Brief for plaintiffs-appellants

Preliminary statement

This is an appeal from An Order by the United States District Court for the Southern District of New York, Lawrence W. Pierce, Judge, dated January 12, 1979...

Issues raised on appeal

The issue raised on the appeal is whether two attorneys and their present firm may represent plaintiff and its original attorneys in the circumstances that these two attorneys held high level jobs in the Department of Justice (hereinafter DOJ) at a time when the DOJ was investigating defendants, and 1) the said investigation included inquiry into the very issues presently under litigation, 2) the said investigation included inquiry into the very suit for which the said attorneys are now privately retained, 3) the said investigation included the gathering of confidential information about defendants gathered in illegal fashion, 4) the attorneys in question were personally responsible for, and did in fact decide to, continue the said investigation and to publicize the same at government expense as the most important investigation that they were then engaged in, and 5) the DOJ inquiry included improper activities by a DOJ informant who is a proposed witness in the matter at bar, and the matter at bar concerns the attempt by an attorney to influence the very DOJ investigation that the two attorneys were in charge of.

Nature of action and result below

Defendants moved to disqualify plaintiff's attorneys for ethical violations involving an attorney attempting to suborn the DOJ to prosecute defendants, and using an FBI informant to steal legal files from defendants' attorney's office. Magistrate Sinclair recommended disqualification. Plaintiff retained as special counsel, for the purpose of the disqualification matter, a firm including two attorneys who, while in governmental service the year before, had been in charge of the investigation of the defendants, and were familiar with, and even involved in, the acts underlying the disqualification of plaintiff's original attorneys. Defendants moved to disqualify these attorneys as well. Judge Pierce denied this Motion. Defendants have Appealed.

Facts

History

This appeal comes before the Court of Appeals as part of a long and involved course of litigation. The plaintiff is the United Automobile Workers of America, (hereinafter UAW). The defendants are members of the National Caucus of Labor Committees, the U.S. Labor Party, the company which prints the newspaper of those organizations, and several individuals. Although several of the defendants have no connection with the NCLC, the defendants will be hereinafter referred to collectively as the NCLC for the sake of convenience. The UAW is a national labor union. Since about 1970, the UAW and the NCLC have been engaged in a political dispute centered around economic policy. The UAW favors the creation of low-skill, low-wage jobs, while the NCLC favors technology-intensive development, exemplified by nuclear power, coupled with educational and social programs, such as strict enforcement of the anti-drug laws, to upgrade the work-force to use such technology.

In 1974, the UAW decided to resolve its dispute with the NCLC by utilizing its large financial resources and its influence with the government to destroy the NCLC. One part of that campaign, as revealed in DOJ documents obtained by NCLC,... was the underlying suit herein, which alleges that the defendants have infringed upon UAW's alleged right in the word "Solidarity," which UAW uses as part of the title of its membership magazine *"UAW Solidarity,"* by publishing *"New Solidarity"* as the newspaper of the NCLC.

At first impression, it would seem that this is a classic example of the sort of dispute that ought to be settled by the political process rather than the judicial one. This, indeed, has been NCLC's contention. However, the District Court has repeatedly rejected this contention.

In general, the UAW's campaign consisted of three tactics. The first was what the UAW characterized, in a confidential report submitted by UAW to the DOJ, as "Overwhelming physical 'defense'."... The second was the institution of specious lawsuits, and the third was the incitement of governmental agencies against the NCLC....

The underlying case

As part of the second tactic, the UAW sued the NCLC for the alleged trademark infringement described supra. The UAW, however, was not content to prosecute this suit in the normal manner in which litigants prosecute such matters, and attempted to "stack the deck" as it were. The UAW's heavy-handed attempts to ensure a guaranteed outcome of the instant case led to the disqualification of the UAW's counsel.

The first disqualification

a. *The Schlossberg Papers.* One Stephen Schlossberg was the UAW's attorney in the underlying case, along with local counsel, Cowan, Liebowitz and Latman. (Hereinafter, the Cowan firm). In the course of separate litigation under the Freedom of Information Act

(FOIA), the NCLC found that attorney Schlossberg was attempting to bolster his "Trademark" case by lobbying various agencies of the Federal government to prosecute the NCLC for offences which the candid Schlossberg admitted in writing that he knew the NCLC had not committed. For instance, Schlossberg approached the Department of Labor (DOL) and demanded prosecution of the NCLC, which is not a union, under the Landrum-Griffin Act.... When the DOL pointed out that there was no legal basis for such prosecution, Schlossberg wrote to the Secretary of Labor, berating him for getting "hung up on legal technicalities," ... and demanding that the NCLC be prosecuted....

Finding no success at the DOL, Schlossberg approached the DOJ and the Attorney General with similar demands, which he repeated yet later to the Federal Election Commission.... In each instance, Schlossberg was explicit in pointing out that such prosecution, coupled with the underlying case, would bankrupt the NCLC, which was the UAW's aim.... This was but one prong of Schlossberg's attack, however.

b. *Gregory Rose.* One Gregory Rose was an FBI informant in the NCLC.... Until September, 1977 the NCLC, in part at Schlossberg's behest, had been under investigation by the FBI. In 1977 the investigation terminated.... No NCLC member had ever been indicted as a result thereof, nor was there so much as a grand jury presentment. However, during the period of investigation, informant Rose was infiltrated into the NCLC. Rose, posing as a bona fide NCLC member, offered to do volunteer paralegal work on the UAW-NCLC case—*the very case at bar.* While doing such work, Rose stole part of the undersigned attorney's files and conveyed the same to Schlossberg....

Schlossberg, in turn, announced that, although the alleged trademark infringement occurred in 1970, and Rose had not even infiltrated the NCLC until 1973, Rose was to be the UAW's star witness at trial.

These facts were presented to the Court below in a Motion to Disqualify pursuant to the Code of Professional Responsibility, D.R. 7-105 and 9-101 as well as Canon 4. The said Motion was referred to Magistrate Sinclair, and granted.... Schlossberg is now the subject of disciplinary hearings before the Board on Professional Responsibility of the District of Columbia Court of Appeals.

c. *The Second Disqualification.* The UAW, having had Mr. Schlossberg and the Cowan firm disqualified, retained the services of Patterson, Belknap, Webb, and Tyler (The Patterson firm). That firm included Rudolf Giuliani and Harold Tyler among its members. Mr. Tyler is, in addition to being a former District Judge in the Southern District of New York, the former Deputy Attorney General (DAG) during the period of Schlossberg's influence-peddling campaign at the DOJ. Mr. Giuliani was Tyler's chief assistant. The Patterson firm was hired on the advice of Joe Rauh, who is Schlossberg's attorney in the disciplinary hearings in Washington....

Harold Tyler, as DAG, was the man in charge of the DOJ investigation of the NCLC. Mr Tyler was, in fact, the man who decided in 1976 *not* to end the investigation of the NCLC, which, therefore, continued for another year before Tyler's successor ordered it ended as having no basis in fact.... This was the same investigation that Schlossberg attempted, in complete defiance of the ethical standards of the legal profession to enflame.

Tyler, however, did far more than decide administratively to continue this one investigation among others. Tyler chose, publicly, to single out this very investigation, ahead of all others, as the most important investigation that he, Tyler, had been in charge of during his tenure as DAG.... In light of that fact, it is significant that the DOJ file on the NCLC, the file that Tyler was responsible for reviewing and passing on, and which Tyler chose to publicize as the center piece of the investigatory activity of his office, contained numerous references to, and documents from, *the very case at bar....*

It was against this factual background that the NCLC moved to disqualify the Patterson firm. This Motion was denied. The Court below heard oral argument, but declined to hold a hearing in this matter. The Appeal herein followed.

Summary of argument

The Court below committed plain error in that it misread and misapplied the applicable law, and in that it showed no awareness of the evidence before it.

Argument

The Court below applied an inapplicable rule of law and thereby committed plain error

The Court below issued an 18 page decision in this matter.... While that opinion cited a great deal of law, it completely misapprehended the nature of the case before the Court. Judge Pierce relied exclusively on case law applicable to *low* ranking former public officials, while the case at bar involves the second ranking officer in the United States DOJ and his top assistant. In so doing, Judge Pierce ignored the applicable law as it has been authoritatively stated by this Circuit, and, in other circumstances, by Judge Tyler himself.

The matter before this Court is controlled by both the spirit as well as the letter of Canon 9 and D.R. 9-101 (B) of the Code of Professional Responsibility.

These rules read as follows:

> "Canon 9: A lawyer should avoid even the appearance of professional impropriety.
>
> D.R. 9-101(B): A lawyer should not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

None other than Judge Tyler has stated that a niggardly, hypertechnical reading of this rule would defeat the plain intent of Canon 9, which is to dispel even the appearance of impropriety from the Federal Courts.

> "The power of this Court to disqualify lawyers is based on the Court's general supervisory powers, and questionable behavior will not be permitted merely because it is not directly covered by the canons." *Handleman v Weiss* 368 F Supp 258, 263 (SDNY 1973) Tyler, J.

The question at bar is whether a firm with a significant component of former high ranking government officials can, exactly one year and five days after those officials have left office, participate in a civil action against defendants whom they investigated, whose confidential files they reviewed, and with regard to an aspect of the ethical matter of which they have special knowledge. A state of affairs more calculated to instill a cynical attitude in the public with regard to the legal profession can hardly be imagined. Were the Patterson firm to be allowed to represent Schlossberg and the Cowan firm in the hearing that Judge Pierce now wants to hold in this matter,... an already cynical public would be presented with the following incredible spectacle.

Gregory Rose, a DOJ informant ... who infiltrated and stole files from the NCLC's attorneys in the case at bar ... would be on the stand before Judge Pierce. The subject with regard to which Rose would be examined would be Rose's activities with regard to the DOJ and Schlossberg. Rose would appear on behalf of Schlossberg, an attorney now disqualified herein, and facing disciplinary charges because of his activities, *inter alia* in attempting to suborn the DOJ. Who would represent Schlossberg and examine Rose on his behalf? A firm of attorneys whose members include the two highest ranking public officials in charge of reviewing and directing the investigation of NCLC which Schlossberg tried to enflame, and with regard to which Rose was employed.

One of the leading figures crusading against this undermining of the public's faith in the justice system has been Chief Judge Kaufman of this Circuit. The earliest, and still, after over twenty years, the only comprehensive discussion of the problem at bar is Judge Kaufman's article *"The Former Government Attorney and the Canons of Professional Ethics"* 70 Harvard Law Review 657 (1957), recognized as unique in *Allied Realty v Exchange Bank* 283 F Supp 464, 468, aff'd 408 Fed 2nd 1099 (8 Cir.) cert. den. 396 US 823 (1969).

In that article, Judge Kaufman set forth the prime consideration of law that the Court below utterly failed to perceive or apply; the distinction between *high ranking* and *low ranking* former government officials. Judge Kaufman sets forth the standard of responsibility of *high* ranking government officials for any and all work done in their bailiwick. This is the standard which the Court below erred in failing to apply.

> "Although there are many supervisory officials who are ultimately responsible for myriad decisions which they do not personally make and for numerous rulings which they never actually review, nonetheless, since ultimate responsibility is theirs, knowledge of all work done by their subordinates should be imputed to them. This position is similar to the conclusion that *the specific requirement to perform a related task will disqualify regardless of whether that assignment was actually performed. I believe this rule of vertical responsibility is absolutely essential to avoid the appearance of evil."* 70 Harvard Law Review at 666 (emphasis added).
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> "It was necessary, in order to avoid the appearance of evil, *that a supervisory official be presumed to have knowledge of the contents of all documents which came to his office.*" id. at 667 (emphasis added).

It is painfully apparent that the Court below, in ignoring this presumption, or ruling that it disappeared conclusively and as a matter of law in the face of an affidavit of non-memory, which affidavit was neither subject to cross-examination, nor read in the context of the evidence before the Court, committed error.... As early as ABA Formal opinion 37 (May 4, 1931) the rule has been that where an attorney,

> "Though he has no recollection of the matter, the records show that the report ... was made *or approved by* (the official) ... *whether he made an examination of the matter personally, or whether he merely approved the work of one of the other examiners ...*"

The Official, *ten years afterward*, in proceedings "of an entirely different nature" was disqualified.

Albeit morals may be more lax than in the 1930's, where, as in the case at bar, the official was involved in the *same* matter just *one* year before, the official should be disqualified. The conclusion is all the more compelling in the instant case, since Tyler's chief

subordinate, Giuliani, is also with the Patterson firm. The attorney involved in Opinion 37 withdrew upon being informed of the facts. It is regrettable that the Patterson firm did not do the same. A survey of the decisional law shows that Judge Kaufman's standards, far from being outmoded, are applied without exception, and require the Patterson firm's disqualification....

The nature of the inquiry

Judge Tyler's affidavit ... specifically states that ... the defendants in the case at bar *were* the subject of a recommendation, which he *did* review, and which *did* result in formal action against defendants taken by Tyler; namely another full year of investigation....

Judge Tyler *did* have defendants mentioned to him, and he *did* make a decision. The decision was two-fold. First, Judge Tyler decided to accept the staff recommendation to continue the investigation. Second, he decided to publicly announce that the investigation of defendants at bar herein was *the single most important investigation* for internal security purposes that the Department of Justice was engaged in. Who made this announcement, in writing, with its incalculable effect on defendants? *Harold R. Tyler, Jr.*, in his section of the Attorney General's report....

The investigation that Judge Tyler so characterized ran from 1969 to 1977. The suit he now seeks to involve himself in was commenced in 1974.(...)

The activities of Mr. Schlossberg and of the Cowan firm, which are Judge Tyler's concern, occurred right in the very *heart* of the period of investigation, and during the very period of time when that investigation was under the direction of Harold R. Tyler, Jr.

As the *Allbrand v Advent* opinion [relied upon by Judge Pierce] says, quoting Judge Kaufman:

> "When an attorney was the head of a government office or subdivision ... the inference arises that he 'knows of the proceedings taken by his juniors.' " Slip Op., page 9.

In the case at bar, Judge Tyler not only knew of the actions of his subordinates, he knows of his *own* actions: he was the man who proclaimed to the public at large the importance that he attached to the investigation of the defendants, however much he now seeks to gloss his past actions over. Now, as a private counsel, he cannot disavow his own public actions in order to deal with the very facts and, indeed, the very informants-cum-clients, that he utilized during the investigation he directed while Deputy Attorney General, without transgressing Canon 9 of the Code of Professional Responsibility. See *Allbrand*, Slip Op., page 4.

Under the factual circumstances, Judge Gagliardi's Allbrand opinion announces a rule under which it is clear that Judge Tyler and the Patterson firm should by disqualified.(...)

Judge Pierce ruled, in effect, that Tyler and Giuliani's disavowals of memory—an exceedingly convenient lapse—are enough to rebutt the inference of prior knowledge. Given that this case was the one case Tyler singled out as of prime significance in his report (see p. 196(b)a) this disavowal should be granted little weight. More to the point, no court has ever equated a simple disavowal of memory with the rebutting of a strong inference.

This decision has a point of particular irony in that the strongest expressions supportive of defendants' position were enunciated by Judge Tyler when he sat on the bench. The best example of that is the case of *Handleman v Weiss,* 368 F. Supp. 258 (SDNY, 1973).

Handleman v Weiss, 368 F. Supp. 258 (SDNY, 1973) Tyler, J., concerned an attorney (Solomon) who had been appointed by a government agency (the Securities Investors Protection Corporation—SIPC) to act as a trustee over an investment firm. Solomon did so, then resigned, formed a law form, and, in time, was retained to sue the same investment firm. Judge Tyler brushed aside a host of technical quibbles, including the claim that Solomon was not really a public official, and that at any rate his private employment was not the same matter as his trusteeship exactly the sort of hypertechnicalities that characterized the decision below. Judge Tyler focussed in on two points: the *appearance* of impropriety, and the *opportunity* to benefit from information gained as a public official. His words apply with pointed relevance to the actions of the Patterson firm.

> "Solomons' representation of SIPC trustee, followed shortly thereafter by his representation of plaintiffs ... has created, at the very least, the appearance of impropriety ... This position gave him a real advantage in learning of any illicit activities in which defendants may have been engaged ... (he) was able to obtain information that he would have been unable to secure if he had been interviewing in a private capacity." 368 F. Supp. at 263, citing *Allied Realty.* And see ABA Formal Opinion 134 (March 15, 1935).

This standard applies with imperative force to Judge Tyler, who admits possibly having requested an FBI investigation of defendants, and who certainly reviewed the fruits of such investigation, ... Judge Tyler, writing from the bench, went further. He did not make the confidentiality of the information determinative. In fact, he clearly stated that the integrity and reputation of bench and bar was the most vital factor.

Judge Tyler was preemptory in rejecting the claim that, if a member of a firm was disqualified, the firm might "screen" that member from the matter and so continue the representation. The rejection of an artificial and unbelievable distinction between a firm

and its members is all the more applicable when not one, but two members are disqualified, as are Judge Tyler and Mr. Giuliani.

The Second Circuit's requirement that the honor of the legal profession be preserved from the appearance of impropriety by an iron-clad rule, a position first enunciated in ABA Opinion 134, and then in Judge Kaufman's seminal Harvard Law Review article, is emphatically still the law today. Opinion 134 (March 15, 1935) states:

> "The investigation of the prosecutor was ostensibly in the exercise of official authority: information was obtained from persons, who may have felt, quite naturally under a sense of coercion or respect for actual or supposed power ... Unsuspecting, unshielded, at serious disadvantage, he submitted to interrogation by one who later, as opposing counsel in a civil action, might use the knowledge thus acquired against him."

Judge Tyler has knowledge of a seven year and more FBI investigation made under color of law. This language is as if written for him. Judge Kaufman, who believes strongly that *junior* government attorneys should not be disqualified so as to deter them from public service, has a stern rule for *senior* government attorneys, who must be disqualified:

> "Where the supervisor had ultimate responsibility for all the work of his office, *despite the fact that he was not informed about some of it.*" 70 Harvard Law Review at 667 (emphasis added).

Judge Tyler was, plainly, such a supervisor. The law is still applied with this sense of traditional propriety. In *Canadian Gulf Lines v Triton,* 434 F. Supp. 691 (D. Conn., 1976), the Court was persuaded that the attorney in question did *not* recall having knowledge of the matter from his prior employment, yet both the attorney and his firm were disqualified. This is precisely what Judge Pierce found to be the case. Nonetheless, the Court in *Canadian Gulf* held:

> "The admonition of Canon 9 of the Code of Professional Responsibility that a lawyer should avoid even the appearance of impropriety justifies resolving the issue in (defendants') favor, even if, as appears likely, there has been no actual wrongdoing." 434 F. Supp. at 685.

That the Deputy Attorney General and his top associate, having reviewed close to 10,000 pages of FBI reports on defendants, would, within five days of becoming free of criminal liability therefore under 18 U.S.C. 207, appear as counsel against those very defendants, in an issue involving ethics, and intimately involving activities of the Justice Department (Mr. Rose was an FBI informant, Mr. Schlossberg sent letters and lengthy memoranda on the case at bar to the Justice Department) is the very heart and core of the evil that D.R. 9-101 (B) was written to prevent. It may be that, as this Circuit has said in Shakespeare's Iago's cynical words, "There is nothing either good or bad but thinking makes it so." See *Emle v Patentex,* 478 F. 2nd at 571; *General Motors v City of New York,* 501 F. 2nd at 651. It is respectfully submitted that to permit the Patterson firm to participate herein is to compel every moral observer to think cynically of the bench, the bar and the legal profession. This Circuit knows this to be true, and its Chief Judge has repeatedly so declared it. Judge Tyler in his role as an objective minister of justice, has stated this to be the law in no uncertain terms. *Handleman v Weiss,* 368 F. Supp 258 (SDNY, 1973). Would it not be an invitation to public censure of our profession if Judge Tyler, as a private attorney, was not compelled to obey the law *as he himself enunciated it from the bench?* Yet, that is the rule enunciated below. Such a rule is intolerable and should be reversed.(...)

Any citizen capable of logical thought, as well as the members of the legal community, must be at the prospect of the decision below becoming embedded in the law as precedent. That an attorney, a former Federal Judge who espoused a high-sounding theory of ethics from the bench, would, but one year after presiding over and publicly lauding a pointless investigation of a political party, allow his firm to appear in defense of a matter that centers around that very investigation, Schlossberg's inflammation of it, and Rose's abuse of it, is not the *appearance* of impropriety; it *is* improper. It is scandalous. It cheapens the public's opinion of the legal profession because it cheapens the legal profession *in fact.* It locates our morals (as Judge Ryan said) "in the marketplace." The Chief Judge of this Court has the reputation of demanding a high standard of conduct from the attorneys who practice before this Court. Judge Kaufman's efforts in this regard have, in turn, given this Court an outstanding reputation for probity. It would be a bitter irony if this Court should embed in the law a precedent that renders nugatory that effort and that reputation.

Conclusion

The decision of the court below should be reversed on the law and on the facts, and the Patterson firm should be disqualified from further participation herein.