IT IS ORDERED as set forth below:

Date: May 23, 2008

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 07-72241
Reuben Charles Odum and Rhonda L. Odum,	CHAPTER 7
Debtors.	JUDGE MASSEY
Merrill Lynch, Pierce, Fenner & Smith Incorporated,	
Plaintiff,	
v.	ADVERSARY NO. 07-9048
Reuben Charles Odum and Rhonda L. Odum,	
Defendants.	

ORDER DENYING MOTION TO DISQUALIFY COUNSEL

In this adversary proceeding, Plaintiff, Merrill Lynch, Pierce, Fenner & Smith Incorporated, on its own behalf and on behalf of, and as assignee of, Jean E. Henderson, seeks a determination of the dischargeability of a debt alleged to be owed to Plaintiff by Defendants, who

are the Debtors in the above-referenced Chapter 7 case. Plaintiff is represented by Lawrence Polk. On May 19, 2008, Defendants filed a motion to disqualify Mr. Polk and his law firm, Sutherland, Asbill & Brennan LLP, on the ground that he has a conflict of interest.

In their Memorandum of Law filed with the motion, Defendants point out that Mr. Polk represented Plaintiff in a state court action against Defendants filed in 2005, while also representing Ms. Henderson. They further point out that Merrill Lynch paid Ms. Henderson at least $600,000 in connection with the fraudulent acts alleged in the complaint filed here. Defendants contend that if $600,000 exceeds whatever amount Defendants owe to Ms. Henderson, Merrill Lynch might seek to recover from Ms. Henderson the difference between what it paid her and the actual amount of her damages caused by Defendants, stating:

> At this point, the amount of Ms. Henderson's money that was allegedly taken by the Odums is unknown. (See, Record.) If it turns out that Mrs. Odum returned some of the money that she allegedly took from Ms. Henderson, or that the Odums were never guilty of any wrongdoing, then Merrill Lynch would be within its rights to seek the return of any overpayment that they made to Ms. Henderson. In such a situation the interests of Ms. Henderson and Merrill Lynch are clearly in conflict. Because Mr. Polk represents both Ms. Henderson and Merrill Lynch with regard to this very issue, he has an obvious conflict of interest.

Defendants' Memorandum of Law in Support of Their Motion to Disqualify Counsel, p. 11.

On the basis of what they say they do not know, Defendants assert that Mr. Polk is disqualified to represent Plaintiff under Rule 1.7 of the Georgia Rules of Professional Conduct, which provides:

> (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, except as permitted in (b).
>
> (b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after:

> (1) consultation with the lawyer,
> (2) having received in writing reasonable and adequate information about the material risks of the representation, and
> (3) having been given the opportunity to consult with independent counsel.
>
> (c) Client consent is not permissible if the representation:
>
> (1) is prohibited by law or these rules;
> (2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or
> (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

Defendants' motion to disqualify Mr. Polk based on Rule 1.7 is completely without merit for at least three reasons. First, Defendants have failed to provide factual evidence of a violation of Rule 1.7. To disqualify an attorney because of a conflict of interest, "the conflict must be palpable and have a substantial basis in fact" and may not be "theoretical or speculative." *See Lamb v. State*, 267 Ga. 41, 42 472 S.E.2d 683, 685 (1996). Defendants argue that there would be an actual conflict if the recovery on her claim against Defendants is less than $600,000 and if Plaintiff were then to sue Ms. Henderson for the overage. But this is speculation – not fact. The mere possibility of a conflict is not the equivalent of an actual conflict.

Rule 1.7 requires a probability and weighing analysis. Is there a "significant risk" that a lawyer's duty to one client will "materially and adversely" affect the representation of a different client? If so, there would be an actual conflict. But Defendants have not shown any facts that would enable anyone to assess the probability that such a risk exists, much less that it is significant. Nor have they alleged facts that would permit anyone to weigh the propensity of such representation to harm the other client.

Under Defendants' theory, Mr. Polk would be disqualified without regard to whether a conflict actually exists. The amount paid by Plaintiff to Ms. Henderson might be greater than her claim against Defendants or it might not be. The assertion that "Merrill Lynch would be within its rights to seek the return of any overpayment" might or might not be true. (The quoted statement is asserted as fact, but counsel for Defendants has not shown how he knows the terms of the arrangement between Merrill Lynch and Ms. Henderson.) Even if Plaintiff might have a claim against Ms. Henderson, Plaintiff might or might not ever assert it. In short, the facts alleged by Defendants fail to state a claim for the disqualification of Mr. Polk under Rule 1.7.

Second, Defendants lack standing to assert a conflict of interest.

> Comment 15 to Rule 1.7 places the primary responsibility for resolving questions of conflict of interest on the lawyer undertaking the representation. A court may raise the question when, in litigation, there is reason to infer the lawyer has neglected the responsibility, and opposing counsel may raise the question "[w]here the conflict is such as clearly to call into question the fair or efficient administration of justice ..." *Id.* The Comment goes on to advise that an objection from opposing counsel "should be viewed with caution ... for it can be misused as a technique of harassment." In order for counsel to have standing to raise the issue of an opposing lawyer having a conflict of interest in simultaneously representing multiple plaintiffs or defendants, there must be a violation of the rules which is sufficiently severe to call in question the fair and efficient administration of justice (*In re Robinson*, 90 S.W.3d 921, 925 (Tex.App.2002)), and opposing counsel must provide substantiation. *Meehan v. Antonino, supra*, 2002 WL 31559712 (Conn.Super.2002) (unpub. op.). See also *Anderson Trucking Serv. v. Gibson, supra*, 884 So.2d 1046.

Bernocchi v. Forcucci, 279 Ga. 460, 463, 614 S.E.2d 775 (2005). Defendants have not identified "a violation of the rules which is sufficiently severe to call in question the fair and efficient administration of justice," let alone substantiated a violation of Rule 1.7. Instead, they offer only speculation. Indeed, they went so far as to speculate whether Ms. Odum has repaid Ms. Henderson ("If it turns out that Mrs. Odum returned some of the money . . . .") Surely, they know whether or not they returned some money to Ms. Henderson. Even if they have, that fact

would not prove that the payment made by Plaintiff to Ms. Henderson was excessive or that there is any likelihood whatsoever that Plaintiff will ever make a claim against Ms. Henderson.

Third, even if Mr. Polk had a conflict of interest, Defendants have waived by their inaction any right to object to his representation of Plaintiff. Defendants's counsel made the same assertion of the existence of a conflict at the deposition of Ms. Henderson taken in January 2007 in the 2005 state court litigation brought by Plaintiff against Defendants. (Transcript of Deposition of Jean Henderson filed by Defendants, pp. 6, 45). Yet, Defendants waited six months after the service of the complaint in this adversary proceeding to file their motion to disqualify.

> "[T]he right to counsel is an important interest which requires that any curtailment of the client's right to counsel of choice be approached with great caution." *Blumenfeld v. Borenstein*, 247 Ga. 406, 408, 276 S.E.2d 607 (1981). Disqualification not only curtails a client's right to counsel of choice, but results in expense and delay that are costly both to the client and to the administration of justice. *See Reese v. Ga. Power Co.*, 191 Ga.App. 125, 127(2), 381 S.E.2d 110 (1989). Consequently, "[a] motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead to the motion." (Citations omitted.) *Jackson v. J.C. Penney Co.*, 521 F.Supp. 1032, 1034 (N.D.Ga.1981). A failure to make a reasonably prompt motion to disqualify may result in the conflict being waived. Id.; *see also Conley v. Arnold*, 93 Ga. 823, 824, 20 S.E. 762 (1894); *cf. Summerlin v. Johnson*, 176 Ga.App. 336, 341, 335 S.E.2d 879 (1985).

Georgia Baptist Health Care System, Inc. v. Hanafi, 253 Ga. App. 540, 541-542, 559 S.E.2d 746 (Ga. App. 2002). Not only was the motion not promptly filed, its timing appears to have been a deliberate effort to create a diversion for the purpose of delay because the Court had set June 8, 2008 as the date after which it would consider Plaintiff's motion for summary judgment, the delay having been requested by Defendants and granted in the Order entered on April 2, 2008.

In an effort to convince this Court that the alleged conflict has borne rotten fruit, Defendants assert in their Memorandum of Law that Mr. Polk obstructed their efforts to obtain

information necessary to their defense and blocked their efforts to obtain certain documents, citing the deposition of Ms. Henderson taken in the state court case. They assert:

> Without these documents Defendants cannot begin to make a determination as to the evidence Ms. Henderson presented and upon which Merrill Lynch relied in accusing the Odums of fraud. Without having made this determination, the Odums cannot begin to defend themselves. Mr. Polk should know this. Any objective person, who is armed with this knowledge, cannot reasonably view his conduct as being either professional or ethical.

Defendants' Memorandum of Law in Support of Their Motion to Disqualify Counsel, p. 14. Defendants' counsel's inability to obtain discovery in a state court case between the same parties is irrelevant here.

This adversary proceeding was filed on November 27, 2007. Defendants filed an answer on December 19, 2007. They have had five months within which to conduct discovery. To the extent that a party in litigation in federal court fails to produce documents or make other lawful discovery that an opposing party has requested, the proper way to proceed is to file a motion to compel discovery pursuant to Fed. R. Civ. P. 37, made applicable here by Fed.. R. Bankr. P. 9037. Defendants have made no such motion. This Court is objective about this dispute and is armed with the knowledge of Defendants' contentions and has reviewed the pages of the deposition transcript filed with and designated in the motion. The Court finds Defendants' assertion as set out in their Memorandum of Law that Mr. Polk acted unethically to be preposterous.

For these reasons, Defendants' motion to disqualify Mr. Polk and Sutherland, Asbill & Brennan LLP is DENIED.

END OF ORDER