

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

MCLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION, Plaintiffs

v.

C.A. No. 99-286-T

ALFRED A. RECHBERGER and
ARC PARTNERS, LTD.,
Defendants

v.

EDWARD L. HAHN and JON MEYER,
Third-party defendants

CITIZENS BANK OF NEW HAMPSHIRE,
ALAN REICHE and EDWARD L. HAHN,
Trustees

MEMORANDUM AND ORDER

The defendants, Alfred A. Rechberger and his company, ARC Partners, Ltd., have moved for a continuance of the trial date on the ground that their expert witness has a conflict of interest that disqualifies him from testifying and that additional time is needed to engage a new expert. For reasons hereinafter stated, this Court has determined that no such conflict exists, but that a brief continuance should be granted in order to allow the defendants to engage another expert to testify with respect to any remaining issues not previously decided and to allow the plaintiffs and third-party defendants to obtain discovery from that expert at the defendant's expense.

Background

The McLane law firm brought this action in the District of New Hampshire to recover legal fees allegedly owed to it for services performed in representing Rechberger in a civil action brought against him for alleged sexual abuse. The case was scheduled for trial on June 15, 1999. However, on the eve of trial, Rechberger filed this motion for a continuance alleging that his expert witness, attorney Finis Williams, had been compromised by a conflict of interest created by a telephone conversation between Williams and Supreme Court Justice David Souter. Rechberger seeks additional time in which to engage another expert.

Because the district judges in New Hampshire are all well acquainted with Justice Souter, the motion was transferred to this Court.

Findings of Fact

After considering the evidence presented at an evidentiary hearing, I find the relevant facts to be as follows:

Finis Williams is a New Hampshire trial attorney. He met Justice Souter approximately twenty years ago when Justice Souter was a Superior Court judge and Williams was part of a pool of law clerks who, on occasion, were called upon to perform legal research for various Superior Court judges. Since that time, Williams's contacts with Justice Souter have been limited to one or two luncheon meetings each year when Justice Souter returns to New

Hampshire during the Supreme Court's summer recesses. Williams arranges those lunches by telephoning Justice Souter sometime during the spring of each year.

Sometime before March of 1998, Williams was engaged by Rechberger and Rechberger's attorney, Valeriano Diviacchi, to serve as an expert witness in this suit. Williams's role was to provide an opinion regarding the reasonableness of the fees claimed by the McLane law firm and the viability of a counterclaim by Rechberger for malpractice.

Since he is a member of the New Hampshire bar, Williams is acquainted with the other parties in the suit but he has no personal relationship or business affiliation with them.

In March 1998, Williams submitted a written draft of his opinion to Diviacchi and Rechberger. The gist of that opinion was that the portion of the fee attributable to services performed by Edward Hahn, a corporate attorney at the McLane firm, were excessive because there was no need for his continued involvement in the case but that the remainder of the fee was reasonable. Williams further opined that while it was imprudent for the McLane firm to have advised Rechberger that the case against him was "only a \$50,000 case," the malpractice counterclaim could not be proven because there was no indication that the plaintiffs would have been amenable to accepting less than \$1.37 million, the amount for which the case ultimately was settled. Rechberger expressed

dissatisfaction with Williams's opinion and tried, unsuccessfully, to persuade Williams to change it.

In April 1998 Williams made his annual telephone call to Justice Souter to attempt to schedule a lunch meeting sometime that summer. Justice Souter told Williams that he could not have lunch with him that summer because Wilbur Glahn, a partner in the McLane law firm, was a good friend of Justice Souter and Williams was a witness against the firm. Williams understood Justice Souter's comment to mean that Justice Souter could not have social contact with both him and Glahn while the case was pending.

Justice Souter never discussed any aspect of the case with Williams either during that telephone conversation or any other time. In fact, with one exception, there has been no other communication at all between Williams and Justice Souter during the entire period that Williams has been working on the case. The exception consisted of a brief encounter on the street when Justice Souter smiled and said hello to Williams. That occurred shortly after the April telephone conversation.

In January of 1999, Williams submitted his final opinion, in writing, to Rechberger and Diviacchi. That opinion was essentially the same as the draft opinion. Shortly after that, Judge DiClerico, the judge presiding over the case, granted partial summary judgment in favor of the plaintiffs and third-party defendants on a number of issues. As a result of those rulings,

there are very few issues remaining in the lawsuit.

Matters came to a head in May 1999 during a telephone conversation between Diviacchi and Williams in which Diviacchi complained bitterly about Judge DiClerico's rulings and how he felt that he had suffered by accepting this case. In an effort to console Diviacchi, Williams, for the first time, mentioned his April 1998 telephone conversation with Justice Souter and went on to express his feeling that he, too, had suffered because he felt that he may have lost Justice Souter's friendship. In attempting to explain why he agreed to become involved in a legal malpractice case, Williams also made reference to his dismay during a previous medical malpractice case in which a plaintiff, having what Williams believed to be a meritorious case, was unable to obtain a doctor willing to testify as an expert witness against other doctors.

Rechberger argues that these statements indicate a belief by Williams that, if he testifies in a manner harmful to the McLane firm, he risks possible punishment and the loss of Justice Souter's friendship. However, Williams states that his understanding was that Justice Souter was declining to have lunch with him only until this case is terminated. Moreover, Williams vigorously maintains that his conversation with Justice Souter has not, in any way, altered his expert opinion or his willingness to testify on the defendant's behalf. In any event, Rechberger has fired Williams.

Discussion

Rechberger concedes his inability to show that Williams's conversation with Justice Souter influenced Williams's opinion in any way or lessened his willingness to testify on Rechberger's behalf. However, Rechberger argues that the conversation establishes that Williams has a conflict of interest that creates a presumption that Rechberger would be prejudiced by being required to retain Williams as his expert witness.

Although the relationship between a client and the client's expert witness differs from the relationship between the client and the client's attorney, there are some common principles that govern both relationships. An expert witness, like an attorney, is hired to perform a service for the client. Consequently, an expert witness, like an attorney, has a duty of loyalty to the client. The witness's ability to serve the client loyally is brought into question when the expert has allegiances or interests that conflict with the witness's obligations to the client.

Because such a conflict presents a great risk that the duty of loyalty will be breached, its mere existence is sufficient to disqualify an attorney unless the client waives his right to be represented by conflict-free counsel. See United States v. Fahey, 769 F.2d 829, 834-35 (1st Cir. 1985); Doherty v. United States, 948 F. Supp. 111, 115-16 (D. Mass. 1996). The same considerations are applicable in the case of an expert witness.

In determining whether a disqualifying conflict exists, the test is whether a reasonable person, with knowledge of the pertinent facts, could conclude that the witness has loyalties or interests adverse to the client's interests. The fact that the client might prefer a different witness or, even, that the client might believe that the witness has a conflict is not sufficient. A client is free to select or reject an expert witness at will. However, in order to obtain an eleventh-hour postponement of a trial on the ground that an expert witness has an alleged conflict of interest, good reason must be presented for disqualifying the expert. Otherwise, a party would have the unilateral power to delay a trial indefinitely and to require the opposing party to engage in a new round of discovery prompted by the retention of a new expert.

In this case, Rechberger has failed to establish any reasonable basis for believing that Williams's telephone conversation with Justice Souter created any conflict of interest. There is not even the faintest suggestion that Justice Souter, in any way, sought to influence Williams's opinion or to deter his participation in the case. The April 1998 telephone conversation was the only communication between the two men since Williams was retained as a witness, and that telephone call was initiated by Williams. Furthermore, there was no discussion about the case, Williams's role in it, or Williams's opinion other than Justice

Souter's statement that because of his friendship with Glahn, he could not have lunch with Williams while the case was pending. What Rechberger does not appear to recognize is that, under the circumstances, that was a perfectly proper course of action for Justice Souter to take. Indeed, given Rechberger's apparent proclivity to believe the worst, one can only imagine what his reaction would have been if Justice Souter had agreed to have lunch with Williams while the case was pending.

Nor is there any reasonable basis for concluding that, even though Justice Souter acted properly, Williams's duty of loyalty has been undermined by some subjective fear of losing Justice Souter's friendship. First, as Williams himself testified, he understood that Justice Souter declined to have lunch with him only during the pendency of this case. There is no evidence that Justice Souter intended to permanently terminate their relationship if Williams testified on Rechberger's behalf.

Furthermore, since Williams's "friendship" with Justice Souter consisted of little more than an annual luncheon meeting, it is highly unlikely that the suspension of those meetings for a brief time would influence Williams in any way. Indeed, as already noted, Williams adamantly denies that it has had any effect, whatsoever, on his opinion or his willingness to testify. Finally, it is very far-fetched to suggest that simply because Justice Souter is friendly with Glahn, Williams harbored a fear that he

would lose Justice Souter's friendship by testifying against the McLane firm. There would have to be some reasonable basis for inferring such a fear. In this case, there is no basis for such an inference.

The fact that Rechberger has chosen to "fire" Williams does not entitle him to a continuance. Despite the firing, Williams has disclaimed any ill feeling toward Rechberger and has reaffirmed his willingness to testify wholeheartedly on Rechberger's behalf. Although Rechberger may believe otherwise, his concern arises from a situation of his own making. He cannot create cause for disqualifying his expert witness by unilaterally terminating the witness without good reason and, then, citing the animosity allegedly engendered by the termination as a ground for the disqualification. In this respect, Rechberger is like the apocryphal young man who murders both of his parents and pleads for mercy on the ground that he is an orphan.

Nonetheless, giving Rechberger the benefit of the doubt and assuming that he was sincere in his erroneous belief that Williams had a conflict of interest, it is difficult to ignore the unenviable position in which he now finds himself. Since it does not appear that the other parties will be prejudiced by a short delay, the Court is inclined to grant Rechberger's motion for a brief continuance.

Conclusion

For all of the foregoing reasons, Rechberger's motion for a continuance is hereby granted upon the following terms and conditions:

1. Rechberger may have a period of three weeks in which to engage a new expert witness and to furnish the opposing parties with that witness's written opinion.
2. The witness's opinion and testimony shall be limited to the remaining issues not previously decided by Judge DiClerico.
3. The opposing parties shall have the right to depose the expert and Rechberger shall pay all reasonable expenses and/or attorneys' fees that they incur in doing so.

IT IS SO ORDERED,

Ernest C. Torres
United States District Judge

Date:

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