1979 WL 1613
United States District Court, E.D. Arkansas, Western Division.

Little Rock School District, et al.
v.
Borden, Inc., et al.
State of Arkansas
v.
Borden, Inc., et al.
United States
v.
Borden, Inc., et al.

No. LR-76-C-41
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No. LR-C-77-126
|
No. LR-C-77-108
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Filed April 5, 1979

EISELE, D. J.

Memorandum and Order

***1** Pending before this Court is defendant Dean Foods' motion to disqualify attorneys for the plaintiff State of Arkansas in this antitrust case. This motion is based upon the prior association of one of the State's attorneys, Mr. Royce Griffin, a deputy attorney general for the State of Arkansas and head of the antitrust division of the Office of the Attorney General, with the law firm of Owens, McHaney & McHaney, of Little Rock, Arkansas, now Owens, McHaney & Calhoun, which firm is one of the counsel for defendant Dean Foods in this case. Dean states that, during Mr. Griffin's association with the McHaney firm, from May, 1974, to December 1, 1975, that firm performed legal work for Dean that is "substantially related" to issues involved in the present antitrust case, and contends that, therefore, Mr. Griffin, as an associate in the firm, must be conclusively presumed to have had access to, and to have received, the confidential information pertaining thereto. Under such circumstances, Dean argues that Mr. Griffin's later representation of the State of Arkansas in an adversary position to his former client (Dean) is in violation of Canons 4 and 9 of the Code of Professional Responsibility, providing that "a lawyer should preserve the confidences and secrets of a client" and that a lawyer should avoid "even the appearance of professional impropriety."[1]

Pursuant to the affidavits, depositions, exhibits and testimony submitted with regard to this motion, the Court made certain findings of record which are reaffirmed here. The Court further finds that Mr. Royce Griffin was an associate with the McHaney firm during a period in which that firm represented Dean in a matter involving a debt owed Dean by one of Dean's distributors, Buckingham & Shutt, Inc., which ended up as a claim in bankruptcy. Mr. Griffin did a very small amount of work in this matter, consisting of a title search and the filing of certain papers in the bankruptcy court. His total work time was one hour and twenty minutes. Mr. Griffin left the firm on December 1, 1975.

The Court having now examined defendants' Exhibit J, the "Dean Foods Company–Buckingham & Schutt, Inc.," file, further finds that said file was the only one maintained in the McHaney law firm during the period when Mr. Royce Griffin was associated with that law firm which can be said to contain any information that might be considered substantially related to the issues in this case. The Buckingham matter indirectly concerned the operational and financial relationship of Dean to its distributors, and that issue has also become of potential importance in this antitrust action. In an attempt to determine the extent of the claimed loss, Dean and its attorneys endeavored to work up a theoretical sales structure based upon purchases from Dean and also upon known facts regarding the price structure used by Buckingham. Customer lists were developed and an investigation undertaken to determine how much each purchaser bought during 1975, one of the very years covered by the antitrust action. It would serve no useful purpose for the Court to detail in all respects the information in defendants' Exhibit J or the inferences that might properly be drawn therefrom, because that exhibit, sealed by order of the Court, will remain a part of the evidence upon the disqualification issue. Suffice it to say that, when carefully analyzed, one would have to conclude that the information therein would be substantially related to at least certain issues, or potential issues, in the current case, and would provide some modicum of pertinent information and also helpful leads

for further inquiry.

***2** Of course, the Court has already found that Mr. Royce Griffin did not in fact ever look at the Dean-Buckingham file and had, and has, no knowledge of its contents. If, however, the law presumes him to have such knowledge, the Court concludes that such knowledge is substantially related to certain issues in this case.

In resolving the dispute before the Court, it is well to keep in mind the comments of Judge Kaufman in *Emle Industries, Inc. v. Patentex, Inc.*, 478 F. 2d 562, 564-65 (2d Cir. 1973):

> We approach our task as a reviewing court in this case conscious of our responsibility to preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility. This balance is essential if the public's trust in the integrity of the Bar is to be preserved. Moreover, we are mindful that ethical problems cannot be resolved in a vacuum.

The law is clear that a lawyer's representation of a party in a suit against a former client concerning a matter substantially related to some work previously handled by that lawyer for the former client is a sufficient and proper ground for disqualification of the lawyer. The attorney-client relationship raises an irrefutable presumption that confidences were disclosed. See, *e. g., T. C. Theatre Corporation v. Warner Brothers Pictures* [1953 TRADE CASES P 67,500], 113 F. Supp. 265 (S. D. N. Y. 1953); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F. 2d 562 (2d Cir. 1973); *Cannon v. U. S. Acoustics Corp.*, 398 F. Supp. 209 (N. D. Ill. 1975), aff'd in relevant part, 534 F. 2d 1118 (7th Cir. 1976); *Fred Weber, Inc. v. Shell Oil Co.* [1977-2 TRADE CASES P 61,754], 566 F. 2d 602 (8th Cir. 1977); *Westinghouse Electric Corp. v. Gulf Oil Corp.* [1978-2 TRADE CASES P 62,372], 588 F. 2d 221 (7th Cir. 1978). Further, the presumed access of a partner to confidential information results in an imputation of knowledge of that information to others in his firm. See, *e. g., Weber supra. Cf. Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc. et al.*, No. 78-1180 (7th Cir., filed Feb. 27, 1979). Accordingly, the Court has, with some hesitation, concluded that Mr. Griffin must be disqualified in this case. It must be noted that many disqualifications, including this one, result not from intentionally wrongful or unethical conduct by the attorney but from the operation of rules that are based on presumptions established in order to guard, ultimately, against even the appearance of impropriety.

Mr. Griffin contends that his representation of Dean falls within the "peripheral representation" exception, articulated in *Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, 518 F. 2d 751 (2d Cir. 1975). This exception allows a court to avoid disqualifying an attorney whose own actual work for a client was not *itself* "substantially related" to the matter the attorney later becomes involved in against the former client, regardless of the substantial relationship thereto of other work of other attorneys in his firm, where the attorney had, at some undefined early point in his career, so little to do with the client's business and such a subordinate status within the firm that it would not be fair to impute to him the "knowledge" of the firm generally. It is said that under such circumstances there is not even the appearance of impropriety in allowing the young attorney's subsequent representation of interests adverse to that former "client." The true attorney-client relationship upon which the disqualification rules are based is said to be lacking in situations where a young attorney enters "briefly on the periphery for a limited and specific purpose relating solely to the legal question." 518 F. 2d at 756.

***3** Dean contends that this "Wall Street associate" rule, formulated in the context of very large law firms, cannot possibly be applied to the three man firm in this case. But the basis for the exception is the nature of the young attorney's relation to his firm and the character and extent of the work done for the client, and not upon the size, *per se*, of the law firm. Therefore, the Court rejects Dean's contention that the peripheral representation exception cannot under any circumstances apply to a small law firm. But, *cf.* Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy, 73 NW. L. Rev.* 996, 1017-18, 1036-37 (1979). The Court further rejects the argument that the Eighth Circuit has, in *Weber*, rejected the peripheral representation exception.[2] It may reject it, but it has not yet.

Nevertheless, the Court finds that Mr. Griffin's

association with the McHaney firm was such that restricted and limited roles for Mr. Griffin in the firm's business were not the norm and that most matters were the subject of general discussion in the typical, relatively informal atmosphere of most small law firms. The Court concludes that the peripheral representation exception should not be applied to the circumstances of this case.

Dean also contends that, if Mr. Griffin is disqualified, then all of his co-counsel in the present case must also be disqualified by the operation of a second presumption: that confidential information presumed to have been obtained by Mr. Griffin must also be presumed to have been disclosed by him to his co-counsel. Such a second tier irrebuttable presumption of disclosure of confidences is, however, improper where cocounsel were in no way involved in any attorney-client relationship with the client, here Dean. See, *e. g., American Can Co. v. Citrus Feed Co.*, 436 F. 2d 1125 (5th Cir. 1971); *Akerly v. Red Barn Systems, Inc.* [1977-1 TRADE CASES P 61,271], 551 F. 2d 539 (3d Cir. 1977); *Wilson P. Abraham Construc. Corp. v. Armco Steel Corp.* [1977-2 TRADE CASES P 61,625], 559 F. 2d 250 (5th Cir. 1977); *Brennan's, Inc. v. Brennan's Restaurant*, No. 77-1699 (5th Cir., Feb. 26, 1979); *Fred Weber, Inc. v. Shell Oil Co.* [1977-2 TRADE CASES P 61,754], 566 F. 2d 602 (8th Cir. 1977); Liebman, *supra*, 73 *Nw. L. Rev.* at 1000, n. 18.

Dean also contends that, upon the disqualification of an attorney, the entire work product of the disqualified attorney is presumptively tained and cannot be used by successor, or in this case, continuing, counsel. The question of the availability of such work product must be answered on the basis of the facts of the particular case rather than upon any irrebuttable presumption. See *International Business Machines Corp. v. Levin* [1978-1 TRADE CASES P 62,11 4], 579 F. 2d 271 (3d Cir. 1978); *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F. 2d 201 (7th Cir. 1978). In this case, no work at stake actually involved the use of any confidential information obtained from the former client, Dean, and a ban on the use of such work could do a substantial injustice to the client of the disqualified counsel, imposing a sanction not on the attorney but upon the client. No such ban will be imposed.

***4** As a final matter, Mr. Griffin contends that the doctrine of laches bars Dean's raising of this disqualification issue at this time, because Mr. McHaney, as one of Dean's attorneys in this case, obviously knew from the inception of the case that one of plaintiff's counsel was his former associate and also has known of the extent of his firm's representation of Dean during Mr. Griffin's tenure with the firm. The Court, however, recognizes that the situation in *Central Milk Producers Co-op v. Sentry Food Stores* [1978-1 TRADE CASES P 61,953], 573 F. 2d 988 (8th Cir. 1978), on which Mr. Griffin heavily relies, involved a more egregious situation that actually amounted to an estoppel of a party to assert a disqualification motion because of a specific agreement with regard to the screening of the subject attorney. On the other hand, the Court rejects Dean's contention that the doctrine of laches can never be applied to a disqualification motion. A motion to disqualify should ordinarily be made with reasonable promptness after a party discovers the facts that form the basis for the motion In this case, Dean's Chicago attorneys have represented to the Court that they moved for disqualification promptly upon *their* learning of Mr. Griffin's prior association with the McHaney firm, albeit that, as stated, Mr. McHaney knew of this fact all along. The laches issue here is quite close, but on balance the Court concludes that, because of the important role of Mr. Griffin, the fact that the case is still in the discovery phase, the shortness of the delay (when compared to other cases), and the importance of the ethical issue involved, the defense of laches must fail.

It is therefore Ordered that defendant Dean Foods' motion to disqualify Mr. Royce Griffin be, and it is hereby, granted. It is further Ordered that Dean Foods' motion to disqualify other counsel for plaintiff be, and it is hereby, denied.

All Citations

Not Reported in F.Supp., 1979 WL 1613, 1979-1 Trade Cases P 62,568

Footnotes

[1] Ethical Consideration 4-6 states that:

'The obligation of a lawyer to preserve the confidences and secrets of his clients continues after the termination of his employment."

The principle underlying Canon 4 has been stated as follows:

"[A] client should be encouraged to reveal to his attorney all possibly pertinent information. . . . A client should not fear that the confidences conveyed to his attorney in one action will return to haunt him in a later one."

Richardson v. Hamilton Int'l Corp., 469 F. 2d 1382, 1384 (3rd Cir. 1972).

The principle underlying Canon 9 is stated in Ethical Consideration 9-1: "a lawyer should promote public confidence in our legal system and in the legal profession."

[2] The *Weber* case contained broad statements of the principles developed under Canon 4 concerning disqualification. Although one can argue that it can be read as undermining the whole idea of "peripheral representation," its actual attitude on that issue will have to await a case where the facts permit the issue to be developed. Dean's statement in its brief that the Seventh Circuit recently "specifically rejected the 'periphery' argument" in *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, No. 78-1180 (7th Cir., filed Feb. 27, 1979), is also misleading. See *Novo, supra*, slip op. at 9.