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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos Justice PART 53m

Allianz Global Risks US Insurance

INDEX NO. 603455/07

MOTION DATE

- v -

MOTION SEQ. NO. 001

Scor SE et al

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

FILED
NOV 29 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/14/07

HON. CHARLES E. RAMOS, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

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ALLIANZ GLOBAL RISKS US INSURANCE COMPANY,

Petitioner,

Index No. 603455/07

-against-

SCOR SE and SIMPSON THACHER & BARTLETT LLP,

Respondents.

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Charles Edward Ramos, J.S.C.:

The petitioner's motion to disqualify Barry Ostrager and his firm of Simpson Thacher & Bartlett LLP (collectively "Simpson Thacher") as counsel for respondent SCOR SE in a reinsurance arbitration is denied as baseless.

Before the arbitrators is a reinsurance dispute between petitioner as the fronting insurer and SCOR as its reinsurer. During the World Trade Center insurance settlement negotiations, SCOR sought to be associated in the defense and control of a WTC insurance claim on which it was a reinsurer. SCOR alleges that it was denied that right to association and objects (in the arbitration) to what it claims was a settlement of that WTC claim by petitioner of hundreds of millions of dollars more than SCOR agreed to pay and over its expressed disapproval.

The petitioner contends that Simpson Thacher's representation of other reinsurers in WTC litigation causes that firm to now run afoul of the necessary witness rule (DR 5-102) so as to require disqualification. For its part, SCOR has no intention of calling any witness from Simpson Thacher in the arbitration.

Putting aside the obvious issue of attorney-client privilege which would surely avoid much potential testimony, the petitioner fails to allege any issues upon which it is "necessary" under the Rule to call counsel as a witness. This record is clear that none of Simpson Thacher's former clients are directly or indirectly involved in this dispute between the petitioner and SCOR. Although this Court doubts that any of Simpson Thacher's former clients could give probative or relevant testimony in this arbitration, that determination is best left to the arbitrators.

The key to petitioner's motion as expressed at oral argument and in its memo of law, is that Mr. Ostrager, acting as an attorney for another insurance carrier in the WTC litigation, took a different posture involving the settlement of WTC claims than he is now taking on behalf of SCOR. The petitioner is seeking to make Mr. Ostrager's credibility an issue in this arbitration even though he will not be called as a witness by SCOR but rather because petitioner will call him as a witness to prove that when he participated in the WTC litigation as an attorney for another client he allegedly took a contrary position. Otherwise, a witness from Simpson Thacher will not be called as a witness for any other purpose in this arbitration.

Petitioner's position is clearly set forth in its Memo of Law.

> During the several months of settlement negotiations, counsel for the various settling insurers worked closely together, and Allianz shared drafts and strategies with Mr.

> Ostrager and his partners.[1] Now, switching hats, Simpson Thacher's and SCOR's principal challenge to the Allianz settlement agreement is a claim that Allianz acted in bad faith by agreeing to settlement terms that are similar (but superior) to the terms that Mr. Ostrager and Simpson Thacher obtained on behalf of their clients.

Petitioner is in effect asserting that an attorney must never represent a new client if that client seeks to take a position contrary to a position taken in other litigation by a former client. This has never been New York law. If such were the rule, a Pandora's Box of ethical litigation would descend upon the practicing bar.

Although arbitrators are granted great latitude in determining what testimony they will hear, this application is being made absent any ruling by the arbitrators that they in fact do wish to hear if Simpson Thacher or one of its other clients, advocated a contrary position. This Court must therefore assume that New York law will be applied to this fundamental evidentiary and ethical issue.

Under well established principles, the actions of an attorney on behalf of a former client (absent conflict issues not asserted here) are not probative or relevant when representing a new client. Clients have enough credibility issues of their own, they do not need to be held responsible for the actions of their counsel in other matters when representing other clients, even if the issues are similar or the same. Simpson Thacher's testimony

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[1] This allegation is superfluous. Petitioner expressly stated at oral argument that no claim is made of a joint defense privilege. Nor is there any claim of imparting confidences or secrets of petitioner.

is simply not "necessary."

> The "advocate-witness" rule requires an attorney to withdraw from a case where it is likely that he will be called as a witness (Code of Professional Responsibility DR 5-102 [22 NYCRR 1200.21]). But such disqualification is required only where the testimony by the attorney is considered necessary. "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 446). The challenging party carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be "so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification" (Martinez v Cease, 186 AD2d 378, 379). Absent such a showing, it would appear that defendants are simply seeking a strategic advantage by the disqualification of plaintiff's attorney of longstanding, a result which would deny their adversary the valued right to representation by counsel of its choice (S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., supra, 69 NY2d, at 443). *Broadwhite Assocs. v Mac Truong* 237 AD2d 162 (1st Dept 1997).

As is clear from *Broadwhite*, that there is no basis upon which Simpson Thacher's testimony can be considered as "necessary." If the petitioner is permitted in the arbitration to show that other insurance carriers settled WTC claims in the same manner as it did, petitioner can do so by calling those insurance carriers as witnesses. There is no "necessity" under the Rule to call Simpson Thacher as a witness when there are reasonable alternative witnesses who would not trigger attorney disqualification. In the unlikely event that attorney witnesses are necessary, counsel for other carriers could be called as witnesses, again not triggering disqualification of Simpson Thacher.

As the Court of Appeals has stated:

> The advocate-witness disqualification rules contained in the Code of Professional Responsibility provide guidance, not binding authority, for courts in determining whether a party's law firm, at its adversary's instance, should be disqualified during litigation. Courts must, in addition, consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation.
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> The Code of Professional Responsibility establishes ethical standards that guide attorneys in their professional conduct, and its importance is not to be diminished or denigrated by indifference *(see, Matter of Weinstock*, 40 NY2d 1, 6). When raised in litigation, however -- which in addition to matters of professional conduct directly involves the interests of clients and others -- the Code provisions cannot be applied as if they were controlling statutory or decisional law. "When we agree that the Code applies in an equitable manner to a matter before us, we should not hesitate to enforce it with vigor. When we find an area of uncertainty, however, we must use our judicial process to make our own decision in the interests of justice to all concerned." *(Foley & Co. v Vanderbilt*, 523 F2d 1357, 1360 [Gurfein, J., concurring].)
> *S & S Hotel Ventures Limited Partnership v 777 S. H. Corp., supra.*

This present attempt to disqualify an adversary is so devoid of supporting facts or applicable law that this Court concludes that the motive behind the effort to disqualify Simpson Thacher is to delay the arbitration. The arbitrators have stated that they will endeavor to determine SCOR's application for summary relief prior to January 31, 2008. In the event that determination is delayed, on February 1, 2008 petitioner will be free to commence monthly draw-downs on SCOR's letters of credit which total approximately $300 million. The advantage to the petitioner in the event of a delay is obvious.

The motion is denied with costs and disbursements to respondents. The respondents application for sanctions is

granted against Petitioner and its attorneys in the sum of $10,000 to be paid to the Fund for Client Protection, in addition to which the respondents are hereby awarded their reasonable attorneys' fees occasioned by this effort to disqualify. Accordingly, it is

ORDERED, that the motion to disqualify is denied and the petition is dismissed; and it is further

ORDERED, that if the parties are unable to agree on an amount of attorney's fees by November 30, 2007, the issue of the amount of attorney's fees shall be referred to a Special Referee to hear and report with recommendations, except that in the event that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as Referee, shall determine the aforesaid issue; and it is further

ORDERED, that absent an agreement, this motion for sanctions is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED, that the respondents' application for sanctions is granted against petitioner and its attorneys in the sum of $10,000 to be paid to the Fund for Client Protection within 10 days of service of a copy of this Order with notice of its entry; and it is further

ORDERED that a copy of this order with notice of entry shall

be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Dated: November 16, 2007

J.S.C.
HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.