ANALYSIS

Motions To Disqualify Opposing Counsel, Raising the Rights of Another

"When faced with a disqualification motion, 'the court's function is to take such action as is necessary to insure the proper representation of the parties and fairness in the conduct of the litigation.'"

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Litigation

By Elliott Scheinberg | October 27, 2022 at 11:00 AM

In *Van Ryn v. Goland*, 189 A.D.3d 1749 (3d Dept. 2020), plaintiff moved to disqualify his wife's counsel, with whom plaintiff never had a prior attorney-client relationship, based on a potential conflict of interest between the wife and *her* counsel. In essence, in contravention of the general prohibition against a party's raising the rights of another in litigation plaintiff was asserting his wife's rights. The Third Department, nevertheless, addressed plaintiff's claims on the merits without any mention of the prohibition.

The right to be represented by counsel of choice. "Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar with the particular matter." *Tekni-Plex v. Meyner and Landis*, 89 N.Y.2d 123, 131-32 (1996). "Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice. The right to counsel of choice is not absolute and may be overridden where necessary—for example, to protect a compelling public interest—but it is a valued right and any restrictions must be carefully scrutinized." *S & S Hotel Ventures Ltd. Partnership v. 777 S.H.*, 69 N.Y.2d 437, 443 (1987).

The three elements of disqualification, no "mechanical application" of the test. "A party seeking disqualification of [an] adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse." *Tekni-Plex*, 89 N.Y.2d at 131; *Solow v. Grace & Co.*, 83 N.Y.2d 303, 308 (1994); *Benevolent and Protective of Elks of United States v. Creative Comfort Sys.*, 175 A.D.3d 887, 888 (4th Dept. 2019).

"In assessing whether the moving party has met its burden of satisfying each of the three requirements for disqualification [] courts should avoid mechanical application of blanket rules. Rather, the three pivotal inquiries [] *require careful appraisal of the interests involved*. Only where the movant satisfies all three inquiries does the

irrebuttable presumption of disqualification arise." *Tekni-Plex*, 89 N.Y.2d at 131-32; *Van Ryn*, 189 A.D.3d at 1753 ("When considering a motion to disqualify counsel, the court must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of his or her choosing against the other party's right to be free from possible prejudice due to the questioned representation.") "Any fair rule of disqualification should consider the circumstances of the prior representation." *Solow*, 83 N.Y.2d at 313.

"When faced with a disqualification motion, 'the court's function is to take such action as is necessary to insure the proper representation of the parties and fairness in the conduct of the litigation.'" *Bridges v. Alcan Const.*, 134 A.D.2d 316, 316 (2d Dept. 1987).

'**Motions to disqualify are generally not favored**.' *Felix v. Balkin*, 49 F. Supp. 2d 260, 267 (SDNY 1999). "Disqualification motions, unfortunately, have also been used as a litigation tactic to gain strategic advantage over an adversary." *Tekni-Plex*, 89 N.Y.2d at 131-32. "Motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts by forcing disqualification even though the client's attorney is ignorant of any confidences of the prior client. Such motions result in a loss of time and money, even if they are eventually denied. [The Court of Appeals] and others have expressed concern that such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused." *Matter of Colello*, 167 A.D.3d 1445, 1447 (4th Dept. 2018). "[W]e cannot ignore that where the Code of Professional Responsibility is invoked not in a disciplinary proceeding to punish a lawyer's own transgression, but in the context of an ongoing lawsuit, disqualification of a plaintiff's law firm can stall and derail the proceedings, redounding to the strategic advantage of one party over another … Already more than three years have elapsed since the present action was instituted." *S & S Hotel*, 69 N.Y.2d at 443.

Heavy burden to disqualify, doubts should be resolved in favor of disqualification. "Parties moving for disqualification carry a heavy burden' and must satisfy a high standard of proof. [D]oubts should be resolved in favor of disqualification.' [A] balance must be struck between being solicitous of a client's right freely to choose his counsel,' and protecting the need to maintain the highest standards of the profession' and the integrity of the adversary process.'" *Felix v. Balkin*, 49 F. Supp. 2d 260, 267 (SDNY 1999); *Kelly v. Paulsen*, 145 A.D.3d 1398, 1399 (3d Dept. 2016); *Roddy v. Nederlander Producing Co. of Am.*, 96 A.D.3d 509 (1st Dept. 2012) ("Doubts as to the existence of a conflict of interest must be resolved in favor of disqualification."); *Delaney v. Roman*, 175 A.D.3d 648, 649 (2d Dept. 2019).

The advocate-witness rule. "Under the so-called advocate-witness rule, subject to certain exceptions not applicable here, '[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact' (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7[a]). *Taylor v. Casolo*, 144 A.D.3d 1209, 1211-12 (3d Dept. 2016); *Matter of de Menil*, 195 A.D.3d 410, 410-11 (1st Dept. 2021). (See *Anderson & Anderson LLP-Guangzhou v. N. Am. Foreign Trading Corp.*, 45 Misc 3d 1210(A) (NY Sup 2014), affd., 139 A.D.3d 464 (1st Dept. 2016), re exceptions to the rule; Rules of Professional Conduct 3.7.

Disqualification requires a prior attorney-client relationship. *Bond v. Lichtenstein*, 129 A.D.3d 535 (1st Dept. 2015) affirmed an order denying defendant's disqualification motion based on a lack of standing to make the motion because there was no prior attorney-client relationship with plaintiff's attorneys (… Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9[a]). Nor was a conflict of interest presented by the attorneys' representation of plaintiff (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[a][1])."

"When the firm sought to be disqualified ha[s] never represented the moving party, that firm owe[s] no duty to that party. And it follows that if there is no duty owed there can be no duty breached." *Ellison v. Chartis Claims*, 142 A.D.3d 487, 487 (2d Dept. 2016); *Develop Don't Destroy Brooklyn v. Empire State Dev.*, 31 A.D.3d 144, 150 (1st Dept. 2006). "Since the defendant third-party plaintiff was neither a former nor a present client of the law firm of Roosevelt & Benowich, LLP, or of Leonard Benowich, she did not have standing to seek the disqualification of Benowich or his law firm from dual

representation of the plaintiff and the third-party defendants." *Hall Dickler Kent Goldstein & Wood v. McCormick*, 36 A.D.3d 758, 759 (2d Dept. 2007); see also *Turner v. Owens Funeral Home*, 140 A.D.3d 632, 634 (1st Dept. 2016); *Cunningham ex rel. Rogers v. Anderson*, 66 A.D.3d 1207, 1209 (3d Dept. 2009).

Conflict of interest is anchored in a breach of fiduciary duty owed by counsel to current and former clients, appearance of impropriety. A disqualification motion due to an alleged conflict of interest is anchored in a breach of a fiduciary duty owed by counsel to current and former clients. *HSBC Bank USA, N.A. v. Santos*, 185 A.D.3d 475, 477-78 (1st Dept. 2020).

Appearance of conflict of interest. "The standards of the profession exist for the protection and assurance of the clients and are demanding; an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests. '[W]ith rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.'" *Cardinale v. Golinello*, 43 N.Y.2d 288, 296 (1977). "Even when an actual conflict of interest may not exist, disqualification may be warranted based on a mere appearance of impropriety so long as there is actual prejudice or a substantial risk thereof. *Wiederman v. Halpert*, 172 A.D.3d 1442, 1443-44 (2d Dept. 2019); see also *McCutchen v. 3 Princesses and A P Tr. Dated February 3, 2004*, 138 A.D.3d 1223, 1226 (3d Dept. 2016); *In re Strasser*, 129 A.D.3d 457, 458 (1st Dept. 2015).

A court may sua sponte disqualify counsel if it finds a conflict of interest. "A court has the authority to act sua sponte to disqualify counsel if it finds a conflict of interest warranting disqualification." *HSBC Bank USA, N.A. v. Santos*, 185 A.D.3d 475, 477-78 (1st Dept. 2020); *Kantrowitz, Goldhamer & Graifman, P.C. v. Ayrovainen*, 122 A.D.3d 908 (2d Dept. 2014); *Bentz v. Bentz,* 37 A.D.3d 386, 387 (2d Dept. 2007) ("We discern nothing in the record before us which justified the sua sponte disqualification of the plaintiff's law firm from representing him in this action.")

Conflict of interest between parent and Attorney for the Child in child custody cases. In 2002, the Second and the Fourth Departments addressed the issue of parents suing the Law Guardians [now called the Attorney for the Child (AFTC)] for legal malpractice. In *Drummond v. Drummond*, 291 A.D.2d 368 (2d Dept. 2002), the Second Department rejected plaintiff's contention that her child's court-appointed Law Guardian (AFTC) committed legal malpractice. Significantly, "plaintiff did not have an attorney-client relationship with the Law Guardian and, therefore, did not have standing to assert a direct claim of malpractice against her … The plaintiff's contention that 22 NYCRR 136 is also applicable to a fee dispute with a Law Guardian is equally meritless since the child, and not the parent, is the Law Guardian's client." See also *Kerley v. Kerley*, 131 A.D.3d 1124, 1127 (2d Dept. 2015).

In *Bluntt v. O'Connor*, 291 A.D.2d 106 (4th Dept. 2002), the Fourth Department held that the mother lacked standing to bring a malpractice action against defendant Law Guardian (AFTC)], either on behalf of the child or individually, based on CPLR 1201. Holding that the mother's motion should have been dismissed because she and the Law Guardian were adverse parties, the Appellate Division observed, "Under most conditions, CPLR 1201 allows a parent to serve as a child's guardian in an action. 'Unless the court appoints a guardian ad litem, an infant shall appear by *** a parent having legal custody ***. A person shall appear by his guardian ad litem if *** the court so directs because of a conflict of interest or for other cause.'"

Noting the mother's "incontrovertible" "animus" toward the court and the Law Guardian, *Bluntt* emphasized the defendant's [the AFTC's] duty to the child, not to either parent. The child's and the mother's interests were plainly adversarial; the mother had obstructed the child's contact with the father, contrary to decisional authority which fosters the relationship with the noncustodial parent provided it is not against the child's best interest, the position advanced by the Law Guardian. CPLR 1201 notwithstanding, "a parent may be removed as natural guardian if he or she has an interest adverse to the infant ***, or if the infant's natural guardians have irreconcilable differences with each other." Id. at 113; *Stahl v. Rhee*, 220 A.D.2d 39, 44 (2d Dept. 1996); see also *Weiss v. Weiss*, 52 N.Y.2d 170, 175 (1981) ("Visitation

is a joint right of the noncustodial parent and of the child. This view does not lose sight of the fact that while legal custody may be in one or both of the parents, the fact that it is placed in one does not necessarily terminate the role of the other as a psychological guardian and preceptor.").

Conflicts of interest in small firms versus larger firms. In *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303 (1994), the Court of Appeals addressed disqualification based on conflict of interest occurring in a small firm and in a large firm: "In smaller, more informal settings the imputation of knowledge as a matter of law is necessary to protect the client and avoid the appearance of impropriety" (id. at 311), as opposed to potential conflict in large firms ("[I]t is a fact of life that many attorneys in today's society spend a substantial portion of their careers with large firms []. To attach to those attorneys an irrebuttable presumption that they have knowledge of all the business the firm handled during their employment, and thus are disqualified from later appearing in matters substantially related to any part of it, seriously disadvantages them and the clients who wish to retain them" (id. at 310)).

A firm "should be allowed to rebut that presumption by facts establishing that the firm's remaining attorneys possess no confidences or secrets of the former client. That procedure does no violence to our existing rules. In firms characterized by the informality exhibited by the Halperin firm in *Cardinale*, disqualification will be imposed as a matter of law without a hearing. If the firm can demonstrate prima facie that there is no reasonable possibility that any of its other attorneys acquired confidential information concerning the client, a hearing should be held after which the court may determine that disqualification may be unnecessary. The evidence must be sufficient, however, to establish that the former client's interests are fully protected and to overcome any suggestion of impropriety" (id. at 313).

'Van Ryn v. Goland'; 'Socy. of Plastics Indus.' The parties, in *Van Ryn v. Goland*, 189 A.D.3d 1749 (3d Dept. 2020), were embroiled in postjudgment litigation regarding an ambiguity in their separation agreement. Plaintiff appealed from an order denying his motion to disqualify defendant's counsel. Plaintiff alleged, inter alia, that there was a conflict of interest *between defendant and defendant's own counsel—not between defendant's counsel and himself*; *plaintiff alleged that defendant's counsel, who had never represented plaintiff, was at risk of personal liability to defendant for malpractice arising out of counsel's acknowledged error in drafting the agreement*.

"Defendant, an attorney, averred by affidavit that she understood the pertinent principles of ethics and conflict. She stated that her counsel had fully advised her of the alleged drafting error and the potential for a future malpractice claim, that her counsel had recommended that defendant obtain independent legal representation, and that defendant had rejected this advice because she wished to continue to be represented by the counsel of her choice." Id. at 1754. The waiver of the conflict belonged to defendant not the plaintiff.

The Appellate Division made no mention of the rule that "[w]hen the firm sought to be disqualified ha[s] never represented the moving party, that firm owe[s] no duty to that party [for which reason] there is no duty owed there can be no duty breached," above. The Appellate Division addressed plaintiff's erroneous contention, inter alia, on the merits, "plaintiff failed in the first instance to meet his burden to establish that there [wa]s a risk of any significance that defendant and her counsel have adverse interests. Plaintiff's argument that malpractice liability may arise if he prevails in this litigation necessarily leads to the conclusion that defendant and her counsel share an identical interest in advocating for defendant to prevail."

Van Ryn minimized plaintiff's assertion, "defendant's counsel will have personal liability for an eventual malpractice claim was conjectural" because such liability could only come to be if a certain sequence of Rube Goldberg-like events first occurred. Once it was clear that there had never been an attorney-client relationship between plaintiff and defendant's counsel, conjecture, along with plaintiff's other contentions, became irrelevant and ought not to have been reached.

Very significantly, absent from but critical to *Van Ryn* was the "general prohibition on one litigant raising the legal rights of another." *Socy. of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991); *Fleischer v. New York State Liq. Auth.*, 103 A.D.3d 581, 583 (1st Dept. 2013); *Douglaston Civic Assn. v. City of New York*, 199 A.D.3d 562 (1st Dept.

2021) (citing *Socy. of Plastics*); *Matter of Rodriguez v. Feldman*, 126 A.D.3d 1557, 1558 (4th Dept. 2015), (citing *Socy. of Plastics*).

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