



**Issue Date: 19 October 2004**

CASE NO. 2004-SOX-00074

*In the Matter of:*

**Sean Gallagher,**  
Complainant,

vs.

**Granada Entertainment USA and ITV plc,**  
Respondents.

**Order Denying Complainant's Motion to Disqualify Lawyers in the firm of Manatt, Phelps  
Phillips from Representing Respondents**

Complainant, Sean Gallagher, has moved to disqualify Sharon Bauman as trial counsel for Respondents Granada Entertainment USA and ITV plc. He also moved to disqualify her firm, Manatt, Phelps & Phillips, LLP (Manatt), from defending Respondents against allegations that he was dismissed in retaliation for disclosing accounting and other fraud to corporate superiors, in violation of Section 806 of the Sarbanes-Oxley Act of 2002, P.L. 107-204, codified at 18 U.S.C.A. § 1514A (West Supp. 2004). A long list of conflicts of interest, misrepresentations, violations of the California Rules of Professional Conduct and the State Bar Act (California Business & Professions Code §6000-6230) said to have taken place during the restructuring of Anglo-American television production companies and in the investigation of the complaint by the Secretary of Labor form the bases for the disqualifications. No affidavit or declaration was submitted with the motion.

The most prominent charges are that Manatt has a conflict because Complainant served as Respondents' in-house counsel beginning in November 2000, supervising matters he assigned to the Manatt firm, especially after he was promoted to serve as head of Business and Legal Affairs for Granada's efforts in the United States beginning in November 2001 until his termination. Motion at 3, 11. He also has stated his intention to call Ms. Bauman and other lawyers from Manatt as trial witnesses on "material and important issues." Motion at 12.

Complainant says no further proceedings on his motion are needed. Motion at 7. The motion fails because its factual allegations are unsupported by oral testimony at a hearing or by affidavits or declarations. Complainant might be able to cure this procedural defect, so I will reach the motion's merits to avoid delay. I assume the truth of the motion's allegations, except where I specifically rely on Respondents' counter-declarations. *Colyer v. Smith*, 50 F. Supp. 2d

966, 968 (C.D. Cal. 1999) (treating facts not proven in a disqualification motion as undisputed before denying it on legal grounds).

*A. Complainant's Standing on the Conflict Allegations*

A former client may seek disqualification of a lawyer who appears on behalf of an adversary. *In Re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 90 (5th Cir. 1976); *see also, Kasza v. Browner*, 133 F.3d 1159, 1171 (9th Cir. 1998) (recognizing the rule). The client must show that the matter in litigation is substantially related to one in which the lawyer had represented him or her. If related, breaches of confidences are presumed, and the lawyer disqualified. The presumption of breached confidences encourages clients to discuss confidential matters frankly with their lawyer, unencumbered with fear that they will be wielded as weapons against them in the future. *In Re Yarn Processing Patent Validity Litigation*, 530 F.2d at 90. By pretermittting a lawyer's efforts to reconcile conflicting interests among current and former clients, the disqualification rule also promotes the full enforcement of each client's rights. *Smiley v. Director, OWCP*, 984 F.2d 278, 282 (9th Cir. 1993). Third parties who neither shared confidences with the lawyer, nor acquired a claim to the lawyer's loyalty, lack a basis to assert a former client's rights. Complainant's failure to allege facts showing he was a Manatt client leaves him without standing. Other grounds asserted for disqualification are not as readily dismissed.

*B. Identifying the Applicable Standard for Disqualification of Trial Counsel*

The Secretary of Labor has nationwide jurisdiction to adjudicate claims of employment discrimination under the Sarbanes-Oxley Act, through on the record hearings conducted at the Office of Administrative Law Judges (OALJ). 18 U.S.C.A. § 1514A(b)(2)(A); 29 C.F.R. §§ 1980.107(b) and 1980.109 (adopted as final rules in 69 F.R. 52104, 52115, Aug. 24, 2004). Congress swept away agency-specific requirements for admission to practice almost 40 years ago. A lawyer who defends a claim like this one need only be a member in good standing of the bar of the highest court of some State, the District of Columbia, or a territory or commonwealth. 5 U.S.C.A. § 500(b) (West 1996); *see also*, 29 C.F.R. § 18.34(g) (2004) (implementing that statute). Parties can rely on the fitness and character examinations state courts conduct in their admission process. *See*, H.R. Rep. No. 1141, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News 4171, 4173. Congress left the agencies' authority to discipline attorneys and accountants who appear before them intact. 5 U.S.C.A. § 500(d)(2) (West 1996); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 578 & n. 13, 582 (2<sup>nd</sup> Cir. 1979) (upholding the authority of the SEC to discipline accountants, and by implication lawyers who appear there, to assure the fitness of professionals practicing before the agency); *see also*, the letter of Attorney General Katzenbach attached to House Judiciary Committee report No. 1146, reproduced at 1965 U.S. Code Cong. & Admin. News at 4178.

The Secretary of Labor authorizes judges to exclude from an adjudication any lawyer who engages in ethical or other misconduct, as well as any party who engages in disruptive behavior<sup>1</sup>. 29 C.F.R. § 18.36(b) (2004); *Rex v. Ebasco Services Inc.*, Case Nos. 87-ERA-6 & 87-

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<sup>1</sup> Judges have the additional authority under a separate regulation to disqualify a lawyer from representing any clients in adjudications here. 5 U.S.C.A. § 500(d)(2); 29 C.F.R. § 18.34(g)(3); *In the Matter of the Qualifications of Edward A. Slavin, Jr.*, OALJ Case No. 2004-MIS-00002 (March 30, 2004) (disqualifying a lawyer

ERA-40, Sec'y. Final Dec. and Order (Mar. 4, 1994) at 4 (holding that pursuit of a groundless claim exposes a lawyer to discipline under 29 C.F.R. § 18.36(b) for unethical conduct). Exclusion brings "an immediate halt to disruptive behavior and . . . ensure[s] that the offending participant poses no further obstacle to the orderly conduct of proceedings." *In the Matter of the Disqualification of Edward A. Slavin, Jr.*, ARB Case No. 02-109 at 9 (June 30, 2003) (excluding a lawyer). A summary procedure that identifies reasons for the exclusion from facts in the record suffices, as the regulation itself implies. *Id.* at 7.

The Secretary of Labor has adopted neither a detailed ethics code for lawyers who litigate at OALJ nor a choice of law provision for the discipline of lawyers who practice here. A state supreme court's legal ethics rules, including those on disqualification, can guide the parties and judge in evaluating a lawyer's conduct. But the challenged conduct may have occurred beyond the boundaries of the state where the lawyer was admitted, or the lawyer may be admitted in more than one jurisdiction, so which state's rules to apply may not be obvious.

There are nationally recognized standards of conduct for lawyers, although the Secretary has not adopted them through rulemaking. The choice of law provision in the AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT<sup>2</sup> (2003 edition) (Model Rules) would apply the ethics rules of the jurisdiction where the tribunal sits, unless the tribunal's rules provide otherwise. Model Rule 8.5(b)(1). The trial will convene in Los Angeles county, because the facts that gave rise to the whistleblower claim occurred there. 29 C.F.R. § 18.27(c). The conduct Complainant says was unethical took place in California; lawyers in the Manatt firm are admitted to the California bar. The ethics rules adopted by the Governors of the State Bar of California and approved by the Supreme Court of California under Business and Professions Code sections 6076 and 6077 are appropriate sources for the substantive law. *In the Matter of the Qualifications of Edward A. Slavin, Jr.*, OALJ Case No. 2004-MIS-00002 at 21 (March 30, 2004) (disqualifying a member of the Tennessee bar from representing clients at OALJ, applying the Model Rules and the similar Tennessee Rules of Professional Conduct approved by that state's supreme court, effective March 1, 2003).

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from representing any party before OALJ). A lawyer facing this broader sanction must be offered a separate formal hearing to defend his or her fitness and character. *In the Matter of the Disqualification of Edward A. Slavin, Jr.*, ARB Case No. 02-109 at 8; *Rex v. Ebasco Services Inc.*, Case Nos. 87-ERA-6 & 87-ERA-40, Sec'y. Final Dec. and Order (Mar. 4, 1994) at 5.

<sup>2</sup> The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983. The predecessor Model Code of Professional Responsibility had served as the national model of professional standards governing the practice of law from August 1969 to 1983. Thereafter 42 jurisdictions adopted new professional standards based on the Model Rules; California is among the jurisdictions that have not embraced them. Between 1983 and 2002, the House of Delegates amended the Rules and their Comments on fourteen occasions. The American Bar Association created the Commission on Evaluation of the Rules of Professional Conduct (sometimes called the Ethics 2000 Commission) in 1997, to review the Model Rules comprehensively and propose appropriate amendments. The House of Delegates adopted a series of amendments arising from that review on February 5, 2002. The Model Rules with those 2002 amendments constitute the current version of the ABA ethics standards for lawyers. See, the Preface to the Model Rules, available at <http://www.abanet.org/cpr/mrpc/preface.html>.

The U. S. Court of Appeals for Ninth Circuit held that the procedural rules<sup>3</sup> of this forum authorize judges to disqualify lawyers who have conflicts of interest prohibited by “the applicable rules of professional conduct,” and require judges to inquire into the issue. *Smiley v. Director, OWCP*, 984 F.2d 278, 283 (9th Cir. 1993). The court approved and applied a holding of the Department’s Benefits Review Board<sup>4</sup> in *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989) in that decision. The *Smiley* opinion reversed and remanded a decision that rejected a claim under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* The claimant’s trial lawyer had not disclosed that he also represented the administrator for her employer’s workers’ compensation self-insurance plan, and may not have communicated a \$150,000.00 settlement offer to her. 984 F.2d at 281. The facts given in the decision raise an inference that the claim had been tried in California, but neither the venue nor the state where the trial lawyer was admitted to practice are mentioned, presumably because they made no difference. The court focused on the attorney’s common law duty of undivided loyalty to the claimant, exemplified in ABA Model Rule of Professional Conduct 1.7(a) (1989), and predecessor Disciplinary Rule 5-105 of the Model Code of Professional Responsibility (1981), to find the lawyer disqualified, unless the claimant had given informed consent to the conflict. 984 F.2d at 283. The court treated these model rules as illustrative of the common law, not controlling standards, for both codes were not in force at the same time, and the court did not find that either rule had been adopted by a relevant state court.

The Administrative Review Board and Benefits Review Board ought to treat disqualification motions from cases tried in west coast states similarly. Both act for the Secretary, apply the same disqualification rule of the Office of Administrative Law Judges, and their decisions ordinarily are subject to review in the same appellate court, the Ninth Circuit.

The Los Angeles federal court where this matter could otherwise be litigated<sup>5</sup>, the U. S. District Court for the Central District of California, has adopted standards of professional conduct for members of its bar. They incorporate California’s State Bar Act (California Business & Professions Code §6000-6230), the Rules of Professional Conduct of the State Bar of California, and the decisions applying them, while the current Model Rules of Professional Conduct of the American Bar Association serve as guides. Local Rule 83-3.1.2, *Standards of Professional Conduct - Basis for Disciplinary Action*, Central District of California, last revised

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<sup>3</sup> 29 C.F.R. § 18.36(b). Unless a statute or its regulations dictate otherwise, this forum follows a unified set of rules of practice and procedure published at 29 C.F.R. Part 18. It makes no difference which entity may review the decision entered after trial. 29 C.F.R. § 18.1(a).

<sup>4</sup> The Administrative Review Board, a different body, reviews trial decisions for the Secretary on claims for employment protection under whistleblower statutes, including the Sarbanes-Oxley Act of 2002. 29 C.F.R. § 1980.110 (final procedural rules adopted at 69 F.R. 52104, 52116, Aug. 24, 2004). The Benefits Review Board, established in 33 U.S.C. § 921 and regulations at 20 C.F.R. §§ 801.101 and 801.102(a), hears appeals for the Secretary on claims for benefits under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* and its extensions, which include the Defense Base Act, 42 U.S.C. 1651 *et seq.*; the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*; the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 *et seq.*; and the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq.* (1973); plus appeals on claims for benefits under the Black Lung Benefits Revenue Act of 1977, Public Law 95-227, 92 Stat. 11, as amended in the Black Lung Benefits Amendments of 1981, Public Law 97-119, 95 Stat. 1643 (30 U.S.C. 901 *et seq.*).

<sup>5</sup> Concurrent jurisdiction here and in the U. S. district court is conferred by 18 U.S.C.A. § 1514A(b)(1)(B).

Dec. 1, 2003. The local rule reflects the respect for federalism the Rules of Decisions Act encourages. 28 U.S.C.A. § 1652 (West 1994). Those California and national professional standards will be applied so the outcome of a disqualification motion would be identical in the Central District or here.

*C. Cases Applying State Ethics Rules as Disqualification Standards*

A litigant who believes the opponent's lawyer is guilty of misconduct or is otherwise prohibited from serving as trial counsel may move to disqualify the lawyer from that proceeding under 29 C.F.R. § 18.36(b). Research has not disclosed a ruling that applied California's disqualification standards in a case pending before the Secretary, but disqualification has been addressed using ethics standards of other states. The cases are uneven in their analysis of why a particular state code applied, unfortunately.

*Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989) involved a disqualification motion an insurer filed in a Longshore compensation matter. The claimant's lawyer was a member of the bar of the Supreme Court of Washington, the state where the facts arose and where the case would be tried. The worker had suffered a second back injury. After taking the case, the claimant's lawyer became a partner of the lawyer who had represented the worker's compensation insurance carrier against his client on the original back injury. The trial judge and the Benefits Review Board applied Washington State Rule of Professional Conduct 1.9, forbidding the treachery of switching sides in representing parties in the same or a substantially similar claim, as the substantive ethics standard under 29 C.F.R. § 18.36. The trial judge disqualified both partners from representing the claimant. The Benefits Review Board held that federal district court interpretations of Washington's rules allowed the claimant's lawyer, who never had represented the insurer himself, the opportunity to prove that when the tainted partner joined his firm, a "Chinese wall" has been established to ensure that no confidences were shared, and remanded the motion for more fact finding. This is the holding the Ninth Circuit approved in *Smiley, supra*, 884 F.2d at 283.

The complainant in *Hobby v. Ga. Power Co.*, Case No. 90-ERA-30 (ALJ July 27, 1990), a whistleblower protection case filed under § 210 of the Energy Reorganization Act<sup>6</sup>, raised numerous bases for disqualification of respondent's trial lawyer, a member of the Georgia bar. The trial judge found that ABA Model Rule 3.7(b) (1983), entitled "*Lawyer as Witness*," specifically permitted a lawyer to act as a trial advocate when another member of the advocate's firm would be a witness at trial<sup>7</sup>, taking a less strict position than the 1969 ABA Code of Professional Responsibility (CPR)<sup>8</sup> that governed until the Model Rules were adopted in August

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<sup>6</sup> The current version of the statute is found at 42 U.S.C.A. § 5851 (West 2003).

<sup>7</sup> "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." The preclusions in those other rules did not apply.

<sup>8</sup> Disciplinary Rule 5-102 of that earlier ABA ethics code required both the trial lawyer and the lawyer's firm to withdraw from the representation if it became obvious that the advocate or any lawyer in the firm would be called as a witness on the client's behalf, or if called other than on the client's behalf, when it became obvious that their testimony would be prejudicial to the client.

1983. *Id.* at 7. The judge rejected the argument that complainant’s mere allegation that the same witness/lawyer had suborned perjury mandated the disqualification of that lawyer’s entire firm under the “appearance of impropriety” standard found in Canon 9 of the old CPR. The Eleventh Circuit (the jurisdiction where the case arose) already had held the 1983 Model Rules did not make the slippery “appearance of impropriety” standard a basis to disqualify a lawyer from representing a party at trial. *Waters v. Kemp*, 845 F.2d 260, 265-266 & n. 12 (11th Cir. 1988). The judge found the employer’s law firm should not be disqualified for what complainant characterized as “discovery abuses” when complainant never had filed a motion to compel the discovery he complained about in his disqualification motion. Finally, the judge ruled a letter the lawyer/witness had written did not constitute an improper *ex parte* contact under 5 U.S.C. § 557(d)(1)(A), the federal Administrative Procedure Act. The *Hobby* decision gives the impression the trial judge believed complainant brought his disqualification motion to obtain a tactical advantage rather than to vindicate ethical principles.

A trial judge relied on Connecticut Rule of Professional Conduct 3.7 to disqualify a military lawyer who had appeared for the U. S. Coast Guard Academy. *Berkman v. U.S. Coast Guard Academy*, 97-CAA-2 and 9, Order Granting Complainant's Motion To Disqualify (ALJ Apr. 9, 1997). Complainant sought disqualification after it became obvious the Academy’s lawyer would be a witness about significant events in a whistleblower protection proceeding filed under five statutes, the Clean Air Act, 42 U.S.C. §7622; the Federal Water Pollution Control Act, 33 U.S.C. §1367; the Toxic Substances Control Act, 15 U.S.C. §2622; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610; and the Solid Waste Disposal Act, 42 U.S.C. §6971. Rule 3.7 required withdrawal as a trial advocate when it became likely the lawyer would be a necessary witness on a material matter, unless the disqualification would work a substantial hardship on the client. Connecticut tribunals enforced the rule by disqualifying an attorney/witness. *State v. Rapuano*, 471 A.2d 240 (Conn. 1984), overruled on other grounds, *Burger and Burger, Inc. v. Murren*, 522 A.2d 816 (Conn. 1987). The order did not discuss why the Connecticut ethics rules applied, but I infer it was because underlying events occurred in New London, where the Academy is located. No mention is made of the state bar membership of the disqualified lawyer. *See also, Rockefeller v. U. S. Dept. of Energy*, OALJ Case No. 2002-ERA-00005 (Feb. 7, 2002) (raising but not deciding the question whether a government lawyer could represent the agency at trial if she herself became a witness in the case, due to the prohibitions in Model Rule 3.7).

#### D. *California’s Disqualification Standards*

##### 1. Conflicts

No disqualifying conflict arose because Manatt lawyers served as outside counsel for Respondents on work Complainant supervised. His most specific factual allegation is that “he was their [Manatt’s] client on corporate matters....” Motion at 11. For “corporate matters” Complainant was not Manatt’s client; the Respondents were, and still are. That Respondents terminated Complainant only highlights that Complainant and Respondents are separate legal entities, not an inseparable unity. Complainant never claims he consulted Manatt lawyers about how to defend against his job termination. The declaration of Ms. Bauman annexed to the Respondents’ answer to the motion shows he never engaged Manatt lawyers for advice personally, or formed an attorney-client or other confidential relationship with them in any

context other than as one of Respondents' executives.

## 2. Trial Testimony by Manatt Lawyers

The State Bar and the Supreme Court of California have not adopted the ABA Model Rules to govern attorney conduct, nor generally patterned California's Rules of Professional Conduct on them. Former Cal. R. Prof. Conduct 2-111(A)(4) stated that if "a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial . . . ." This was similar to DR 5-102 of the ABA's old CPR, and to Connecticut Rule of Professional Conduct 3.7 that the trial judge enforced in *Berkman v. U.S. Coast Guard Academy, supra*. When a lawyer represented a party at trial and testified as a witness, the lawyer's effectiveness both as an advocate and as a witness were thought to be impaired in the eyes of the fact finder.

That professional standard was amended in 1992 to its current, very different form. Today the rule distinguishes between cases tried to a jury and those tried to a judge. Under Cal. R. Prof. Conduct 5-210<sup>9</sup>, a member of the bar may not act as an advocate before a jury that also will hear testimony from that lawyer, except in limited situations, *viz.*, when the testimony relates to an uncontested matter, to the nature or value of legal services in the case, or when the client has given informed written consent to the dual roles. The Discussion appended to that Rule says:

Rule 5-210 is intended to apply to situations in which the [California bar] member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge.\* \* \* Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness.

In bench trials the dual roles of a witness and advocate are not regarded as inconsistent. Were the rule otherwise the Complainant, a lawyer who appears *pro se*, would be exposed to the same awkwardness. California courts place a high value on a party's right to choose trial counsel. *See, e.g., Smith, Smith & Kring v. Superior Court (Oliver)*, 60 Cal. App. 4th 573 (1997); *Johnson v. Superior Court*, 159 Cal. App. 3d 573 (1984). This policy choice is not inconsistent with the one Congress enacted in 5 U.S.C.A. § 500(b), discussed above. The Discussion for Rule 5-210 clarifies that in jury trials, testimony from another lawyer in the advocate's firm is no grounds for disqualification.

Finally, even if Complainant called Ms. Bauman (not just a member of her firm) as a witness in a jury matter, her disqualification as an advocate would not be automatic. California courts understand that such tactics can be used to oppress a litigation opponent financially, requiring "the duplicate expense and time-consuming effort" of replacing counsel already

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<sup>9</sup> "A member shall not act as an advocate before a jury which will hear testimony from the member..."

familiar with a case. *Smith, Smith & Kring, supra*, 60 Cal. App. 4<sup>th</sup> at 580. A more searching inquiry is required than the bare text of Cal. R. Prof. Conduct 5-210 implies:

"[W]henver an adversary declares his intent to call opposing counsel as a witness, prior to ordering disqualification of counsel, the court should determine whether counsel's testimony is, in fact, genuinely needed." (*Reynolds v. Superior Court, supra*, 177 Cal.App.3d at p. 1027, quoting *Connell v. Clairol, Inc.* (N.D.Ga. 1977) 440 F. Supp. 17, 18, fn. 1.) In determining the necessity of counsel's testimony, the court should consider "the significance of the matters to which he might testify, the weight his testimony might have in resolving such matters, and the availability of other witnesses or documentary evidence by which these matters may be independently established." (*Comden v. Superior Court, supra*, 20 Cal.3d at p. 913; *Graphic Process Co. v. Superior Court, supra*, 95 Cal.App.3d at p. 50.) The court should also consider whether it is the trial attorney or another member of his or her firm who will be the witness.

*Smith, Smith & Kring, supra*, 60 Cal. App. 4<sup>th</sup> at 581.

I need not make those inquiries, for no jury is empanelled here.

### 3. Allegations of Other Ethical Breaches

Complainant argued that Ms. Bauman violated "rules 951 and 962" of the "California Ethics Rules" by refusing to identify her client. Motion at 7, 8. I am unable to find those rules.<sup>10</sup> It makes no difference, for the record refutes the factual assertion. The only Respondents in this proceeding currently are Granada Entertainment USA and ITV plc. Ms. Bauman identified them as her clients at the initial pretrial conference, and in her letter of September 27, 2004. She has made a written filing containing the information required for a notice of appearance under 29 C.F.R. § 18.34(b).

Complainant accuses Ms. Bauman of having filed false statements and declarations with OSHA in its investigation of his Sarbanes-Oxley complaint for the Secretary, by misrepresenting the duties of another in-house lawyer for Respondents, Charles Tremanye, and by claiming to OSHA that an internal investigation of his allegations of fraud in a corporate restructuring had been undertaken when none was. Motion at 7, 11. He relies on cases where discipline was imposed or threatened for improper conduct in the course of litigation in this forum to support his disqualification motion. *See, e.g., Amato v. Assured Transportation & Delivery Inc.*, ARB No. 98-167, ALJ No. 1998-TSC-06 (ARB Jan. 31, 2000); *Greene v. EPA*, 2002-SWD-01, (ALJ June 20, 2002.).

An adjudicatory forum, whether a court or an agency, may bring charges against a member of its bar for misconduct that did not occur in a pending case, in order to preserve the

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<sup>10</sup> The California Rules of Professional Conduct use a wholly different numbering system, and have no such numbers.

integrity of its own proceedings. *Koden v. U. S. Dep't. of Justice*, 564 F.2d 228 (7th Cir. 1977) (suspending a lawyer from representing clients before the Board of Immigration Appeals and the Immigration and Naturalization Service for willfully deceiving an alien that he would represent her, and for hiring runners to secure clients); *In re Carroll*, 416 F.2d 585 (10th Cir. 1969) (per curiam) (disciplining a bar member for misrepresenting to jail officials that a reporter and a photographer were his associates, in order to admit them to the jail to interview and photograph his client). It is not clear that a litigant's opportunity to seek exclusion of an opponent's advocate is equally broad. Exclusion under 29 C.F.R. § 18.36(b) ought to be limited to instances of ethical misconduct that prejudiced the movant at OALJ, or that caused the lawyer to have been disciplined by another court or agency.

Complainant's allegation of some breach of a lawyer-client relationship, arising from filings Respondents made in the Temporary Restraining Order and Preliminary Injunction proceedings filed against him in state court, is incomprehensible.<sup>11</sup> The further assertions that lawyers at Manatt misrepresented they had obtained service of process on him in that equity proceeding, or made mendacious statements in filings there accusing him of harassing former subordinates, ought to be addressed to that court. This disqualification motion cannot serve as a collateral attack on proceedings elsewhere. If the presiding state court judge disciplined Ms. Bauman for improprieties (something not alleged in the motion), I would consider those rulings. Any discipline imposed by the California State Bar Court also would be highly relevant, but none is alleged.

Allegations that lawyers in the Manatt firm who have not appeared here as trial counsel aided a British lawyer to engage in the unauthorized practice of law in California, including back dating documents to hide such actions, should be addressed to the Office of the Chief Trial Counsel of the State Bar. *See*, Rule 2101, Rules of Procedure of the State Bar of California. A disqualification motion under 29 C.F.R. § 18.36(b) is not an occasion to examine the ethics of selected members of a law firm for actions they took as counsel in other cases, or in the corporate restructurings.

*E. Complainant's Motion was not Filed in Good Faith*

It is appropriate to consider whether a disqualification motion is being used as a subversive tactic. According to the rules of this forum, proceedings are to be conducted expeditiously and parties are expected to make every effort at each stage of a proceeding to avoid delay. 29 C.F.R. § 18.1. No proof was offered for any of the allegations. Complainant argued that California law applies, but the motion fails to acknowledge the relevant rules from the California Rules of Professional Conduct on the issue whether Manatt lawyers would be disqualified if Complainant called Ms. Bauman or other Manatt lawyers as witnesses, and instead cites to other non-existent ethics rules. This leads me to infer that the motion was not filed in good faith.

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<sup>11</sup> The motion says: "By filing a Temporary Restraining Order and Preliminary Injunction against the Complainant for a breach of duty while Counsel was in breach for having spoken to third parties violates this rule [from context a non-existent § 958 of California Ethics Rules] as since there is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." Motion, at 8.

The motion to disqualify Ms. Bauman and the Manatt firm from representing the Respondents at trial is denied.

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WILLIAM DORSEY  
Administrative Law Judge