UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 02-74350
Apyron Technologies, Inc.,	CHAPTER 11
Debtor.	JUDGE MASSEY
S. Gregory Hays,	
Movant,	
v.	CONTESTED MATTER
Leslie J. Story,	
Respondent.	

ORDER DENYING TRUSTEE'S MOTION TO DISQUALIFY RESPONDENT'S COUNSEL AND DENYING RESPONDENT'S MOTION TO APPROVE COUNSEL

In this contested matter, the Chapter 11 Trustee, Gregory Hayes, moves for an Order disqualifying the firm of Gibson, Deal & Fletcher, P.C. as counsel to Leslie J. Story with respect to Dr. Story's application for payment of administrative expenses allegedly incurred by Debtor Apryon Technologies, Inc., the Debtor, while it was the Debtor in Possession. The Gibson firm countered with a motion to approve that firm as Dr. Story's counsel. The Court held a hearing on the Trustee's motion on October 24, 2006. For the following reasons, the Court denies both motions.

The parties have agreed that the operative facts are undisputed, and neither party introduced evidence at the October 24 hearing or asked for the opportunity to present evidence at a continued hearing. Accordingly, the Court finds the following facts based on the record in this case, including the pleadings in this contested matter, and the statements made by the attorneys for the parties at the October 24 hearing.

This case was initiated by the filing of an involuntary Chapter 7 petition on December 4, 2002. On March 24, 2003, the Court entered an Order for Relief under Chapter 7 of the Bankruptcy Code and, on March 25, 2003, the case was converted to a case under Chapter 11. The Debtor remained in possession until March 2005, when the Court approved the U.S. Trustee's selection of Gregory Hayes as the Chapter 11 Trustee. While Debtor remained in possession, Leslie J. Story was Debtor's president and chief executive officer, but he was not paid a salary during the pendency of this case. Debtor's bankruptcy counsel was until March 24, 2006, Richard J. Storrs and thereafter was and is the firm of Lambreth, Cifelli, Stokes & Stout, P.C.

On April 5, 2006, Dr. Story filed an application pro se for payment of alleged administrative expenses consisting of a postpetition salary of $231,000, unreimbursed expenses of $8,996.28 and a DIP loan of $46,600 plus accrued interest. On August 7, 2006, the Trustee filed an objection to Dr. Story's application for payment of Dr. Story's salary as an administrative expense; the Trustee does not contest Dr. Story's application with respect to expenses and the DIP loan.

The Gibson firm represented Apyron Technologies, Inc. prior to the filing of the involuntary petition on discrete litigation matters and also on the effects of filing bankruptcy generally. Apyron's general counsel prior to the filing of the involuntary petition was McKenna

Long & Aldridge L.L.P, which is listed as a creditor in Schedule F with a claim of $135,603.86. The Gibson firm is a creditor of Debtor with a claim listed in Schedule F in the amount of $14,904.13 and is a shareholder in Debtor. The bulk of the $14,000 billed to the Debtor was related to litigation with a senior noteholder who claimed to own the Debtor's technology. The Gibson firm prevailed in that litigation. There is no evidence that the Gibson firm gave any advice to Apyron or to Dr. Story before the filing of the involuntary petition concerning executive compensation.

Debtor's Statement of Financial Affairs states in response to question 9 concerning payments related to debt counseling or bankruptcy that it paid $8,000 to the Gibson firm, but Mr. Gibson stated at the hearing that the firm's advice was limited to a general overview of bankruptcy and that he referred Debtor to bankruptcy lawyers outside his firm. Dr. Story personally paid the fees in question. At the hearing, Mr. James Frenzel, counsel to the Trustee, pointed out what the statement of affairs stated about $8,000 having been paid to the Gibson firm prepetition for bankruptcy advice but then acknowledged "whether it is right or wrong we don't know." Mr. Gibson referred Debtor to a bankruptcy lawyer who could not take on the case, and Debtor hired Richard Storrs, who filed the answer to the involuntary petition, without consulting the Gibson firm.

After the filing of the petition, Dr. Story engaged the Gibson firm on behalf of the Debtor to give the Debtor advice on corporate and litigation matters including financing, Sherman Ponder's claim and executory contracts. The Trustee concedes that he has no evidence to show that the Gibson firm rendered any advice to Debtor or Dr. Story about executive compensation. Mr. Gibson stated at the October 24 hearing that his firm gave no advice on executive

compensation. His firm advised the Debtor in Possession on certain matters related to the conduct of its business. The Gibson firm received $3,100 postpetition from the Debtor in connection with these services. The Gibson firm also rendered a bill for $1,100 in August 2003 for services to the Debtor in Possession, which Dr. Story paid in the fall of 2003.

Debtor never sought court approval of the Gibson firm as special counsel to Debtor postpetition. The firm was not "disinterested" because it was a creditor and shareholder of the Debtor but might have been approved as special counsel under section 327(e) of the Bankruptcy Code even though not disinterested. Section 327(e) of the Bankruptcy Code provides:

> (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e). As indicated, the Gibson firm had represented Debtor prepetition.

In an Order entered on July 22, 2005, the Court approved the sale of substantially all of Debtor's assets to Streamline Capital, Inc., a company in which Dr. Story is a shareholder. That sale would not have occurred if the Debtor had been unsuccessful in the litigation giving rise in large measure to the prepetition claim of the Gibson firm. The Gibson firm represents Streamline.

At the October 24 hearing, the Trustee made several arguments in his effort to disqualify the Gibson firm. First, he pointed to the fact that the Gibson firm had a number of relationships with the Debtor – as a creditor, shareholder, prepetition special counsel and postpetition special counsel – and currently represents Dr. Story and Streamline. The presence of these "hats," as Trustee's counsel described the relationships, does not, however, necessarily tar the Gibson firm with a conflict. It is incumbent on the Trustee to prove facts that require disqualification. The

fact that the Gibson firm holds an unsecured claim would create a conflict between it and Dr. Story, who also holds an unsecured claim, but Dr. Story has waived that conflict. The hats of creditor and shareholder do not give rise to a conflict, real or potential, between the firm and the estate on the objection to Dr. Story's postpetition claim.

The Trustee's counsel also contended at the hearing that a conflict exists between Dr. Story and the Gibson firm, because the Gibson firm received a postpetition transfer from Debtor, which the Trustee apparently thinks he can get back. If so, the funds on hand would increase by the amount of the fee paid to the Gibson firm. The Trustee contends that the funds on hand are not sufficient to pay all administrative expenses, and therefore Dr. Story would be entitled to receive a portion of what the Gibson firm allegedly owes the estate.

The primary problem with this argument is that the Trustee did not prove that there would be insufficient funds to pay all administrative expenses. Although the Court has awarded interim compensation in this case, whether those awards will stand and what other compensation may be paid remains to be decided. This case can hardly be described as a roaring success, which might have some bearing on the levels of compensation. Further, until the October 24 hearing, the Trustee had assumed that employment of the Gibson firm was proper because he complained in his supplemental brief in support of his motion to disqualify that "[t]he firm apparently holds a postpetition cost of administration claim for services rendered to the Debtor postpetition in the amount of $1,100." Trustee's Supplemental Brief, p. 3. Now the Trustee says the firm has no administrative claim and must return the money.

Until the Trustee formally seeks to recover the funds paid to the Gibson firm, the conflict between that firm and Dr. Story is hypothetical. Further, Dr. Story is almost certainly going to

waive the conflict (assuming the amount he will receive for his administrative claims would be increased if the Gibson firm paid back the compensation it received postpetition), though this also is yet to be proved. If the Gibson firm in fact received an unauthorized postpetition payment and Dr. Story waived the conflict, the Trustee's argument would fail. Nonetheless, the Gibson firm is forewarned that this Court has the inherent authority to bar the firm from appearing in this Court if it thumbs its nose at an unassailable demand to return an unauthorized payment, and the Court will exercise that authority if, after a proper demand, it fails to repay the money and has no reasonable basis for doing so.

At oral argument, counsel for the Trustee raised for the first time the argument that the Gibson firm's representation of Dr. Story was in violation of Rules 1.1 and 1.4 of the Georgia Rules of Professional Conduct. Rule 1.1 requires a lawyer to provide competent representation. Although the Gibson firm may not be competent in bankruptcy matters where detailed knowledge is required, the Trustee failed to provide any evidence that the firm gave incompetent advice on the matters on which it was engaged. Nor did he show how this rule is relevant. Rule 1.4 requires an attorney to keep a client informed. Similarly, the Trustee did not provide any evidence to show the relevance of this rule. These objections are without merit.

In his motion to disqualify the Gibson firm, the Trustee raised the argument that the Gibson firm is disqualified from representing Story in connection with this application for payment of administrative expenses by reason of Rule 1.9(a) of the Georgia Rules of Professional Conduct. Rule 1.9(a) provides: "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 consents after consultation." The Trustee also contends that Rule 1.7(a) of the Georgia Rules of Professional Conduct would be violated if the Gibson firm represents Dr. Story. That rule states in part:

> (A) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client . . . .

With respect to both of these rules, the Trustee asserts that the Gibson firm's representation of the Debtor prepetition and of the Debtor in Possession postpetition fall within these rules because the firm may have learned confidential information during that representation that would be adverse to the estate's position in opposing Dr. Story's administrative expense claim for compensation.

At the October 24 hearing, the Court pointedly asked the Trustee's attorney to identify the specific matter as to which there was a conflict. Counsel could not identify any matter, which is to say, there is no evidence that the Gibson firm gave any advice to or had any conversation with any representative of Debtor prepetition or postpetition about the terms on which Dr. Story was employed or about a waiver of compensation. Instead, counsel argued that the Chapter 11 case itself is the "matter," that the Trustee is unable to inquire into privileged matters between Story and the Gibson firm and that something adverse to the estate may have been disclosed to the Gibson firm. Generalizing on that objection, the Trustee's counsel asserted that an attorney who has represented a debtor or debtor in possession on a discrete subject matter may not represent an entity adverse to the estate on a different subject matter without the permission of the debtor in possession or trustee.

Dr. Story makes two basic arguments in response. First, he contends that the Gibson firm's representation of the estate can be disregarded, citing *Bagdan v. Beck*, 140 F.R.D. 660 (D.C. N.J. 1991), in which that court opined that Rule 1.9(a) has no application to a corporation that is for all practical purposes "dead." Second, and more importantly, Respondent contends that the matters on which the Gibson firm represented the Debtor and Debtor in Possession have no connection with the issues of whether Dr. Story waived a postpetition compensation claim and whether the value of his services is worth what he is claiming. Respondent asserts that the Trustee has not proved facts to show his representation by the Gibson firm will materially and adversely affect the Trustee and the estate because of knowledge gained while the firm represented the Debtor and Debtor in Possession.

There is a "constitutionally based right to counsel of choice" in civil as well as criminal cases, but that right is not absolute. *In re BellSouth Corporation*, 334 F.3d 941, 955 (11th Cir. 2003). The Eleventh Circuit has recently considered issues arising out of a motion to disqualify counsel in *Herrmann v. GutterGuard, Inc.*, 2006 WL 2591878 (11th Cir. 2006). There the Court opined as follows:

> Motions to disqualify are governed by two sources of authority. First, attorneys are bound by the local rules of the court in which they appear. The Georgia Rules of Professional Conduct, contained in the Rules and Regulations of the State Bar of Georgia, and judicial decisions interpreting those rules and standards, govern the professional conduct of members of the bar of the United States District Court for the Northern District of Georgia. N.D. Ga. R. 83.1(C); see also *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 380 F.3d 1331, 1338 (11th Cir. 2004). Second, federal common law also governs attorneys' professional conduct because motions to disqualify are substantive motions affecting the rights of the parties. See *Fed. Deposit Ins. Corp. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994).
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> . . .

> The party bringing the motion to disqualify bears the burden of proving the grounds for disqualification. *In re: BellSouth Corp*., 334 F.3d 941, 961 (11th Cir.2003). "Because a party is presumptively entitled to the counsel of his choice, that right may be overridden only if 'compelling reasons' exist." Id. A disqualification order "is a harsh sanction, often working substantial hardship on the client" and should therefore "be resorted to sparingly." *Norton v. Tallahassee Mem'l Hosp*., 689 F.2d 938, 941 n. 4 (11th Cir. 1982). A motion to disqualify brought by opposing counsel "should be viewed with caution ··· for it can be misused as a technique of harassment." Ga. Rules of Prof'l Conduct, R. 1.7, cmt. 15.

Herrmann v. GutterGuard, Inc., 2006 WL 2591878, at 6.

Before proceeding to address the Trustee's contentions, it is necessary to briefly discuss the Repondent's argument based on *Bagdan v. Beck*, 140 F.R.D. 660 (D.C. N.J. 1991) that the demise of the Debtor means that there could not possibly be a conflict. This Court disagrees with that proposition. The Supreme Court's decision in *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985) makes it settled law that a trustee may exercise the attorney-client privilege with respect to communications between a bankrupt corporation and its counsel prior to bankruptcy. By extension, the same rule applies while a debtor is in possession during a Chapter 11 case. That a corporation may no longer be operating does not deprive a bankruptcy trustee from exercising the attorney-client privilege to protect from disclosure, communications between an attorney for a corporation and the corporation prior to bankruptcy or prior to the appointment of the trustee, at least under the facts of the present case.

To resolve the dispute under Rule 1.9, the Court must determine whether the factual elements of that rule have been proved by the Trustee by a preponderance of the evidence. It is undisputed that the Gibson firm formerly represented the Debtor and the Debtor in Possession in the matters described above. If the Gibson firm still represented the estate, it could not represent

Dr. Story, even though the specific subject matters on which the Gibson Firm was formerly engaged differ from the specific subject matter of its representation of Dr. Story in the present contested matter. This is made clear by Rule 1.7 of the Georgia Rules of Professional Conduct, which the Trustee also cites as a basis for disqualification of the Gibson firm. Rule 1.7 is the general rule on conflicts of interest. Comment [8] to Rule 1.7 states in part that "[o]rdinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated." Comment [8] to Rule 1.7, Georgia Rules of Professional Conduct, State Bar of Georgia 2005-2006 Directory and Handbook, p. H-29. But it is clear from the facts agreed on by the parties that the Gibson firm no longer represents the Debtor or Debtor in Possession or the estate.

Rule 1.9 deals with conflicts involving former clients. Comment [1] to Rule 1.9 states in part: "[1] The principles in Rule 1.7: Conflicts of Interest determine whether, and to what extent the interests of a present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client." *Id*. at p. H-31. Comment [2] to Rule 1.9 states in part:

> [2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter may be one of degree. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Id.

The matters on which the Gibson firm represented the Debtor and the Debtor in Possession involved certain litigation against third parties, business advice on specific questions and very general advice about bankruptcy proceedings. By contrast, the issues involved in the present contested matter are whether Dr. Story waived any right to postpetition salary and if not,

what the value of his services to the estate is. Based on the agreed facts, the Court concludes that the Trustee has not shown that issues on which the Gibson firm was engaged by the Debtor and by the Debtor in Possession have anything at all to do with the issues raised by Dr. Story's application for payment of administrative expenses and the Trustee's objection to that application. The Court rejects the Trustee's argument that the Chapter 11 case itself is the "matter" with which Rule 1.9(a) is concerned.

The Trustee relies heavily on *In re Peck Foods,* 196 B.R. 434 (Bankr. E.D.Wis. 1996) for the proposition that having once represented the Debtor in Possession, the Gibson firm may not represent a new client adverse to the bankruptcy estate. In that connection, the Trustee posits that having represented the Debtor in Possession, the Gibson firm might have gained confidential information that could "potentially be used to the disadvantage of the Debtor." Trustee's Supplemental Brief, p. 6. But the *Peck* case is inapposite because it involved very different facts.

There, the bankruptcy court disqualified a law firm that had formerly represented the Chapter 11 debtor from representing a defendant in a preference action brought by the Chapter 7 trustee after case was converted. One of the duties of a debtor in possession, like a trustee, is to maximize the value of the estate. Typically, an attorney for a debtor in possession will discuss with the principals of the debtor in possession the claims of the estate to recover preferences. The *Peck* court held that disqualification was mandated by Rule 1.9 because the subject matter of the preference litigation was part of the subject matter of the Chapter 11 representation, whether or not the law firm had in fact acquired any information useful in defending the preference proceeding.

In *Peck*, the disqualified firm was general counsel to the debtor in possession. It directed the conduct of the entire case. Included in the scope of its representation of the debtor in possession was preference analysis and recovery. It did not matter whether or not the firm actually did any work on preferences or in fact obtained confidential information.

Here, the Gibson firm was not bankruptcy or general counsel for the Debtor or Debtor in Possession. It was engaged as special counsel on discrete and specific matters having nothing to do with the terms on which Dr. Story was employed. Because the matters on which the Gibson firm advised its former clients are not related, much less substantially related, to its present representation of Dr. Story, it cannot be disqualified for violation of Rules 1.7 and 1.9 of the Georgia Rules of Professional Conduct.

None of the other cases cited by the Trustee support his argument, articulated at the October 24 hearing, that former special counsel for a debtor in possession on a particular matter is automatically disqualified from representing a party adverse to the estate on a matter unrelated to the former representation. The Trustee mentioned four other cases besides *Peck* in his supplemental brief.

In *In re Jaeger*, 213 B.R. 578 (Bankr. C.D. Cal. 1997), the bankruptcy court disqualified a law firm from representing defendants in a fraudulent transfer action brought by the Chapter 7 trustee where the law firm had represented the debtors in state court litigation on the same cause of action. The congruency of the issues in separate matters involving the same firm distinguishes *Jaeger* from this case.

In *In re I Successor Corp.*, 321 B.R. 640 (Bankr. S.D.N.Y. 2005), the bankruptcy court disqualified a law firm from representing defendants in an adversary proceeding brought by a

trustee to recover fraudulent transfers and transfers in breach of fiduciary duties of officers and directors. The court stated, "Proskauer did switch sides in this case. Proskauer previously represented Interliant on at least two acquisitions and now Proskauer represents directors and officers adverse to Interliant's successor on claims that directly involve those two transactions." *Id*. at 658. The issues in the disputes with respect to which the disqualified firm was retained by different clients were the same. Not so here.

In *In re Meridian Automotive Systems-Composite Operations, Inc.*, 340 B.R. 740 (Bankr, D. Del. 2006), a creditor of debtors hired a law firm to analyze credit and intercreditor agreements in which the creditor held first and second liens. Thereafter, the law firm sought to represent creditors that held first liens on property as to which its former creditor client held second liens. The bankruptcy court disqualified the law firm because the subject matters of the representations overlapped in a substantial way. Not so here.

The Trustee also cited *Host Marriott Corp. v. Fast Food Operators, Inc.*, 891 F. Supp. 1002 (D.N.J. 1995). In that case, the district court refused to disqualify a law firm that had represented a sublessee in connection with a condemnation case and made an appearance briefly for the sublessor in that case for purposes of effecting approval of a settlement, where the law firm had always dealt with the sublessor through its attorneys and not directly with the sublessor with respect to the matter in dispute. The court found that the sublessor had no expectation that its communications with the law firm would be kept confidential, and the moving party failed to show that any confidential information was ever communicated to the law firm.

None of these cases bears the slightest resemblance to the present case, with the exception of the *Host Marriott* case.

In his motion, the Trustee argued that the case of *Matter of William H. Davis*, 40 B.R. 163 (Bankr. M.D. Ga. 1984) supported the proposition that this contested matter "would be 'substantially related' to the representation that Gibson, Fletcher and/or the Firm provided to the Debtor both prepetition and postpetition." Motion By Trustee to Disqualify Gibson, Deal & Fletcher, P.C., p. 4. The Trustee is substantially mistaken.

In the *Davis* case, the bankruptcy court disqualified a lawyer representing a bank that had filed a complaint seeking to determine the dischargeability of a debt owed to the bank. The bank's attorney had been the debtor's only attorney during the four years preceding the filing of the bankruptcy petition and had represented the debtor in several lawsuits, including a pending suit at the time the bankruptcy case was filed. The debtor contended that he had confided in the lawyer concerning his financial difficulties, but the lawyer denied such conversations. The court found, however, that

> Debtor disclosed to Mr. Fielder his financial condition and dealings. These are matters that had to be considered by Debtor in deciding whether to file bankruptcy. Also, since this adversary proceeding is, in part, based on the false financial statement provision of 11 U.S.C.A. § 523(a)(2)(B) (West 1979), Mr. Fielder could use confidences about Debtor's financial condition to prove that Debtor's representations in the financial statement were false.

Matter of Davis, 40 B.R. at 166. Based on the long relationship, the pending litigation and the finding that Debtor disclosed his financial condition and dealings to the attorney, the court held that there was a substantial relationship between the attorney's representation of the debtor prior to the filing of bankruptcy and the subject matter of the adversary proceeding. This case has absolutely nothing to do with the facts here, as counsel for the Trustee should have known, because here there is no evidence that the Gibson firm's representation of the Debtor and Debtor in Possession had anything remotely to do with the terms of Dr. Story's employment.

In his motion, the Trustee stated:

> "Conflict-of-interest rules are more strictly applied in the bankruptcy context than in other areas of the law, at least insofar as they related to professionals retained by the estate." Collier on Bankruptcy, 15"' ed. Vol. 1, 5 8.03[1] (citations omitted). Because Gibson and the Firm represented the entity that is now the bankruptcy estate, this rule of thumb is particularly applicable, and the Court should, therefore, disqualify Gibson, Fletcher, and the Firm from representing Claimant in the Proceeding.

This argument is likewise wide of the mark. Legal decisions on specific sets of facts cannot be properly made on the basis of more or less abstract summaries of legal principals. The quote from *Collier on Bankruptcy* is useful only in the context in which it is found. That section of Collier is referring to conflicts that arise under the Bankruptcy Code because the professional is alleged not to be disinterested. The term "disinterested" is defined in section 101 of the Bankruptcy Code. All five of the cases cited for the quoted proposition, which the Trustee omitted and the Court will likewise omit, are cases in which the employment of the professional was challenged because the movant contended that the professional was not disinterested. The quote is useless and inapplicable to the issues here that turn on state bar rules and not on whether the Gibson firm was disinterested when it did work for the Debtor in Possession.

The Trustee has offered no evidence to show that any inference can be made that the Gibson firm learned anything in connection with its limited engagements by Debtor and Debtor in Possession that might be used adversely against the Trustee in this contested matter. Indeed, there is no evidence that the Gibson firm dealt with anyone other than Dr. Story. It can be presumed that whatever Dr. Story knows about the circumstances surrounding his employment and claim for post-petition compensation he will convey to the Gibson firm, but the Trustee has no lock on Dr. Story's knowledge. He would divulge the same information to any lawyer representing him in this dispute. The Trustee was and is free to inquire about what Dr. Story told the Gibson firm

in his capacity as the president of the Debtor and Debtor in possession. Therefore, the Trustee's contention that the ultimate problem is one of confidentiality is extremely weak.

Finally, the Court observes that the reason for the objection to the Gibson firm's representation of Dr. Story is because the professionals in the case will not be paid in full if Dr. Story's application is granted. The Trustee's counsel stated at oral argument as follows:

> The purpose of that objection [to Story's administrative expense application] primarily was that we only have four hundred fifty to five hundred thousand dollars of cash, as you are aware, resulting from that sale [of assets to Streamline], and this would take the bulk of the funds on hand resulting from the sale of the assets in this case to pay his claim.

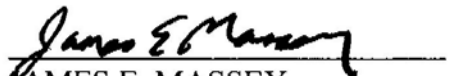
That was a most unfortunate way of arguing for disqualification. It suggests that the Trustee is making the objection solely to protect his own and his counsel's own pocket book. The Trustee has mounted a shotgun approach to attempting to state a claim for disqualification that fails to hit the target, let alone the bull's eye.

This Court has no authority to entertain Dr. Story's motion to approve his employment of his counsel. Respondent is free to choose his own counsel and is not entitled to this Court's stamp of approval for his choice.

For these reasons, it is

ORDERED that the Trustee's motion to disqualify Respondent's counsel and Respondent's motion to approve his counsel are DENIED.

Dated: November 28, 2006.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE