

Risking Disqualification By Hiring an Adversary's Former Employee

BY ROY SIMON

All year long, in anticipation of the next edition of my annual book on the New York Code of Professional Responsibility, I collect hundreds of new cases in the field of professional responsibility. In 2006, one of the most interesting opinions was *Dela Raba v. Suozzi*, 2006 U.S. Dist. LEXIS 92813 (E.D.N.Y. 2006), a ruling denying a motion to disqualify. The motion to disqualify was precipitated when one of two law firms representing the plaintiffs hired a non-lawyer who had previously held a high-level position with the defendants. In that position, he had worked on the very same matters that were now at issue in the lawsuit, and had allegedly acquired significant confidential information about those matters, including legal strategies and other sensitive attorney-client communications. The well-reasoned, lengthy opinion (23 single-spaced pages) analyzes a wide range of conflicts issues, including confidentiality, presumptions, the appearance of impropriety, screening, double imputation, and conflicts that arise when a law firm hires an adversary's former non-lawyer employee.

The *Dela Raba* opinion. It was written by Magistrate Judge A. Kathleen Tomlinson as a Report and Recommendation, subject to approval by the District Judge handling the case. The losing side filed objections, and the case settled before the District Judge ruled on the motion. But the opinion is well worth reading, and I believe it would have been adopted by the District Judge if the case had not settled. In fact, I had planned to write about the District Judge's ruling as soon as it was issued. Because the District Judge never ruled, I will devote this column to the Magistrate Judge's opinion and the many issues it addresses. I am intimately familiar with the opinion because I was an expert witness for the winning side regarding the disqualification motion. (Of course, I am basing my column only on published sources - principally Magistrate Judge Tomlinson's Report and Recommendation - not on any confidential information that I obtained in my capacity as an expert.)

Background: Thomas Suozzi and the Police Benevolent Association

In 2001, Thomas Suozzi won election as the Nassau County Executive, the first Democrat to win that post in three decades. He inherited a county on the verge of bankruptcy, and soon set about cutting the budget of every county agency, including the Nassau County Police Department. Specifically, Suozzi proposed reducing the police force from 2,800 to 2,444 officers and reducing the number of new recruits. In response, the Police Benevolent Association ("PBA") began a public campaign vigorously opposing the proposed cuts. (The PBA is essentially the police union representing the Nassau County Police Department in labor negotiations and contract administration.) As part of the campaign, the PBA purchased advertising in local newspapers and other media outlets. The police also took Nassau County to arbitration on various major issues. For example, in arbitration proceedings in June and December 2004 the PBA won overtime and off-duty pay supplements. The tension between Suozzi and the police continued throughout Suozzi's first term as County Executive.

In 2005, Suozzi ran for re-election as Nassau County Executive. The PBA endorsed Suozzi's opponent (Republican Greg Peterson) and attacked Suozzi's record on police issues. Suozzi won anyway. After his

victory, Suozzi terminated the overtime and off-duty pay supplements that the police officers had won in the 2004 arbitration proceedings. Plaintiffs, who are members of the PBA Executive Board, responded by hiring the law firm of Greenberg Burzichelli Greenberg, P.C., to challenge Suozzi's termination of the pay supplements. The Greenberg law firm recommended that plaintiffs hire the noted civil rights firm Emery Celli Brinckerhoff & Abady, LLP ("the Emery firm"). In March 2006, the Emery firm, as co-counsel to the Greenberg firm, filed a lawsuit on plaintiffs' behalf. The suit alleged that defendants Suozzi and Nassau County had violated the First and Fourteenth Amendments of the United States Constitution by terminating the police pay supplements in retaliation for the PBA's support of Suozzi's opponent in the 2005 Nassau County Executive election.

In January 2006, a few months before the lawsuit was filed, the Greenberg firm retained a non-lawyer named David Greene as a part-time outside consultant to advise the firm on "matters of government relations" and to assist the Greenberg firm in expanding its practice representing and advising labor unions. The Greenberg firm thought Greene could help the firm attract business through his many contacts in labor and government in both Nassau County and Suffolk County. For example, he had served for the previous three years as Director of Nassau County's Office of Labor Relations, where he had presided over negotiations between Nassau County and local unions (such as the police union).

Shortly after this suit was filed, defendants moved to disqualify both the Greenberg firm and the Emery firm. The basis for the motion was that David Greene was directly involved in privileged communications concerning the issues alleged by plaintiffs, giving both the Emery firm and the Greenberg firm "an unjust advantage in this litigation which would taint any trial of this matter." Defendants supported their motion with an affidavit from Nassau County Attorney Lorna Goodman, who asserted that Greene was privy to "legal advice of outside counsel" regarding the 2004 police arbitration proceedings, and with an affidavit from attorney Seth Weiss, Assistant Director of the Nassau County Office of Labor Relations, who stated that Greene had assisted him with the 2004 arbitrations and served as a "liaison between counsel, both inside and outside, and the executive staff." Relying on Canon 9, defendants argued that permitting the Greenberg firm to remain in the case gives an "appearance of impropriety" based upon "the presumed shared confidences between Greene and plaintiffs' counsel creating an impression that plaintiffs will obtain an unfair advantage at trial."

The Emery firm (represented by special counsel Hal Lieberman of Hinshaw & Culbertson) responded that defendants could not meet "the high burden of proof required to deprive a party of its chosen counsel" and that defendants could not prove "trial taint." Richard Emery unequivocally stated in his affidavit that the Emery firm "has not received any information, privileged or otherwise, from Greene." Moreover, the offices of the Emery firm were at least fifteen miles from the offices of the Greenberg firm, and neither firm had access to the other's files or electronic data.

Interestingly, although *Dela Raba v. Suozzi* is similar in form to a conflict of interest case arising out of the lateral hire of an attorney, the defendants did not cite any of the usual conflict rules - DR 5-101, DR 5-105, or DR 5-108. Those rules did not apply because Greene is not a lawyer and did not have clients when he worked for Nassau County. Therefore, the defendants based their motion to disqualify almost entirely on Canon 9 and the alleged "appearance of impropriety."

The Basic Analytical Framework

Magistrate Judge Tomlinson began by noting that disqualification motions require "a fact-specific analysis," and that courts in the Second Circuit "are reluctant to use Canon 9 as a basis for disqualification." She called disqualification of counsel a "drastic measure" requiring a "careful balancing of competing interests." The "paradigm" for evaluating motions to disqualify in the Second Circuit, the Magistrate Judge said, is *Board of Education v. Nyquist*, 590 F2d 1241 (2d Cir. 1979), in which the court said:

[W]e have utilized the power of trial judges to disqualify counsel where necessary to preserve the integrity of the adversary process in actions before them. In other words, with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interest in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client, or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage.

Therefore, the Magistrate Judge said, unless an attorney's conduct tends to "taint the underlying trial" by disturbing the balance of the presentations in one of these two ways, "courts should be quite hesitant to disqualify an attorney."

Magistrate Judge Tomlinson found it "likely that Greene was privy to confidential and/or privileged information," but Greene's exposure to such communications "is only part of the relevant inquiry." The remaining issues, in the Magistrate Judge's view, are "(1) what were the ethical obligations of the Greenberg firm - knowing of Greene's prior employment with the County and his involvement with the specific issues giving rise to this litigation - in hiring Greene as a part-time consultant; and (2) what obligations, if any, were imposed on the Emery firm as a result of the Greenberg firm's hiring Greene in this capacity?"

De Facto Screening

Under DR 9-101(B)(2), a law firm may represent a client even if the firm has hired a lawyer who is a former government officer or employee who participated personally and substantially in the same matter while in government service, as long as the former government officer or employee is effectively screened from any participation in the matter and in any fee resulting from the matter. The Second Circuit has expressly accepted the proposition that "in appropriate cases and on convincing facts, isolation - whether by intentional construction or de facto separation - effectively protects against any sharing of confidential information." When a law firm hires a nonlawyer who has previously worked at another law firm, the law firm must adequately supervise the conduct of the nonlawyer, but screening the nonlawyer is not mandatory. Rather, as expressed in *N.Y. State 774* (2005), it is among the "further steps" a law firm may take "to guard against improper disclosure of protected information."

Defendants argued that the Greenberg and Emery firms had a greater duty to screen Greene, especially since he had worked on the same subject matter as this litigation, but the court disagreed. The lack of screening "is not a sufficient basis in and of itself to mandate disqualification." Rather, a party seeking disqualification "bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring is substantial." Defendants have not

sustained this burden.

Moreover, even if the Greenberg firm did not establish a formal screening mechanism to isolate Greene, "a de facto screen was nonetheless operating by happenstance." The court based this conclusion on many factors, including that (a) Greene never had an office at the Greenberg firm but rather worked from home; (b) Greene did not communicate with anyone at the Greenberg firm except Harry Greenberg; the Greenberg firm retained Greene as a consultant without any consultation with the Emery firm; Greene did not impart any confidential or privileged information to the Greenberg firm or the Emery firm concerning his prior employment as Director of OLR for Nassau County; no one from the Emery firm has ever been to the offices of the Greenberg firm; the Greenberg firm does not have access to the Emery firm's files or electronic data and vice-versa; and the Greenberg firm implemented a screen between it and the Emery firm as soon as it received notice of defendants' intent to file a motion to disqualify; and the Greenberg firm terminated Greene on June 15, 2006, thus, obviating any concern over the effectiveness of the screen going forward. These factors rebut the presumption that confidences were shared.

Defendants argued that since the Greenberg firm had hired Greene, disqualification should be imputed to its co-counsel, the Emery firm. The imputation rule is "premised on the presumption that if confidences or secrets were disclosed to one member of a firm, each individual attorney in the firm has or may become privy to those confidences." This presumption is rebuttable, and under appropriate circumstances a screen may rebut the presumption of shared confidences. Since the facts support a finding that neither Mr. Greenberg nor his firm acquired any confidences or secrets of Defendants, the theory of "double imputation" must also fail. Nothing in the record supports an inference that there are = "extensive and intimate contacts" between the two firms.

A Significant Risk of Trial Taint?

Finally, disqualification is appropriate only if allowing the representation to continue would pose a "significant risk of trial taint. ... A violation of the Code of Professional Responsibility should result in disqualification only when the violation taints the integrity of the proceeding before the court." The question is whether the short-term, part-time consulting arrangement between David Greene and the Greenberg law firm would taint the underlying trial by giving plaintiffs "an unfair advantage in this case." The court found that they did not. "No proof has been presented that specific confidential information was shared that might taint the underlying trial." Defendants have no basis to support a claim of trial taint. Nor have defendants presented any evidence of an ethical "violation" that taints the integrity of the proceeding. Therefore, the court found that "allowing the representation to continue would not pose a significant risk of trial taint."

In conclusion, the court stated: "There are obvious competing interests inherent in a motion to disqualify an attorney or a law firm. The Court must balance the general policy favoring a party's right to choose its counsel while ensuring that a party will not obtain an unfair advantage over an adversary at trial." Here, "disqualification is not necessary in order to preserve the integrity of this judicial proceeding." Magistrate Judge Tomlinson therefore recommended that the District Judge deny the motion. Magistrate Judge also permitted the Emery firm to continue representing the plaintiffs pending a ruling by the District Judge. As mentioned earlier, however, the case settled before the District Judge issued a ruling.

Some Lessons for the Future

The Emery and Greenberg law firms were not disqualified in *Dela Raba v. Suozzi*, but they spent considerable time and money fighting the motion to disqualify. Moreover, given the plastic nature of the "appearance of impropriety" standard, the ruling on the motion could have gone the other way. (I think granting the motion to disqualify would have been incorrect, but it would not have been the first incorrect ruling in history.) What lessons can law firms learn from *Dela Raba*? Here are two:

1. Exercise extreme caution before hiring a former employee of your client's adversary as a consultant. Sometimes it is tempting to hire an adversary's former employee (or even an adversary's current employee who is looking for a new job) as a consultant. An adversary's former employee may possess unprotected information about the other side (i.e., information not protected by the attorney-client privilege, by trade secret law, or by some other body of law). For example, a person who formerly worked for a medical insurance company may know how to interpret the company's claim denial codes, and a person who formerly worked as a mid-level executive at a manufacturing company may know a lot about the company's quality control measures. A law firm would be entitled to interview such a person in connection with contemplated or pending litigation as long as the law firm did not elicit or listen to privileged or otherwise protected information, and would even be permitted to pay the person reasonable compensation for the loss of time while assisting counsel. *See* DR 7-109(C)(2) (lawyer may not compensate a witness contingent on the content of her testimony or the outcome of the case, but may pay "[r]easonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel") (emphasis added); N.Y. State 668 (1994) ("Reasonable compensation is not merely out-of-pocket expenses or lost wages, it includes loss of free time. It is the market value of the testifying witness that determines what is reasonable compensation.").

Nevertheless, even interviewing an adversary's high-level former employee may lead to a law firm's disqualification, especially if the law firm does not take adequate precautions to shield itself from privileged or proprietary information. A highly cautionary example is now pending before the New York Court of Appeals. *See Muriel Siebert & Co., Inc. v. Intuit Inc.*, N.Y.L.J., January 23, 2006 (N.Y. County Supreme Ct.) (Lowe, J.), reversed, 32 A.D.3d 284, 820 N.Y.S.2d 54 (1st Dep't 2006), *stay and review granted*, 2006 N.Y. App. Div. LEXIS 12331 (2006). (Three prominent bar groups filed amicus briefs, and the Court of Appeals heard oral argument on March 28, 2007.) In *Siebert*, the law firm representing Intuit interviewed Siebert's former CEO informally only eight days after he left Siebert on unpleasant terms. The former CEO had been intimately involved in the lawsuit while at Siebert, reviewing pleadings and meeting with Siebert's lawyers. In the Supreme Court, Justice Lowe granted Siebert's motion to disqualify Intuit's lawyers based on the appearance of impropriety. The First Department reversed, but the Court of Appeals will have the last word. Intuit's lawyers will avoid disqualification if the Court of Appeals affirms the First Department, but the risks are palpable.

2. *Build a formal screen immediately upon hiring a consultant who may have confidential information about a pending case.* In *Dela Raba v. Suozzi*, the Greenberg firm did not build a formal screen around David Greene because his work had nothing to do with the *Dela Raba* case, he had no office at the Greenberg firm, and he seldom even showed up at the Greenberg firm. Likewise, the Emery firm did not build a formal screen between itself and Greene after the Greenberg firm hired Greene firm because the Emery firm's offices were more than fifteen miles from the Greenberg firm's offices and the firms had no access to each other's files. Yet precisely because of these circumstances, building a formal screen would have

been a snap. The only action required at both firms was to issue memos to all lawyers, and to Greene, prohibiting any discussions between the lawyers and Greene about the *Dela Raba* case and prohibiting Greene from gaining any access to paper or electronic files relating to the case. That would have taken about ten minutes at each firm, and would have made the issue much easier for the Magistrate Judge.

In my view, the failure to build formal screens was nearly a fatal mistake by both firms. If Greene had spent more time at the Greenberg firm (as a more typical consultant might have done), the Magistrate Judge might have presumed that he communicated confidential information to the Greenberg firm. That might well have tipped the balance in favor of disqualification.

Conclusion: Low Precedential Value, High Analytical Value

Because the Magistrate Judge's opinion was never adopted by a District Judge, it has been left in limbo and has relatively low precedential value. But because it is carefully crafted and logically sound, it has high analytical value. It also holds some important lessons for lawyers who want to hire an adversary's former employee as a consultant. Hiring an adversary's former employee is often an effective and legitimate way to gain expertise in litigation, but *Dela Raba v. Suozzi* shows that such hiring carries high risks. The issues that arose in *Dela Raba* can arise anytime a lawyer hires an adversary's former employee, so any lawyer who does so should be prepared to fight a long and arduous battle over disqualification.

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