New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
VOLUME 242—NO. 107 WWW.NYLJ.COM THURSDAY, DECEMBER 03, 2009 An ALM Publication

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Can Disqualification Be Avoided?

By **Edward M. Spiro** And **Judith L. Mogul**

Not all disqualification motions are created equal. Where a challenged representation threatens to encroach on an attorney's duty to a former or current client, it will be subject to far more exacting scrutiny than a motion seeking disqualification under the advocate-witness rule, which counsels against an attorney testifying and representing a party before the same tribunal. Several recent decisions illustrate the contrasting approaches to different types of disqualification motions and provide useful practical guidance on how attorneys can (and in some instances cannot) avoid disqualification in the midst of litigation.

The Advocate-Witness Rule

When a party becomes embroiled in litigation over a deal gone sour, it often, understandably, wants the lawyers who represented it in the transaction to handle the litigation as well. Lawyers considering such representations (particularly where they may be fact witnesses on a disputed point of importance to the case) should be mindful of the advocate-witness rule, and plan accordingly so that their client will not unexpectedly have to obtain new representation as the case progresses.

The advocate-witness rule, set forth in Rule 3.7 of the New York Rules of Professional Conduct, has two parts. Subsection (a) provides that a lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact. Subsection (b) of the rule, also referred to as the imputation provision, prohibits a lawyer from acting as an advocate in a matter if: (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or (2) the lawyer is precluded from doing so by conflict of interest ethics rules.

Courts have traditionally set a high bar for motions to disqualify under the advocate-witness rule. For cases seeking disqualification under the imputation provision, that bar was raised even higher by the recent decision of the U.S. Court of Appeals for the Second Circuit in *Murray v. Metropolitan Life Insurance Co.*, reversing an order disqualifying the law firm of Debevoise & Plimpton on the eve of trial.[1] Plaintiffs in that class action against Metropolitan Life Insurance Company alleged that the company violated federal securities laws by misrepresenting information to its policyholders when it demutualized. Debevoise represented MetLife in the lawsuit and had also represented the company during the demutualization in 2000.

> Subsection (a) of the advocate-witness rule provides that a lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact.

Plaintiffs moved to disqualify Debevoise arguing that the law firm had an attorney-client relationship with plaintiff policyholders by virtue of its prior representation of the company. In a previous discovery ruling, the district court had rejected MetLife's assertion that communications between itself and Debevoise during the demutualization process were privileged, finding that because plaintiffs were policyholders at the time the documents were created, they qualified as "owners" of the then-mutual company and were therefore clients of Debevoise.

More than two years after that ruling, following the breakdown of settlement discussions, plaintiffs moved to disqualify Debevoise arguing that Debevoise could not "jump sides" in the litigation and be adverse to its former clients. They argued in the alternative, that Debevoise should be disqualified under the advocate-witness rule because plaintiffs intended to call several Debevoise attorneys as witnesses. The district court disqualified Debevoise on the first ground, without reaching the second.

The Second Circuit gave short shrift to plaintiffs' contention that they were former clients of Debevoise. The court ruled that although policyholders constitute mem-

EDWARD M. SPIRO *and* JUDITH L. MOGUL *are principals of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, both concentrating in commercial litigation. Mr. Spiro is co-author of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson West 2009).* GRETCHAN R. OHLIG LLP, *an associate at the firm, assisted in the preparation of this article.*

bers of the insurance company for whose benefit the company is organized, they are not "partners" of the company and hold only a contractual relationship with the company. Accordingly, the court refused to treat the policyholders as former clients for disqualification purposes.

The court then turned to plaintiffs' argument that the advocate-witness rule mandated Debevoise's disqualification. It identifed four potential risks to the adversary process from an advocate appearing in the same case as both trial counsel and witness: (1) the lawyer might appear to vouch for his own credibility; (2) the lawyer's testimony might place opposing counsel in a difficult position when cross-examining an attorney-adversary; (3) there is concern that the testifying attorney may distort the truth as a result of bias in favor of his client; and (4) the line between argument and evidence may be blurred, thus confusing the jury.[2]

The court noted that these risks are greatly reduced in imputation cases, because the trial counsel is not the lawyer/witness but only a member of that lawyer's firm. Consistent with its previous decisions seeking to limit tactical abuse of the advocate-witness rule, the Second Circuit announced a new formulation of the rule for imputation cases: "we now hold that a law firm can be disqualified by imputation only if the movant proves by clear and convincing evidence that [A] the witness will provide testimony prejudicial to the client, and [B] the integrity of the judicial system will suffer as a result."[3]

Applying that new formulation, the court held that disqualification was not appropriate. Three of the four potential Debevoise witness/lawyers were transactional attorneys, not litigators, and the remaining attorney, although a litigator actually on MetLife's trial team, was not going to act as an advocate before the jury. On the crucial question of prejudice to MetLife, the court noted that the Debevoise witnesses would do little more than authenticate documents and confirm facts not otherwise in dispute. The court held that plaintiffs had "failed to establish the clear and convincing evidence of prejudice necessary to justify the extreme remedy of disqualification by imputation."

The Second Circuit went on to conclude that any arguable harm to the integrity of the judicial process posed by Debevoise remaining as trial counsel for MetLife was far outweighed by the harm that would result from disqualification at that juncture. In addition to the fact that disqualification would interfere with MetLife's interest in securing counsel of its choice, the court found that the swift and orderly administration of justice would be impaired by disqualifying the attorneys who had been involved in that complex, high-stakes litigation for more than nine years. Finally, the court found that plaintiffs' "lengthy and unexcused delay" in seeking disqualification which "suggests opportunistic and tactical motives, magnifies the harms to the judicial system that already inhere in any disqualification by imputation, abuse the expectations of jurors, and has the general tendency to impair rather than promote confidence in the integrity of the judicial system."[4]

A Distinction

If the plaintiffs in *MetLife* waited too long to seek disqualification, a pair of recent decisions by judges from the U.S. District Court for the Southern District of New York illustrate that such motions can also be brought too soon. Thus, in *Gormin v. Hubregsen*[5] and *Amusement Industry Inc. v. Stern*,[6] Judge Paul G. Gardephe and Magistrate Judge Gabriel W. Gorenstein, respectively, each denied motions to disqualify under the advocate-witness rule, at least in part because those motions were premature.

In *Gormin* the dispute turned, in part, on whether the plaintiff had improperly diverted corporate opportunities from the defendant investment partnership. Based on their discovery of certain e-mails between the plaintiff and his attorney which preceded the litigation and which concerned the challenged business opportunities, defendants sought to disqualify the plaintiff's attorney arguing that the attorney would likely be called to testify at trial. Judge Gardephe denied the motion in reliance on an established line of cases finding that disqualification motions made "pre- or during discovery are premature."[7]

Judge Gardephe noted that there was little risk of "trial taint" in this case because the attorney whose disqualification was sought was not going to appear as trial counsel for plaintiff. He distinguished decisions ordering pretrial disqualification of attorney/witnesses, observing that in those cases, the attorney was a "vital fact witness" or played an otherwise dominant role in the dispute between the parties.[8] Here, Judge Gardephe stressed that given the early stage of the litigation, it was impossible to determine how important the attorney would be as a witness or if his testimony would hurt or help plaintiff.[9]

Judges in two recent decisions from the Southern District of New York denied motions to disqualify under the advocate-witness rule, at least in part because those motions were premature.

Similarly, in *Amusement Industry*, the attorney/witness warded off disqualification by proactively assuring the court that he would limit his role in the case. The attorney had handled the real estate transaction which was the subject of that litigation. Judge Gorenstein refused to order his pretrial disqualifcation because the attorney had represented that he would not act as trial counsel, and would not even take depositions of potential witnesses. Judge Gorenstein observed that "'[t]he concerns underlying [the advocate-witness rule] arise out of an attorney's presence at trial. Allowing an attorney to continue his representation pre-trial does nothing to undermine those interests, and protects the clients' right to choose their own counsel.'"[10]

Judge Gorenstein rejected the argument that participation in pretrial litigation threatened jury confusion. Quoting from *Gormin*, Judge Gorenstein found little risk

of jury confusion even if a trial witness/attorney has conducted videotaped depositions later introduced at trial: "the focus in any videotaped deposition is on

the witness, and not on the lawyer asking questions…. In any event, any possible juror confusion… surely would be curable through a jury instruction."[11] Citing *New Gold Equities Corp. v. Capital Growth Real Estate Inc.*,[12] Judge Goren-stein recognized in theory that a potential witness/attorney should not be permitted to question non-party deposition witnesses regarding his own interactions with them, but found that any concern on this score was alleviated by this attorney's specific representation that he would not be taking any depositions.

Conflict of Interest

As illustrated by Southern District Judge Jed S. Rakoff's recent decision in *GSI Commerce Solutions Inc. v. BabyCenter, L.L.C.*,[13] attorneys have far less latitude when questions of conflicting loyalties are at issue. In that case, defendant BabyCenter refused to proceed with an arbitration while plaintiff GSI was represented by the law firm that also represented BabyCenter's corporate parent, Johnson & Johnson (J&J).

The law firm had specified in its engagement agreements with J&J that it represented only the J&J parent and not J&J's affiliates or subsidiaries. The engagement agreements also carved out conflict waivers permitting the firm to be adverse to J&J or its affiliates in certain current and potential patent litigation. In practice, J&J periodically asked the firm to provide legal advice relating to J&J's subsidiaries and affiliates on specific matters or transactions, including matters for BabyCenter. Although the firm had provided no advice to BabyCenter in connection with the agreement with GSI at issue in the instant case, and the partners representing GSI in the dispute with BabyCenter had never performed any work for J&J or BabyCenter, Judge Rakoff nevertheless granted BabyCenter's disqualification motion.

Judge Rakoff rejected GSI's reliance on the engagement agreements' stated limitation of the attorney-client relationship to J&J alone, focusing instead on the actual nature of the relationship between BabyCenter and its parent. BabyCenter shared accounting, audit, human resource, and information technology services with J&J, and relied entirely on J&J's law department for its legal services. Further, J&J's law department had been involved in the instant action on behalf of BabyCenter, and the contract at issue had been negotiated by an attorney in J&J's law department. Finally, given BabyCenter's subsidiary relationship to J&J, its liabilities directly impacted J&J. Accordingly, Judge Rakoff found that "the relationship between BabyCenter and J&J is sufficiently close as to deem them a single entity for conflict of interest purposes."[14] In disqualifying GSI's counsel, Judge Rakoff accepted BabyCenter's argument that it was a current client of that firm, making the "conflict…palpable, since it is undisputed that [the firm] continues to represent J&J in various matters."[15]

Conclusion

An attorney who is also a potential witness in a litigation will not necessarily be disqualified under the advocate-witness rule. If the attorney is not a vital witness on an important fact, he or she may continue to play a substantial role in the litigation by ensuring that other attorneys will serve as trial counsel. As demonstrated most recently in *BabyCenter,* disqualification is not so easily avoided where a conflict pits the lawyer's duties to one client against his duties to another. In such cases, even an artfully drafted retention letter purporting to define the attorney-client relationship so as to avoid a conflict will not suffice where the realities reveal otherwise.

1. 583 F.3d 173 (2d Cir. 2009).
2. Id. at 178 (citing *Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers,* 378 F.2d 269, 282-83 (2d Cir. 2004)).
3. Id. at 178-79.
4. Id. at 180.
5. 2009 WL 508269 (SDNY Feb. 27, 2009).
6. F.Supp. 2d, 2009 WL 3069740 (SDNY Sept. 28, 2009).
7. 2009 WL 508269, at *3-4 (citing *Ly man v. City of Albany,* 2007 WL 496454 (N.D.N.Y. Feb. 12, 2007); *A.V by Versace Inc. v. Gianni Versace, S.p.A.,* 160 F.Supp.2d 657 (SDNY 2001); *Rosefield v. Orentreich,* 1998 WL 567750 (SDNY Sept. 4, 1998)). See also *Ragdoll Prods. (UK) Ltd. v. Wal-Mart Stores Inc.,* 1999 WL 760209 (SDNY Sept. 27, 1999); *Conigliaro v. Horace Mann Sch.,* 1997 WL 189058 (SDNY April 17, 1997); *NL Indus. Inc. v. PaineWebber Inc.,* 1990 WL 43929 (SDNY April 9, 1990).
8. See *Corona v. Hotel and Allied Services Union Local 758,* 2005 WL 2086326, at *7 (SDNY Aug. 30, 2005) (counsel disqualified after court determined he was "uniquely qualified to paint that legal landscape which lies at the heart of the plaintiffs' case"); *Soberman v. Groff Studios Corp.,* 1999 WL 349989 (SDNY June 1, 1999) (plaintiff's counsel disqualified where fraud claim was based on misrepresentation allegedly made to plaintiff's counsel). See also *New Gold Equities Corp. v. Capital Growth Real Estate Inc.,* 1990 U.S.Dist. LEXIS 3854 (SDNY April 9, 1990) (attorney was also president of plaintiff corporation and, although permitted to depose party witnesses, was disqualified from deposing non-party witnesses with whom he had significant contact in negotiating agreement at issue).
9. 2009 WL 508269, at *3.
10. 2009 WL 3069740, at *3 (quoting *Conigliaro v. Horace Mann,* 1997 WL 189058, at *4).
11. Id. at *4 (quoting *Gormin,* 2009 WL 508269, at *3 n.1).
12. 1990 U.S. Dist. LEXIS 3854 (SDNY April 9, 1990).
13. —F.Supp.2d—, 2009 WL 2244344 (SDNY July 27, 2009). GSI filed an expedited appeal of Judge Rakoff's order disqualifying its counsel, which is scheduled for oral argument on Dec. 3, 2009.
14. Id. at *4 (internal quotations omitted).
15. Id. at *3.