UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BRETTE TINGLE	*	**CIVIL NO. 15-626**
	*	
VERSUS	*	
	*	**HON JUDGE JOHN W. DEGRAVELLES**
TROY HEBERT, IN HIS INDIVIDUAL & OFFICAL CAPACITY AS THE COMMISSIONER OF THE OFFICE OF ALCOHOL AND TOBACCO CONTROL OF THE LOUISIANA DEPARTMENT OF REVENUE	*	**MAG. JUDGE ERIN WILDER-DOOMES**
	*	**JURY TRIAL REQUESTED**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY COUNSEL OF RECORD

MAY IT PLEASE THE COURT:

The Plaintiff, Brette Tingle, through undersigned counsel, respectfully submits the following Memorandum in Opposition to Defendant's Motion to Disqualify Counsel of Record. For the following reasons, the Plaintiff respectfully submits that the Defendant's Motion[1] should be denied.[2]

The Defendant seeks to have Smith Law Firm disqualified from further representation of Mr. Tingle based on Troy Hebert's alleged belief that Mr. DeJean, in connection with another case, provided information to Smith Law Firm in violation of: (i) his own duty of confidentiality to Mr. Hebert; and (ii) the evidentiary principle of attorney-client privilege. The Plaintiff

[1] Doc. 164.

[2] Defendant Office of Alcohol and Tobacco Control ("ATC") filed a further memorandum in support of Defendant Hebert's motion on March 20, 2018 at 4:39 p.m. (Doc. 166), mere hours before the deadline for this opposition (see Doc. 165). As the Plaintiff was given twenty-one (21) days to file a response to the Defendant's motion (*Id.*), the Plaintiff respectfully submits that he should not be expected to respond to Defendant ATC's arguments within a period of less than eight (8) hours. For this reason, the Plaintiff will file a separate motion praying that this Honorable Court set a separate deadline for the Plaintiff's response to Defendant ATC's memorandum.

respectfully submits that, not only are these statements inaccurate and unsupported by any evidence, but also that they would not provide a basis to disqualify Smith Law Firm even if they were proven.

I. STANDARDS FOR MOTIONS TO DISQUALIFY

A motion to disqualify is "of profound significance," as it greatly affects "[t]he ability of the FDIC to present its case at trial" and "[deprives] a party of the right to be represented by the attorney of his or her choice." *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1313 (5th Cir. 1995). "A severe remedy such as disqualification cannot be granted on generalities," and the movant bears the burden of demonstrating that disqualification is necessary. *Microsoft Corp. v. Commonwealth Sci. & Indus. Research Organisation*, 6:06 CV 549, 2007 WL 4376104, at *9 (E.D. Tex. Dec. 13, 2007), *aff'd sub nom. Commonwealth Sci. & Indus. Research Organisation v. Toshiba Am. Info. Sys., Inc.*, 297 Fed.Appx. 970 (Fed. Cir.2008). Thus, disqualification "is a penalty that must not be imposed without careful consideration." *Id.* The Plaintiff respectfully submits that the Defendant has failed to meet this stringent burden.

II. THE DEFENDANT FAILS TO ASSERT ANY LEGALLY RECOGNIZED GROUNDS FOR DISQUALIFICATION

Generally, motions to disqualify are brought in the event of a conflict of interest on the part of the attorney sought to be disqualified. See *In re Dresser Indus., Inc.*, 972 F.2d 540, 543–44 (5th Cir. 1992); *F.D.I.C. v. U.S. Fire Ins. Co., supra.*; *Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742, 744 (5th Cir.1980); and *Amec Constr. Mgmt., Inc. v. Fireman's Fund Ins. Co.*, CV 13-00718-JJB-EWD, 2016 WL 7468808, at *1 (M.D. La. May 31, 2016). They are also used in the related scenario in which an attorney is expected to testify in a matter in which he represents a party. See *F.D.I.C. v. U.S. Fire Ins. Co., supra.*; *Amec Constr. Mgmt., Inc. v. Fireman's Fund Ins. Co., supra*. They also may be appropriate in the event of a conflict of interest created by an

attorney's possession of confidential information obtained in his own previous representation of an opposing party. See *Microsoft Corp. v. Commonwealth Sci. & Indus. Research Organisation, supra.* It is clear that none of these circumstances are present in the instant case, nor have they even been alleged.

Any conflict of interest arising from Smith Law Firm's representation of Mr. Tingle would be governed by Rule 1.7, Rule 1.8, or Rule 1.9(c)(1) of the Louisiana Rules of Professional Conduct. Rule 1.7 defines such a conflict of interest as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

LA ST BAR ART 16 RPC Rule 1.7. Rule 1.8 provides several, more specific rules in which an attorney is prohibited from representing a client, such as if the attorney enters into a business transaction with the client or solicits a gift from the client. See *Id.* at Rule 1.8.

As for conflicts of interest with respect to former clients, Rule 1.9(c)(1) provides that "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter […] use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known." *Id.* at Rule 1.9(c)(1).

Neither the undersigned nor any of the other attorneys at Smith Law Firm has any conflict of interest with respect to Mr. Tingle and any current or former client. Neither the

undersigned nor any of the other attorneys at Smith Law Firm has ever represented Troy Hebert or the ATC in any capacity. The Defendant has not even alleged otherwise. Nor is the undersigned expected to be called to testify in the instant matter. Thus, the Defendant's reliance on *In re Dresser Indus., Inc.* and *F.D.I.C. v. U.S. Fire Ins. Co., supra.* is misguided, as both of these cases decided motions to disqualify based on conflicts of interest.

The *Dresser* factors cited by the Defendant are used to determine whether a ***conflict of interest*** provides a basis for disqualification. *In re Dresser Indus., Inc.*, 972 F.2d at 544. The Court in *F.D.I.C. v. U.S. Fire Ins. Co., supra.* held that "[d]isqualification of LMHT & B in this case is unwarranted unless there is a ***true conflict of interest*** between Kenney and her client, the FDIC." *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d at 1313. The court found that there was no true conflict of interest, and held that the "remote possibility" that one could arise would not "support the burdensome sanction of law firm disqualification." *Id.* at 1314.

In neither of these cases did the Fifth Circuit hold, as the Defendant suggests, that a party's alleged subjective belief of an appearance of impropriety provides a basis for the disqualification of opposing counsel. Rather, the Fifth Circuit held that "the appearance of impropriety" was one factor to consider in deciding a motion to disqualify in the event that there is an ***actual conflict of interest***. *Id.* Thus, neither of these cases provides support for the Defendant's motion.

While there may be other circumstances in which a motion to disqualify may conceivably be appropriate, the Plaintiff respectfully submits that such motions should not be used as a weapon to punish an opposing ***party*** based on vague, unsubstantiated speculation that his opponent's lawyer ***might*** have engaged in misconduct, particularly in light of the holdings of *Microsoft Corp. v. Commonwealth Sci. & Indus. Research Organisation, supra* and *F.D.I.C. v.*

U.S. Fire Ins. Co., supra. Thus, none of the arguments offered by the Defendant would provide a basis for the disqualification of Smith Law Firm even if they were accurate. However, the Plaintiff respectfully submits that they are not accurate.

III. THERE HAVE BEEN NO VIOLATIONS OF ATTORNEY-CLIENT PRIVILEGE OR THE DUTY OF CONFIDENTIALITY

The Defendant's motion is based entirely on the inaccurate premise that "that Mr. Smith elicited from Mr. DeJean privileged and confidential communications between Commissioner Hebert and his own attorney."[3] As attorney-client privilege and the duty of confidentiality are two separate issues, the Plaintiff will discuss them separately.

A. Attorney-Client Privilege

Attorney-client privilege is an evidentiary doctrine governed generally by common law and Supreme Court jurisprudence. Fed. R. Evid. 501. The privilege "protects the disclosures that a client makes to his attorney, in confidence, for the purpose of securing legal advice or assistance." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir.1994), *opinion modified on reh'g*, 30 F.3d 1347 (11th Cir.1994). The privilege provides that "an attorney should not, and cannot be, compelled to, testify regarding communications made to him in his professional character by his client." *Goldman, Sachs & Co. v. Blondis*, 412 F.Supp. 286, 288 (N.D. Ill.1976).

As the United States Supreme Court has said of the privilege:

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."

[3] Doc. 164-1.

Upjohn Co. v. United States, 449 U.S. 383, 396 (1981), citing *City of Philadelphia, Pa. v. Westinghouse Elec. Corp.*, 205 F.Supp. 830 (E.D. Pa.1962).

The Defendant has not listed a single instance in which Mr. DeJean has allegedly disclosed a communication made to him by Mr. Hebert in confidence for the purpose of obtaining legal advice. In fact, the Defendant concedes that it does not know of any such communications.[4] Rather, the Defendant's argument is simply based on the fact that Mr. Dejean met with the undersigned and was issued a subpoena for trial.[5]

The United States Court of Appeals for the Fifth Circuit has held that "[t]here is no presumption that a company's communications with counsel are privileged" and that "communications by a corporation with its attorney, who at the time is acting solely in his capacity as a business advisor, are not privileged." *Equal Employment Opportunity Comm'n v. BDO USA, L.L.P.*, 876 F.3d 690, 696 (5th Cir.2017) (brackets omitted), citing *Great Plains Mut. Ins. Co. v. Mut. Reinsurance Bureau*, 150 F.R.D. 193, 197 (D. Kan. 1993). Thus, the Defendant's conclusion, that a violation of attorney-client privilege must have occurred simply because the undersigned met with Mr. DeJean as a potential witness, represents logic that the Fifth Circuit has clearly rejected.

Further, even if Mr. DeJean had violated the privilege, the proper remedy would be the exclusion of any privileged communication from evidence, not the disqualification of Mr. Tingle's attorney. Moreover, such a violation would not provide a basis for precluding Mr. DeJean from testifying altogether, but merely for precluding him from testifying as to any privileged communications. See *In re Grand Jury Subpoena Duces Tecum*, 391 F.Supp. 1029,

[4] Doc. 164-1 at 9 ("We will never know the full extent of what Commissioner Hebert's lawyer disclosed to Mr. Smith during their meeting of indeterminate duration").
[5] Doc. 164-1 at 2.

1033 (S.D.N.Y.1975) (attorney-client privilege is "confined to a narrow and limited enclave" and "does not encompass an inchoate right to withhold documents merely because an attorney-client relationship existed"). Undersigned counsel does not intend to ask Mr. DeJean about any privileged discussions with Mr. Hebert at trial. Nonetheless, the Defendant's counsel can rest assured that, were undersigned counsel to do so, he is free to raise an objection to any such questions under Rule 501.

Thus, the Defendant's unsubstantiated allegation that Mr. DeJean violated attorney-client privilege does not provide a basis for the disqualification of Smith Law Firm from representing Mr. Tingle.

B. The Duty of Confidentiality

The Defendant apparently believes that Mr. DeJean violated the Louisiana Rules of Professional Conduct by disclosing confidential information obtained in the course of representing the ATC. The Defendant correctly notes that "[i]t cannot be seriously disputed that breaching the confidences of a client runs afoul of these Rules."[6] Indeed, the Plaintiff does not dispute that the disclosure of such confidential information would violate the rule prohibiting such disclosure. However, the Plaintiff respectfully submits that: (i) Mr. DeJean did not share any confidential information with Smith Law Firm; and (ii) even if he had, and he did not, this would not provide a basis for the disqualification of Smith Law Firm.

Rule 1.6 provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." LA ST BAR ART 16 RPC Rule 1.6(a). As Rule 1.6 provides an attorney's duty of

[6] Doc. 164-1 at 4.

confidentiality with respect to a current client, Mr. DeJean's duty to the ATC is governed by Rule 1.9(c)(2), which provides that "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter […] reveal information relating to the representation except as these Rules would permit or require with respect to a client." LA ST BAR ART 16 RPC Rule 1.9.

Mr. DeJean did not disclose any "information relating to the representation" of the ATC to Smith Law Firm, and undersigned counsel did not ask him to do so. Mr. DeJean testified that he did not discuss protected information with the undersigned, and that, prior to meeting with the undersigned, Mr. DeJean specifically stated that he would be careful not to do so.[7] The Defendant has not listed a single item of confidential information that he believes Mr. DeJean disclosed to Smith Law Firm. Thus, the Defendant has not established that a violation of Rule 1.9(c) has occurred.

As Mr. DeJean formerly represented the ATC, he almost certainly ***possesses*** confidential information, which would therefore likely present a conflict of interest that would prevent ***him*** from representing Mr. Tingle. See *Microsoft Corp. v. Commonwealth Sci. & Indus. Research Organisation*, *supra*; *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 171 (5th Cir.1979). However, Mr. DeJean does not represent Mr. Tingle, and this motion does not seek to disqualify Mr. DeJean. The motion seeks to disqualify Mr. Smith, and the Defendant's claim that Mr. DeJean breached his duty of confidentiality is not grounds for the undersigned's disqualification.

C. The Evidence Presented by the Defendant Does Not Establish a Violation of either the Duty of Confidentiality or of the Attorney-Client Privilege

[7] See Doc. 164-2 at 13.

The evidence presented by the Defendant only demonstrates that: (i) Mr. DeJean discussed racially insensitive decorations in the ATC office with the undersigned;[8] (ii) Mr. DeJean discussed his distaste for Mr. Hebert in text messages to Charles Gilmore;[9] (iii) Mr. DeJean informed Mr. Tingle that Keith McCoy was no longer employed by the ATC as of September 19, 2016;[10] (iv) J. Arthur Smith, IV sent to Mr. DeJean a link to a Fifth Circuit case involving attorney-client privilege[11] which had been discussed in open court in the *Gilmore* matter; and (v) Mr. DeJean clearly stated that he would be careful not to violate attorney-client privilege.

The Defendant does not clarify whether these are purported violations of the duty of confidentiality or of the attorney-client privilege, nor does it explain how these communications are violations of either. However, the Plaintiff respectfully submits that none of this evidence establishes a violation of ***either*** of these duties because: (i) decorations inside of a government office, which is open to the public, cannot reasonably be considered "confidential," and are not "communications" for purposes of attorney-client privilege; (ii) the communications to Charles Gilmore did not involve Mr. DeJean's representation of the ATC or Mr. Hebert and did not disclose communications from ATC employees seeking legal advice; and (iii) Mr. DeJean did not learn of Keith McCoy's employment status until ***after*** his representation of Mr. Hebert and the ATC, so his communication of such cannot be regarded as privileged or confidential.

D. CONCLUSION

None of the authority cited by the Defendant holds that an attorney may be disqualified from representation of a client because a ***witness*** has violated the duty of confidentiality or of the

[8] *Id.*
[9] Doc. 164-3
[10] Doc. 164-4 at 7.
[11] Doc. 164-5 at 1.

attorney-client privilege. Further, the Defendant has failed to establish that there have been any violations of these duties by either the undersigned or Mr. DeJean, merely stating that there is a "potential likelihood" of such violations. The Defendant's entire motion centers on vague, baseless accusations that wrongdoing must have occurred simply because undersigned counsel interviewed Mr. DeJean as a potential witness. Such generalities cannot be the basis for a motion for disqualification, and the Defendant has therefore not met his burden under *Microsoft Corp. v. Commonwealth Sci. & Indus. Research Organisation, supra.*

For these reasons, the Plaintiff respectfully requests that the Defendant's motion be denied.

Respectfully Submitted:

SMITH LAW FIRM

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading has been electronically mailed to all counsel of record as an automatic function of the Court's electronic ECM/ECF filing system.

Baton Rouge, Louisiana, this 20th day of March, 2018.

/s/ J. Arthur Smith, III
J. Arthur Smith, III