In the United States Claims Court

No. 102-63

(FILED JULY 25, 1989)

JESSIE SHORT, ET AL.,
Plaintiffs,
v.
THE UNITED STATES,
Defendant,
and
THE HOOPA VALLEY TRIBE OF INDIANS,
Defendant-Intervenor.

O R D E R

The defendant-intervenor Hoopa Valley Tribe (Tribe) filed a motion to disqualify the law firm of Heller, Ehrman, White & McAuliffe (Heller, Ehrman) from any further representation of the plaintiffs in this case. This motion stems from the merger of Heller, Ehrman, a large San Francisco based firm, with the 12 attorney Seattle firm of Syrdal, Danelo, Klein, Myre & Woods (Syrdal, Danelo), and specifically with the actions of Steven Anderson, a Syrdal, Danelo attorney now with Heller, Ehrman. For the following reasons, the Tribe's motion is denied.

FACTS

Prior to his association with Syrdal, Danelo, Anderson was a partner in the firm of Ziontz, Pirtle, Morisset, Ernstoff and Chestnut (Ziontz, Pirtle). At Ziontz, Pirtle, Anderson was involved from 1981-1986 in the representation of the Tribe in Puzz v. United States Department of Interior, No. C80 2908 TEH (N.D. Cal.), a case closely related to the Short litigation, as well as being involved in the Short litigation itself.

Ziontz, Pirtle dissolved on July 31, 1986, and certain partners in that firm, including Thomas Schlosser, currently the Tribe's attorney of record in the Short litigation, formed the law firm of Pirtle, Morisset, Schlosser & Ayer (Pirtle, Morisset). Pirtle, Morisset became the attorneys for the Tribe pursuant to a legal services contract that was approved as required by the Bureau of Indian Affairs.

In October 1986, Steven Anderson joined Syrdal, Danelo on an of counsel basis and became a partner on January 1, 1988. While of counsel to Syrdal, Danelo, Anderson continued to do some work on behalf of the Tribe at the request of Thomas Schlosser. Anderson was able to assist the Tribe through Pirtle, Morisset because a clause in Pirtle, Morisset's legal services contract with the Tribe allowed Pirtle, Morisset to use the services of consultants. Anderson's time was billed to the Tribe through Pirtle, Morisset, with Syrdal, Danelo later billing Pirtle, Morisset. Anderson has not performed any legal services on behalf of the Tribe since August 1987, and he was the only member of Syrdal, Danelo to do any work for the Tribe.

On April 1, 1988, Syrdal, Danelo merged with Heller, Ehrman. Heller, Ehrman assists the attorney of record, William C. Wunsch, in representing most of the plaintiffs in the Short litigation. Due to Anderson's previous representation of the Tribe, the Tribe contends that the merger has created a conflict of interest that mandates the disqualification of Heller, Ehrman. Plaintiffs claim that effective screening measures have been put into effect that prevent the exchange of any information concerning the Tribe, and particularly the Short litigation, between Anderson and former Syrdal, Danelo personnel and the personnel of Heller, Ehrman. Plaintiffs argue that the screening measures, commonly known as a "Chinese Wall," preclude the disqualification of Heller, Ehrman.

DISCUSSION

The Claims Court adopted the ABA Model Rules of Professional Conduct to govern the behavior of attorneys practicing before the court. The rule applicable to the situation is Rule 1.10(b), which provides:

> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer

> was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(Rules 1.6 and 1.9(b) deal with a lawyer's duty to maintain confidentiality with respect to information concerning the representation of a client). Read literally, this rule would mandate the disqualification of Heller, Ehrman due to Anderson's relationship with the Tribe, regardless of whether that relationship is labelled "attorney-client," "consultant," "current client," "former client," etc. There is no question that Anderson at some point represented the Tribe, and there is also no question that the matters in which Anderson represented the Tribe constitute positions materially adverse to the current interests of Heller Ehrman's client.

However, the Comment to Rule 1.10 favors a functional analysis emphasizing preservation of confidentiality and avoidance of positions adverse to a client over a rigid per se approach to disqualification. Each situation must be analyzed according to its particular facts to assure that the former client's confidentiality is maintained, and that the former client's interests are not compromised by the lawyer "changing sides." ABA Model Rules of Professional Conduct, Rule 1.10, Comment.

Many courts, including the the U.S. Court of Appeals for the Federal Circuit, extended this functional approach in determining whether a firm should be disqualified to "create a rebuttable presumption of shared confidences among attorneys in a law firm in order to avoid vicarious disqualification." Nemours Foundation v. Gilbane, Aetna, Federal Insurance Co., 632 F. Supp. 418, 427 (D. Del. 1986); see EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459, 1461 (Fed. Cir. 1984); Panduit Corp. v. All States Plastic Manufacturing Co., 744 F.2d 1564, 1580 (Fed. Cir. 1984); United States for the Use and Benefit of Lord Electric Co. v. Titan Pacific Construction Corp., 637 F. Supp. 1556, 1564 (W.D. Wash. 1986). The burden of rebutting the presumption of shared confidences rests with the party seeking to avoid disqualification. In this case, if Heller, Ehrman cannot prove that Anderson is effectively screened from sharing pertinent information with Heller, Ehrman employees, then the firm must be disqualified.

In EZ Paintr and Panduit, the Federal Circuit determined that the presumption of shared confidences is rebuttable. That court has not reached this issue specifically with respect to Rule 1.10 of the Model Rules, but in Atasi Corp. v. Seagate Technology, 847 F.2d 826 (1988), the court suggested that the presumption of shared confidences could be rebutted with "evidence of an effective screening of the tainted attorney from the rest of the firm." Id. at 831. In Atasi, the Federal Circuit applied Disciplinary Rule 5-105(D) of the Model Code of Professional Responsibility, which, though worded differently, is virtually identical in effect to Rule 1.10.

In Nemours, a case with facts similar to those in the instant case, the Delaware District Court held that Rule 1.10 created a rebuttable presumption. 632 F. Supp. at 427. Principles of fairness also dictate that the presumption should be rebuttable. The court's inquiry is to determine whether improprieties are likely to occur that would impair the Tribe's interests. If no improprieties are likely, a rigid rule mandating disqualification whenever an attorney moves between firms is unduly harsh. The court must strike a proper balance between the policies of preserving the confidentiality of clients and allowing parties freedom to retain the counsel of their choice. Panduit, 744 F.2d at 1576. Only through a flexible case-by-case analysis can these policies be reconciled.

The record indicates that Heller, Ehrman has constructed a "Chinese Wall" around Anderson and all former Syrdal, Danelo personnel to prevent any disclosure of information concerning the Tribe. These mechanisms were in place at the time of the merger of the firms, unlike the situation in Padco where the court held that the presumption was not rebutted because the screening procedure was attempted too late. "[T]he screening arrangement must be set up 'when the potentially disqualifying event occurred' and the new firm knows . . . of the problem." Padco, 746 F.2d at 1462; see LaSalle National Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983). Thus, if a Chinese Wall is implemented in a timely fashion, as it was by Heller, Ehrman, the presumption of shared confidences can be rebutted.

The steps taken by Heller, Ehrman to insulate Anderson are outlined in a memo that was distributed to all Heller, Ehrman personnel in all offices. Plaintiffs state in their opposition:

> All of the former Syrdal Danelo attorneys and staff have been denied

> access to the Heller Ehrman files in this case, and have agreed not to talk with any Heller Ehrman attorneys and staff about the case (except as necessary to respond to the instant motion). The Heller Ehrman files, all of which are located in the firm's San Francisco office [the Syrdal, Danelo staff is in Seattle], have the following label affixed to them:
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> > CONFIDENTIAL CLIENT FILES: DO NOT DISCLOSE TO STEVEN ANDERSON, OR ANY LAWYER OR NON-LAWYER PERSONNEL FORMERLY EMPLOYED BY SYRDAL, DANELO, KLEIN, MYRE & WOODS.
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> While the client files of the Hoopa Valley Tribe are in the custody of Pirtle Morisset, Mr. Anderson had some notes, memoranda and other materials in his possession regarding the Tribe. He has personally segregated all of these materials, and they have not been, and will not be, incorporated into the Heller Ehrman files. Only he has access to them. In addition, all of the former Syrdal Danelo attorneys have agreed to forego any financial interest in Short v. United States, and all of them have agreed not to have any responsibility in the future with respect to either the Short or Puzz cases.

Plaintiffs' Memorandum in Opposition at 9-10.

The affidavits and declarations of all twelve former Syrdal Danelo attorneys and Eric Redman, the current administrative partner of Heller Ehrman's Seattle office indicate that these measures have been fully implemented. These measures are at least as extensive as those allowed by other courts, including the Court of Claims. See Sierra Vista Hospital, Inc. v. United States, 226 Ct. Cl. 223, 227-28, 639 F.2d 749, 751-52 (1981); Kovacevic v. Fair Automobile Repair, Inc., 641 F. Supp. 237, 238-39 (N.D. Ill. 1986); Nemours, 632 F. Supp. at 429.

The Tribe argues that because Rule 1.11 of the Model Rules, dealing with the movement of government attorneys to private practice, expressly allows for screening measures, such measures are prohibited

by implication with respect to Rule 1.10. The court concludes that this approach is far too rigid, and that the Tribe's argument is without merit.

The Tribe also contends that screening mechanisms are inappropriate because an entire firm "switched sides," as opposed to a single attorney. However, as the affidavits of the former Syrdal, Danelo attorneys indicate, they were not involved and did not have substantive discussions of any matters concerning the Tribe. Only Anderson did work for the Tribe. The situation is thus analogous to a single attorney switching firms, and the Tribe's argument is unfounded.

Finally, a balancing of the equities also weighs in favor of allowing Heller, Ehrman to continue its representation of the Short plaintiffs absent any specific improprieties. This case has been pending for over 25 years, involves thousands of plaintiffs, and countless documents. To disqualify Heller, Ehrman at this late stage in the litigation would be disastrous to the plaintiffs. Finding replacement counsel would be difficult, time consuming, and costly. If new counsel were found, familiarizing themselves with the case would also take an inordinate amount of time. The interests of fairness to the plaintiffs and convenience indicate that Heller, Ehrman should be retained.

CONCLUSION

It should be emphasized that "disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary." Panduit, 744 F.2d at 1577, (quoting Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982) (emphasis added)). The evidence indicates that no confidential information has been shared, and that measures were implemented to assure that no confidential information will be shared in the future. For these reasons, the Tribe's motion to disqualify plaintiffs' counsel is denied.

Lawrence S. Margolis

LAWRENCE S. MARGOLIS
Judge, U.S. Claims Court