

#42

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN, AND
COMPANY, INC.

Plaintiff,

vs.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.

Defendant.

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO
CONDUCT LIMITED DISCOVERY RELATING TO PLAINTIFF'S SECOND
MOTION TO DISQUALIFY COUNSEL FOR DEFENDANT AMERICA
ONLINE, INC. OR, IN THE ALTERNATIVE, EXCLUDE CERTAIN
EVIDENCE, SERVED JUNE 2, 1997**

Plaintiff Ben Ezra, Weinstein, and Company, Inc. (BEW) has moved the Court for an order allowing it to conduct limited discovery relating to its Second Motion to Disqualify Counsel for Defendant America Online, Inc. (AOL). In its Motion to Disqualify and supporting Memorandum, BEW establishes that Eaves, Bardacke & Baugh, P.A., AOL's local counsel, should be disqualified from representing AOL because it had a prior attorney-client relationship with BEW and obtained confidential information from BEW in a matter substantially related to the pending litigation. The Motion to Disqualify also establishes that AOL's in-house and national counsel, Wilmer, Cutler & Pickering, should be disqualified because of their relationship with Eaves, Bardacke & Baugh and because of their relationship with AOL's prior local counsel, Browning & Peifer, P.A. BEW believes

that limited discovery regarding local counsels' prior relationship with BEW and their relationship with AOL's in-house counsel and Wilmer will further substantiate and support disqualification.

Case law supports allowing limited discovery on the issue of disqualification of counsel. Courts historically have taken a liberal position with regard to discovery and have viewed discovery as a means to define and clarify the issues. *Gheesling v. Chater*, 162 F.R.D. 649, 650 (D. Kan. 1995). Accordingly, the court in *Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570 (M.D. Ga. 1992), held that the federal rules relating to discovery were available to a party who contemplated filing a motion to disqualify a presiding judge as long as the discovery was reasonably calculated to lead to the discovery of admissible evidence in support of the pending disqualification motion. The court reasoned that under the rules, discovery was available with respect to a variety of collateral and ancillary issues. *Id.* at 1580. *Cf. Kelling v. Bridgestone/Firestone, Inc.*, 157 F.R.D. 496, 497 (D. Kan. 1994) (court allowed use of financial records for limited purpose of motion to disqualify counsel).

Courts considering counsel disqualification motions and the question of substantial relationship do not limit themselves to the allegations in the pending complaint, but also consider the nature of the evidence useful in proving the allegations. *Trone v. Smith*, 621 F.2d 994, 1000 (9th Cir. 1980); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 226 (7th Cir. 1979); *Koch v. Koch Indus.*, 798 F. Supp. 1525, 1537 (D. Kan. 1992). Courts have also based their decisions

regarding disqualification on evidence that appears to have been produced as a result of discovery directed toward the disqualification issue. *See UNC v. GAC*, 96 N.M. 155, 245 n.152, 629 P.2d 231, 321 (1980) (court refers to notes from litigation strategy meeting); *Maritrans v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1281 (Pa. 1992) (court refers to evidence relating to confidential information that was produced from discovery).

In this case, BEW requests limited discovery relating to the prior relationship between Eaves, Bardacke & Baugh and BEW, between Browning & Peifer and BEW, and between local counsel and AOL's in-house counsel and Wilmer. This discovery will produce evidence directly related to BEW's assertion that there was a prior attorney-client relationship between BEW and local counsel, there is a substantial relationship between the pending litigation and the prior matter, and disqualification of local counsel should be imputed to in-house counsel and Wilmer. BEW therefore respectfully requests that the Court grant its Motion for Leave to Conduct Limited Discovery relating to its Motion to Disqualify.

Respectfully submitted,

Esteban A. Aguilar, Esq.
1011 Lomas NW
Albuquerque, NM 87102
(505) 242-6677

Original signed by
ESTEBAN A. AGUILAR

By: _____
Esteban A. Aguilar

Co-counsel for Plaintiff

Paul J. Kennedy, Esq.
Donna E. Correll, Esq.
PEPPER, HAMILTON & SCHEETZ, LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103

Mark A. Glenn, Esq.
MOSES, DUNN, FARMER &
TUTHILL, P.C.
P. O. Box 27047
Albuquerque, NM 87102
(505) 843-9440

I hereby certify that a copy
of the foregoing pleading was
mailed via overnight delivery
to the following counsel of record
on this 2nd day of June 1997:

WILMER, CUTLER & PICKERING
Patrick J. Carome, Esq.
John Payton, Esq.
Samir Jain, Esq.
2445 M Street NW
Washington, D.C. 20037

Randall J. Boe, Esq.
Elizabeth deGrazia Blumenfeld, Esq.
America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323

and was hand-delivered to:

John G. Baugh, Esq.
EAVES, BARDACKE & BAUGH, P.A.
P.O. Box 35670
Albuquerque, NM 87176-5670

Original signed by
ESTEBAN A. AGUILAR

Esteban A. Aguilar