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Lawyer Can't Defend Against Legal Mal Suit Brought By Her Former Client, Judge Rules

Former Client's Silence Can't Be Read as Consent

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A federal magistrate judge in Camden has disqualified the firm of Obermayer Rebmann Maxwell & Hippel from handling the defense of a legal malpractice claim against a lawyer who recently joined the firm because the firm also previously represented the clients who are now suing him.

In a strongly worded, 31-page opinion, U.S. Magistrate Judge Robert B. Kugler found that Obermayer attorney Kimberly Sutton suffered from a conflict of interest in defending attorney Gregory D. Saputelli and his former firm, Saputelli & Associates.

Kugler wasn't impressed by Sutton's claim that her former clients never objected to her appearance on Saputelli's behalf.

"All of defendants' arguments are based on a mistaken assumption that Sutton's and Obermayer's ethical obligations to their former clients under Rule of Professional Conduct 1.9(a)(1) can be waived through silence or implied consent. The rule requires much more," Kugler wrote.

Saputelli, who is now a partner at Obermayer, was sued by Cantor Cantor & Kean, a real estate development partnership, for malpractice in representing them in a New Jersey real estate deal that soured and ended up in court.

While he was still with his own firm, Saputelli represented CCK in the real estate transactions. When the dispute

moved to court, Sutton, who was already with Obermayer, defended CCK in a suit in the New Jersey Superior Court.

After CCK lost the lawsuit and was ordered to pay damages, it sued all of the lawyers — including Saputelli, his former firm, Sutton and the Obermayer firm.

But in an amended version of the suit, CCK dropped Sutton and her firm as defendants.

By then, Saputelli had joined Obermayer as a partner in its Haddonfield, N.J., office. Soon after the second amended version of the suit was filed, Sutton entered her appearance to defend him.

CCK's lawyers in the malpractice case, Alan L. Frank, Lance S. Rosen and David T. Shulick of Frank & Rosen, moved to have Sutton disqualified due to her previous representation of CCK in the underlying state court action.

Sutton agreed that she had a previous attorney-client relationship with CCK, but insisted that she should be allowed to continue representing Saputelli since CCK had tacitly or impliedly consented by allowing her to start working on the case without raising any objection.

CCK wouldn't be harmed, she insisted, since any information she had gained from the period she represented CCK was the same information Saputelli had from his own representation of CCK.

But Kugler found that Sutton's ethical obligations to CCK could not be deemed waived based solely on CCK's silence.

"A non-attorney former client's silence can never rise to the level of the informed consent required under Rule 1.9(a)(1)," Kugler wrote.

And under Rule 1.9(b), Kugler also found that Sutton's representation of

Saputelli would create an impermissible appearance of impropriety.

"An ordinary citizen would look at the facts of this case and see an attorney who previously stood before a state court and defended her clients in an action involving a real estate transaction, suddenly on the other side of a subsequent federal action relating to that same real estate transaction representing interests directly adverse to those very same clients," Kugler wrote.

"That ordinary citizen would not appreciate that the state court action ... was in essence a breach of contract action, while the subsequent federal action was for professional malpractice, nor appreciate the subtleties of privileges and waiver. All the citizen would observe is Plaintiffs' former defense attorney, Kimberly Sutton, on the opposite side of a lawsuit from her former clients advocating for a new client regarding the same or similar matter."

Kugler said that when he balanced the competing interests in the case, "the scale ... tips overwhelmingly in favor of disqualification."

Even a "casual reading" of the ethical rules and the cases interpreting them, he said, "would lead to the inescapable conclusion that her representation on the defendants here is prohibited."

As for the potential prejudice to Saputelli in losing the lawyer he chose to defend himself, Kugler found that it weighed little because he "knew or should have known that Sutton and Obermayer would be disqualified from representing him in this action if their disqualification was sought."

In his final pages, Kugler had a few sharp remarks and a word of warning as

he denied Sutton's motion for Rule 11 sanctions against CCK's lawyers in which she argued that the motion seeking her disqualification was "frivolous."

Procedurally, Kugler found that Sutton's motion suffered from multiple flaws. Although the rules require that a Rule 11 motion be filed separately from any others, Kugler said, Sutton simply included it in her response to the disqualification motion.

Rule 11 motions also cannot be filed until 21 days have passed after serving them on one's opponent — a provision intended to create a "safe harbor" so that an attorney accused of violating the rule has a chance to correct the conduct before the court takes action. Sutton ignored the 21-day requirement, Kugler said.

And in a final footnote, Kugler said that while he had never even reached the

merits of her arguments, he found Sutton's sanction motion "to be entirely frivolous on its face.... Counsel are warned that Rule 11 and the court's inherent authority permit the court, on its own motion, to impose sanctions on attorneys for filing frivolous motions."

(Copies of the 31-page opinion in Cantor v. Ettin, PICS NO. 99-0673, are available from The Legal Intelligencer. Please refer to the order form on p. 9).