

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CareToLive, et al.,

Plaintiff,

Case No. 2:07 CV 729

vs.

Judge Frost

Andrew von Eschenbach,
in his capacity as Commissioner
of the FDA et al.,

Magistrate Judge King

Defendants.

MOTION TO DISQUALIFY
THE DEPARTMENT OF JUSTICE FROM REPRESENTATION
OF ANY AND/OR ALL DEFENDANTS

Now comes Plaintiffs and hereby moves this court for an order that the US Attorney and or other representatives of the Department of Justice be prohibited from representing any and/or all Defendants in this matter for reasons set forth in the attached memorandum of law.

Respectfully submitted,

S/Kerry M. Donahue

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MEMORANDUM

A Motion to disqualify is the proper method for a party-litigant to bring an issue of conflict of interest or the breach of an ethical duty to the court's attention. *Yates v. Applied Performance Technologies, Inc.* 209 F.R.D. 143 (S.D.Ohio,2002).

In this case, the interest of Dr. Andrew von Eschenbach, as commissioner of the Food and Drug Administration (FDA), are different from those of Defendant Richard Pazdur and Defendant Howard Scher who by their actions essentially defrauded the FDA. In addition the interests of Defendant Pazdur and Defendant Scher are in conflict, as they will, by the very nature of the accusations themselves, as well as the events that transpired in the course of the conspiracy, be forced to testify against each other. Defendant Scher and Defendant Pazdur conspired to insure the denial of due process to the Provenge Biologics Application (BLA), in violation of the constitutional rights of the patients that the FDA is sworn to protect. In order to achieve their goal of subverting the Provenge BLA, Defendant Pazdur needed to get Defendant Scher on the advisory committee reviewing the Provenge BLA and to otherwise assist him in undermining the BLA. Defendant Pazdur understood the assignment of the Provenge BLA to CBER (an inter agency rival), as a threat to his power within the FDA and set out to insure the denial of the BLA as a message to Commissioner Dr. von Eshenbach and others at the FDA, that he and his division of the FDA would have all decision making authority over Provenge and all future immunotherapies, and if they didn't, he would see that they were not approved by what ever means he found necessary, irrespective of the science (safety and efficacy profile). This FDA political infighting has caused serious constitutional harm to the rights of cancer patients.

The actions of Defendant Pazdur in conspiracy with Defendant Scher were believed to have occurred (at least at the time they occurred) without the knowledge of the Commissioner of the FDA. It is unknown for certain at this point if Defendant Pazdur knew only about the disclosed conflicts of interest of Defendant Scher at the time Scher was placed on the Advisory Committee, or if he also knew of the undisclosed conflicts of interest which would have certainly not allowed his pre, post or any other involvement with the Provenge BLA (it is indisputable that Defendant Pazdur knows about them now). What is clear is that the Defendant Howard Scher committed a fraud against the FDA. Clearly the FDA and Defendant Scher do not have the same interests. It is conceivable and even likely that Defendant Pazdur and Scher will be testifying against each other, and that Defendant von Eschenbach will be testifying against them both. It is also believed that Defendant Pazdur placed improper political pressure on Defendant von Eschenbach, to get him to agree to the decision not to approve Provenge.

Yet other evidence will suggest that Defendant Scher and Defendant Pazdur exceeded their scope of employment when they took their plot to derail Provenge outside the agency, even though this outside activity may have been with the intent to pressure those within the agency, to take the action he desired.

Under this scenario it is impossible for the same counsel to represent the competing interest of the parties.

If the court allows the dual representation it is possible that the individual defendants would use the error of combined counsel for defense in a higher court to reverse a decision in favor of Plaintiffs herein, which could delay the relief sought by the Plaintiffs thus causing them prejudice. As in the cases wherein the DOJ files these kinds of motions in criminal

cases, there is the possibility that the Plaintiffs could cooperatively obtain testimony from some of the Defendants to the detriments of others or to resolve the case in ways that might be favorable to some of the Defendants but not others. By having single representation the lips of all Defendants are sealed through the one counsel that must try to protect all interests collectively, even if those persons' best interests are different.

An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. *U.S. v. Hreljac* 2007 WL 38372, *2 (E.D.Ky.) (E.D.Ky.,2007).

Conflicts can impair counsel's duty of loyalty to each client, pose a risk that confidential information from representation of an executive could be used against employer, and place counsel in a position of possibly having to cross-examine its own client at trial. *Yates v. Applied Performance Technologies, Inc.* 209 F.R.D. 143 (S.D.Ohio,2002).

In considering whether representation of multiple parties poses a conflict of interest, this Court must turn to the standards established by the Ohio Code of Professional Responsibility. The multiple representations of the Defendants in this case implicate Canon 5 of the Code of Professional Responsibility, which states that "a lawyer should exercise independent professional judgment on behalf of a client." The relevant Ethical Considerations read as follows:

EC 5-1 LOYALTY TO CLIENT

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-14 CONFLICTING INTERESTS BETWEEN CLIENTS

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15 ACTUAL AND POTENTIAL DIFFERING INTERESTS

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

Often it is the Department of Justice in Criminal cases that seeks to separate defendants by pointing out to the court that the Defendants have conflicting interests. This is often done by the DOJ to protect the record against Appellate arguments that Defendants would later make, but it is also done so that the DOJ may discuss the case individually with each Defendant's counsel and investigate whether one Defendant would testify against the other in exchange for some benefit (or in this case to protect the agency interest over any individuals interests). In this case the Plaintiffs case will be much easier to prove and more judicially economical, when the divergent interests of Defendants line up against one another, just as often happens in criminal cases, at the insistence of the DOJ.

In this case if Defendant Howard Scher defrauded the FDA then one of the FDA's defenses would be to file a cross claim against Defendant Scher. Whether they do take such action can hardly be contemplated or discussed through one common counsel. Failure to file such a claim could be an indication that Defendant Pazdur, and thus the FDA, knew of the undisclosed conflicts of interest that would have disqualified Defendant Scher from serving on the committee and intentionally subverting the Provenge BLA, yet they allowed it anyways.

It is in the best interest of both Defendant von Eschenbach and the FDA, for Dr. von Eschenbach, as FDA commissioner to disclose what is already known to many to have unfairly happened to the Provenge BLA, either publicly or privately, promptly correct the mistakes, provide fair due process to dying patients and begin saving lives now, even it that would be to the detriment of the personal interests of Defendant Pazdur and Defendant Scher. To the Commissioner, the interest of the agency should trump the interest of the individuals within the agency, or who were temporary employees of the agency, but of course should not trump the interest of dying cancer patients whom the FDA is sworn to protect.

Conflicts can exist in civil as well as criminal cases:

An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.

U.S. v. Hreljac 2007 WL 38372, *2 (E.D.Ky.) (E.D.Ky.,2007)

In this case even the subsequent representation of any Defendant by the DOJ is likely to be improper as one of his past clients in this matter could have to be cross examined by them on the basis of information they obtained while representing all of them.

The Sixth Circuit addressed the issue of successive representation of co-defendants in *Moss v. United States*, 323 F.3d 445 (6th Cir.2003). In that case, two co-defendants were represented by the same counsel at the arraignment, after which, one of the co-defendants retained separate counsel. Although the court concluded that the conflict created by the successive representation did not materially affect the attorney's performance, it did find that the representation created an actual conflict of interest. *Moss*, 323 F.3d at 476. In discussing the issues presented by the successive representation, the court stated that:

While we agree that there is a lesser likelihood of prejudice in traditional cases of successive representation, such as where the attorney is compelled to cross-examine a former client and the former representation bore only a “substantial relation” to the current proceedings, the probability of prejudice dramatically increases in circumstances where the attorney represented a co-defendant during the pre-indictment phase of the same proceeding.

Moss, 323 F.3d at 462. The court further noted that, “[t]he most common example of an actual conflict of interest arising from successive representation occurs where an attorney's former client serves as a government witness against the attorney's current client at trial.” *Id.* at 460.

Even if the Court does not find that an actual conflict of interest exists due to a successive representation at this time, the possibility that the DOJ could cross-examine a former client is sufficient to create the potential appearance of a conflict.

U.S. v. Hreljac 2007 WL 38372, *2 (E.D.Ky.) (E.D.Ky.,2007)

It is maintained that Defendant von Eschenbach, and/or his immediate and closest advisors, assistants, secretaries, employees as well as certain CBER division employees will likely become witnesses for the Plaintiffs in this matter. It is also possible that Defendant Pazdur and Defendant Scher will testify against each other or that Defendant Scher will assert his

rights under the fifth amendment not to testify against himself, which decision could be favorable to him but adverse to the other Defendants, or vice versa. Clearly the DOJ after presumably discussing this case with all Defendants cannot henceforth represent any of them much less all of them.

Strong policy reasons lie behind the prohibition of conflicting interests in the same case. Dual representation is improper because the client has a right to expect undivided loyalty, and an attorney's zealous representation of one client might come at the expense of another client. In addition, there is an omnipresent fear that an attorney representing multiple interests in the same case will be motivated by different desires and objectives, depending upon his own interest in a particular client. Finally, former clients have a right to expect that privileged information exchanged through communication with their attorney will not be used against them in the attorney's subsequent representations in substantially related matters. *See generally International Business Machines Corp. v. Levin*, 579 F.2d 271, 280 (3d Cir.1978); *Fund of Funds Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 232-33 (2d Cir.1977). An attorney representing multiple conflicting interests thus undermines and subverts the nature of the adversarial system and prevents it from operating properly. In re Cleveland Trinidad Paving Co. 218 B.R. 385, *388 (Bkrcty.N.D.Ohio,1998).

WHEREFORE, this court should disqualify the DOJ from representing all or some of the Defendants in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is understood that since this document was e-filed with the court that the clerk will transmit a copy by e-mail to all counsel of record in this matter this 29th day of September, 2007.

S/Kerry M. Donahue

Kerry M. Donahue