

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET
REGULATION,

Complainant,

v.

and

Respondents.

Disciplinary Proceeding
No. CMS020143

Hearing Officer—Andrew H. Perkins

ORDER DENYING COMPLAINANT'S MOTION TO DISQUALIFY COUNSEL

On April 14, 2003, the Department of Market Regulation (the "Department") moved to disqualify Respondent's defense counsel, _____ ("___") because of counsel's prior representation of three individuals who may be witnesses in this matter. The Department claims that ___'s continued representation of Respondent would be improper pursuant to the Minnesota Rules of Professional Conduct because, if counsel must cross-examine their former clients, counsel may be in the position of either breaching their former clients' confidences or foregoing a zealous defense of their current client.¹

¹ Rule 1.9 of the Minnesota Rules of Professional Conduct describes a lawyer's ethical obligations with respect to a former client. The Rule states that:

1. Factual Background

During the course of the investigation of trading in the securities of Minnesota American, Inc. ("MNAC"), ___ represented MS, Inc.'s ("MS") two principals, DS and Respondent, along with several other MS brokers, including JS and TJ. In June and July 2000, the Department took on-the-record interviews of DS, TJ, JS, and Respondent. ___ represented each of these individuals at the interviews. The Department then interviewed TJ a second time in March 2001, at which time he was represented by another attorney. Other than Respondent, none of these individuals is a respondent in the present proceeding. The Department settled charges against DS and TJ; the Department never asserted charges against JS.

The Department first raised the potential conflict of interest on April 14, 2003, one month before the scheduled hearing, after it filed its witness list disclosing that it intended to call TJ, JS, and DS to testify at the hearing.² The Department's Motion lacks detail about the nature of the potential conflict. In general, the Motion asserts that Respondent has argued that there is no evidence that he improperly disclosed inside information to any of the MS brokers and that the Department intends to call these persons as witnesses to contradict Respondent. In the Department's view, this testimony will require ___ to impeach its former clients, possibly using confidential information.

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same matter or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

² The Department filed its witness list on March 31, 2003.

2. Discussion

a) Principles Governing Motions for Disqualification of Counsel

As an initial matter, the Hearing Officer notes that the question of disqualification of counsel on ethical grounds is a novel issue. Accordingly, the Hearing Officer will look to federal case precedent in resolving this motion.

Generally, in civil cases, motions to disqualify counsel are disfavored.³ Disqualification is a drastic measure that courts should hesitate to impose except when necessary because disqualification serves to destroy an attorney-client relationship by depriving a party of the right to employ counsel of his choice.⁴ Moreover, courts have long recognized that such motions are often made for tactical reasons and that "disqualification motions inevitably entail often-unnecessary delay."⁵ Accordingly, federal courts impose a relatively high burden of proof on those who move to disqualify counsel.⁶

b) Standing

Respondent's primary challenge to the Department's motion is that the Department lacks standing to object to ___'s continued representation because the Department is not ___'s former client. Respondent contends that some courts have barred such motions on this ground, holding that "courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification."⁷ However, other courts have permitted such motions because the authority to disqualify an attorney stems from the court's supervisory power to maintain the

³ See, e.g. *Skidmore v. Warburg Dillon Read LLC*, No. 99 Civ. 10525, 2001 U.S. Dist. LEXIS 6101, at *4-5 (S.D.N.Y., May 11, 2001).

⁴ *Advanced Manufacturing Technologies, Inc. v. Motorola, Inc.*, No. CIV 99-01219, 2002 U.S. Dist. LEXIS 12055, at *7 (D. AZ, July 3, 2002).

⁵ *Skidmore*. 2001 U.S. Dist. LEXIS 6101, at *5.

⁶ *Id.*

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integrity of the trial process.⁸ The Hearing Officer adopts the latter view. In the appropriate circumstances, a party who is not an attorney's former client may have standing to move to disqualify the attorney. In this case, the Hearing Officer finds that the Department has standing to move for ___'s disqualification.

c) Use of Confidential Information/Adverse Interest

The Department contends that if the case proceeds to a hearing and it calls ___'s former clients to contradict Respondent, ___'s continued representation of Respondent will be "materially adverse" to its former clients' interests because ___ will need to cross-examine its former clients. Furthermore, the Department theorizes that such cross-examination may require ___ to use confidential information that it obtained during the course of its representation of its former clients.

As to the first prong of the Department's argument, the fact that ___ may attempt to impeach their former clients' credibility at the hearing "is too slender a reed on which to rest a disqualification motion."⁹ As the court in *Skidmore* recognized, such cross-examination may be embarrassing or unseemly, but no tangible prejudice would result. None of the former clients is a respondent in this proceeding, and the Department cites no other grounds to support a finding of prejudice if ___ continues with its representation of Respondent.

Turning to the second prong of the Department's argument, the Department has failed to establish that ___'s continued representation would necessarily require it to breach any client confidences if it must cross-examine its former clients. As ___ points out in its Opposition, TJ, JS,

⁷ *United States v. Rogers*, 9 F.3d 1025, 1031 (2d Cir. 1993).

⁸ *Skidmore*, 2001 U.S. Dist. LEXIS 6101, at *8.

⁹ *Id.* at *14 (quoting *Board of Educ. V. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1978)).

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and DS each provided sworn testimony to NASD. Accordingly, ___'s use of the transcripts of that testimony would not necessarily involve the improper use of confidential information. TJ, JS, and DS have already provided the information to NASD at their interviews. In that sense, the information is "public," not confidential. Thus, questioning them about those statements would not involve the disclosure of a "confidence or secret" as those terms are defined by the Minnesota Rules of Professional Conduct.

In conclusion, the Department's Motion fails to establish sufficient grounds for the Hearing Officer to take the extraordinary step of disqualifying defense counsel at the eve of trial. While there is no evidence that the Department filed its Motion in bad faith to gain a tactical advantage, the Hearing Officer does note that the potential conflict has been known to the Department for a considerable time and that the Department has presented no explanation for its delay in bringing this Motion. The Hearing Officer must balance this delay against the undeniable prejudice the Respondent will suffer if ___ is disqualified at this late date. Thus, the Department's Motion to Disqualify Counsel is denied.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

April 30, 2003