UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARIELLE ("MOLLY") KRONBERG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 1:09cv947**
	)	**AJT/TRJ**
LYNDON LAROUCHE, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OR FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Defendants Lyndon LaRouche, Barbara Boyd, Lyndon LaRouche Political Action Committee, Inc., and Executive Intelligence Review, by counsel, hereby submit their memorandum in opposition to Plaintiff Marielle Kronberg's motion for reconsideration of, or for a certification allowing interlocutory appeal of, the order disqualifying John E. Markham, III ("Markham"), and for an interim stay.

I. INTRODUCTION

Plaintiff has moved for reconsideration (or, in the alternative, certification for interlocutory appeal) of the Court's order of April 9, 2010 ("Opinion"), disqualifying one of Plaintiff's attorneys, John E. Markham, III, Esq., who has been admitted *pro hac vice* in this case. In granting Defendants' motion to disqualify, this Court held that disqualification of Markham was required by Virginia Rule of Professional Conduct ("Rule") 1.11(c) because Markham has knowledge of confidential government information obtained as a result of his extended role as a former United States Attorney in prosecuting Lyndon LaRouche and others,

which information could be used to materially disadvantage the Defendants in this case. (Doc. No. 40 at 10).

As set forth below, Plaintiff's motion should be denied. This Court's ruling disqualifying Markham is not in error and the extraordinary circumstances for certifying interlocutory review are not present here.

II. LEGAL ARGUMENT

A. Plaintiff's Motion for Reconsideration Should Be Denied.

1. This Court Applied the Correct Standard for Disqualification Under Rule 1.11(c).

In moving for reconsideration, Plaintiff contends that this Court misread Rule 1.11(c), which is worded in the present tense, and disqualified Markham merely because he previously had access to confidential government information that could materially disadvantage the Defendants, not on the basis of his actual knowledge of such information. Markham's argument is not well taken. It is directed at a straw man and is based upon a misreading of the Court's opinion.

First, contrary to Plaintiff's contention, this Court interpreted Rule 1.11(c) as being worded in the present tense and as being founded on a lawyer "having information," not just access to information. As this Court stated in its opinion, "applying the Rule here, Markham should be disqualified if . . . he has confidential government information he acquired while working as an AUSA about one or more defendants." Opinion at 5. (emphasis added).[1] Thus, the Court's opinion explained that it "must first address whether Markham has confidential

[1] The Court also stated that the following two additional prongs of Rule 1.11(c) must be met to warrant disqualification: "(2) Kronberg's interests are adverse to the defendants' in this matter; and (3) the confidential government information 'could be used in this matter to the material disadvantage' to one or more defendants." *Id.*

government information" and specifically recognized that "Rule 1.11(c) only applies if Markham has actual knowledge of this confidential government information." *Id.* (emphasis added). In short, contrary to Plaintiff's argument, this Court properly read the requirements of Rule 1.11(c) as focusing upon an attorney's having actual knowledge of confidential government information.

Second, in concluding that Markham did have such actual knowledge and, accordingly, should be disqualified, this Court found -- again contrary to Plaintiff's contention -- that Markham had more than mere "access" to confidential government information. Indeed, in opposing disqualification, "Markham concede[d] that in the 1980's he had access to and actual knowledge of confidential information related to LaRouche and LaRouche activities, as well as the LaRouche organization." Opinion at 5. Thus, the Court properly concluded:

> There is no question that Markham, while involved with the LaRouche prosecutions, obtained "confidential government information" and had actual knowledge of confidential government information related to LaRouche during the 1990's.

Id. at 6. Plaintiff's contention that this Court's analysis was predicated solely upon Markham's access to confidential government information is in error.

Third, Plaintiff's argument that this Court applied the erroneous standard of "access" to, rather than "actual knowledge" of, confidential government information is predicated upon Plaintiff's wrenching out of context the following statement from page 10 of this Court's opinion: "Markham's access to confidential information could materially disadvantage one or more of the defendants." Pl.'s Mem. at 1 (Plaintiff's emphasis). Contrary to the impression Plaintiff seeks to give, the court's reference in its Opinion to Markham's access to confidential government information was not made in the context of the first prong of Rule 1.11(c), i.e., whether he has actual knowledge of such confidential government information. Only after having concluded that Markham has actual knowledge of confidential government information that the passage of

time cannot "undo" (Opinion at 8), did the Court, then, consider the third prong of Rule 1.11(c), i.e., "whether the confidential government information 'could be used to the material disadvantage' of one or more defendants." *Id.* In opposing disqualification, Plaintiff argued that "he had no access to information regarding Kronberg's testimony or about Ken Kronberg during the earlier prosecutions." *Id.* The Court, however, rejected Plaintiff's "access" argument, finding "that Markham's access to confidential government information about a variety of relevant topics obtained as a result of his extended role prosecuting LaRouche could materially disadvantage one or more of the Defendants in this case." *Id.* at 10.

In short, when placed in the proper context, it is clear that the Court employed the appropriate analysis for disqualification. Plaintiff's contention that this Court improperly focused upon "access" to confidential government information is nothing but a red herring and provides no basis for reconsideration of the Court's disqualification order.

2. Professed Lack of Memory and Passage of Time Does Not Undo Having Knowledge of Confidential Information.

Plaintiff's motion for reconsideration also rehashes her contention that Markham's professed lack of memory should exempt him from the disqualification requirements of Rule 1.11(c). In doing so, Plaintiff takes issue with this Court's observation that Plaintiff cited no cases where "lack of memory and passage of time negates one's possession of confidential government information" (Opinion at 8) by pointing to the decision in *Tucker v. George*, 569 F. Supp. 2d 834, 839 (W.D. Wisc. 2008), which considered Wisconsin Rule 1.11(c), whose wording is similar to the Virginia Rule. According to Plaintiff, the *Tucker* opinion makes clear that "the requirement for disqualification is current knowledge, not prior access." Pl.'s Mem. at 3.

However, Plaintiff's discussion of *Tucker* omits a critical aspect of the court's decision. In *Tucker,* the two attorneys subject to disqualification had submitted affidavits in which they averred they "remembered little" about the confidential government information. *Tucker,* 569 F. Supp. 2d at 837. Nonetheless, the court still disqualified them. Moreover, the plaintiff in *Tucker* moved for reconsideration of the disqualification order (*Tucker v. George,* 2008 U.S. Dist. LEXIS 66783 (W.D. Wisc. Aug. 29, 2008)), contending, as Plaintiff does here, that the attorneys' lack of recollection should undo any knowledge of confidential information that they previously may have acquired. The district court, however, denied the reconsideration motion. In doing so, the *Tucker* court acknowledged the two attorneys' "sworn assertions that they recall little of their involvement in the state's investigation and had no memory of any confidential information they might have learned about [defendant] during the course of that investigation." *Id.,* *4. Yet, the *Tucker* court found that any lack of memory did not nullify the attorneys' knowledge of confidential government information. Hence, contrary to Plaintiff's argument here, *Tucker* confirms this Court's reasoning for disqualifying Markham.

Finally, as Defendants previously have pointed out, outside the specific context of former government attorneys, a number of courts have reiterated the basic principle that disqualification still is warranted even though the attorney may not currently recall the confidential information. See, e.g., *Smith & Nephew, Inc. v. Ethicon, Inc.,* 98 F. Supp. 2d 106, 109 fn. 7 (D. Mass. 2000), ("a lawyer's assertion of less than perfect recall is not the controlling consideration" for disqualification); *Schwed v. General Electric Co.,* 990 F. Supp. 113, 117 fn. 2 (N.D.N.Y. 1998) (although attorney asserted he did not recall any discussions he had about the case while employed at defense counsel's law firm, disqualification still mandated); *Fierro v. Gallucci,* 2007 U.S. Dist. LEXIS 89296, *22 (E.D.N.Y. Dec. 4, 2007) (fact that attorney did not recall

conversations with plaintiff did not vitiate the otherwise clear basis for disqualification of counsel for defendant); *Arifi v. Great Dane Trailers, Inc.*, 290 F. Supp. 2d 344, 350 (E.D.N.Y. 2003) (attorney's claim that he did not remember any confidential information was not reason to undo disqualification requirement).[2]

Plaintiff seeks to distinguish these decisions involving the disqualification of private attorneys because they involved switching sides. However, this simply is a distinction without a difference. That disqualification may be triggered in circumstances where an attorney switches sides merely represents one fact pattern where issues of disqualification may arise. Other fact patterns include the facts that gave rise to the *Tucker* case, as well as the case at bar. In none of these disqualification cases has an attorney's professed lack of recollection been a reason that the courts have found to deny disqualification.

In sum, Plaintiff's arguments for reconsideration are predicated upon either a misreading of this Court's opinion or a rehash of the arguments previously made and rejected by this Court. Plaintiff has failed to come forward with any cognizable reason for this Court to reconsider its disqualification order. That order should stand.

B. Plaintiff's Motion for Certification of an Interlocutory Appeal Should Be Denied.

In the alternative to reconsideration, Plaintiff asks this Court to certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and to stay proceedings while any appeal is pending. Because this matter does not present the type of exceptional circumstances that warrant certification, Plaintiff's request should be denied.

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[2] See also *General Motors Corp. v. City of New York*, 501 F.2d 639 (S.D.N.Y. 1974) (former government attorney's statement that he had no recollection of any active participation in government investigation of antitrust case against GM eighteen years prior to attorney's representation of city against GM did not negate requirement that attorney be disqualified).

1. Standard for Interlocutory Review

The standard for certifying an interlocutory appeal is well-established, and the certification power of a district court is strictly limited to exceptional circumstances. Thus, to certify an interlocutory appeal, a district court must find that the order sought to be appealed: (1) involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). "This language has been construed as granting district courts 'circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable.'" *Difelice v. U.S. Airways, Inc*., 404 F. Supp. 2d 907, 908 (E.D. Va. 2005) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 46, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)).[3]

Because § 1292(b) is contrary to the general rule that appeals may be had only after a final judgment, the statute should be used sparingly and its requirements must be strictly construed. *Id*. (citing *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989)). In other words, the certification of an interlocutory appeal requires "exceptional circumstances that justify a departure from the basic policy limiting appellate review to final judgments." *Id*. (citations omitted). According to the Fourth Circuit, "the kind of question best adapted to discretionary interlocutory review is a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes." *Fannin*

[3] Plaintiff cites to two appeals court decisions which considered the interlocutory appeal of a district court order disqualifying counsel. Pl's. Mem. at 5, citing *Rogers v. Pittston Coal Co*., 996 F. 2d 1212, 1993 W.L. 239001, *1 (4th Cir. 1993) (*per curiam)* (unpublished); *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304 (5th Cir. 1995). However, in neither case did the court address the basis for certification of an interlocutory appeal and, hence, the decisions provide no guidance as to the standards this Court should apply in considering Plaintiff's request for certification.

v. CSX Transp., Inc., 873 F.2d 1438, 1989 U.S. App. LEXIS 20859, at *16 (4th Cir. 1989) (unpublished); *see also KPMG Peat Marwick, LLP v. Estate of Nelco, Ltd.*, 250 B.R. 74, 78 (E.D. Va. 2000).

In regard to motions to disqualify, the Supreme Court has recognized that a party may seek to have an order disqualifying counsel certified for interlocutory review pursuant to § 1292(b), but only "in the exceptional circumstances for which it was designed." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985). In the case at bar, no such "exceptional circumstances" exist. There is nothing about the facts or law at issue which militate for a departure from the general requirement that parties await the final determination of their disputes before taking appeal.

2. There is no controlling question of law at issue here.

A question of law is “controlling” if “reversal of the district court’s order would terminate the action.” *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990); *Kore Holdings, Inc. v. Rosen (In re Rood)*, 2010 U.S. Dist. LEXIS 24936, *22 (D. Md. Mar. 17, 2010); *see also Fannin*, 873 F.2d 1438, 1989 U.S. App. LEXIS 20859, at *16 (a controlling question of law is “a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes.”).[4] For

[4] In *Fannin*, the district court had certified an order for interlocutory appeal under § 1292(b), but the Fourth Circuit denied the motion for leave to appeal and remanded the case for further proceedings. In doing so, the appeal court found that the matter presented "no 'controlling question of law' ripe for our consideration." 1989 U.S. App. LEXIS 20859, *1. As the Fourth Circuit explained:

> [C]ertification by a district court that an interlocutory order turned on a "controlling question of law" does not require us to grant leave to appeal. The immediate appeal of a certified question is an extraordinary remedy, which may be granted or denied at the sole discretion of the court of appeals.

Id., *5 (citation omitted).

example, questions of in personam and subject matter jurisdiction warrant certification under § 1292(b) because their resolution may dispose of a case. *Klinghoffer*, 921 F.2d at 24. In comparison, here, even if the disqualification order was reversed on appeal, the action would not be ended. *Id.*

Additionally, a question may be "controlling" if it substantially affects a large number of cases. *Genentech, Inc. v. Novo Nordisk*, 907 F. Supp. 97, 99 (S.D.N.Y. 1995) (citations omitted). Plaintiff, however, has not established that the question at issue in this matter has wide application. Markham's disqualification rested on a highly fact-specific inquiry. Specifically, this Court found that Markham's knowledge of confidential government information about a variety of relevant topics obtained as a result of his extended role prosecuting LaRouche could materially disadvantage one or more of the Defendants in this case. Opinion at 11. Because the Court's determination turned on the specific facts of this litigation, it is highly unlikely that further consideration of the issue would influence the outcome of many other cases, and Plaintiff certainly has not referenced any. *See, e.g., Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185, 1198 (E.D. Va. 1991) ("The Court's determination of this issue in its Order was grounded in the specific facts of the case and cannot be divorced from the facts in such a way that it is a 'controlling issue of law.'").

Furthermore, the controlling issues must be issues of law. If the controlling issues are factual rather than legal as is the case here, then § 1292(b) certification is unavailable. *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 630 (2d Cir. 1991); *see also Fannin*, 873 F.2d 1438, 1989 U.S. App. LEXIS 20859, at *16.

3. There is no substantial ground for disagreement concerning the law of disqualification.

Plaintiff has not established that there is "substantial ground for disagreement" concerning the law of disqualification as it relates to this case. The Court disqualified Markham pursuant to Virginia Rule 1.11(c). Plaintiff has not cited conflicting legal authority to show that there exists substantial doubt about the law. "[A]n interlocutory appeal will lie only if a difference of opinion exists *between courts* on a given controlling question of law, creating the need for an interlocutory appeal to resolve the split or clarify the law." *KPMG Peat Marwick,* 250 B.R. at 82 (emphasis in original); *see also McDaniel v. Mehfoud*, 708 F. Supp. 754, 756 (E.D. Va. 1989) (in finding no case conflict or circuit split supporting the defendants' claim of substantial ground for difference of opinion, Judge Merhige stated that "the only apparent difference in opinion defendants demonstrate is between their counsel and the Order of this Court. Counsel's disagreement with the Court is simply not reason enough to grant an interlocutory appeal.")

Instead of citing conflicting legal authority to show there exists substantial doubt about the law, Plaintiff merely argues there is a ground for disagreement because (1) there is no case interpreting the specific language used to disqualify Markham and (2) the Court noted that two of the three issues to be decided were "less clear cut" (*i.e.*, whether Markham "has confidential information" and whether, if he does have such information, it "could be used in this matter to the material disadvantage to one or more of the defendants."). Pl.'s Mem. at 4, fn 4. However, these are not issues involving a question of law or a disagreement concerning the law; rather, they involve factual inquiries and/or application of the facts to the language of Rule 1.11(c).

In short, Plaintiff has failed to demonstrate any ground for disagreement, much less a substantial one, concerning the *law* of disqualification. See *The Shipping Corporation of India,*

Ltd. v. The American Bureau of Shipping, 752 F. Supp. 173, 175 (S.D.N.Y. 1990) (denying certification where plaintiff "failed to demonstrate that there was any conflicting legal authority which would persuade this court that there could be substantial doubt on this issue of law."); *Moll v. US Life Title Ins. Co. of New York*, 1987 U.S. Dist. LEXIS 3122, *7 (S.D.N.Y. 1987) ("the legislative history of [of § 1292(b)] indicates that to satisfy this prerequisite there must be 'substantial doubt' that the district court's order was correct.").

4. There will be no material advancement of the ultimate termination of the litigation

Finally, Plaintiff has failed to show that the termination of this litigation would be "materially advanced" by certification. See *DiFelice*, 404 F. Supp. at 910 (denying certification where "it is unlikely that certification of an interlocutory appeal will 'materially advance the ultimate termination of the litigation.'"). The disqualification of Markham does not materially advance or affect at all a resolution on the merits of Plaintiff's case. *Brooks*, 759 F. Supp. at 1198.

In fact, certifying the question of Markham's disqualification for interlocutory appeal will have the effect of actually postponing the ultimate resolution of the case. *See Brooks*, 759 F. Supp. at 1198 (finding that an immediate appeal of dismissal order was less likely to "advance the ultimate termination of [the] litigation" than a denial of such an appeal); *DeFelice*, 404 F. Supp. at 910 (denying certification where "an interlocutory appeal will simply add unnecessary delay and cost to the resolution of the remaining issues in this case.").

Instead of demonstrating that certification will materially advance the litigation, Plaintiff merely complains that Markham's disqualification constitutes a hardship because she will have difficulty retaining replacement counsel. Plaintiff's argument lacks merit. First, hardship to the party whose counsel is disqualified is not part of the relevant analysis for determining whether an

interlocutory appeal is warranted. Second, difficulty finding replacement counsel is a consideration that has been rejected by this Court. *Brooks, supra*. (Plaintiff's concern regarding retaining replacement counsel failed to convince the court that an immediate appeal would advance the ultimate termination of the litigation). Indeed, in *Brooks*, the court specifically addressed the same argument that Plaintiff makes here -- lack of sufficient funds to pay an attorney -- and stated:

> [t]o the extent that the Plaintiffs, none of whom claim to be indigent, may not have sufficient funds to pay an attorney an advance retainer, they merely face the dilemma that all civil litigants face; whether the relief sought in a lawsuit is worth the cost of maintaining the lawsuit. Neither of these concerns convince the Court that an immediate appeal would advance the ultimate termination of this litigation.

759 F. Supp. at 1198.

Lastly, Defendants note that despite Markham's disqualification, Plaintiff still has capable counsel, John Bond, Esq., who has been counsel of record in this case since its inception.[5] Defendants should not be prejudiced by a delay in the prosecution of this matter while an interlocutory appeal is taken simply because Plaintiff's present counsel might not desire to be lead counsel or lead trial attorney in this matter.

III. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiff's motion for reconsideration of, or for a certification allowing interlocutory appeal of, the order disqualifying John E. Markham, III and for an interim stay.

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[5] Defendants possess no information to lead them to believe that Mr. Bond obtained any confidential government information from Mr. Markham during their joint representation of Plaintiff which would require Mr. Bond to be disqualified for the same reasons as Mr. Markham.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing (NEF) to the following:

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