

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 657/July 19, 2010

ADMINISTRATIVE PROCEEDING

File No. 3-13847

In the Matter of

MORGAN ASSET MANAGEMENT, INC.,
MORGAN KEEGAN & COMPANY, INC.,
JAMES C. KELSOE, JR., and
JOSEPH THOMPSON WELLER, CPA

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ORDER DENYING MOTION
TO DISQUALIFY ATTORNEYS
FOR RESPONDENTS

On June 1, 2010, the Division of Enforcement (Division) moved to disqualify certain attorneys for Respondents. The Division argues that the law firm of Sutherland, Asbill & Brennan, LLP (SAB), has two conflicts of interest which should prevent it from representing Respondents in this proceeding (Div. Mot.).

The first alleged conflict is that Respondents Morgan Keegan & Company, Inc. (Morgan Keegan), and Joseph Thompson Weller, CPA (Weller), on the one hand, and James C. Kelsoe, Jr. (Kelsoe), on the other hand, "have potential defenses involving the conduct of [each] other, but they are foreclosed from any such blame-shifting" because SAB represents all four Respondents (Div. Mot. at 1). The Division asserts that SAB's joint representation raises serious questions about Respondents' ability to mount a vigorous defense and threatens the integrity of the proceeding. The Division contends that Morgan Keegan, Weller, and Kelsoe should each have separate attorneys. However, the Division would not object if Kelsoe and Respondent Morgan Asset Management, Inc. (Morgan Asset), share the same attorney because Morgan Asset's liability is "largely or exclusively" derivative of Kelsoe's liability (June 2, 2010, Prehearing Conference Transcript at 16-17) (Prehearing Conf. Tr.).

The second alleged conflict arises from the fact that SAB represented not only the four Respondents, but also three Morgan Keegan employees and the president of Morgan Asset during the investigation that led to the present proceeding. The Division expects to call these four individuals as witnesses during the hearing. The conflict of interest concern is that SAB attorneys may not be able to cross-examine these witnesses for fear of divulging privileged information. SAB faces the dual risks of improperly using privileged communications from its representation of the witnesses or, by protecting those communications, failing effectively to cross-examine the witnesses as Respondents' interests require.

On June 18, 2010, Respondents opposed the Division's motion. Respondents claim that the Division would like them to attack each other, but they believe that it is not in their interest to do so. They also argue that the Division should not be allowed to interfere with their statutory right to the attorneys of their choice or to force its own ideas of a proper defense on them via a disqualification motion. Respondents submit declarations attesting that they are aware of, and waive objections to, the conflicts of interest identified by the Division. Finally, Respondents contend that granting the Division's motion would place them at a serious disadvantage, force them to expend additional resources to defend themselves, and compromise the integrity of the proceeding.

On June 25, 2010, the Division replied to Respondents' opposition (Div. Reply). The Division denies that it wishes Respondents to adopt any particular defense strategy (Div. Reply at 5). It explains that certain defenses are "suggested by the charges [in the Order Instituting Proceedings (OIP)], whether or not those defenses involve blame-shifting" (Div. Reply at 5). The Division also argues that Respondents' written conflict-of-interest waivers are "ineffective" or "without effect" (Div. Reply at 10-11).

I have considered these and all other pleadings submitted by the parties.¹

The Applicable Law

Rule 111(d) of the Rules of Practice of the Securities and Exchange Commission (Commission) authorizes an Administrative Law Judge (ALJ) to regulate the course of a proceeding and the conduct of the parties and their counsel. The Commission has held that an ALJ has the authority under Rule 111(d) to disqualify counsel if a conflict of interest is of sufficient magnitude to render the proceeding unjust. Clarke T. Blizzard, 77 SEC Docket 1515, 1517 (Apr. 24, 2002).

An agency's right to exclude an attorney from a proceeding pursuant to its rules and regulations must be construed in relation to the language of 5 U.S.C. § 555(b). That section of the Administrative Procedure Act provides that a party summoned to appear before a federal agency has a right to be assisted by counsel. The courts have interpreted Section 555(b) as not only guaranteeing the right to counsel, but also the right to counsel of one's choice. See SEC v. Csapo, 533 F.2d 7, 10-11 (D.C. Cir. 1976); SEC v. Higashi, 359 F.2d 550, 553 (9th Cir. 1966):

The Commission has held that the statutory right to counsel is not absolute. Trautman Wasserman & Co., 90 SEC Docket 3098, 3104 & n.20 (June 29, 2007) ("[R]espondents in Commission proceedings do not enjoy an absolute right to counsel of their original choosing

¹ These other pleadings are the Division's Motion for Leave to Supplement the Appendix to its Reply, filed June 29, 2010, and the supplemental briefs and replies filed by the parties on July 6 and July 9, 2010, in response to my Order of June 29, 2010.

when a conflict of interest with that attorney threatens the integrity of the Commission's processes.") (citing Blizzard).

The American Bar Association's Model Rules of Professional Conduct (Model Rules) and the American Law Institute Restatement (Third) of the Law: The Law Governing Lawyers (Restatement) provide helpful guidance in resolving motions to disqualify counsel. See Scattered Corp., 53 S.E.C. 948, 959 (1998). However, the Commission does not view the Model Rules as binding precedent. See Blizzard, Order Denying Stay (July 18, 2002) at 5-6 n.14 (unpublished).

Motions to disqualify counsel are strongly disfavored as they often pose the very threat to the integrity of the judicial process that they purport to prevent. VISA U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1104 (N.D. Cal. 2003) (citations omitted); see Cohen v. Acorn Int'l Ltd., 921 F. Supp. 1062, 1063-64 (S.D.N.Y. 1995) (collecting cases). Because of the potential for abuse by opposing counsel, motions to disqualify are subject to particularly strict judicial scrutiny. Harker v. Comm'r, 82 F.3d 806, 808 (8th Cir. 1996); Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1050 (9th Cir. 1985) (collecting cases). Disqualification "is a drastic measure which courts should hesitate to impose except when absolutely necessary." Freeman v. Chi. Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982).

1. Whether the Model Rules and the Restatement Are Still Relevant

The Division's first two pleadings did not discuss the Model Rules or the Restatement. Accordingly, I required the Division to state whether, in its judgment, SAB violated any prohibitions in the Model Rules or the Restatement and, if so, to identify the specific provisions (June 29, 2010, Order).

In response, the Division argues that the Model Rules and the Restatement are more tolerant of multiple representations than the standard adopted by the Commission in Blizzard. To the extent that the Model Rules and the Restatement conflict with Blizzard, the Division urges that they should not be applied here. Nonetheless, the Division contends that SAB's multiple representations in this proceeding are prohibited by both Model Rule 1.7 and Restatement §§ 121-23.

The Division appears to argue that Blizzard threw the Model Rules and the Restatement overboard, thereby implicitly overruling Scattered. Inasmuch as there is a considerable middle ground between treating these sources as helpful guidance and stating that one of them is "not binding precedent," I respectfully disagree. The Commission continues to cite the Model Rules and the Restatement in its post-Blizzard actions in other areas. See Scott G. Monson, 93 SEC Docket 7517, 7526 n.26 (June 30, 2008); Ira Weiss, 86 SEC Docket 2588, 2605-06 n.33 (Dec. 2, 2005), *pet. denied*, 468 F.3d 849 (D.C. Cir. 2006); Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6305, 6310, 6313 (Feb. 6, 2003) (final rules).

2. Representing Four Respondents

a. Model Rules and Restatement

Model Rule 1.7, Conflict of Interest: Current Clients, offers a useful starting point in considering the first alleged ground for disqualification. With certain exceptions discussed infra, Model Rule 1.7(a) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. Model Rule 1.7(a)(2) states that a concurrent conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.”

Section 121 of the Restatement is nearly identical. The relevant passage provides that “[a] conflict of interest is involved if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s . . . duties to another current client”

The Division argues that, because of SAB’s multiple representations, Respondents are effectively foreclosed from raising certain defenses that are “suggested by the charges” in the OIP (Div. Reply at 5). As an illustration, the Division claims that Respondents are restricted to a “united front” defense whereas separate counsel would be free to pursue a blame-shifting strategy. The Division also contends that Kelsoe’s actions will substantially undermine any defense that Morgan Keegan may raise of reliance on the Funds’ auditors.

The claim of an actual conflict of interest based on a united front defense has been considered and rejected frequently in the criminal law setting. See United States v. Solomon, 856 F.2d 1572, 1581 & n.49 (11th Cir. 1988); United States v. Medel, 592 F.2d 1305, 1312 (5th Cir. 1979) (finding no conflict of interest in the joint representation because a “united front strategy may well have been the best strategy available”). When such a contention is made, the inquiry focuses on whether the alleged conflict obstructs the use of a plausible alternative strategy or defense. Solomon, 856 F.2d at 1581 & n.50. The party raising the actual conflict of interest claim need not show that the alternative defenses will necessarily be successful if they are used, but it must show that the defenses possess sufficient substance to be viable alternatives. Cf. United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985).

The proposed blame-shifting defense does not meet this test. Cf. Joseph Abbondante, 87 SEC Docket 203, 226 & n.76 (Jan. 6, 2006) (collecting cases), aff’d, 209 Fed. Appx. 6 (2d Cir. 2006). The same is true of the suggested “reliance on auditors” defense. Cf. SEC v. Yuen, 2006 U.S. Dist. LEXIS 33938, at *110-13 (C.D. Cal. Mar. 16, 2006) (collecting cases), aff’d, 272 Fed. Appx. 615, 617 (9th Cir. 2008); Robert W. Armstrong, III, 85 SEC Docket 3011, 3027-28 (June 24, 2005). Forfeiting defenses that are not viable does not involve a “significant risk” that the client will be “materially limited” within the meaning of Model Rule 1.7(a)(2). Nor does it rise to the level of a “serious potential for conflict,” as discussed in Blizzard.

Model Rule 1.7(b) provides that, notwithstanding the existence of a concurrent conflict of interest under Model Rule 1.7(a), a lawyer may represent a client if four conditions are satisfied: (1) the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

There is no question that SAB met its obligations to Respondents under Model Rule 1.7(b)(2)-(4), but the parties offer dueling assertions about SAB's compliance with Model Rule 1.7(b)(1). The Division claims that "no lawyer could reasonably believe under the circumstances that he could render competent and diligent representation to each affected client" (Div. Suppl. Br. at 10). Respondents argue the opposite: "[SAB] reasonably believes that it 'will be able to provide competent and diligent representation to each affected client.'" (Resp't Opp'n at 8). In view of the Division's high burden of proof, this issue must be resolved in Respondents' favor.

I conclude that the Division has failed to carry its burden of showing that SAB has a "concurrent conflict of interest" within the meaning of Model Rule 1.7(a). Assuming arguendo that SAB has a concurrent conflict of interest, I further conclude that SAB has met its obligations to Respondents under Model Rule 1.7(b).

b. Whether the Written Conflict-of-Interest Waivers Are Relevant

The Division also argues that SAB cannot avoid disqualification by persuading Respondents to sign written conflict-of-interest waivers. This argument finds support in Blizzard. 77 SEC Docket at 1518 (stating that the Commission's concern about the appearance of a lack of integrity "cannot be addressed by the consent of [an attorney's] clients to his representation of them"). However, I believe that a fairer reading of Blizzard is that the Commission applied a balancing test, not a per se rule categorically rejecting all conflict-of-interest waivers involving potential conflicts of interest. Id. at 1520 ("Here, the right to counsel of one's choice is outweighed by the necessity of ensuring that our administrative proceeding is conducted with a scrupulous regard for the propriety and integrity of the process.") (emphasis added).

My conclusion that the Commission applied a balancing test in Blizzard is confirmed by Blizzard's repeated citations to Wheat v. United States, 486 U.S. 153 (1988). See Blizzard, 77 SEC Docket at 1518-20 nn.10, 16-19. In Wheat, the Supreme Court rejected a claim that the provision of waivers by all affected defendants cured any problems created by multiple representations in criminal cases. Id. at 160 ("[N]o such flat rule can be deduced from the *Sixth Amendment* presumption in favor of counsel of choice."). The Supreme Court held instead that a trial court must recognize a rebuttable presumption in favor of a defendant's Sixth Amendment right to counsel of choice. Id. It further held that the presumption may be overcome not only by a demonstration of an actual conflict of interest, but also by a showing

of a serious potential for a conflict of interest.² *Id.* at 164; cf. *United States v. Combs*, 222 F.3d 353, 361 (7th Cir. 2000) (“[A] court has an independent duty to balance the right to counsel of choice with the broader interests of judicial integrity.”) (emphasis added).

c. Conclusions

I conclude that the Division has not shown an actual conflict of interest. It has shown a potential conflict of interest, but the potential is not sufficient to justify disqualification of SAB. Denying the Division’s motion does not threaten the integrity of the proceeding. Conversely, granting the Division’s motion would seriously disrupt Respondents’ preparation for the hearing and would require them to incur significant additional costs. Accordingly, I conclude that Respondents’ statutory right to counsel of choice must be respected.

d. An Additional Factor

I decline to disqualify SAB from representing all four Respondents for an additional reason. Respondents Morgan Keegan and Morgan Asset are represented in this proceeding by a second law firm, Sullivan & Cromwell (S&C). S&C has a longstanding relationship with Morgan Keegan’s and Morgan Asset’s corporate parent (June 2, 2010, Prehearing Conf. Tr. at 22-23). Although the Division asserts that Morgan Keegan’s interests are not aligned with Kelsoe’s and that Morgan Asset’s liability is derivative of Kelsoe’s, the Division’s motion to disqualify does not challenge S&C’s joint representation of Morgan Keegan and Morgan Asset.

At the second prehearing conference, I inquired as to why the Division sought to disqualify SAB, but not S&C (June 2, 2010, Prehearing Conf. Tr. at 16-18). The Division explained that it is engaged in preliminary settlement discussions with S&C, while SAB is preparing for the hearing. It also stated that conflicts of interest in the hearing context are more troublesome than conflicts of interest in the settlement context. The Division’s distinction is rejected. No counsel who has entered an appearance in this proceeding has done so in a limited capacity. Moreover, the case law does not support the apparent suggestion that conflicts of interest in the settlement context can be safely ignored. Cf. *Iowa Physicians Clinic Med. Found. v. Physicians Ins. Co. of Wis.*, 547 F.3d 810, 812 (7th Cir. 2008) (explaining that, if a plaintiff sues an insured for an amount above the policy limit and seeks a settlement at the upper limit of the policy, a conflict of interest arises between the insured and the insurance company); *Reynolds v. Benefit Nat’l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (“Conflicts of interest can create serious problems for class action settlements”).

² Scholarly analysis has criticized *Wheat* for failing to provide a clear framework for the appropriate degree of deference that the federal courts should give to the right to counsel. See Eugene L. Shapiro, *The Sixth Amendment Right to Counsel of Choice: An Exercise in the Weighing of Unarticulated Values*, 43 S.C. L. Rev. 345, 350-55 (1992). Shapiro concluded that the presumption of the right to counsel in *Wheat* is of “indeterminate strength” and there is no standard for assessing the counterbalancing governmental interests. *Id.* at 350-55.

To disqualify one law firm from representing multiple Respondents, but allow another law firm to represent two of the very same Respondents would be arbitrary and would undermine the integrity of the proceeding.³

3. Current vs. Former Clients

In addition to representing Respondents during the investigation, SAB also represented three Morgan Keegan employees (Louis Hale, Michele Wood, and Amy Walker) and the president of Morgan Asset (Brian Sullivan). The Division intends to call these four individuals as witnesses during the hearing. It contends that the investigative testimony of Hale, Wood, and Walker differed on key points from the investigative testimony of Kelsoe, and it anticipates that this conflicting testimony will carry over to the hearing.⁴ The Division alleges that SAB “likely gained” privileged information about Hale, Wood, Walker, and Sullivan during the attorney-client relationship and would be in a position to use that information against them on behalf of Respondents during the hearing (Div. Mot. at 8).

The Division does not consider the conflicting interests of SAB’s current and former clients to present as egregious an ethical issue as the conflicting interests between and among Respondents (Div. Suppl. Br. at 15). It nonetheless contends that the conflict between SAB’s current and former clients also warrants disqualification of SAB.

Respondents acknowledge that SAB had attorney-client relationships with Hale, Wood, Walker, and Sullivan during the investigation. These attorney-client relationships continued during the first two and one-half months of the present proceeding, but ended on June 30, 2010, with respect to Walker, and on July 1, 2010, with respect to Hale, Wood, and Sullivan. All four individuals recently retained separate counsel to represent them with respect to their anticipated testimony at the upcoming hearing.

Model Rule 1.9, Duties to Former Clients, offers helpful guidance. It provides: “(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” Comment 9 to Model Rule 1.9 explains: “The provisions of

³ I do not suggest that S&C has a conflict of interest. Nor do I believe that the Division should now be allowed to file a separate motion to disqualify S&C. At the first prehearing conference on May 7, 2010, I gave the Division one week to notify all concerned if it intended to file a motion to disqualify counsel. I gave the Division another two weeks to file its motion for disqualification. After deliberation, the Division moved to disqualify only SAB. At the second prehearing conference, the Division sought leave to supplement its motion as to S&C. I denied the Division’s request.

⁴ The Division does not identify any conflicts between the investigative testimony of Sullivan and that of Kelsoe.

this Rule are for the protection of former clients and can be waived if the client gives informed consent”

The courts do not inquire whether a former client in fact made confidential disclosures to a former attorney or whether the attorney is likely to use confidences to the detriment of his former client. See NCK Org. Ltd. v. Bregman, 542 F.2d 128, 134 (2d Cir. 1976); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1384-85 (3d Cir. 1972). The Model Rule simply requires inquiry into whether there is a “substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” Comment 3 to Model Rule 1.9. Once a court determines that the present representation is substantially related to the prior representation, the court irrebutably presumes that relevant confidential information was disclosed during the prior representation. See In re Am. Airlines, Inc., 972 F.2d 605, 614 & n.1 (5th Cir. 1992). Moreover, the presumption is imputed to the lawyer’s entire firm. Grosser-Samuels v. Jacquelin Designs Enters., Inc., 448 F. Supp. 2d 772, 779 (N.D. Tex. 2006).

Respondents do not dispute that the underlying investigation and the present proceeding are substantially related matters. In the present proceeding, Respondents have waived any objection to conflicts arising from SAB’s former representation of likely witnesses against them.

I conclude that the Division has not shown an actual conflict of interest. As to prospective witness Sullivan, the Division has not shown any conflict at all. As to prospective witnesses Hale, Wood, and Walker, the Division has shown a potential conflict, but not a serious potential conflict. I do not believe that disqualification of SAB is required to ensure the integrity of the proceeding.

There are several problems with this aspect of the Division’s motion to disqualify. By identifying these problems, I am not inviting the Division to cure them and resubmit its motion in a slightly altered format.

First, courts are hesitant to grant motions to disqualify counsel when the witnesses, whose interests the government is supposedly protecting, do not demand disqualification in order to protect those interests. See United States v. Moscony, 927 F.2d 742, 747 (3d Cir. 1991) (noting that all three of the government’s witnesses expressly joined in the government’s motion to disqualify their former counsel); United States v. O’Malley, 786 F.2d 786, 792 (7th Cir. 1986) (granting disqualification where the attorney’s former client made it clear that he viewed the risk of an intrusion upon his attorney-client privilege as substantial); United States v. James, 708 F.2d 40, 46 (2d Cir. 1983) (“the interest of the government in disqualifying the attorney is normally quite weak” if the former client does not join in the motion to disqualify); United States v. Cunningham, 672 F.2d 1064, 1072 (2d Cir. 1982) (explaining that one basis for not disqualifying counsel was the non-joinder of the former client, a government witness, in the government’s motion to disqualify); United States v. Hawkins, 2004 U.S. Dist. LEXIS 17732, at *22 (E.D. Pa. Aug. 26, 2004) (same); United States v. McDade, 1992 U.S. Dist. LEXIS 11447, at *9 (E.D. Pa. July 30, 1992) (weighing “the salient and inescapable fact that

the witness in question has not joined in the [government's] motion to disqualify"). I appreciate that prospective witnesses Hale, Wood, Walker, and Sullivan have only recently retained their own attorney and may not yet have carefully considered their options. However, this part of the record is blank, and the Division's argument suffers as a result.

Second, there are ways to prevent the potential conflict from becoming an actual conflict, and the Division has not explored them. The Division's List of Proposed Witnesses states that Hale, Wood, and Walker are expected to testify about "the Funds' and Morgan Keegan's valuation policies and procedures and practices" and that Sullivan is expected to testify about "Morgan Asset's policies and procedures and practices." The Division's List of Proposed Witnesses identifies fourteen other witnesses who will also testify about the same subjects. The Division's motion does not explain why some of these other fourteen witnesses (none of whom it has identified as a client or former client of SAB) cannot provide any necessary testimony.⁵

Third, assuming arguendo that the Division had established a serious potential conflict of interest, there would be ways of curing the problem short of disqualification. Each such alternative should have been explored in good faith. Cf. United States v. Turner, 594 F.3d 946, 952 (7th Cir. 2010) (holding that, before disqualifying counsel on the basis of a potential conflict, the court must evaluate whether there are alternative measures available other than disqualification). For example, the parties might be able to stipulate to the evidence giving rise to the conflict. Additionally, there is the possibility of arranging a "pinch hitter" for conflicted counsel. Under this approach, SAB could continue to represent Respondents at the hearing, but would be prohibited from cross-examining any of the witnesses it formerly represented. Respondents would be required to retain new counsel to conduct the cross-examination of the witnesses in question and consultation between old and new counsel regarding such cross-examination would be prohibited. See United States v. Britton, 289 F.3d 976, 979-80, 983 (7th Cir. 2002); United States v. Cellini, 596 F. Supp. 2d 1194, 1200 (N.D. Ill. 2009); United States v. Lebed, 2005 U.S. Dist. LEXIS 16767, at *17 (E.D. Pa. Aug. 12, 2005); Hawkins, at *22. In fact, this was the Division's alternative recommendation to cure the conflict of interest in Blizzard.⁶

4. Miscellaneous Issues

The courts have repeatedly recognized that motions to disqualify opposing counsel may be filed purely for tactical purposes. See Am. Airlines, 972 F.2d at 611; Universal City

⁵ By Order dated July 12, 2010, I required the Division to shorten its witness list to eliminate needless repetition. It is difficult to believe that the conflict-of-interest issue could not be sidestepped, even with a significantly shorter witness list.

⁶ Administrative Proceeding No. 3-10007, Division's Emergency Motion to Disqualify Respondent [Rudolph] Abel's Counsel, dated Feb. 27, 2002, at 9 n.5 (official notice).

Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449, 455 (S.D.N.Y. 2000). In Wheat, 486 U.S. at 163, the Supreme Court held:

Petitioner . . . rightly points out that the Government may seek to “manufacture” a conflict in order to prevent a defendant from having a particularly able defense counsel at his side; but trial courts are undoubtedly aware of this possibility, and must take it into consideration along with all of the other factors which inform this sort of a decision.

The lead attorney for SAB qualifies as “particularly able defense counsel.” See IFG Network Secs., Inc., 88 SEC Docket 1374 (July 11, 2006) (dismissing allegations of failure to supervise); Richard Hoffman, 71 SEC Docket 1510 (Jan. 27, 2000) (Initial Decision) (same), final, 71 SEC Docket 2430 (Mar. 6, 2000). Granting the motion to disqualify would hand the Division a significant tactical advantage.

Respondents assert that Blizzard’s reliance on Wheat, a criminal law case, is misplaced because Wheat relied on the *Sixth Amendment*, which guarantees criminal defendants certain rights that are not guaranteed to respondents in administrative proceedings. Cf. FED. R. CRIM. P. 44(c); Comment 23 to Model Rule 1.7 (“The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of [Model Rule 1.7(b)] are met.”).

The Division correctly observes that Blizzard is binding precedent. The Division also notes that there is no reason why the Commission cannot adopt high standards regarding attorney conflicts of interest for its proceedings. In doing so, the Division argues, the Commission is free to consider the standards adopted in the context of criminal proceedings.⁷ While the Division is undoubtedly correct, there are two post-Blizzard developments which warrant consideration.

First, in Rita J. McConville, 85 SEC Docket 3127, 3151 (June 30, 2005), pet. denied, 465 F.3d 780 (7th Cir. 2006), the Commission held that “[t]he *Sixth Amendment* is irrelevant to non-criminal proceedings.” The Division has not addressed the impact, if any, of this holding for Blizzard’s reliance on Wheat.

Second, Wheat did not determine what remedy a defendant would be entitled to if an appellate court found that a trial court judge had erroneously deprived him of the right to the

⁷ The Division has not cited, and I have not located, any federal court decisions applying Wheat outside the criminal law or habeas corpus context. Likewise, the Division has not identified, and I am not aware of, any decisions by other federal agencies applying Wheat to motions to disqualify counsel from their administrative proceedings.

attorney of his choice.⁸ However, the Supreme Court has now held that the erroneous denial of a criminal defendant's choice of counsel warrants automatic reversal of the conviction. See United States v. Gonzalez-Lopez, 548 U.S. 140, 147-51 (2006). The Supreme Court specifically rejected a requirement that the criminal defendant show that he suffered actual prejudice. Id. at 148-49. It also held that the erroneous denial of a defendant's counsel of choice was a structural error, for which the government may not advance a harmless-error argument. Id. at 149-50.

The Division has not discussed whether, because the Commission has incorporated the *Sixth Amendment* precedent of Wheat into its conflict-of-interest analysis, it would now be appropriate for the Commission also to embrace the *Sixth Amendment* precedent of Gonzalez-Lopez. In other words, the cost of erroneously granting the Division's motion to disqualify may be significantly higher than the Division believes it to be.

IT IS ORDERED THAT the Division's motion to disqualify Sutherland, Asbill & Brennan, LLP, as counsel for Respondents is denied.



James T. Kelly
Administrative Law Judge

⁸ Blizzard was never the subject of judicial review. After the Commission disqualified counsel for Respondent Abel in Blizzard, Abel defended the case pro se. On the merits, the ALJ dismissed the allegations against Abel, and the Commission affirmed. In these circumstances, the Commission did not need to decide if its earlier disqualification of Abel's attorney rendered the proceeding unfair. Blizzard, 83 SEC Docket 362, 378 n.23 (June 23, 2004).