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Courts Apply a Case-by-Case Analysis in Distinguishing a Meritorious Motion to Disqualify from a Delaying Litigation Tactic

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INTRODUCTION

It is becoming increasingly rare for an attorney to remain at the same firm for an entire career.¹ Lateral movements of lawyers coupled with large firms employing hundreds of attorneys creates ample opportunity for conflicts of interest to arise.² The American Bar Association explains a conflict of interest is present when “there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the other lawyer’s responsibilities or interest.”³ Furthermore, Rule 1.10(b) dictates that a lawyer joining a new firm brings with him all his previous conflicts, to the extent that they are “substantially related to that which the formerly associated lawyer represented the client” and the lawyer has confidential information related to the matter.⁴

¹ Nick Badgerow, *Conflicts and Confidentiality: Duties When a Lawyer Changes Firms*, J. Kan. B. Ass'n, January 2010, at 21.

² *Id.*

³ Model Code of Pro. Resp. 1.7, Cmt. 8 (Am. Bar Ass'n 1983).

⁴ Model Code of Pro. Resp. 1.10(b) (Am. Bar Ass'n 1983).

While the Model Rules of Professional Responsibility serve only a persuasive purpose, both federal and state courts have adopted the exact model rule language in addressing conflicts of interest.⁵

A failure to avoid a conflict can result in disqualification from representation of one or both clients.⁶ Furthermore, a granted motion to disqualify can remove a singular attorney or an entire firm from representation. While the purpose of a motion to disqualify is to prevent the continuation of a conflict and minimize harm to clients, it is often used as a tactic to delay litigation.⁷ Therefore, courts must employ extreme caution and weigh varying public policy concerns when determining the outcome of a motion to disqualify.⁸ At issue is the court's ability to distinguish motions to disqualify as simply a delaying litigation tactic from those with merit.

This memorandum addresses the analysis employed by courts to determine whether to grant or deny a motion to disqualify based on a conflict of interest. Part I discusses motions to disqualify generally as well as identifying when the motion is simply being brought as a litigation tactic. Part II discusses more specifically the concept of a conflict of interest and the circumstances required to disqualify an entire firm from representation.

DISCUSSION

I. Courts Look to Outside Factors Influencing a Motion to Disqualify When No Professional Rule Has Been Violated.

A motion to disqualify is the “axiomatic and principal method” for a party-litigant to bring the issue of a conflict of interest to the court.⁹ In deciding a motion to disqualify, the court

⁵ See *In re* Maxus Energy Corp., 626 B.R. 249, 255 (Bankr. D. Del.) (noting “this court...has adopted the American Bar Association’s Model Rules of Professional Conduct to govern the conduct of the attorneys appearing before it”); See also *In re* David Cutler Indus., Ltd., 432 B.R. 529, 539 (Bankr. E.D. Pa. 2010).

⁶ Badgergrow, *supra* at 21.

⁷ Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir.1983).

⁸ *Id.*

⁹ Hamrick v. Union Twp., 79 F. Supp. 2d 871, 874 (S.D. Ohio 1999).

must consider: (1) whether “an ethical violation has actually occurred” and (2) whether “disqualification is the appropriate remedy.”¹⁰

Motions to disqualify are determined by a case-by-case basis.¹¹ When looking at a particular case, courts should disqualify “only when it determines...that disqualification is an appropriate means of enforcing the applicable disciplinary rule.”¹² That is because the consequence is a drastic one – i.e., preventing one from its choice of counsel. Accordingly, it must be used only sparingly.

Furthermore, motions to disqualify “must be viewed with extreme caution . . . for their use can serve tactical or harassment purposes as opposed to the more righteous goal of protecting the attorney-client relationship.”¹³ Where there is no apparent violation of the professional rules of conduct, courts will look to outside factors influencing a motion to disqualify.¹⁴ For example, In *Mumma*, the Third Circuit found no violation of the Pennsylvania Rules of Professional Conduct.¹⁵ The court then began a factual analysis finding the appellant had engaged in litigation against his family for decades with conduct bordering on “harassment.”¹⁶ The court concluded the motion to disqualify was simply another harmful tactic used to slow litigation.¹⁷

A. Motions to Disqualify Made Amid Litigation or After Unreasonable Delay Will be Viewed Critically by the Courts.

¹⁰ Amir Shachmurove, *A Devilishly Daring Gambit: A Partial Roadmap Through the Federal Common Law of Disqualification in A Newly Modeled World*, 70 S.C. L. Rev. 261, 272 (2018).

¹¹ *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121, 1124 (N.D. Ohio 1990).

¹² *United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980).

¹³ *Golson-Dunlap v. Am. Motorists Ins.*, No. 1:05-cv-1191-JDT-TAB, 2007 WL 925260, at *6 (S.D. Ind. Mar. 26, 2007).

¹⁴ *Mumma v. Bobali Corp.*, 382 F. App'x 209, 210 (3d Cir. 2010).

¹⁵ *Id.*

¹⁶ *Id.* at 211.

¹⁷ *Id.*

Vexatious timing of a motion to disqualify is an indicator to courts that the motion may not be meritorious.¹⁸ New York’s Appellate Division, Second Department denied a motion to disqualify in part because it was brought amid the litigation.¹⁹ The court reasoned, “it can be inferred that the motion to disqualify was made to secure a tactical advantage, as it was made in the midst of litigation and as [appellant] knew of the attorney’s representation well before he made the motion.”²⁰

Just as motions to disqualify during litigation cause courts to question party’s motives, an unreasonably delayed motion can raise the same suspicions.²¹ There is not a specific amount of time courts deem to be unreasonable. However, when looking at the timing of the motion the court also considers when the movant learned of the conflict, whether the movant was represented by counsel during the delay, and why the delay occurred.²² Instances in which a motion to dismiss has been brought after a substantial amount of time and the moving party was aware or should have been aware of the alleged conflict of interest at the time the action was commenced, is deemed a waiver of their objection to the opposing party’s counsel.²³

II. Conflicts of Interest are Commonly the Basis of a Motion to Disqualify

In today’s litigation, the most common basis for a motion to disqualify is a conflict of interest. Federal and state courts have historically recognized ten categories for an attorney’s disqualification, (1) concurrent client conflicts of interest; (2) personal interest conflicts, (3) former client conflicts of interest; (4) receipt of confidential, privileged, or stolen information;

¹⁸ *Voss v. 87-10 51st Ave. Owners Corp.*, 740 N.Y.S.2d 371, 373 (2002).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Hele Asset, LLC v. S.E.E. Realty Assocs.*, 106 A.D.3d 692, 694, 964 N.Y.S.2d 570, 572 (2013) (denying a motion to disqualify that was made six years after the action had begun and discovery was completed). *See also* *Com. Ins. Co. v. Graphix Hot Line, Inc.*, 808 F. Supp. 1200, 1209 (E.D. Pa. 1992) (emphasizing that this motion to disqualify was brought two years after the action had commenced and was likely “to obtain a tactical advantage”).

²² *Id.* at 1208.

²³ *Id.* at 573.

(5) imputed misconduct including conflicts of interest; (6) lawyers as witnesses; (7) contact with a represented party; (8) misconduct with witnesses; and (9) any unspecified misconduct deemed bothersome or troubling (10) appearance of impropriety.²⁴ None of these individual bases are “mutually exclusive” and the same facts can support more than one ground to disqualify.²⁵

A. Conflict of Interest Generally

A conflict of interest exists when “there is a significant risk that the representation . . . will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person.”²⁶ There are four types of conflict: (1) positional conflicts; (2) concurrent client conflicts; (3) former client conflicts; and (4) prospective client conflicts. A positional conflict does not necessarily involve another client but may involve an attorney previously having a “contrary position” on a matter important to his current client.²⁷

Typically, a lawyer can take altering positions on a matter if it is in different tribunals at different times with different clients unless “concrete and discernible harm can be shown.”²⁸ To avoid concurrent conflicts, most states follow the rule that a lawyer may not act adversely to a current client.²⁹ For former clients, a conflict exists “whenever a substantial relationship exists between matters, or the attorney once enjoyed confidential information material to his or her current litigation.”³⁰ Finally, regarding prospective clients, a conflict exists when “represent[ing] a client with interests materially adverse to those of a prospective client in the same or a

²⁴ Shachmurove *supra* at 276.

²⁵ *Id.* at 277.

²⁶ NuStar Farms, LLC v. Zylstra, 880 N.W.2d 478, 482 (Iowa 2016).

²⁷ Restatement (Third) of the Law Governing Lawyers § 128 (2000).

²⁸ Model Code of Pro. Resp. 1.7, Cmt. 24 (Am. Bar Ass’n 1983).

²⁹ *Id.* at 1.7(a).

³⁰ Shachmurove, *supra* at 279 (2018).

substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter”³¹

B. If a Court Deems an Attorney’s Previous Representation and Current Representation

“Substantially Related” the Motion to Disqualify is Granted.

When determining whether a conflict of interest exists most courts refer to the standards outlined in the Professional Rules of Responsibility.³² The “substantial relationship test” appears in Model Rule 1.9(a) and has two distinct elements.³³ First, a movant must prove that an attorney-client relationship exists. This can be established by representation of a client in court, providing legal advice, or an action on behalf on the client in connection with the law.³⁴ Second, a movant must establish that the attorney likely obtained confidential information in the prior representation that is relevant in the current representation.³⁵

Parties do not have to disclose confidential information, nor do they need to provide specific breach of confidence in order to assert a substantial relationship.³⁶ Instead, “where it can be reasonably said that in course of former representation attorney might have acquired information related to subject matter of his subsequent representation, it is the court’s duty to order attorney disqualified” based on an attorney’s prior practice that the attorney acquired confidential information.³⁷

The Bankruptcy Code provision governing conflicts dictates that “disqualification is mandated only where there is an actual conflict with the interests of the debtor’s estate and a

³¹ Model Code of Pro. Resp. 1.18(c) (Am. Bar Ass’n 1983).

³² Shachmurove, *supra* at 280.

³³ *Id.* at 281.

³⁴ Hamrick v. Union Twp., 79 F. Supp. 2d 871, 875 (S.D. Ohio 1999).

³⁵ *In re Am. Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1992).

³⁶ Hull v. Celanese Corp., 513 F.2d 572 (2d Cir. 1975).

³⁷ *Id.*

court may not disqualify an attorney on the appearance of conflict alone.”³⁸ Furthermore, the test of Section 327 states that counsel “must not hold or represent an interest adverse to the estate,” and “must be a disinterested person.”³⁹ The purpose of these principles is to ensure counsel can “competently and vigorously represent the trustee or debtor in possession.”⁴⁰ In *In re Boy Scouts of America*, the Delaware Bankruptcy Court denied a motion to disqualify because the movant did not provide any evidence as to specific, relevant, confidential information the opposing party had obtained.⁴¹ Without specific evidence of a conflict of interest or evidence that counsel is unable to adequately represent their client, there is no violation of Section 327 of the Bankruptcy Code.⁴²

Similarly, Pennsylvania law dictates that two representations of similar facts, alone, are insufficient to be classified as a substantial relationship.⁴³ However, if the attorney “‘might’ have acquired confidential information related to subject matter of a subsequent representation, Pennsylvania law would prevent [the] attorney from representing [the] second client.”⁴⁴ For example, in *Com. Ins. Co.*, the court found an attorney’s prior representation of a business owner who suffered damage from a fire and his current representation involving a negligence claim with the same fire was not substantially related.⁴⁵ Since the scope of the attorney’s previous representation was so narrow any confidences that he may have received would not be relevant to the current action which was focused solely on how the fire began.⁴⁶

C. Exceptional Cases of Conflict of Interest Resulting in the Disqualification of a Firm.

³⁸ 11 U.S.C.A. § 327(a).

³⁹ *Id.*

⁴⁰ *In re Boy Scouts of America*, 630 B.R. 122 (D. Del. 2021).

⁴¹ *Id.* at 135.

⁴² *Id.*

⁴³ *Com. Ins. Co. v. Graphix Hot Line, Inc.*, 808 F. Supp. 1200 (E.D. Pa. 1992).

⁴⁴ *Id.* at 1204.

⁴⁵ *Id.* at 1200.

⁴⁶ *Id.*

Only in rare, “exceptional” circumstances is a transferring attorney’s conflict imputed to their new firm, resulting in the disqualification of the entire firm from the litigation.⁴⁷ Typically, a transferring attorney undergoes an ethical screen upon transfer to a new firm, in which potential conflicts are identified.⁴⁸ Therefore, an instance in which an entire firm is removed signifies that the ethical screen performed is insufficient to protect the client’s interests.⁴⁹ When determining if an “exceptional circumstance” exists the courts will look to several factors including: “(1) the substantiality of the relationship between transferring attorney and the former client; (2) the time lapse between the matters in dispute; (3) the size of the firm and the number of disqualified attorneys; (4) the nature of the disqualified attorney’s involvement; and (5) the timing of the screen.”⁵⁰

When a “thorough, robust” ethical screen has been conducted in a timely manner it is likely not an exceptional circumstance.⁵¹ Furthermore, when the attorney had minimal billing hours on the previous representation and no involvement in the current representation, an ethical screen will be deemed adequate and there is no need to dismiss the entire firm for representation.⁵²

Meanwhile, the Fifth Circuit found where a firm has multiple previous representations of a client in a substantially related matter, it does amount to an “exceptional case” requiring the firm’s disqualification.⁵³ The court reasoned that because the firm had represented the opposing

⁴⁷ *In re Maxus Energy Corp.*, 626 B.R. at 256.

⁴⁸ *Id.*

⁴⁹ *Id.* at 259.

⁵⁰ *Id.* at 258.

⁵¹ *Id.* at 257.

⁵² *Id.* at 259.

⁵³ *In re American Airlines, Inc.*, 972 F.2d 627 (5th Cir. 1992).

party on essentially the same issue the firm had access to relevant confidential information of the opposing party and must be dismissed.⁵⁴

CONCLUSION

A motion to disqualify is a powerful tool and one that requires an in-depth factual analysis rather than a broad general rule.⁵⁵ With the continued lateral movement of attorneys to different law firms, conflicts of interest will continue to gain prominence. Courts are required to consider the policy concerns in granting a motion to disqualify such as the motivation of the movant as well as the burden placed on the opposing party.⁵⁶ Additionally, courts must afford parties “substantial deference” in their choice of counsel as well as ensure ethical rules are not violated in the process.⁵⁷ Weighing these considerations are vital in distinguishing motions to disqualify brought as a litigation tactic from those with merit.

⁵⁴ *In re American Airlines, Inc.*, 972 F.2d 628 (5th Cir. 1992).

⁵⁵ *United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir.1980).

⁵⁶ *Id.*

⁵⁷ *Hamilton v. Merrill Lynch*, 645 F.Supp. 60, 61 (E.D.Pa.1986).