UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, ET AL.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 2:12-cv-184
	:	
KENNETH L. MILLER ET AL.,	:	
	:	
Defendants.	:	

ORDER RE: MOTION TO DISQUALIFY COUNSEL FOR THE PLAINTIFFS

(ECF 636)

Plaintiff Janet Jenkins ("Jenkins") has brought suit against several individuals and organizations, alleging that they kidnapped and conspired to kidnap Isabella Miller-Jenkins aka Isabella Miller ("Isabella"). Jenkins asserts claims of commission of, and conspiracy to commit, an intentional tort of kidnapping and conspiracy to violate civil rights under 42 U.S.C. § 1985(3). Defendant Timothy Miller has moved to disqualify Plaintiffs' counsel, and Kenneth L. Miller, Liberty Counsel, LLC, and Rena Lindevaldsen have joined this motion in support. ECF Nos. 636, 640, 656. For the reasons set forth below, the Court **denies** this motion.

I. Factual Background

This case arises out of the alleged international kidnapping of Isabella in September 2009 by her mother, Lisa

Miller, in obstruction of the parental rights of her other mother, Janet Jenkins. Among the many assertions Jenkins brought in this lawsuit were claims of conspiracy and aiding and abetting under Vermont law, as well as of conspiracy to violate civil rights under federal law, as a next friend of Isabella. On April 16, 2020, Isabella reached the statutory age of majority under Vermont law and on the same day the Liberty Counsel Defendants and Lindevaldsen promptly filed a motion for partial summary judgment on all claims Jenkins brought as next friend of Isabella. This Court denied the motion, allowing Jenkins to continue as next friend because she had shown that Isabella lacked access to the U.S. courts under *Whitmore v. Arkansas*, 495 U.S. 149 (1990). ECF No. 556. In its order, the Court noted the "specific and highly unusual circumstances" of this case. *Id.* at 10.

On February 10, 2021, Isabella moved through her attorney, Deborah T. Bucknam, to dismiss all claims with prejudice against all Defendants. ECF No. 641. In the motion to dismiss, Isabella did not seek to bar counsel from continuing to represent Jenkins. Plaintiffs did not oppose this motion, ECF No. 642, and the Court granted it, ECF No. 650. Attached to Isabella's motion were two affidavits, signed in Nicaragua.[1] The first affidavit

[1] In fact, these affidavits had first appeared before the Court as attachments to Timothy Miller's Motion to Disqualify Counsel

was dated January 25, 2021. In relevant part, paragraphs 15 – 20 of the affidavit read:

> 15. All the lawyers who purport to represent me and my wishes are actingcontrary [sic] to my wishes and desires and in way [sic] to further a cause that is the exact opposite of what my desire and wishes as their client in fact are.
>
> 16. I want those people who claim to be my attorneys to cease their actions that are contrary to my wishes and desires.
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> 17. I order and direct them to file all papers necessary to have me removed as a Plaintiff in this case.
>
> 18. Once I am dismissed from this action – whether through their effort, unilateral action of the Court, or the result of any filing from any party – I summarily and without equivocation fire, terminate, and discharge SPLC and all attorneys who have appeared ostensibly on my behalf in this litigation from taking any further action in my name.
>
> 19. I authorize any attorneys for the Defendants in this case to utilize this Affidavit in the best interest of your clients.
>
> 20. Contemporaneously with this Affidavit, I am also executing a full, unconditional, global, total Release for the benefit of each of the Defendants in this lawsuit together with my deepest appreciations for whatever they did or might have done or didn't do that has helped me to have a happy and safe life.

ECF No. 641-1. The second affidavit is dated January 26, 2021. ECF No. 641-2. It states in part that "I want Janet Jenkins removed as my representative and all attorneys, including but

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for the Plaintiffs on February 1, 2021. ECF No. 636. The parties appear to have emailed about the affidavits earlier, on January 29, 2021, after an attorney named Vincent F. Heuser, Jr., distributed them via email and claimed to represent Isabella. ECF No. 635-2. Questions of impropriety on the part of Heuser were later raised by Plaintiffs. *See* ECF Nos. 645-2, 645-3. These questions appear to have been dropped now that Isabella is represented by a different attorney.

not limited to Sarah Starr, Scott McCoy, Tyler Clemons, Diego A. Soto, Frank H. Langrock, Jessica L Stone, Maya G. Rajaratnam and any and all attorneys working with them, discharged and withdrawn as my attorney and I further object to their representing any other person in this matter after having access to my personal information." *Id.* at ¶ 3.[2] Paragraphs 6 -8 of the second affidavit read:

> 6. I have contacted Attorney Vincent F. Heuser, Jr., of Louisville, Kentucky, to enable my access to the U.S. Courts and I have instructed him that I do not want my personal appearance entered, but I want the claims made in this case on my behalf dismissed.
>
> 7. All the lawyers who purport to represent me, except Vincent F. Heuser, Jr., are acting contrary to my wishes and desires and in way [sic] to further a cause that is the opposite of what my desire and wishes as their client in fact are. I do not want the claims in this case continued on my behalf.
>
> 8. I want those people who claim to be my attorneys to cease their actions that are contrary to my wishes and desires. I request, order and direct that I be dismissed and removed as a Plaintiff in this case.

Id. at ¶s 6-8. These affidavits were accompanied by an attorney certificate from Deborah T. Bucknam, Esq., certifying that she had directly communicated with Isabella and verified that the affidavits accurately reflected her wishes. ECF No. 641-3. Timothy Miller moved to disqualify counsel for the Plaintiffs on February 1, 2021, and Kenneth L. Miller, Liberty Counsel, LLC,

[2] The Court notes that no one has claimed that Plaintiffs' counsel had access to Isabella's personal information.

and Rena M. Lindevaldsen filed in support of this motion. ECF Nos. 636, 640, 656. The Court held a hearing on March 8, 2021.

II. Legal Standard for Disqualification

The Second Circuit has explained the process of attorney disqualification and the relevant considerations as follows:

> The authority of federal courts to disqualify attorneys derives from their inherent power to "preserve the integrity of the adversary process." *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). In exercising this power, we have attempted to balance "a client's right freely to choose his counsel" against "the need to maintain the highest standards of the profession." *Gov't of India v. Cook Indus., Inc.*, 569 F.2d 737, 739 (2d Cir. 1978); *see also Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 564-65 (2d Cir. 1973). Although our decisions on disqualification motions often benefit from guidance offered by the American Bar Association (ABA) and state disciplinary rules, *see, e.g., Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 227 n. 2 (2d Cir. 1977); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753 (2d Cir. 1975), such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification, *see Nyquist*, 590 F.2d at 1246 (disqualification is only warranted where "an attorney's conduct tends to taint the underlying trial," because other ethical violations can be left to federal and state disciplinary mechanisms (internal quotation marks omitted)).

Hempstead Video, Inc. v. Inc. Vill. Of Valley Stream, 409 F.3d 127, 132-33 (2d Cir. 2005). The Circuit has thus been clear that though it is crucial that the integrity of the adversary process not be undermined, disqualification is not a mere rubber stamp and must be balanced against a client's right to freely choose his counsel. *See also Norwind v. Rowland*, 584 F.3d 420, 435 (2d

Cir. 2009) ("In determining whether to disqualify an attorney from representing a client, a court necessarily balances the client's right to select counsel of his choice against the need to maintain the integrity and high standards of the legal profession."). In deciding motions to disqualify counsel, courts should be mindful of the fact that such motions are "often interposed for tactical reasons . . . [a]nd even when made in the best of faith, such motions inevitably cause delay." *Bd. of Educ. of City of N.Y. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). The Second Circuit has further explained that where an attorney establishes a relationship with a client such that he could taint the underlying trial, there are two tests to decide the standard of disqualification:

> One recognized form of taint arises when an attorney places himself in a position where he could use a client's privileged information against that client. The standard for disqualification varies depending on whether the representation is concurrent or successive. In cases of concurrent representation, we have ruled it is "prima facie improper" for an attorney to simultaneously represent a client and another party with interests directly adverse to that client. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976). The attorney "must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation." *Id.* In cases of successive representation, we have held that an attorney may be disqualified if:
>
> (1) the moving party is a former client of the adverse party's counsel;
>
> (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present

> lawsuit; and
>
> (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

Hempstead Video, Inc. v. Inc. Vill. Of Valley Stream, 409 F.3d 127, 132-33 (2d Cir. 2005). As is apparent from this passage, the successive representation test involves three steps before an attorney "may" be disqualified. The concurrent test, on the other hand, begins as prima facie improper where there are directly adverse interests between the parties represented, but this improperness may be rebutted by a showing that there will be no actual or apparent conflict. "When evaluating whether this presumption of shared confidences has been rebutted, courts should inquire on the facts of the case before them whether the practices and structures in place are sufficient to avoid disqualifying taint." *Victorinox AG v. B&F Sys.*, 709 Fed. Appx. 44, 53 (2d Cir. 2017) (internal quotation marks omitted).

III. Discussion

A. Disqualification Is Not Automatic Under Vermont Rule of Professional Conduct 1.9(a), American Bar Association Model Rule of Professional Conduct 1.7, Or the Duty of Loyalty

The parties vigorously debate the analysis a district court must undertake in order to disqualify counsel. Defendants argue

that under Vermont Rule of Professional Conduct 1.9(a), American Bar Association Model Rule of Professional Conduct 1.7 comment 23, and the duty of loyalty, Plaintiffs' counsel *must* be disqualified because Isabella has not provided them with a waiver. Yet the authorities cited to by Defendants do not support the automatic disqualification test they are asking for. The Court examines each authority in turn, though at the outset it is worth noting that, as explained above, the Second Circuit has explicitly stated that not every violation of ABA guidance or state disciplinary rules necessarily lead to disqualification and instead these rules should be considered as general guidance. *See Hempstead Video, Inc.*, 409 F.3d at 132.

Defendants argue that pursuant to Vermont Rule of Professional Conduct 1.9 (a), Plaintiffs' Counsel are now barred from representing Jenkins. Rule 1.9 (a) reads:

> 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.

The rule is designed to "ensure that a lawyer does not use confidential information acquired from a former client against that client and to avoid even an appearance of impropriety." *In re Gadbois*, 173 Vt. 59, 63, 786 A.2d 393, 397 (2001). The Rule thus was set to avoid the appearance of impropriety, and

requires a materially adverse interest to apply. As explained below, neither the appearance of impropriety nor materially adverse interests are present in this case.

American Bar Association Model Rule 1.7 reads as follows:[3]

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) 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, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that 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.

Comment 23 to this Rule explains that:

[3] The Court notes that this rule did not appear anywhere in Defendants' briefing, though counsel for Timothy Miller cited to it multiple times during the hearing on March 8, 2021.

> Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. 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 paragraph (b) are met.

Defendants latch onto the definition in this comment of conflict as "incompatibility in positions in relation to an opposing party." Defendants argue that Isabella has made clear that she does not wish to sue Lisa Miller, that Jenkins has an interest in suing Lisa Miller, and thus there is a conflict without a waiver from Isabella. Yet this Court finds, as is further explained below, that Plaintiffs' counsel never met the definition of concurrent representation under 1.7(a) because their representation was never directly adverse, and there is no significant risk that their representation will be materially limited now that Isabella is dismissed and Plaintiffs' counsel is no longer representing her.

Finally, Defendants rely heavily on a Third Circuit case, *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157 (3d Cir.

1984), in making their argument for mandatory disqualification under the duty of loyalty. While noting that the District of Vermont follows the Second Circuit, not the Third, this Court also finds that even in the Third Circuit Defendants have vastly overstated their claims. According to Defendants, *In re Corn* describes a "duty of loyalty" owed by attorneys to their clients, and holds that absent waiver of this duty a court has no discretion and must disqualify counsel. The case does describe a duty of loyalty found in ABA Model Rule 1.9(a),[4] but it also recognizes that "in some cases there may be countervailing considerations" and the Third Circuit notes that it has "often employed a balancing test in determining the appropriateness of the disqualification of an attorney." *Id.* at 162. The court then balanced the "relevant considerations" and came out on the side of disqualification, in part because of the information that could be used against the firm's former client:

> With respect to Pan-O-Gold and Land O'Lakes, C & B represented both of these clients for several years in this complex antitrust litigation. Balanced against Land O'Lakes' interests in the loyalty of its attorney are the interests of Pan-O-Gold in retaining its chosen counsel who has extensive familiarity with the factual and legal issues involved, and in avoiding the time and expense required to adequately familiarize a new attorney with the matter.

[4] In part, the Third Circuit explains that "an attorney may not abandon his client and take a adverse position in the same case. This is not merely a matter of revealing or using the client's confidences and secrets, but of a duty of continuing loyalty to the client." *Id.* at 161.

> While disqualification would serve to increase the costs of litigation for Pan-O-Gold, it would be unfair, appearances apart, to permit C & B to use against its former client the information about the strengths and weaknesses of the case gained from the joint representation. Under these circumstances, C & B must be disqualified.

Id. at 162.[5] Thus, disqualification under the duty of loyalty is not mandatory in the Third Circuit and the last of Defendants' arguments as to why disqualification is mandatory in this case is dispensed with.

B. Second Circuit Test for Disqualification

1. The Concurrent Representation Test Is Not Met

Though the parties dispute whether the successive representation test or the concurrent representation test should be used, the Court finds that Plaintiffs' counsel would not be disqualified under either test. It is important to emphasize, as the Court wrote in its prior order, the "specific and highly unusual circumstances" of this case. ECF No. 556 at 10. The parties agreed at the March 8, 2021 hearing that there was no contact between Isabella and Plaintiffs' counsel. Though this

[5] Furthermore, in addition to acknowledging that district courts weighed factors in disqualifying counsel instead of automatically reaching disqualification, the facts of *In re Corn* show that the firm's position was materially adverse to its former client in a way that Plaintiffs' counsel in this case never was. In *In re Corn*, the law firm C & B had formerly represented two plaintiffs in a class action, then moved to withdraw from representing one client-plaintiff who approved a negotiated settlement in order to represent a single client-plaintiff who objected to the settlement on appeal. *Id.* at 160-61.

Court allowed Plaintiffs' counsel to represent Isabella, that representation depended on the very fact that Isabella had no access to the U.S. court system. There was nothing of the usual attorney-client relationship because no representations, communications, or information were shared. As soon as Isabella made known her wish to be dismissed from the case, Plaintiffs accepted this wish as unopposed.[6]

Because of this unusual situation, all parties agree that Isabella did not give her counsel any confidential information. She did not give them any directions. They did not have *any* contact with her. Therefore, unlike in most other cases that have considered this issue, there cannot be even the *appearance* of impropriety or apparent conflict in loyalties here because that special, close relationship between attorney and client took a very unusual form in this instance. Thus the test of concurrent representation would not disqualify counsel for Jenkins. The Court finds that the facts are sufficient to establish the absence of any taint.

2. The Successive Representation Test Is Not Met

[6] As described in more detail above, Plaintiffs' counsel did question the initial affidavits as sent in an email by Heuser, but the Court finds this initial questioning entirely reasonable given the untrustworthy process by which the affidavits were first presented.

The Court also agrees with Jenkins that, if the successive representation test as set out in the Second Circuit did apply here, Defendants would not have shown the three steps in their motion. As reiterated in *United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 239-42 (2d Cir. 2016), there are three steps to disqualification of counsel in successive representation cases, the first step of which involves the moving party existing as a former client of the adverse party's counsel. The Defendants moving for disqualification in this case were never represented by Jenkins' counsel, so the Court finds that this first step is not satisfied.

Furthermore, according to Jenkins, there is no direct or material adversity in this case because Isabella is dismissing her claims, Jenkins does not intend to depose Isabella or call her as a witness, and Isabella's affidavit about her "wishes and desires" is not enough to establish direct adversity. The Court agrees. There is nothing approaching direct or material adversity here. Isabella dismissed her claims in this case, and in her motion to dismiss her claims she did not move to remove Jenkins' counsel. Even had Isabella made such a motion, Defendants have not made a logical argument that such a wish, or any other "wish" expressed by Isabella or contained in the affidavits, would establish direct or material adversity.

3. There Is No Taint to the Integrity of the Adversary Process

Under the disqualification standard as set out in the Second Circuit, Plaintiffs' counsel should not be disqualified because the integrity of the adversary process would be in no way tainted by their continued representation of Jenkins. When undertaking the balancing test for the purpose of preserving the integrity of the adversary process, given the facts of this case, many points weigh in favor of the side of Jenkins' right to freely choose her counsel and few points weigh in favor of the side of using disqualification to uphold the high standards of the legal profession. Common sense dictates that, under the very rare set of facts which led to this situation, Jenkins should be allowed to retain the counsel of her choice. The Court finds that Plaintiffs' Counsel were never in a position such that representation of their current client, Janet Jenkins, would be materially adverse to the interests of Isabella.

C. Conclusion

For the foregoing reasons, the Court **denies** the motion to disqualify counsel for Plaintiffs (ECF No. 636).

DATED at Burlington, in the District of Vermont, this 12th day of March, 2021.

/s/ William K. Sessions III
William K. Sessions III
U.S. District Court Judge