

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 7
ABDUL KAZI, M.D. and)
SAMINA W. KAZI,) No. BK 90-30166
)
Debtor(s).)
)
STEPHEN R. CLARK, Trustee,) Adv. No. 90-0164
)
Movant,)
)
v.)
)
ABDUL W. KAZI, M.D. and)
SAMINA W.KAZI,)
)
Debtors/Respondents.)

OPINION

Blunt, Ellis & Loewi, an unsecured creditor in the instant bankruptcy proceeding, has filed a Motion to Disqualify Attorneys for Debtors. Briefly, the facts on which the motion is based are as follows.

Debtors Abdul W. Kazi, M.D. and Samina W. Kazi filed a joint bankruptcy petition under chapter 7 of the Bankruptcy Code on February 28, 1990. Debtors listed as exempt \$455,000.00 in certain pension and profit sharing plans and individual retirement accounts ("IRAs"). Blunt, Ellis & Loewi filed objections to those exemptions. Likewise, on August 2, 1990, the chapter 7 Trustee filed a complaint for turnover requesting, among other things, that debtors be ordered to turn over all funds held in the pension and profit sharing plans, as well as all funds held in the IRAs. Debtors filed a motion to dismiss the complaint, claiming that the funds in question were not property of the

estate and further claiming that even if said funds did constitute property of the estate, debtors were entitled to exempt those funds from the bankruptcy estate. For the reasons set forth in an opinion dated February 4, 1991, the Court overruled the objections to exemptions filed by Blunt, Ellis & Loewi and granted debtors' motion to dismiss the Trustee's complaint. See In re Kazi, 125 B.R. 981 (Bankr. S.D. Ill. 1991). The Trustee and Blunt, Ellis & Loewi filed a joint notice of appeal on February 13, 1991. Debtors also appealed. Both appeals are currently pending before the United States District Court.

Debtors have been and currently are represented by the law firm of Mathis, Marifian and Richter, Ltd. At the time the Trustee's complaint for turnover and subsequent appeal were filed, the Trustee was represented by Laura Grandy, who, at that time, was employed by the law firm of Suelthaus and Kaplan. On April 15, 1991, Ms. Grandy joined the firm of Mathis, Marifian and Richter, counsel for debtors. Ms. Grandy then filed a motion to withdraw as counsel for the Trustee on the basis that she had become associated with the firm representing debtors. The motion to withdraw was granted by this Court on April 25, 1991.

In its motion to disqualify, Blunt, Ellis & Loewi contends that Ms. Grandy "retain[s] confidential knowledge that she obtained in her capacity as counsel for the Trustee," and that "to permit the firm of Mathis, Marifian & Richter to continue to act as attorneys for Debtors would represent a direct violation of ... the Illinois Rules of Professional Conduct." See Motion to Disqualify Attorneys for Debtors at ¶¶ 5 and 6. In response, debtors assert that in her capacity as

counsel for the Trustee, Ms. Grandy represented the interests of the Trustee, not Blunt, Ellis & Loewi, and further, that she was not in a position adverse to Debtors and had no confidential information that would disqualify the firm of Mathis, Marifian and Richter from continuing to represent debtors. In addition, debtors contend that the firm of Mathis, Marifian and Richter has taken affirmative steps to isolate Ms. Grandy from any information concerning, or any participation in, those matters concerning the instant bankruptcy case and related adversary proceeding.

The United States District Court for the Southern District of Illinois has adopted the Code of Professional Responsibility of the State of Illinois, as amended from time to time, pursuant to Disciplinary Rule IV(B) of its Local Rules.¹ The Illinois Rules of Professional Conduct replaced the Illinois Code of Professional Responsibility, effective August 1, 1990.

Rule 1.6(a) of the Illinois Rules of Professional Conduct provides that "a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure." Rule 1.9 provides:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter:
 - (1) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the

¹Under Rule 101(C) of the Local Rules for the Bankruptcy Court for the Southern District of Illinois, this Court has adopted and incorporated the Local Rules of the District Court.

interests of the former client, unless the former client consents after disclosure; or

(2) use information relating to the representation to the disadvantage of the former client....

Finally, and most importantly, Rule 1.10 provides:

(b) When a lawyer becomes associated with a firm, the firm may not represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:

(1) the newly associated lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter; or

(2) the newly associated lawyer is screened from any participation in the matter.

(e) For purposes of Rule 1.10, Rule 1.11, and Rule 1.12, a lawyer in a firm will be deemed to have been screened from any participation in a matter if:

(1) the lawyer has been isolated from confidences, secrets, and material knowledge concerning the matter;

(2) the lawyer has been isolated from all contact with the client or any agent, officer, or employee of the client and any witness for or against the client;

(3) the lawyer and the firm have been precluded from discussing the matter with each other; and

(4) the firm has taken affirmative steps to accomplish the foregoing.

In addition to the foregoing rules, the Seventh Circuit employs a three-part test in determining whether an entire law firm must be disqualified when one of the attorneys has switched from one

side to another. In U.S. v. Goot, 894 F.2d 231 (7th Cir. 1990), cert. denied, 111 S.Ct. 45 (1990), the Seventh Circuit explained that test as follows:

First, does a "substantial relationship" exist between the subject matter of the prior and present representations? Second, if so, has the presumption of shared confidences with respect to the prior representation been rebutted? Third, if not, has the presumption of shared confidences with respect to the present representation been rebutted?

Id. at 235.

In the present case, debtors appear to concede the first point-- that is, they do not dispute that a substantial relationship exists between the subject matter involved in Ms. Grandy's representation of the Trustee and that involved in Mathis, Marifian and Richter's representation of debtors. With respect to the second point, "the existence of a substantial relationship gives rise to a presumption of shared confidences." Schiessle v. Stephens, 717 F.2d 417, 420 n.2 (7th Cir. 1983). In other words, there is a presumption that the attorney whose change of employment created the disqualification issue was privy to confidences and/or secrets received from the client during the prior representation. While this presumption may be rebutted, "[t]he evidence presented ... must 'clearly and effectively' demonstrate that the attorney in question had no knowledge of the information, confidences and/or secrets related by the client in the prior representation." *Id.* at 420 (citations omitted). Debtors have presented no evidence whatsoever to rebut this presumption, other than a vague and general allegation that Ms. Grandy "had no confidential

information such as would disqualify the firm of Mathis, Marifian & Richter, Ltd. from continuing to serve as counsel for the Debtors." See Debtors' Response to Motion to Disqualify Attorneys for Debtors at 115. Clearly, debtors have failed to rebut the presumption that Ms. Grandy received confidential information relayed by the Trustee. Indeed, given the fact that Ms. Grandy was directly involved with and responsible for the representation of the Trustee, the Court seriously questions whether debtors could ever do so.

Regarding the third point--whether the presumption of shared confidences with respect to the present representation has been rebutted--the Seventh Circuit has held that "[a] very strict standard of proof must be applied to the rebuttal of this presumption ... and any doubts as to the existence of an asserted conflict must be resolved in favor of disqualification." U.S. v. Goot, 894 F.2d at 235 (citing Lasalle Nat. Bank. v. County of Lake, 703 F.2d 252, 257 (7th Cir. 1990)). "[T]he office under review can rebut the presumption by submitting 'objective and verifiable evidence,' which shows that 'specific institutional mechanisms' have sufficiently screened the 'infected' attorney." Id. (citing Schiessle, 717 F.2d at 421 and Lasalle Nat. Bank, 703 F.2d at 259).

In the present case, debtors' law firm contends that it has erected a "Chinese wall" between Ms. Grandy and those lawyers in the firm who are handling debtors' case. more specifically, Ms. Grandy submitted an affidavit in which she states that "Mathis, Marifian & Richter Ltd. has taken special steps to keep this matter and all documents and files related to this case confidential." See

Affidavit of Laura K. Grandy at 17. However, no "objective and verifiable evidence" (by way of testimony or otherwise) was presented to establish exactly what those measures are. The Seventh Circuit, as well as Rule 1.10(e) of the Illinois Rules of Professional Conduct, clearly require more than a general allegation that "special steps" have been taken to screen the attorney in question.² Without specific evidence which establishes that sufficient and effective screening mechanisms have been employed to isolate Ms. Grandy from participation in this case, the Court can only conclude that such measures have not been implemented, and that the law firm of Mathis, Marifian and Richter must be disqualified as counsel for debtors.

Accordingly, IT IS ORDERED that the Motion to Disqualify Attorneys for Debtors is GRANTED.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: July 11, 1991

²During oral argument at the hearing on the motion to disqualify, counsel for debtors noted other measures that had been taken to screen Ms. Grandy from participation in this case. For example, counsel stated that a memo had been circulated advising the attorneys and staff that Ms. Grandy should not have access to any documents involving debtors' case. Counsel further stated that debtors' case file is kept in the office of the attorney in charge of this case, and not with other client files. Under the Seventh Circuit's strict standard of proof, these statements alone do not constitute sufficient evidence that appropriate screening devices have been implemented.