they frequently deny a motion in the first instance without prejudice, specifically noting the moving party's right to renew the motion upon the completion of discovery. *Versace,* at 664-65. Fourth, although the courts in some instances are willing to permit discovery of the facts alleged in support of the motion, they will actively intervene to limit that discovery in order to protect the opposing party from burdensome or overreaching inquiry. *Renner v. Chase Manhattan Bank,* 2001 WL 1356227, at *2-3 (S.D.N.Y. Nov. 2, 2001).

Examining the Four Realities

A lawyer who is seriously contemplating the filing of a disqualification motion based on DR 5-102 should initially examine how each of the four "realities" will influence the court's reception of the relief she seeks. If the lawyer concludes that the supporting evidence is weak or reasonably capable of two opposite interpretations, the lawyer would be wise to refrain from making the motion. The supporting papers are unlikely to withstand the court's strict scrutiny, and the moving party is unlikely to meet its heavy burden. Although the motion in these circumstances may delay the litigation and impose an extra burden on the other side, those goals are ethically illicit, and a lawyer should resist the temptation to exact them. Furthermore, an unwarranted motion may also affect the client's case adversely. Both state and federal judges are burdened with large and often unmanageable caseloads. Judges resent having to commit time

and energy to deciding weak and poorly supported motions. An unsupported motion will also diminish the lawyer's credibility with the judge.

A lawyer who concludes on first reflection that the motion he was contemplating will not withstand initial scrutiny may still find it possible to develop facts that will support disqualification. He must first determine what additional evidence is needed and then develop a strategy for obtaining the evidence. One approach would be to look for the evidence during the course of discovery relating to the lawsuit's merits. Another approach would be to apply to the court for an order specifically permitting discovery on the facts pertinent to the alleged conflict. Since this limited discovery is likely to be contentious, a court that approves this strategy may choose to provide concrete guidance on what topics it considers legitimate areas of inquiry.

For example, in Renner v. Chase Manhattan Bank, 2002 WL 87665 (SDNY Jan. 22, 2002), the court identified four permissible topics: (1) the reasons for, and the events leading up to, a meeting; (2) "who said what to whom" at the meeting; (3) subsequent relevant events; and (4) certain contacts between the defendant's lawyer and another person. Id. at *3. When the court provides its guidance, it serves not only to lessen the possibility of acrimonious disputes between the parties' lawyers, but it also promotes efficiency in the litigation by forcing the parties to focus on the facts that the court has determined are relevant.

Motions for disqualification in civil cases based on DR 5-102 most often involve fact patterns in which the lawyer now serving as one party's advocate was extensively involved in the underlying transaction that gave rise to the litigation. Relying on Subsection A of the Rule, the moving party alleges that the lawyer "ought to be called as a witness on a significant issue on behalf of the client." *E.g., Ulster Scientific, Inc. v. Guest Elchrom Scientific AG,* 181 F. Supp.2d 95 (N.D.N.Y 2001). But even if the claim is successful, it does not necessarily force a complete separation of the lawyer and the client. As I pointed out in February's NYPRR, the disqualification in a Subsection A disqualification is personal to the disqualified lawyer. The client is free to retain another lawyer in the same firm to represent it in the litigation. Furthermore, the disqualified lawyer may participate in pre-trial proceedings, including discovery. *Norman Reitman Co. v. IRB-Brasil Resseguros S.A.*, 2001 WL 1132015, at *4 (S.D.N.Y. Sept. 25, 2001).

Despite the strict scrutiny with which the courts examine motions for disqualification, they do not hesitate to order a lawyer's removal if the moving party successfully meets its heavy burden of proof. The facts of *Ulster Scientific, Inc., supra,* are typical of those in which the courts have granted the requested relief. In that case, a distributor sued the manufacturer of a product to force the repayment of monies that the distributor claimed the manufacturer had wrongfully collected. The distributor's lawyer had been actively involved in the negotiation of the underlying agreements and possessed eye-witness knowledge of the parties' understanding of the agreements' contested terms. Other courts have reached similar conclusions. *E.g., Wensley and Partners, L.L.C. v. Polineni,* 692 N.Y.S.2d 85 (2nd Dep't 1999) (the lawyer participated in the "extensive negotiations" that took place during a related bankruptcy proceeding); *Korfmann v. Kemper National Ins. Co.*, 685 N.Y.S.2d 282 (2nd Dep't 1999) (the lawyer conducted the negotiations that were at the heart of the plaintiffs' bad faith claim against their insurer).

Different Standard in Criminal Cases

The courts apply a very different set of public policy arguments in criminal cases in which DR 5-102 is invoked to support the disqualification of the lawyer for one of the parties. The party affected is almost always the defendant; disqualification motions are rarely made against prosecutors. In criminal cases, the courts express two particular concerns: first, the need to preserve the integrity of the justice system; and second, the need to protect the defendant's interest in a conflict-free representation.

Both concerns were present in United States v. Gonzalez, 105 F. Supp.2d 220 (S.D.N.Y. 2000). In Gonzalez, the defendant was accused of stabbing a fellow inmate. Other prisoners, including one Yu, witnessed the attack. Gonzalez's lawyer represented Yu in an unrelated criminal proceeding and planned on calling him as a witness to exculpate Gonzalez. The court ordered the lawyer's disqualification, finding multiple actual and potential conflicts. Considering potential conflicts under DR 5-102, the court described several scenarios in which the lawyer might become a witness, depending upon the extent to which Yu's testimony in the criminal case against Gonzalez would contradict or limit the statements Yu might make to the lawyer. It rejected out-of-hand the option of appointing a second lawyer for Gonzalez to represent him only in connection with Yu's testimony. *Id.* at 225.

In another line of criminal cases, the courts have been quick to disqualify the defendant's counsel, if the evidence supporting the government's motion suggested that the lawyer was in any way engaged in illicit or illegal conduct relating to the representation. For example, in *United States v. Orgad,* 132 F. Supp.2d 107 (E.D.N.Y. 2001), the defendant's lawyer engaged in extensive discussions with a potential witness against his client. Some of the discussions suggested an attempt by the lawyer to obstruct the witness' cooperation with the government. The court disqualified the lawyer, noting that if the witness testified it was likely that the lawyer would become an "unsworn witness" at the trial, a possibility that would allow the lawyer to impart subtly his first-hand knowledge without ever taking the witness stand or being subject to cross-examination. *Id.* at 124.

In *United States v. Joyeros,* 2001 WL 1597803 (E.D.N.Y. Oct.19, 2001), the defendant's lawyers attached a seemingly exculpatory document to a bail motion. Subsequent events raised serious doubts as to the document's authenticity. The defendant's lawyer withdrew from the representation, but later agreed to argue a motion to dismiss the indictment at the request of the defendant's new lawyer. The court refused to allow the former lawyer to proceed. While acknowledging that it was unlikely that the lawyer knew that the document had been forged, the court concluded that disqualification was warranted.

In sum, there are significant differences in the jurisprudence underlying the decisions interpreting DR 5 102 in civil and criminal cases. In civil cases, the courts emphasize the importance of the client's choice of counsel, are more willing to permit the disqualified advocate to participate in pre-trial proceedings, and often delay ruling on the merits of the disqualification motion as long as possible. In criminal cases, the courts subordinate these concerns to an overriding need to preserve the integrity of the judicial system and the client's right to conflict-free representation.

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