

Michael L. Kathrein
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

MICHAEL L. KATHREIN,)	
VICTORIA ZAYTSEVA,)	
)	
Plaintiffs,)	No. 05 C 3385
)	
v.)	
)	Honorable John W. Darrah
CITY OF EVANSTON, ILLINOIS,)	Judge Presiding
JACK M. SIEGEL,)	
HERBERT D. HILL,)	
ELLEN SZYMANSKI,)	
)	
Defendants.)	
_____)	

PLAINTIFFS' MOTION TO DISQUALIFY ATTORNEYS

NOW come the plaintiffs in the above-entitled action, Michael L. Kathrein and Victoria Zaytseva, and move to disqualify counsels Jack M. Siegel, Herbert D. Hill, Ellen Szymanski, Iain D. Johnston and the law firm Holland & Knight, LLP. Co-defendants and counsels have multiple conflicts of interest, requiring disqualification.

In support of this motion, plaintiffs state following:

Manifest Conflicts of Interest

Attorneys Siegel, Hill, Szymanski and the City of Evanston are named defendants in this action.

Siegel, Hill and Szymanski are employees of co-defendant City of Evanston.

Siegel is Corporation Counsel for co-defendant City of Evanston.

Siegel is of counsel for the law firm Holland & Knight.

Iain D. Johnston, is senior counsel of Holland & Knight.

Iain D. Johnston is a subordinate of co-defendant Siegel at Holland & Knight.

As assistant Corporation Counsels, Hill and Szymanski are subordinates of co-defendant Siegel.

Both Iain D. Johnston and Holland & Knight represent co-defendants Siegel, Hill, Szymanski and City of Evanston.

By circumstance and hierarchy, all co-defendants and counsel, including Holland & Knight and Evanston, are subordinate to, and directed by, Siegel.

As will be shown below, the relationships between and among all counsel and co-defendant parties are materially and structurally, conflicting and inextricably intertwined.

I. Disciplinary Authority 8.5(a) – Choice of Law.

Rule 8.5(a) of the Rules of Professional Conduct (134 Ill. 2d R. 8.5(a) reads:

“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject, for the same conduct, to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted.”

Attorneys Seigel, Hill, Szymanski, Johnston and Holland & Knight are bound by the Illinois Rules of Professional Conduct. They are subject to the disciplinary process of this state regardless of where their conduct occurs.

It is a paramount obligation of each member of the bar to study the Rules and abide by their terms and principles. *In re Cheronis*, 114 Ill.2d 527, 502 N.E.2d 722, 726, 104 Ill.Dec. 225 (1986).

An attorney's lack of knowledge of the provisions of the Rules will not serve as an excuse for his or her misconduct. *Id. See also In re Howard*, 188 Ill.2d 423, 721 N.E.2d 1126, 1135, 242 Ill.Dec. 595 (1999).

II. Violation of Illinois Rules of Professional Conduct 1.10(a) – Imputed Disqualification: General Rule.

Rule 1.10(a) of the Rules of Professional Conduct (134 Ill. 2d R. 1.10(a) reads:

“No lawyer associated with a firm shall represent a client when the lawyer knows or reasonably should know that another lawyer associated with that firm would be prohibited from doing so by Rules, except [under certain circumstances].”

LR 83.51.10(a) – Imputed Disqualification: General Rule.

“No lawyer associated with a firm shall represent a client when the lawyer knows or reasonably should know that another lawyer associated with that firm would be prohibited from doing so by LR83.51.7, LR83.51.8(c), or LR83.51.9, except [under certain circumstances].”

None of the exceptions provided by these rules apply.

Co-defendant Siegel, and the law firm Holland & Knight are one in the same.

Illinois abides by the rule that if one member of a law firm has a conflict of interest, the conflict is imputed to all members of the firm. *People v. Arreguin*, 92 Ill.App.3d 899, 416 N.E.2d 402, 48 Ill.Dec. 371 (3d Dist. 1981). See also *Freund v. Butterworth*, 117 F.3d 1543, 1575 n. 74 (11th Cir. 1997).

Siegel's representation of Evanston is a structural violation of Rule 1.10(a) and LR 83.51.10(a) that cannot be waived.

Siegel and his firm must be disqualified to comply with the mandate of this rule.

III. Violation of Illinois Rules of Professional Conduct 1.7(b) – Conflict of Interest: General Rule.

Rule 1.7(b) of the Rules of Professional Conduct (134 Ill. 2d R. 1.7(b) reads:

"A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless [under certain circumstances]."

LR83.51.7(b) – Conflict of Interest: General Rule.

"A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless [under certain circumstances]."

None of the exceptions provided by these rules apply.

Siegel will be called upon as a material witness in this cause.

Siegel's interests are in direct conflict with the interests of his co-defendant and client, Evanston.

The following example is not exhaustive, but illustrative:

Local Rule 83.51.5(a) states, "a lawyer's fee shall be reasonable."

In this case, Siegel's fees are not reasonable:

1. Indirectly, via the conduit of his (partnership in his) law firm, Siegel receives compensation from client Evanston for his firm's representation of Evanston in this suit.
2. Indirectly, via the conduit of his (partnership in his) law firm, client Evanston also pays fees to Siegel to represent *himself*, as a co-defendant in this suit.
3. Evanston also pays Siegel a salary as Corporation Counsel while he works to defend his client, Evanston.
4. Evanston also pays Siegel a salary as Corporation Counsel while he works to defend *himself* as co-defendant.

Plaintiffs will likely argue that Evanston's liability in this suit arises in large part from the tortious acts of its employee, co-defendant, agent and counsel, Siegel.

It is common for an employer to underwrite the defense of an employee, for torts committed during the course of employment. The spirit of this rule however, must prohibit that employee from enjoying a simultaneous windfall arising directly from his own deliberate actions.

By his continued representation of Evanston, Siegel benefits at his client's expense, *i.e.*, where the suit expands, Siegel's fees multiply. Where it contracts, his fees diminish.

Plaintiffs admit such a condition is a natural byproduct of attorney-client relationships, but in this case, attorney Siegel set up the conditions (effected the retaliation) that created the conflict.

Therefore, it appears that Siegel both created, and continues to maintain, the conditions that allow him to "quadruple-dip" from the trough of his unwitting client and co-defendant, Evanston.

It is not an excuse that an attorney's personal code of ethics does not recognize certain conduct as wrongful. *In Re William J. Gerard, Attorney, Respondent*, 548 N.E.2d 1051, 132 Ill. 2d 507, 139 Ill. Dec. 495 1989.IL.2004.

Siegel's conflict, and by extension, that of his law firm Holland & Knight, is clear and inescapable. The violation of Rules 1.7(b) and LR 83.51.5(a) has already accrued, and continues to multiply with each passing day.

For this reason, all counsel must be disqualified.

IV. Violation of Illinois Rules of Professional Conduct 1.7(a) – Conflict of Interest: General Rule.

Rule 1.7(a) of the Rules of Professional Conduct (134 Ill. 2d R. 1.7(a) reads:

"A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless [under certain circumstances]."

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. In this case however, the different position that must be taken is not legal, temporal, issue, representational or procedural.

The potentially inconsistent positions here are factual. The facts themselves are a wedge between Siegel and his client, Evanston, *i.e.*, it may better serve one defendant to admit a certain fact, while it may better serve the other to deny that same fact.

The following examples are illustrative but not exhaustive:

1. The City's liability may be mitigated where it can be shown that it was Siegel and not Evanston, who established and enforced the alleged policy, custom and practice of retaliation.

Conversely, Siegel's liability may be mitigated where it can be shown that his client was the tortfeasor. Siegel benefits where his client is made to bear the greater burden of responsibility.

At some point before or after discovery, co-defendants may, for tactical reasons, be disposed to assign whole or partial responsibility for the tort among themselves. Ultimately, Siegel will make that distribution. In effect, Siegel will sit in judgment of himself, to the obvious detriment of everyone but himself.

This inherent conflict materially interferes with Siegel's independent professional judgment in considering alternatives, and it forecloses courses of action that reasonably should be pursued on behalf of co-defendant Evanston. (For litigation purposes, Siegel is

Evanston.) Evanston therefore, may be denied the opportunity to know or make informed decisions, where his attorneys' instinct for self-preservation is a filtering element.

2. It is entirely probable that Evanston will not be made aware of the conflicts shown in this Plaintiffs' Motion to Disqualify. It is against Siegel's pecuniary and professional interest to enlighten his client, his law firm, or the Court, regarding the mandatory disqualification requirements of the Rules of Professional Conduct or of other matters of conflict shown herein.

3. Pursuant to paragraph one above, it is probable that the testimony of Hill and Szymanski will be adverse to the interests of co-defendants Siegel and Evanston, and that a material secondary conflict may exist between these co-defendants.

4. Assuming arguendo, that plaintiffs will prevail in this action, Siegel must anticipate and weigh the risk a negative verdict may bear upon the status and reputation of himself, his law firm, and his position within that law firm, against his superior duty to mitigate the liabilities of his client, Evanston.

Counselors cannot possibly strike a fair balance among these several materially adverse attorney-client interests, nor should they allow themselves to remain in a position where such alternatives lay before them.

There is a duty of loyalty inherent in Rule 1.7(a).

Siegel's natural loyalty to himself is a division of that loyalty.

For these and other reasons, all counsel must be disqualified.

V. Violation of Illinois Rules of Professional Conduct 3.7(a) – Lawyer As Witness.

Rule 3.7(a) of the Rules of Professional Conduct (134 Ill. 2d R. 3.7(a) reads:

"A lawyer shall not accept or continue employment in contemplated or pending litigation if the lawyer knows or reasonably should know that the lawyer may be called as a witness on behalf of the client, except [under certain circumstances]."

LR83.53.7(a) – Lawyer as Witness

“A lawyer shall not act as an advocate in a trial or evidentiary proceeding if the lawyer knows or reasonably should know that the lawyer may be called as a witness therein on behalf of the client, except [under certain circumstances].”

Siegel will be called upon as a material witness on behalf of his client in this cause.

Siegel, *ergo* Holland & Knight, cannot be an advocate and a party in the same action. This is a structural violation of the Rules that cannot be waived.

VI. Violation of Illinois Rules of Professional Conduct 3.7(b) – Lawyer As Witness.

Rule 3.7(b) of the Rules of Professional Conduct (134 Ill. 2d R. 3.7(b) reads:

“If a lawyer knows or reasonably should know that the lawyer may be called as a witness other than on behalf of the client, the lawyer may accept or continue the representation until the lawyer knows or reasonably should know that the lawyer's testimony is or may be prejudicial to the client.”

There are no exceptions to this rule.

Counselors will be deposed as material adverse witnesses to testify against co-defendant Evanston.

Employees of Evanston will be called upon as material adverse witnesses to testify against co-defendant Siegel.

Where Siegel may be required to corroborate plaintiffs' damaging evidence, or to testify that Evanston established and acted in compliance with the policy, custom or practice of retaliation, his testimony will be materially prejudicial to his client.

The actual knowledge of one or more lawyers in a firm is imputed to each member of that firm. *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976); RP.C. 1.10.

The law firm of Holland & Knight must be disqualified for violation of this rule.

VII. Violation of Illinois Rules of Professional Conduct 5.1(c) – Responsibilities of a Partner or Supervisory Lawyer.

Rule 5.1(c) of the Rules of Professional Conduct (134 Ill. 2d R. 5.1(c) reads:

(c) A lawyer shall be responsible for another lawyer's violation of these rules if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

On at least two separate occasions, plaintiffs gave notice to Siegel, Hill, Szymanski and Holland & Knight, that each was in violation of Illinois and Local Rules and should be disqualified.

A violation of Rule 5.1(c) does not go directly toward disqualification. It is included here to further illustrate that indifference to the Rules lies not just with Siegel, but is apparently part of a firm-wide culture at Holland & Knight.

Even where counsels may argue there is no conflict, they have a duty to advise the court of a possible conflict and the extent of the possible conflict. *Cuyler v. Sullivan*, 446 U.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708, 1717 (1980).

No attorney took any proactive steps to disqualify themselves or, at a minimum, to advise the Court of possible conflicts, as required.

Holland & Knight is in direct violation of RPC 5.1(c) and should be disqualified.

VIII. Violation of Illinois Rules of Professional Conduct 8.4(a)(1) – Misconduct.

Rule 8.4(a)(1) of the Rules of Professional Conduct (134 Ill. 2d R. 8.4(a)(1) reads:

(a) A lawyer shall not:

(1) violate, or attempt to violate these Rules.

If any attorney has violated any of the previous rules, they have automatically violated this rule.

Holland & Knight has violated this rule by default.

Argument

In *Marvin N. Benn & Associates, Ltd. v. Nelsen Steel & Wire, Inc.*, 107 Ill.App.3d 442, 437 N.E.2d 900, 63 Ill.Dec. 251 (1st Dist. 1982), the Illinois Supreme Court said that the Rules of Professional Conduct are part of the Supreme Court Rules and therefore have the same status as a statute as an appropriate source for defining Illinois public policy. *Hofreiter v. Leigh*, 124 Ill.App.3d 1052, 465 N.E.2d 110, 80 Ill.Dec. 319 (3d Dist. 1984); *Coughlin v. SeRine*, 154 Ill.App.3d 510, 507 N.E.2d 505, 107 Ill.Dec. 592 (1st Dist. 1987).

Plaintiffs accept that disqualification is a drastic measure that courts should grant only when the opposing side can show that the lawyer's actions or circumstances are likely to be prejudicial to the lawyer's client.

Disqualification under these circumstances is not drastic. As shown above, there are inherent structural violations of the Rules that cannot be overcome, waived or ignored. In this case, disqualification is proper and mandatory.

Doubts as to propriety are usually resolved in favor of disqualification. *LaSalle National Bank v. Lake County*, 703 F.2d 252, 257 (7th Cir. 1983).

It is important to bear in mind however, that an actual conflict need not be shown for disqualification to occur.

Because these rules are aimed not only at protecting the attorney-client relationship but also at maintaining public trust in the integrity of the Bar by avoiding even the appearance of impropriety, a very strict standard of proof must be applied, and any doubts as to the existence of a conflict are resolved in favor of disqualification. *La Salle National Bank v. County of Lake* (7th Cir. 1983), 703 F.2d 252.

An attempt to minimize the significance of the Rules of Professional Conduct can be grounds for discipline under R.P.C. 8.4(a)(1). The individual defendants and their law firm Holland & Knight, do not minimize the rules, they ignore the rules.

Regarding sections VII and VIII above, even general violations of the rules are unacceptable. The Illinois Supreme Court has considered the practice of law a privilege that demands a greater acceptance of responsibility and adherence to ethical standards. *In re Rosenthal*, 73 Ill.2d 46, 382 N.E.2d 257, 261, 21 Ill.Dec. 893 (1978).

The trust and confidence that members of the public repose in an attorney will survive only if attorneys consistently conduct themselves with integrity. *Gerard, supra*, 548 N.E.2d at 1065.

The lawyer, as an officer of the court, "is duty-bound to uphold the rules." *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790, 793, 127 Ill.Dec. 708 (1988).

The Rules are not precatory; they are mandatory rules of conduct. *In re Demuth*, 126 Ill.2d 1, 533 N.E.2d 867, 872, 127 Ill.Dec. 785 (1988).

This action has been "at issue" for two weeks. Discovery has not begun. At this early point, Evanston will not be materially prejudiced by disqualification of counsel.

Finally, this case will not be tried at the bench, it will be tried before a jury.

While an experienced jurist may have the capacity to filter the reality and the appearance of the various conflicts that will be shown by plaintiffs at trial, the same simply cannot be demanded or expected of a juror(s).

For these reason, all counsel must be disqualified.

WHEREFORE, and for all of the foregoing, plaintiffs Michael L. Kathrein and Victoria Zaytseva respectfully request this court:

1. Disqualify the law firm Holland & Knight, LLP., from representing any parties in this action.
2. Enjoin any party from defending in this action as long as they are represented by any attorney associated with the law firm Holland & Knight, LLP.
3. For any and all other relief due, just and owing in the premises.

Respectfully submitted,

Dated: March 30, 2006

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 30th day of March 2006, placed a true and exact copy of the above and foregoing

PLAINTIFFS' MOTION TO DISQUALIFY ATTORNEYS

in the U. S. Mail, first class postage, prepaid, addressed to:

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Michael Lee Kathrein

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

MICHAEL L. KATHREIN,)	
VICTORIA ZAYTSEVA,)	
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Plaintiffs,)	No. 05 C 3385
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v.)	
)	Honorable John W. Darrah
CITY OF EVANSTON, ILLINOIS,)	Judge Presiding
JACK M. SIEGEL,)	
HERBERT D. HILL,)	
ELLEN SZYMANSKI,)	
)	
Defendants.)	
_____)	

NOTICE OF MOTION

To: Iain D. Johnston
Holland & Knight, LLP
Attorneys for the Defendants
131 South Dearborn Street, 30th Floor
Chicago, IL 60603-5517

Please take notice that on Thursday, the 6th day of April, 2006, at 9:00 am, or as soon thereafter as may be heard, Michael L. Kathrein shall appear before the Honorable John W. Darrah, United States District Judge or any Judge sitting in that Judge's stead, in Courtroom 1203, located in the Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, and present the Court with this

PLAINTIFFS' MOTION TO DISQUALIFY ATTORNEYS

copies of which are hereby served upon you.

Respectfully submitted,

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