

The Growing Trend Against Motions To Disqualify

BY ROY SIMON

In the prior installments of this article, I considered the reluctance of the district courts to disqualify lawyers on conflicts issues, even when discipline for a breach of the ethics rules may be in order. I discussed first the case of *Rocchigiani v. World Boxing Counsel*, 82 F.Supp.2d 182 (S.D.N.Y. 2000) and then *Sumitomo Corp. v. JR Morgan & Co.*, 2000 WL 145747 (S.D.N.Y. 2000).

A third case suggesting a trend against disqualification is *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp.2d 449 (S.D.N.Y. 2000). Time Warner and other major motion picture studios sued to enjoin defendants from posting a DVD anti-encryption program on the Internet. On March 20, 2000, attorney Martin Garbus of Frankfurt, Garbus, Klein & Selz ("Frankfurt") appeared on behalf of defendant Eric Corley. Initially, Time Warner raised no objection to Frankfurt's appearance. Around April 26, 2000, however, Time Warner moved to disqualify Frankfurt pursuant to DR 5-105(B) on the ground that the firm simultaneously represented it in another action.

The other action was a claim by a woman named Nancy Stouffer against Scholastic, Inc., publisher of the Harry Potter books. Stouffer claimed that she owned the copyright and trademark in the term "Muggles." In September 1999, Time Warner, which was threatened by the Stouffer claim by virtue of its ownership of the copyright and trademark rights in the first four Harry Potter books, retained Frankfurt to defend against her claim. At about the same time, Scholastic and Time Warner decided to commence a declaratory judgment action against Stouffer. Time Warner and Scholastic agreed that Frankfurt, Scholastic's outside litigation counsel, would handle the Stouffer case and that Scholastic would pay its fees. Frankfurt filed the Stouffer case on November 22, 1999.

On or about April 12, 2000, a Time Warner in-house attorney telephoned Frankfurt to discuss the Frankfurt firm's conflict of interest in representing Time Warner as plaintiff in the Stouffer action and in opposing Time Warner in this (the Universal City) case. Frankfurt concluded that there was no conflict. Time Warner disagreed and asked the firm to withdraw from this case. Frankfurt wrote Time Warner that the firm did not believe that there was "any disqualifiable conflict" because this case and the Stouffer case involve "entirely different issues." He suggested that Time Warner retain separate counsel in Stouffer if it remained concerned.

Court Rejects Motion To Disqualify

The court began its analysis by noting that Time Warner has "substantial interests at stake in the Stouffer case." If Ms. Stouffer proved that she owned the copyright and trademark in "Muggles," the value of Time Warner's rights in the Harry Potter books would be impaired. Moreover, while Time Warner has not participated much in the Stouffer case thus far, Time Warner house counsel have been provided drafts of legal papers in advance of filing and have the right to control the actions of Frankfurt as its

counsel. "When the Frankfurt firm agreed to represent Time Warner along with Scholastic...it surrendered the right to represent another client in litigation against any of them." Frankfurt's offer to withdraw as counsel for Time Warner made no difference. "It is...established law that an attorney cannot avoid disqualification ... merely by 'firing' the disfavored client, dropping the client like a hot potato, and transforming a continuing relationship to a former relationship by way of client abandonment." Frankfurt's offense "is compounded by seeking to 'fire' the client in pursuit of the attorney's interest in taking on a new, more attractive representation." If suing a client "is a 'dramatic form of disloyalty' what might be said of trying to drop the first client in an effort to free the attorney to pursue his or her self-interest in taking on a newer and more attractive professional engagement?"

Frankfurt fought the motion to disqualify by submitting an expert affidavit contending that Time Warner was a mere "accommodation client" in the Stouffer case and that Frankfurt was therefore entitled, without Time Warner's consent, to drop it "like a hot potato." Frankfurt cited *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977). In *Allegaert*, the court held that DR 4-101 is not implicated in a joint representation between a long-time "primary client" and a temporary "accommodation client" where there could have been no confidences to begin with.

But that is a far cry from saying that a lawyer in an existing relationship simply may fire a client for the lawyer's own advantage, a matter that implicates Canon 5's requirement of the lawyer's obligation of utmost fidelity to the client. Thus, the Court concludes that the Frankfurt firm is acting improperly in seeking to represent defendants here despite its representation of Time Warner in Stouffer. That, however, does not necessarily mean that it should be disqualified.

Disqualification motions are subject to abuse for tactical purposes. They may require sometimes complex satellite litigation extraneous to the case before the court. Disqualification also deprived a client of counsel of its choice. Moreover, professional disciplinary bodies, including the Grievance Committee of this Court, are available to police the behavior of counsel. Accordingly, the Second Circuit has made clear that disqualification is appropriate only if a violation of the Code of Professional Responsibility gives rise to a significant risk of trial taint. That is to say, disqualification for an alleged conflict of interest is appropriate only if there is a significant risk that the conflict will affect the attorney's ability to represent his or her client with vigor or if the attorney is in a position to use privileged information acquired in the representation of a client against that client in another matter. There is substantial reason to believe that the motion to disqualify the Frankfurt firm is motivated at least partly by tactical considerations. Time Warner knew of the conflict as early as March 14 but did not even raise the issue with the firm until April 12, well after a scheduling order was entered and more than a week after plaintiffs had moved to expand the preliminary injunction. Plaintiffs have been pressing for, and recently obtained, an acceleration of the trial in this action and thus stand to gain by forcing defendants to find and educate new counsel. Moreover, Time Warner's belated objection to the Frankfurt firm's appearance here comes against a background of considerable apparent animosity between Martin Garbus, Esq. of the Frankfurt firm and Time Warner.

The view that the motion is tactically motivated, at least in part, draws support from the fact that Time Warner has made no effort to show that its interests either in this case or in Stouffer would be affected adversely by the Frankfurt firm's conflict. There is no suggestion that the Frankfurt firm is privy to any Time Warner secrets by virtue of the Stouffer representation that could be used to its disadvantage here. There is no suggestion that the firm's representation of Time Warner in Stouffer would suffer

In short, Time Warner has failed to establish any material risk that it would be prejudiced inappropriately by allowing the Frankfurt firm to continue in this litigation notwithstanding its role in the Stouffer case. Moreover, defendants here certainly do not object to Frankfurt's representation of them notwithstanding its obligations to Time Warner in Stouffer.

In conclusion, the court said:

The situation before the Court is troublesome. The lawyers' breach of ethics cannot reasonably be minimized. Even acknowledging that the Frankfurt firm, in consequence of sloppy conflict checking procedures, appears to have agreed to take on this case without realizing that doing so would be improper, its insistence on proceeding once it learned of the conflict was improper. In other circumstances, the Court well might disqualify it. But there are substantial factors pointing to a contrary result. There is no real risk of tainting the trial or, putting it another way, of prejudicing Time Warner absent disqualification. Disqualification at this stage would prejudice defendants in that they would be forced either to find and educate new counsel for an important trial that now is less than two months away or seek an adjournment and thus perhaps prolong the duration of the preliminary injunction. Time Warner sat on its hands for too long to have substantial claims on the Court's exercise of its discretion.

Accordingly, the court denied Time Warner's motion to disqualify, saying: "The proper place for this controversy is in the appropriate professional disciplinary body."

Of course, many judges do grant motions to disqualify. But these three recent cases suggest that courts will not go out of their way to find new and novel kinds of conflicts, and that even when they find blatant conflicts they will deny a motion to disqualify that appears to be tactical or that is not based on a genuine threat of harm to the moving party or to the trial process. Absent harm, the courts may well agree with the Reimerdes court that complaints about conflicts of interest should be made to disciplinary authorities, not to courts.

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