

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-14-16

THE BANK OF MAINE,)
)
Plaintiffs,)
)
v.)
)
ASSOCIATED GROCERS OF MAINE,)
INC., *et al.*,)
)
Defendants)
)
)

**ORDER ON INTERVENOR
PHILADELPHIA INSURANCE
COMPANY’S MOTION TO DISQUALIFY
JAY GELLER & ATTORNEYS FROM
BERNSTEIN SHUR FROM SERVING AS
TRIAL COUNSEL FOR THE BANK OF
MAINE**

Defendants Associated Grocers of Maine, Inc. (“AGME”) and Philadelphia Indemnity Insurance Company (“PIIC”) (collectively the “AGME Defendants”) move to disqualify Attorney Jay Geller as well as certain attorneys from the law firm of Bernstein Shur Sawyer & Nelson, including Attorneys Paul McDonald and Meredith Eilers (collectively, the “Bernstein Shur Attorneys”), from serving as trial counsel for Plaintiff Bank of Maine (the “Bank”).¹ The AGME Defendants argue that these attorneys should be disqualified because they are necessary factual witnesses to disputed issues in this case. Specifically: 1) the amount, nature, necessity, and reasonableness of legal fees paid to these attorneys for representing the Bank in connection with two separate litigation matters;² and 2) Attorney Geller’s role advising the Bank in its decision to forgo approving AGME’s sale to a prospective buyer, and to instead place AGME into involuntary receivership.

¹ The Individual Defendants join the AGME Defendants’ motion to disqualify.

² The matters are: 1) the CB Vendor Litigation and 2) the Set-Off Litigation. These matters will be collectively referred to as the A/R Litigation.

The Bank responds that none of its trial counsel should be disqualified from serving as such because none of them are “necessary” witnesses within the meaning of M.R. Prof. Conduct 3.7. The Bank contends that: 1) testimony regarding the fees incurred by these attorneys could be obtained from other sources, such as expert witnesses; 2) Attorney Geller’s advice regarding the Bank’s decision to forgo approving AGME’s sale to a prospective buyer is privileged and available from other sources; and 3) disqualification would work a substantial hardship on the Bank in light of Attorney Geller’s intimate knowledge of the case and its tangled history. Furthermore, the Bank argues that there are alternative methods of resolving this issue such as bifurcating the liability and damages phases of the trial to at least allow the Bank to retain its chosen counsel for the liability phase.

Oral argument was held on January 21, 2016. At oral argument, counsel for the Bank explained that they were not seeking attorney’s fees in the present action for work performed by the Bernstein Shur Attorneys in the A/R Litigation. Based on this understanding, the AGME Defendants withdrew their motion to disqualify as to the Bernstein Shur Attorneys. Furthermore, although the AGME Defendants maintained their objection to Attorney Geller serving as trial counsel, they agreed with the Bank that it made sense to bifurcate the trial for this case into a liability phase and, if liability is found, a damages phase.

M.R. Prof. Conduct 3.7 provides, in pertinent part, that “a lawyer shall not act as advocate at a tribunal in which the lawyer is likely a necessary witness unless...disqualification of the lawyer would work substantial hardship on the client.” This is because “[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict-of-interest between the lawyer and client.” M.R. Prof. Conduct 3.7, Cmt. 1. In order to prevail, the party seeking disqualification must demonstrate that the testimony of

counsel is necessary in its case. *Stile v. Somerset County*, 2015 U.S. Dist. LEXIS 147251, *9 (D. Me. Oct. 30, 2015). “The requirement for the lawyer’s testimony to be ‘necessary’ means the party moving to disqualify must show that the lawyer’s testimony is relevant, material and unobtainable from other sources.” M.R. Prof. Conduct 3.7, Reporter’s Notes.

Here, the Court orders that trial for the present action shall be bifurcated into a liability phase and, if liability is found, a damages phase. In light of this bifurcation, the Court denies the AGME Defendants’ motion to disqualify Attorney Geller from serving as trial counsel during the liability phase. This is because: 1) the reasonableness of Attorney Geller’s attorney fees is not at issue in the liability phase; and 2) the AGME Defendants have presented no evidence that testimony from Attorney Geller regarding AGME’s decision to forgo approving AGME’s sale to a prospective buyer would not be protected work product and/or attorney-client communications.

In light of the fact that the damages phase of the trial may not occur, the Court denies the AGME Defendants’ motion to disqualify Attorney Geller from serving as trial counsel during the damages phase without prejudice. Should the Bank prevail in the liability phase, the AGME Defendants may renew their motion to disqualify Attorney Geller from serving as trial counsel. Without addressing the merits of this potential motion, the Court notes that the Bank should be prepared for the possibility that Attorney Geller may be disqualified from serving as its trial counsel during the damages phase.

For the reasons discussed above it is hereby ORDERED AND ADJUDGED AS FOLLOWS:

- 1) Trial shall be bifurcated into a liability phase and, if liability is found, a damages phase;
- 2) The AGME Defendants’ Motion to Disqualify the Bernstein Shur Attorneys from serving as trial counsel is denied;

- 3) The AGME Defendants' Motion to Disqualify Attorney Geller from serving as trial counsel is denied with regard to the liability phase of the trial; and
- 4) The AGME Defendants' Motion to Disqualify Attorney Geller from serving as trial counsel is denied, without prejudice, regarding the damages phase of the trial. If liability is found, and the damages phase of the trial is necessary, the AGME Defendants' may renew their motion and/or file a new motion to disqualify Attorney Geller from serving as trial counsel.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: February 10, 2016

_____/s_____
Michaela Murphy
Justice, Business & Consumer Court