

Be Verein Aware: The Verein Structure and Attorneys' Loyalty to Their Clients

I. Introduction:

In a time of increasing globalization, several law firms such as Dentons, DLA Piper, and Baker & McKenzie have expeditiously expanded on an international level. To achieve this growth and this global reach, these firms have organized themselves under the verein structure. A verein is a Swiss structure that allows global law firms to combine and promote a unified brand across borders, while still affording the individual firms within the verein separate corporate or partnership status with discrete legal liability and financial independence.¹

Organizing a law firm under the verein structure affords the member law firms flexibility for future expansion, with an ability to easily add new members to the group.² However, there are several critics of the verein structure that contend that a collection of law firms presenting themselves, as a single global firm is an illusion.³ Specifically, the verein structure presents a greater risk of conflict of interest for the attorneys associated with these law firms. Most recently, an example of the verein firm conflict of interest involves Dentons LLP, which represented Revolaze, LLC in an International Trade Commission investigation for patent infringement by the retailer, Gap, involving jeans.⁴ In this case, Gap filed a motion to disqualify

¹ Edwin B. Reeser, *Swiss Verein--the Cassoulet Pot for Global Law Practice*, S.F. Daily J. (Aug. 18, 2011), available at <http://www.jdsupra.com/legalnews/swiss-verein-the-cassoulet-pot-of-global-83240>.

² Chris Johnson, *Inside the Machine*, Am. Law., Mar. 2013.

³ Peter Kalis, *Grand Illusion*, Am. Law., May 2011.

⁴ *Supra* note 2 Id.

Dentons because Gap was a current client of Dentons.⁵ Gap cited ABA Model Rule 1.7(a), which proscribes a firm representing a client from taking an adverse position against that same client in the same or a different matter.⁶ However, Dentons argued that it was not unethical to represent Gap in some matters while suing it in others because its offices were separate, and it was Dentons' Canadian office that was representing Gap.⁷ Additionally, Dentons further argued that its offices were financially separate, they did not have access to each other's client files, and they did not share client confidences.⁸ However, on June 30, 2015, Chief ALJ Charles E. Bullock issued the public version of the order granting Gap's motion to disqualify Dentons as counsel.⁹ ALJ Bullock found that the definitions of "firm" or "law firm" are broad enough to include a Swiss verein structure and concluded that Dentons is a "firm" or "law firm."¹⁰ Additionally, ALJ Bullock stated that, "Dentons holds itself out to the public as a unified global law firm in order to attract business and Dentons' continued representation in the face of a direct conflict would both contradict this public image and impact negatively on the law profession as a whole."¹¹

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Eric Schweibenz and Kate Cappaert, *ALJ Bullock Grants Motion to Disqualify Counsel in Certain Laser Abraded Denim Garments (337-TA-930)*, ITC Blog (Aug. 3, 2015) available at <http://www.itcblog.com/alj-bullock-grants-motion-to-disqualify-counsel-in-certain-laser-abraded-denim-garments-337-ta-930> (the original order is dated May 7, 2015).

¹⁰ Id.

¹¹ Pub. L. Order No. 43 (May 7, 2015) available at <http://www.itcblog.com/images/order43in930.pdf> (further stating that Dentons owes a duty of loyalty to Gap, however in this case Dentons stands to benefit both in terms of legal fees and a share in certain proceeds by representing other clients who are seeking to bar Gap's imports in

This paper aims to analyze the effects of the verein structure from the perspective of attorneys' loyalty to their client. Part II will give a brief background on the history and structure of a Swiss verein. Part III will discuss conflicts law, in particular conflicts of interest. Part IV will argue that the Dentons case and the fad of the verein structure have led to a re-evaluation of how a firm is defined. Further, Part IV will analyze how the ambiguity of what a firm is, impacts conflicts of interest and attorneys' loyalty to their clients.

II. The Verein Structure: the Latest Fad?

A Swiss verein is an association of member organizations recognized under Swiss law.¹² Specifically, a Swiss verein is governed by the Swiss Civil Code; articles 52 through 59, which deal with legal entities in general, and articles 60 through 79, which deal with regulating associations.¹³ The verein structure was initially intended for the international affiliation of non-profit organizations.¹⁴ This way, non-profit organization did not have to register; rather, Swiss courts have allowed associations to be established for economic purposes.¹⁵ Associations must register if they carry some sort of activity to advance for-profit goals.¹⁶

the U.S.). *Cf In re Royal Ahold N.V. Securities & ERISA Litigation*, 351 F.Supp.2d 334, 385 n. 41 (D.Md., 2004) (quoting *Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*, 2004 WL 112948, *3 (S.D.N.Y. Jan. 22, 2004) (holding that accounting firm Deloitte structured under the verein is not a single firm “and neither are its agents not partners of other member firms simply by virtue of using the same brand name.”))

¹² Peter Kalis, *Grand Illusion*, K&L Gates LLP Editorial (May 2011) available at http://www.klgates.com/files/tempFiles/4ee9900d-b476-42b5-9253-2b24a1615834/Am_Law_Swiss_verein.pdf.

¹³ *See infra* note 15.

¹⁴ Megan E. Vetula, *From the Big Four to Big Law: The Swiss Verein and the Global Law Firm*, 22 *Geo. J. Legal Ethics* 1177, 1181 (2009).

¹⁵ *Id.* at *1181.

The verein structure is used to maintain separation among entities under a common brand.¹⁷ In the legal context, a verein is formed through simple articles of association without the creation of an entity that actually practices law.¹⁸ Instead, the member law firms independently render legal services and severally accept the rewards and liability that accompany this work, they do not share a common profit pool.¹⁹ A verein, in itself is technically a holding entity or a “central administrative vehicle” that does not provide legal services.²⁰ The member firms within the verein deliver all legal services.²¹ This conveniently avoids regulations regarding the qualifications of law firm owners and the necessity of member firms filing multiple tax returns around the world. Additionally, a verein is not subject to the regulation of the Securities and Exchange Commission in the U.S.²²

A. A Grand Illusion?

Although the verein structure seems to be the latest fad among law firms, there are many who criticize it. Some argue that vereins are simply marketing platforms without a common culture,

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id. (arguing that vereins are kaleidoscopic, they are the antithesis of a single firm and create only the appearance and not the reality of a global law firm).

²⁰ Douglas R. Richmond and Matthew K. Corbin, *Professional Responsibility and Liability Aspects of Vereins, the Swiss Army Knife of Global Law Firm Combinations*, 88 St. John’s L. Rev. 917, 917 (2014).

²¹ Id.

²² Nick Jarrett-Kerr and Ed Weseman, *Enter the Swiss Verein: 21st Century Global Platform or Just the Latest Fad?*, Jarrett-Kerr Blog (n.d.) available at <http://jarrett-kerr.com/enter-the-swiss-verein/>.

shared knowledge, and standardized practices that single partnerships enjoy.²³ Further, Peter Kalis of K&L Gates states that these law verein law firms are the “antithesis of a single firm and create only the appearance and not the reality of a global law firm.”²⁴ Further arguing that these law firms endorse independence over integration, a quality of single independent firms and not global firms. However, all law firms are defined by shared values, one of those being financial integration.²⁵ Financial integration is an important value for law firms because it promotes development of a “one for all, all for one” culture in addition to supplying a system of incentives and disincentives.²⁶ But, a verein sees the geographic reach of its brand as an end in itself and financial integration is to be dispensed with.²⁷ This in turn leads to questioning the type of service clients are receiving from vereins – a shortcut to client-focused growth due to the lack of integration and collaborative efforts on behalf of verein structured firms.²⁸

III. Conflict of Interest and/or Attorney Loyalty?

The principles and foundations for ethics laws go back many centuries. However, with the rise of global law firms there has been an increase in the number of clients available to firms both nationally and internationally. Although large firms can now offer a broad range of specialized services to multiple clients, they must be aware of the numerous conflicts of interest that can occur. Further, it must be noted that these conflicts of interest are “largely self-

²³ Id.

²⁴ *See Supra* note 13.

²⁵ Id.

²⁶ Id. (describing that financial integration allows incentives to be geared toward the institutional goal of seamless client service because all contributing ships rise with the common tide, collaboration ranks atop the pantheon of firm values).

²⁷ Id.

²⁸ Id.

regulated,” therefore the burden to police conflicts rests with attorneys themselves and their law firms.²⁹

Conflicts of interest appear in a broad range of scenarios. In determining a conflict of interest, one must determine whether external interests – the lawyer’s or those of other clients or third persons – are likely to impact the exercise of the lawyer’s independent professional judgment.³⁰ Additionally, conflicts of interest arise as a result of current or past representation of other clients.³¹ A lawyer cannot represent both sides in a contested matter. Further, changes in clients’ affiliations or mergers may lead to conflicts as well.³² When a conflict of interest exists, not only can the attorney in question be disqualified, but the attorney’s entire firm can also be disqualified.³³ However, when conflicts of interest do arise, lawyers are guided by the standards of conduct set forth by the Restatement of the Law Governing Lawyers³⁴ and the ABA Model Rules of Professional Conduct.³⁵

²⁹ *Be diligent and avoid conflicts of interests*, American Bar Association (May 2013) available at http://www.americanbar.org/news/abanews/aba-news-archives/2013/07/be_diligent_and_avoi.html (showing that the trends of more law firm mergers and of attorneys changing jobs more frequently expand the possibility of an attorney-client conflict of interest).

³⁰ Ellen Yankiver Suni, *Conflicts of Interest*, American Bar Association (Nov. 2005) available at http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/conflictsofinterest.html.

³¹ *Id.*

³² *Id.*

³³ Denise A. Copeland, *Conflicts of Interest in the Mega-Firm*, 13 J. of the Legal Profession 255, 258 (1988).

³⁴ Restatement (Third) Law Governing Lawyers (2000).

³⁵ Model Rules of Professional Conduct (2008).

Specifically, Rules 1.7-1.11 deal with the avoidance of conflict of interest. Rule 1.7 prohibits representations that may be subject to conflict of interest. In part, the rule provides that “the representation of one client that is directly adverse to another client” will present a conflict of interest.³⁶ Additionally, Rule 1.7 states that “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.”³⁷ This rule not only addresses the different scenarios that a conflict of interest could occur but also this rule demonstrates the importance of an attorneys’ loyalty to their client. The rules following Rule 1.7 cover instances of prohibited conflicts, describe the lawyer’s duty to avoid conflicts of interest to former clients in specified circumstances, and explores conflicts of interest in the context of governmental lawyers.³⁸

On its face, these rules address the different types of scenarios for conflicts of interest, however when looking at the rules and comments to the rules more closely, these rules promote attorney loyalty to clients. For example, Comment 1 to Rule 1.7 states: “*Loyalty* and independent judgment are essential elements in the lawyer’s relationship to a client (emphasis added).”³⁹ Further explaining, “concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client, or a third person.”⁴⁰ Additionally, Comment 6 states that: “[l]oyalty to a current client prohibits undertaking representation directly adverse to that client

³⁶ Model Rules of Professional Conduct at Rule 1.7(a)(1) (2008).

³⁷ Id. at Rule 1.7(a)(2).

³⁸ *See generally* Id. at Rules 1.8-1.11.

³⁹ *See Supra* note 33 at Rule 1.7 cmmt. 1.

⁴⁰ Id.

without that client's informed consent."⁴¹ In a similar fashion, the Restatement identifies attorney loyalty to clients as a key aspect of the attorney-client relationship. The Restatement notes that lawyers owe clients a duty of loyalty.⁴² Further, the Restatement notes that a "lawyer is a fiduciary" and given a lawyer's role as a fiduciary, "assurances of the lawyer's competence, diligence, and loyalty are therefore vital" and lawyers are required "to protect their clients' interests with competence, diligence, and loyalty."⁴³ In avoiding conflict of interests, an attorney can be said to be demonstrating loyalty to his or her client.

Historically, devotion and zeal were also terms that made up an attorney's loyalty to a client.⁴⁴ The inclusion of these words occurred even in the paradigm shift of the legal profession from advocacy to corporate counseling.⁴⁵ However, due to public pressure and the continuing paradigm shift in the legal profession, codes of ethics began to scale back the rhetoric of devotion and warm zeal.⁴⁶

⁴¹ *Id.* at Rule 1.7 cmt. 6 (explaining that the clients as to whom the representation is directly adverse is likely to feel *betrayed*, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively) (emphasis added).

⁴² *See Supra* note 31 ("The lawyer is subject to duties of care, loyalty, confidentiality, and communication").

⁴³ *Id.* § 16.

⁴⁴ Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 St. Mary's L. J. 909, 934 (2009).

⁴⁵ *Id.* (arguing that these components of loyalty were added as components leading practitioners and the courts at a time when they were tempered by competing attorney duties to the court and the public in the context of the adversary system).

⁴⁶ *Id.* at 935.

IV. Be Verein Aware – How has this Fad Re-initiated the Conversation on How to Define a Firm and How can this Ambiguity Impair Attorneys’ Loyalty to their Clients?

The recent decision disqualifying Dentons from representing RevoLaze causes us to consider the liabilities that the verein structure may actually be producing regarding the definition of a firm and the legal profession’s longstanding pillar of loyalty to the client and conflicts of interest. A swiss verein can have two or more members and be perceived as one, which is why it is difficult to state that a swiss verein is a firm. A firm has a common culture, shared knowledge, and standardized practices.⁴⁷ The public’s perception of a firm is similar. When a client presents his or her legal issue to an attorney at a firm, the client views the firm as integrated, resourceful, and knowledgeable. With this vision, a client may infer that attorneys at the local office may discuss his or her legal issue with attorneys in another office at the same firm. Further, a client may infer that the firm may pull resources from one office to another or that if this client has other legal issues in other jurisdictions, the firm will reach out to those offices to assist in the matter. These inferences from a client are based on the shared assumption that a firm is interconnected because each office shares the same firm name and the firm is working to find a solution to the client’s problem. Firms usually do not separate their offices by different names. However, in the Dentons case, Dentons argued that Dentons US is sufficiently separate from the other Dentons Legal Practices.⁴⁸ On the other hand, Dentons’ client, Gap, argued that Dentons holds itself out as a single law firm with a seamless delivery of services and

⁴⁷ Nick Jarrett-Kerr and Ed Wesemann, *Enter the Swiss Verein: 21st Century Global Platform or Just the Latest Fad?*, Edge International Review (n.d.) at 29 available at http://www.edge.ai/wp-content/uploads/2014/05/enterswissverein_2012.pdf.

⁴⁸ See Supra note 12 at 8.

therefore owes it a duty of loyalty.⁴⁹ Gap's perception of Dentons is exactly what all other clients see, unless otherwise advised. A firm, advertising itself under one brand name should not be able to enjoy the benefits of this name, such as reputation and increased business, and when convenient, disassociate itself from its other offices and turn their back to those clients. Therefore, the ambiguity that this case has brought regarding what constitutes a firm has also highlighted the ethical issue that is at stake: attorneys' loyalty to their clients.

A lawyer's duty of loyalty is the most fundamental of all fiduciary duties the legal profession owes to its clients.⁵⁰ The duty of loyalty creates the trust that enables effective representation.⁵¹ Additionally, a client expects loyalty not only directly from the attorney he or she met with but the client expects a level of loyalty from those individuals the attorney associates himself with. Similarly, conflicts of interest can affect any aspect of the attorney-client relationship – depending on the conflict; the breach can undermine a lawyer's professional judgment and advocacy.⁵²

⁴⁹ *Id.* (stating that where a U.S. court has looked at the issue of conflicts with respect to a Swiss *verrein* law firm, the court found that it would not be possible for a law firm that advertises itself under one name to represent two entities without violating ethical standards (quoting *Project Orange*)).

⁵⁰ Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 *Yale L. J.* (2012); *See also* Strickland v. Washington 466 U.S. 668, 692 (1984) available at https://scholar.google.com/scholar_case?case=16585781351150334057 (stating that counsel in owing the client a duty of loyalty also owes the client a duty to avoid conflicts of interest).

⁵¹ *Id.* (arguing that once that pool of loyalty is tainted, every aspect of the relationship, and the representation itself is suspect).

⁵² *Id.* (stating that every state bar has an ethical rule prohibiting a lawyer from undertaking a representation that involves a conflict of interest, these rules have been derived from the ABA's

Although verein structured law firms have provided a simpler path to globalized legal services and have provided a firm's offices a way to maintain their financial independence while still marketing themselves under one brand; this structure has taken the essence of a law firm away. As discussed above, a law firm has shared values, goals, and standards – traditionally the law firm provides a “one for all, all for one” culture.⁵³ Law firm partners, and employees in general, know each other and work with one another to provide a seamless legal service nationally and internationally.⁵⁴ This matters because the legal profession and these firms exist to serve others – clients.⁵⁵ Lack of this integrated culture, brings to question the client loyalty that the verein structure jeopardizes. Specifically, the disqualification of Dentons sets a precedent to all verein law firms that, although their offices around the world and nationwide may be independent, because they are advertised under one brand, the firm in its entirety is one.⁵⁶ In this sense, Judge Bullock's decision takes us back to the idea of “all for one, one for all.”

V. Conclusion

The Court's holding disqualifying Dentons LLP has caused a re-evaluation of what a firm really is. Although it was the Dentons Canada office that represented Gap and is operationally and financially separate from the Washington, DC office, this decision analyzed the way in

Model Rules of Professional conduct and although these state rules may differ, they reflect the same important value of loyalty).

⁵³ See *Supra* note 4; See also Part II(A).

⁵⁴ Peter Kalis, *The Dawning of a New Era? Law, Lawyers and Legal Education*, 73 U. Pitt. L. Rev. 650, 656 (2012) (arguing that some large law firms are willing to affiliate on the flimsiest of bases in order to fly a common flag without any of the historical indicia of integration characteristic of law partnerships).

⁵⁵ *Id.* (stating that clients are the *conditio sine qua non* of the existence of lawyers).

⁵⁶ See generally Part I.

which Dentons marketed itself. The Court concluded that marketing a firm as one firm, under one brand, the firm is seen as a whole and its offices cannot be viewed individually. With this important precedent, attorneys at verein structured law firms should begin to look at their firm as one. The Dentons case suggests that a firm that is marketed and advertised under one brand and name is liable for a break in the loyalty to its client. Setting up the expectation that not only should the attorneys working for the client be loyal to that client in their representation, but the firm itself in some way is expected to exude that loyalty to the client as well – making it a *firm*. Had the Court decided otherwise, agreeing that Dentons DC was separate from Dentons Canada, client loyalty and conflicts rules would be changed forever. Giving verein structured firms an opportunity to compartmentalize client loyalty - assigning loyalty to the office that brought the client business and the office that is working on the client’s legal matter. Currently, as the legal profession and our ethics rules stand, this “assignment” of loyalty would not and should not be tolerated.