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Federal Court Grants Motion to Disqualify Counsel Based on Rules 1.7, 1.9 and 1.10

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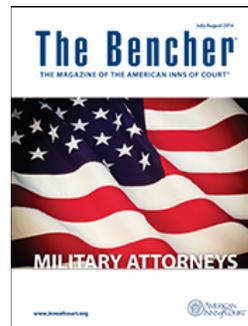
Francis G.X. Pileggi, Esquire



In two separate cases, the U.S. District Court for the District of Delaware granted two separate motions in two separate cases to disqualify counsel based on the Model Rules of Professional Conduct. These decisions provide practical insights for practitioners confronted with issues that often arise when attorneys change firms and when it is not clear whether a prior client relationship had been terminated.

These cases are also noteworthy because prior decisions by the U.S. District Court for the District of Delaware have denied motions to disqualify based on different factual circumstances where attorneys in different offices of the same

firm were arguably adverse to the same client. See, e.g., *Elonex I.P. Holdings v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 583 (D. Del. 2001). Also, by comparison, the Delaware Rules of Professional Conduct, which are slightly different than the Model Rules, are often applied by the Delaware state courts to disfavor disqualification even where a technical violation of the rule may exist, unless there is a material negative impact on the administration of justice. See, e.g., *In the matter of the Rehabilitation of Indemnity Insurance Corp.*, C.A. No. 8601-VCL (Del. Ch. Feb. 19, 2014).



In *Parallel Iron LLC v. Adobe Systems*, 2013 U.S. Dist. LEXIS 29382 (D. Del. 2013), the court addressed the claim that counsel for the plaintiff, Parallel Iron, served as opinion counsel for defendant Adobe at the time that Parallel Iron filed suit, thus creating an impermissible concurrent conflict of interest based on dual representation.

In this case the district court addressed the alleged breach of Model Rule 1.7(a) which prevents a lawyer from representing a client if the representation involves a concurring conflict of interest, absent client consent. Parallel Iron argued that there was no active attorney-client relationship at the time suit was filed. However, the court noted that under Delaware law even where no express contract or formal agreement evidencing an attorney-client relationship exists, courts look to the contacts between the potential client and its potential lawyer to determine whether it "would have been reasonable for the client to believe that the attorney was acting on its behalf as counsel." See *Boston Scientific Corp. v. Johnson & Johnson, Inc.*, 647 F. Supp. 2d 369, 373 (D. Del. 2009).

The court referred to Rule 1.16(b), which allows the termination of a client relationship by an attorney without any adverse impact on the client, but the burden is on the attorney to establish that termination. The court explained that even though no current work was either requested by the client or was being performed by the attorney, that alone would not suffice to establish the termination of the client relationship. The court relied on a New Jersey case for the position that a breach of Rule 1.7 seeks to protect the duty of loyalty, and a "per se" rule of disqualification should be applied when that rule is breached." The court found that counsel in this case should have been more proactive to clarify and establish the termination of the relationship prior to filing suit.

In a separate case by the same court in the matter of *Enzo Life Sciences, Inc. v. Adipogen Corp.*, 2013 U.S. Dist. LEXIS 164939 (D. Del. 2013), the court addressed alleged infractions of Model Rules 1.9 and 1.10. This case involved lawyers who switched firms. A partner in the plaintiff's firm formerly was with the firm that represented the defendant. The court explained that the purpose of Rule 1.9(a) is to prevent the potential that a former client's confidence and secrets may be used against him.

The court also explained that Rule 1.10(a) provides that an attorney's conflicts are imputed to the firm at which he works unless certain requirements are met. The court recited the requirements under Rule 1.10(a)(2) that must be satisfied if the conflict arises from the work that an attorney performed at a prior firm. Those requirements include but are not limited to the creation of an ethical screen to prevent the participation of the attorney, and the court recited a list of many other factors that the courts consider in order to determine whether a screening is adequate.

After applying those multiple factors in this case, the court concluded that for several reasons the screen was not effective and the imputation of the conflict would require that the motion for disqualification be granted.

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First, the court found that there was no prohibition that prevented the former defense counsel, who was now with the firm currently representing the plaintiff, from being in the presence of others in the firm who were discussing the case. Second, the screen provided no enforcement mechanism with penalties that would include termination for violation of the screen. The court found that a reminder e-mail informing employees of the firm that the screen must be followed was not sufficient nor was it tantamount to including in the original policy a penalty of termination for violation of the policy. In addition, the court was not persuaded that the former attorney for the defense firm would be able to satisfy Rule 1.10(a)(2)(i), which would prevent him from being apportioned any of the fee received by his new firm that represented the plaintiff. The court was influenced by the fact that the former attorney for the defendant's firm was now a named partner in the plaintiff's firm, and because of the relatively small size of the plaintiff's firm there was not sufficient evidence to demonstrate that the firm would be able to withhold any of the funds from this case to be shared with that attorney.

Lastly, the court explained that no actual prejudice is necessary in order for a motion to disqualify to be granted based on the public policy that clients must feel confident that they can divulge all relevant information to their attorneys without fear that such confidences will eventually be used against them in a later matter. Also important in the analysis of the court was a recitation of time entries that the attorney involved recorded on behalf of the defendant in the same litigation when he was previously a member of the firm currently representing the defendant.

These cases demonstrate the importance of addressing the factual nuances of potential conflicts when attorneys change firms, and to create clear documentation establishing when a client-relationship has been terminated.

Francis G.X. Pileggi is the Member-in-Charge of the Wilmington, Delaware, office of Eckert Seamans Cherin & Mellott, LLC. He summarizes the corporate and commercial decisions of Delaware Courts, and provides commentaries on legal ethics, at www.delawarelitigation.com.

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225 Reinekers Lane, Suite 770, Alexandria, VA 22314 | Phone: (703) 684-3590 | Fax: (703) 684-3607 | info@innsofcourt.org

