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# TLSS Attorneys Stephen D. Straus and Andrew N. Adler Obtain Disqualification of Opponents' Attorneys

Traub Lieberman Straus & Shrewsbury LLP attorneys Stephen D. Straus and Andrew N. Adler recently won a motion to disqualify plaintiffs' attorneys in a complex legal malpractice action, *Kodsi v. Miller*, Index No. 11-1123 (Sup. Ct. Ulster County). Plaintiffs' initial counsel had sought and been granted leave to withdraw from the action because he would be called as a witness. Under the "advocate-witness rule," an attorney generally may not simultaneously serve in both capacities.

Initial counsel also labored under a conflict of interest because he had taken over as plaintiffs' lawyer in an underlying suit for which TLSS's clients had been representing plaintiffs. Once plaintiffs filed their malpractice action against TLSS's clients, the clients withdrew. The underlying matter has since settled, but plaintiff's initial counsel may be held liable for contribution in the malpractice case due to the manner in which he defended and billed plaintiffs in the underlying litigation. His potential liability presents a conflict with his role as counsel in the instant malpractice case.

After initial counsel was permitted to withdraw, a new firm entered an appearance for plaintiffs. Initial counsel, however, is listed as "Of Counsel" on the new firm's letterhead. TLSS successfully convinced the court to impute the ethical problems faced by initial counsel to new counsel, due to the professional relationship between them.

In its decision, the court meticulously discussed the ethical rules and their exceptions, as well as the scope of vicarious disqualification. Firstly, the court concluded that plaintiffs' initial counsel was properly disqualified under the advocate-witness rule because his testimony may prove both "indispensable" to the case and "highly prejudicial" to plaintiffs. Secondly, the court held that initial counsel had a "palpable conflict of interest" with his former clients.

Finally, the court determined that such disqualification must be imputed to the newly substituted law firm. That firm contended that initial counsel had no office space at their firm, no access to files he was not working on, no set salary, and no involvement in the firm's day-to-day operations. The court rejected that argument, noting that an "of counsel" relationship must be "close, regular, and personal" to abide by pertinent ethical opinions and, in any event, the connection between the firm and initial counsel was "decidedly not... *de minimis*."

A subsequent appellate motion to stay the proceedings pending an appeal of the disqualification was also decided in favor of TLSS's clients.