



very first stage, no discovery cut-off date has been set, and no case management order has been entered.

From the time Judge Peter Flynn received the case in July of 2003 until his recusal in February of 2004, significant progress was made in the case. (The case was originally assigned to Judge Lester D. Foreman, Calendar No. 5, who handled the early motion practice and was working toward a settlement of the case. The matter came to Judge Flynn after the defendants took two substitution of judges after Judge Foreman's death.)

Approximately ten motions were presented to Judge Flynn during nine court appearances. It was obvious to both counsel and the parties that Judge Flynn spent much time on this complicated case, has a good grasp of the issues, and was moving the case to resolution. No party in the case moved to take a substitution of judge from Judge Flynn and all counsel have indicated that they and their clients wish him to remain with the case.

On February 17, 2004, Judge Flynn held a long and contentious hearing involving important discovery issues. He made significant rulings which can be characterized in part as adverse to the defendants. It was two days later, on February 19, 2004, that the law firm of Myron M. Cherry & Associates, LLC filed an Additional Appearance in the case on behalf of certain of the defendants. A copy of the Additional Appearance was mailed that day to counsel of record (but not to co-counsel Collins and Bargione). The following week, on February 24, 2004, a copy of the Additional Appearance, together

with a cover letter was delivered via messenger to Judge Flynn's chambers with copies to all counsel of record. The cover letter on the stationery of Myron M. Cherry & Associates was signed by attorney Cary N. Goldberg.

The next scheduled court date in the case was March 10, 2004, at which time Judge Flynn was scheduled to hear fully briefed Motions to Dismiss filed by Defendants and a Motion to Strike filed by Plaintiffs. See Orders of January 6, 2004, and February 17, 2004. (The last filing in regard to those motions was made on February 20, 2004.)

Judge Flynn decided not to wait until the next court date to enter his recusal. Apparently he felt that the circumstances warranted immediate action on his part. Upon receiving the messenger delivery from Mr. Cherry's office on February 24, 2004, he immediately recused himself, citing Supreme Court Rule 62(A) and Supreme Court Rule 63(C)(1). Those rules read in pertinent part as follows:

**Rule 62. CANON 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.**

A. A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

**Rule 63. CANON 3. A Judge Should Perform the Duties of Judicial Office Impartially and Diligently.**

**C. Disqualification**

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonable be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) *[not applicable]*;

(c) the judge was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy...;

(d) *[not applicable]*;

(e) *[not applicable]*.

[Note: Although Rule 63C(1)(c) is not applicable to the facts in this case, it is cited here since there was considerable discussion in this case about that section of Rule 63.]

Judge Flynn, in his draft recusal Order, did not expand on the reasons for his recusal other than citing the rules. He was not required to do so. On March 2, 2004, Judge Flynn signed the form order required by the Clerk's Office in order to effectuate a recusal. That same day this Court returned the case to the Clerk of the Court for random assignment and the case was reassigned to Judge Sophia H. Hall, Calendar No. 14. After the case was on Judge Hall's calendar, the Defendants filed, on March 10, 2004, Defendants' Motion to Reconsider certain of Judge Flynn's rulings of February 17, 2004.

Myron Cherry and Peter Flynn had their first professional association in the early 1970's at the law firm of Jenner & Block. From 1976 until 1999, for 23 years, they were partners in the law firm of Cherry & Flynn, a small firm which hired other lawyers from

time to time, but never exceeded six lawyers in number.

Although they were partners for 23 years, Mr. Cherry and Judge Flynn have not maintained a social relationship since Judge Flynn ascended to the bench in 1999. In December of 2002, over three and a half years after Judge Flynn was appointed to the bench, he recused himself on three related Chancery Division cases pending before him in which Myron Cherry was counsel of record. These cases, known collectively as the "Primco" cases were *Primco Personal Communications v. Illinois Commerce Commission*, Case No. 98 Ch 5500; *Saul Wexler v. Ameritech*, Case No. 98 CH 1282; and *Michael Siegel v. Village of Northbrook*, Case No. 02 Ch 1901. Having just taken over Judge Robert V. Boharic's calendar, on which the notorious *Primco* cases were pending, Judge Flynn invited a request for a recusal the very first day the cases came before him, citing his 23 years at Cherry & Flynn. Recusals from Judge Peter Flynn are a rarity, since he takes his duty to serve very seriously. (Similarly, substitutions from Judge Flynn are a rarity.).

#### **Proceedings Before This Court**

Plaintiffs filed their Motion for a Supervisory Order before this Court after the recusal of Judge Flynn at a time when the case was pending before Judge Sophia H. Hall. Citing and attaching to their Motion the case of *The Dartmouth Plan, Inc. v. Delgado*, 87 CH 6676, a decision by former Chancery Division Presiding Judge Richard L. Curry,

Plaintiffs have argued that “the Presiding Judge of the Chancery Division has the power to grant the supervisory relief requested in this Motion to rectify judge shopping, and to sanction defendants and their lawyers for thwarting our system of judicial administration and random assignment of judges.” The relief requested of this Court by Plaintiffs in their written Motion for a Supervisory Order included requiring Defendants to abide by all production, discovery and other deadlines set by Judge Flynn, appointing a Special Master at the expense of Defendants to assist the new judge in moving discovery forward, prohibiting Defendants from taking any further changes of judge as of right, requiring the rulings of Judge Flynn to stand as the law of the case, disqualifying all defense counsel, and awarding Plaintiffs their costs and attorneys fees.

At the outset of the proceedings before this Court, this Court raised the issue of the appropriateness of this Court hearing Plaintiffs’ Motion. Although the defendants argued that the relief requested in the Motion should not be granted, there was no objection to this Court entertaining the Motion. Similarly in all of the substantial briefing which followed no written objection was filed regarding the appropriateness of the Presiding Judge hearing Plaintiffs’ Motion. No request was made to transfer the Motion for hearing before Judge Hall.

The filing of Plaintiffs’ Motion for a Supervisory Order has resulted in a flurry of filings from both sides including multiple motions supported by affidavits, supplemental affidavits, declarations, supplemental declarations, transcripts, previous court orders,

pleadings, correspondence relating to discovery, and other exhibits. The accusations made in Plaintiffs' initial filing were strong ones, and with the subsequent filings, particularly the written declarations of counsel, and the statements made in open Court, the intensity of the hostility between the parties and their counsel became readily apparent. This has not been an easy case for any judge to handle.

Specifically, this Court has received and reviewed the following documents, together with all of the aforementioned categories of attachments:

Motion for a Supervisory Order to Disqualify Defense Counsel  
and For Other Relief

Supplement to Plaintiffs' Motion for a Supervisory Order and  
to Disqualify Defense Counsel

Verified Response to the Plaintiffs' Motion to Disqualify Counsel  
and For a Supervisory Order

Response to Supplement to Plaintiff's Motion to Disqualify

Plaintiffs' Reply in Support of Their Motion for a Supervisory  
Order and to Disqualify the Cherry Firm

Defendants' Motion for Sanctions Against Plaintiffs' and Counsel

Plaintiffs' Response to Defendants' Rule 137 Motion

Motion for Leave to File a Memorandum Addressing the Court's  
Inquiry of March 15, 2004 Instantly

Plaintiffs' Response to the Court's Inquiry on Whether an  
Evidentiary Hearing is Needed to Decide Plaintiffs' Motion  
to Disqualify the Cherry Firm

**Defendants' Response to Plaintiffs' Memorandum Concerning  
an Evidentiary Hearing**

**A Letter to the Court from Plaintiffs' Counsel dated March 22, 2004**

**Supplement to Plaintiffs' Motion for a Supervisory Order and to  
Disqualify Defense Counsel Attaching Primco Order**

**Defendants' Response to Plaintiffs' Supplemental Brief and *Ex-  
Parte* Communication**

**Plaintiffs' Motion to Correct Material Misstatements of Fact and  
Law in Defendants' Response to Plaintiffs' Supplemental Brief**

**Affidavit of Myron M. Cherry filed May 3, 2004**

**Motion for Leave to File Affidavit of Brian Crowe**

In addition to the foregoing, the Court has reviewed the case authority submitted by the parties and has considered the parties' respective arguments made in proceedings on March 15, 2004, March 19, 2004, April 7, 2004, April 19, 2004, and May 12, 2004. By Order dated April 20, 2004, all Rule 137 Motions were denied. In that same Order this Court ruled that the affidavits (and declarations) of attorneys Lubin, DiTommaso and Cherry filed by that date would not be considered and that the request for an evidentiary hearing would be denied. By Order dated May 24, 2004, the Court denied the Motion for Leave to File Affidavit of Brian Crowe.

A court reporter was present at all proceedings before this Court. During the proceeding on March 19, 2004, this Court engaged in a question and answer exchange

with counsel. Although there was no formal evidentiary hearing allowed, this Court has considered certain of the answers received from counsel to the Court's questions of March 19, 2004, while not considering the written declarations of counsel filed herein.

### **Applicable Legal Principles**

At the outset, this Court notes that attorney disqualification and judicial recusal are not new to Illinois courts, however, the unique facts of this case present a situation which requires looking to other jurisdictions for guidance. A disqualification of an attorney is an extreme measure to take in a case. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 178, 685 N.E.2d 871, 877 (1997); *SK Handtool Corp. v. Dresser Industries, Inc.* 246 Ill. App. 3d 979, 989, 619 N.E.2d 1282, 1289 (1st Dist. 1993). Disqualification is an extreme measure because it "destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing." *Schwartz*, 177 Ill. 2d at 178, 685 N.E.2d at 877. Because of the drastic nature of a motion to disqualify and the potential for abuse, a court must use caution when ordering the disqualification of an attorney from a case. *Schwartz*, 177 Ill. 2d 166, 178, 685 N.E.2d 871, 877 (1997) (citing *International Ins. Co. v. City of Chicago Heights*, 268 Ill. App. 3d 289 (1994)).

When presented with a motion to disqualify, a court must be sensitive to both the integrity and administration of justice on one hand, and a litigant's right to an attorney of his own choosing, on the other hand. It is unethical to retain an attorney to appear for the

sole purpose of forcing a judge's recusal because it interferes with the orderly administration of justice. *In re Bellsouth Corp.*, 334 F.3d 941, 956 (11th Cir. 2003). Even though a party is presumptively entitled to counsel of choice, this right is not absolute and can be overcome by compelling reasons. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (“[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.”); *Bellsouth*, at 961 (“when circumstances exist involving the selection of counsel with the sole or primary purpose of causing the recusal of the judge, ... the right to counsel of choice can be overridden”).

The right to counsel of one's choice should be balanced in cases where the choice threatens effective administration of justice and society's need to maintain high ethical standards of professional responsibility. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1263 (5th Cir. 1983). As such, the disqualification of an attorney is within the discretion of the trial court. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176, 685 N.E.2d 871, 876 (1997). A trial court is allowed to provide an appropriate remedy that satisfies “orderly administration and the public interest, as well as for the interests of the parties.” *Board of Education v. Sikorski*, 214 Ill. App. 3d 945, 952, 574 N.E.2d 736, 740 (1st Dist. 1991) (citations omitted). Therefore, a presiding judge may make individual case assignments to any judges serving on his or her court. *People v. Hattery*, 183 Ill. App.

3d 785, 802-03, 539 N.E.2d 368, 380 (1st Dist. 1989) (approving individual case assignments despite random computer assignment capabilities in order to further justice and aid judicial administration).

Furthermore, a court must uphold the integrity of the judicial system and must avoid the appearance of impropriety. "A party is not free to judge shop until he finds a jurist who is favorably disposed to his cause of action." *The City of Granite City v. House of Prayers, Inc.*, 333 Ill. App. 3d 452, 461, 775 N.E.2d 643, 651 (5th Dist. 2002); *In re Petersen*, 319 Ill. App. 3d 325, 338, 744 N.E.2d 877, 887 (1st Dist. 2001) (citing *In re Marriage of Birt*, 157 Ill. App. 3d 363, 367, 510 N.E.2d 559 (1987)). It is unethical for a lawyer to enter a case for the sole purpose of forcing a judge's recusal. *BellSouth*, 334 F. 3d at 964. Lawyers and judges, as officers of the court, are bound to "guard against actions and procedures to avoid the useless expenditure of judicial time." *Robinson v. Boeing Co.*, 79 F.3d 1053, 1055 (11th Cir. 1996). Therefore, if the issue is truly not one of judge shopping, maintaining judicial integrity by granting a motion to disqualify will not adversely affect the party whose attorney is disqualified. *Id.* at 1055.

While an evidentiary hearing on the issue of disqualification may aid the court, it is not necessary to determine an improper motive because the true motive is most likely not ascertainable. *Robinson*, at 1055 ("no matter how extensive the discovery may be, the true motive will be elusive"). Thus, in cases involving disqualification where the facts are undisputed, the trial court is not required to hold an evidentiary hearing and may

determine the motion on the basis of appearance of impropriety. *See City of Kalamazoo v. Michigan Disposal Service Corp.*, 125 F. Supp. 2d 219, 223 (W. D. Mich. 2000) (citation omitted) (“A decision to disqualify counsel must be based on a factual inquiry conducted in a manner which will afford appellate review.”).

While an attorney is duty-bound to avoid any appearance of impropriety (*see SK Handtool*, 256 Ill. App. 3d at 987, 619 N.E.2d at 1287), so too is a judge. Ill. Sup. Ct. R. 62(B) (2004). A judge is required to recuse oneself where his or her impartiality might reasonably be questioned. Ill. Sup. Ct. R. 63(C) (2004). Instances include where the judge: (1) has a personal bias or prejudice; (2) was a lawyer in the case at bar; (3) was associated with either attorney (or the firm) within the past three years; (4) has an economic interest; or (5) has a relative involved in the case. Ill. Sup. Ct. R. 63(C)(1)(a)-(e). The three year limitation on associations with attorneys or firms serves as a minimum threshold to mandate disqualification – a judge must disqualify himself if he was associated with an attorney or firm in the case within the previous three years. Ill. Sup. Ct. R. 63(C)(1)(c). Once the three year limit passes, judicial disqualification in cases where the judge had a previous association with an attorney becomes discretionary. *Ford Motor Credit Co. v. Manzo*, 196 Ill. App. 3d 874, 883-84, 554 N.E.2d 480, 485 (1st Dist. 1990). To require a judge to disqualify himself or herself “simply because he or she had a prior professional relationship with an attorney would be particularly burdensome on the judiciary.” Jeffrey M. Shaman, Steven Lubet and James J. Alfani, JUDICIAL

CONDUCT AND ETHICS, 144 (3d ed. 1990) (citing *Bumpus v. Uniroyal Tire Co. Div. of Uniroyal, Inc.*, 385 F. Supp. 711 (E.D. Pa. 1974)).

Even though disqualification may not be mandated after the three year limitation, a judge must be aware of situations where impartiality may be reasonably questioned. Shaman, *supra*, at 154 (citing A.B.A. Model Code, Canon 3E(1)). The association must still be viewed in light of any personal bias, actual or perceived, which may result from the past association. See *Eychaner v. Gross*, 202 Ill. 2d 228, 281, 779 N.E.2d 1115, 1147 (2002) (referring to *Liteky v. United States*, 510 U.S. 540 (1994) to find that a movant's evidence of bias must show a "deep-seated favoritism or antagonism that would make fair judgment impossible"); *Ford Motor Credit Co.*, 196 Ill. App. 3d at 884, 554 N.E.2d at 485 (determining that a movant did not sufficiently establish bias where the judge had minimal involvement with one of the litigants as a lawyer prior to becoming a judge). The Court of Appeals for the Seventh Circuit set forth a test for determining an appearance of partiality in *Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985): "whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial." Therefore, even though an association between a judge and an attorney may have occurred well beyond the three year limitation and no bias *actually* exists, the association may cause a neutral observer to perceive an impropriety. *Id.* at 461. Any appearance of impropriety is grounds for recusal. *Id.*

### Decision of This Court

The circumstances surrounding the entry of Mr. Cherry into this case were indeed unusual. First, the appearance of Mr. Cherry was filed without leave of court. This Court has never seen or heard of a situation in the Chancery Division where an attorney has filed an appearance without leave of court and then sent a copy of that appearance by messenger directly to the judge. The customary practice is to seek leave to court to file the appearance by motion noticed to all parties. (That custom and practice in the Chancery Division has been witnessed by this Court during 16 years of practice as lawyer in the Chancery Division and during an 10 additional years of sitting as a judge in the Division.)

When a party is represented by an attorney, Illinois Supreme Court Rule 13 states that “(a)n attorney shall file his written appearance or other pleading *before he addresses the court* unless he is presenting a motion for leave to appear by intervention or otherwise.” (emphasis added). This very same language is used in the Circuit Court of Cook County Local Rule 1.4(a): “An attorney shall file his appearance before he addresses the court unless he is presenting a motion for leave to appear by intervention or otherwise.” The purpose of requiring an attorney to file an appearance is to inform the court and the parties of who is representing each litigant and where notice may be sent to each litigant. *Tobias*

v. *King*, 84 Ill. App. 3d 998, 1001, 406 N.E.2d 101, 103 (1st Dist. 1980); *Pitulla v. Novoselsky*, 202 Ill. App. 3d 103, 120, 559 N.E.2d 819, 831 (1st Dist. 1990), *aff'd*, 265 Ill. App. 3d 84, 628 N.E.2d 563 (1993) (following *Tobias* and determining this to be the purpose of Illinois Supreme Court Rule 13).

The Illinois Supreme Court adopted Rule 13 in 1982 in order to define when an attorney of record may withdraw from a case and the procedure for substituting attorneys. *Pitulla*, 202 Ill. App. 3d at 120, 559 N.E.2d at 831. However, the “or otherwise” indicates that there may be other instances when an attorney would need to file an appearance before addressing the court or would need leave of court to file an appearance. The Illinois Supreme Court has not defined the phrase “or otherwise” in any case. However, Rule 13 was patterned after Cook County Rule 1.4. *Pitulla*, 202 Ill. App. 3d at 120, 559 N.E.2d at 831. Rule 1.4 is an exercise of the circuit court’s supervisory powers under Supreme Court Rule 21(a). *Tobias*, 84 Ill. App. 3d at 1001, 406 N.E.2d at 103; *In re Estate of Hader*, 114 Ill. App. 3d 611, 617, 449 N.E.2d 540, 545 (1st Dist. 1983). Therefore, it may be inferred that it was meant to give discretion to the trial court to apply Rule 13 and Rule 1.4 to any appropriate situations where an attorney appearance may be required.

Many of the attorneys who practice in the Chancery Division of the Circuit Court of Cook County also regularly practice in the United States District Court for the Northern District of Illinois. Over the years many of the practices and procedures in the federal court have become customary in the Chancery Division. The District Court requires leave of

court for additional counsel to appear and incorporates the requirement into the same rule dealing with attorney withdrawals. N.D. Ill. Local Rule 83.17 (2003). Specifically, Local Rule 83.17 states: "The attorney of record may not withdraw, nor may any other attorney file an appearance on behalf of the same party or as a substitute for the attorney of record, without first obtaining leave of court, except that substitutions or additions may be made without motion where both counsel are of the same firm." The local federal rule thus indicates that a withdrawal and addition of an attorney are similar in nature and require the same procedures in court. (Rule 83.17 has not been the subject of any district court opinions.)

Mr. Cherry has argued that his actions in this case are not at all unusual. He has said that it is his firm's practice to send a duplicate copy of everything that is filed in a case to the judge so that the judge can have a duplicate file. Not being a regular practitioner in the Chancery Division, Mr. Cherry is apparently unaware that such a practice is almost universally frowned upon by all of the judges in the Division and that our judges do not keep complete duplicate files. Judges in the Chancery Division currently have calendars ranging from 1000 to 1400 cases each. Some judges have between 400 and 500 non-foreclosure cases assigned to them. They simply do not have the staff or the space to enable them to receive and keep complete duplicate pleadings in every case.

Mr. Cherry has also argued, because he has not practiced law with Judge Flynn for five years and because the Code of Judicial Conduct does not require Judge Flynn's recusal

under such circumstances, that he had no reason to believe that Judge Flynn would recuse himself in this case. Such an argument again shows a lack of knowledge and understanding of today's Chancery Division.

The reputation of this Division was sorely blemished during the 1980's as a result of certain indictments and convictions. The blemish has disappeared, but the memory of it continues in the forefront of the minds of all of the judges who have since been carefully chosen to sit in what is considered to be the most prestigious division in the Circuit Court.

Beginning in the 1980's numerous court reforms, both in writing and in practice, were put into place. Among the written reforms are Local Rule 17 of the Rules of the Circuit Court of Cook County on *ex parte* communications and General Order No. 3.1 on the assignment of cases in the Chancery Division. Among the practical reforms are the one which relate to the operations of judges' chambers. Most Chancery Division judges do not answer telephone lines that are known to the public and many do not allow any lawyers or litigants into their chambers, opting even to hold settlement conferences in their courtrooms or in adjacent conference rooms.

Most significant to this case is the care which judges in the Chancery Division currently take in deciding when and under what circumstances they will recuse themselves in cases. (All of the judges currently sitting in the Chancery Division joined the Division in the year 1993 or subsequent years and half of the judges in the Division ascended to the bench after 1990.) This Court is not aware of a single judge in the Division who has or

would hear a case involving a lawyer who was a former partner within five or even ten years of the end of that relationship. For instance, the late Judge Lester D. Foreman recused himself for over 20 years from cases involving his former law firm, Rudnick and Wolf. It was only after 20 years, and after Rudnick and Wolf had become Piper Rudnick, that Judge Foreman heard any cases from the successor to his former law firm.

In this case, although Mr. Cherry, Mr. Collins, and Mr. Vukovich discussed with Mr. DiMucci the issue of whether Judge Flynn would be required under the rules to recuse himself, no effort was made to bring the issue to Judge Flynn's attention. The issue could have easily been addressed, and the current situation entirely avoided, had a motion for leave to file an appearance been made by Mr. Cherry before Judge Flynn. Judge Flynn would then have been given the opportunity to explain that if Mr. Cherry entered the case, a recusal would result. After both sides had an opportunity to be heard, a decision could have been made to: 1) deny the motion for leave to file appearance; 2) grant the motion for leave and recuse; or 3) grant the motion for leave to appear and secure a remittal of disqualification under Supreme Court Rule 63D. (In the proceedings before this Court on March 19, 2004, counsel for both sides indicated that even though they are fully aware of Judge Flynn's past relationship with Mr. Cherry they want Judge Flynn to continue to hear this case. It can be argued that those statements, made after the parties and their counsel had had a chance to consider the matter outside the presence of Judge Flynn, constitute a *de facto* remittal of disqualification.)

This Court believes that the filing of the appearance by Mr. Cherry under the circumstances of this case constitutes the appearance of impropriety and that no objective, disinterested observer would perceive otherwise. In making this ruling this Court reiterates that it is not ascribing any ill motive to either defendant Anthony DiMucci or to Mr. Cherry regarding the entrance of Mr. Cherry into this case. The Court is specifically not finding that Mr. Cherry entered the case in order to either force Judge Flynn's recusal or in an attempt to incur favor with him. The Court is not finding that Mr. Cherry knew that Judge Flynn would recuse himself, although a persuasive argument can be made that considering the recusals in the *Primo* cases and considering Mr. Cherry's 23 year partnership with Judge Flynn, Mr. Cherry should have known that such a recusal would occur. Given that Mr. DiMucci and his attorneys discussed in detail the possibility of a recusal by Judge Flynn, the filing of the appearance by Mr. Cherry without leave of court was particularly egregious.

This Court is specifically not finding any impropriety on the part of attorneys George B. Collins or Adrian Vuckovich. There is no hint in the record before this Court that either Mr. Collins or Mr. Vuckovich knew that Mr. Cherry was filing his appearance without leave of court. There is no indication in the record that they even knew that the appearance had been filed on February 19, 2004. (The certificate of service for the appearance does not include the Collins and Bargione firm.) In fact, the next day, on February 20, 2004, when Defendants' Reply in Support of Motions to Dismiss Counts II-V of the Fifth Amended Complaint was filed, the only attorneys listed on the pleading as representing the Defendants

were Mr. Collins and Mr. Vuckovich. There is also no indication in the record that either Mr. Collins or Mr. Vuckovich knew in advance that Mr. Cherry would send a copy of his appearance directly to the judge, rather than presenting it in court as is the custom and practice.

The fact remains that Mr. Cherry's filing of his appearance for the defendants two days after rulings on three hotly contested motions (including significant rulings adverse to defendants), the filing of that appearance without leave of court and without prior notice to the plaintiffs, and the sending of the appearance by messenger directly to Judge Flynn when the next court date was scheduled within a few weeks, with the result being the immediate recusal of the judge, just simply looks bad. Mr. Cherry's entrance into this case under the circumstances above constitutes the appearance of impropriety in that it undermines public confidence in the integrity of the judicial system. With Mr. Cherry's entrance into this case under these circumstances, Judge Flynn's immediate recusal under Supreme Court 62(A) signifies that he agreed that he had been placed in a situation where the appearance of impropriety was present. He took the step which he believed was necessary under the rule to promote public confidence in the integrity and impartiality of the judiciary.

Disqualification of an attorney is a drastic and extreme measure. While it may be warranted in this case, using strictly an objective standard on the appearance of impropriety, it is not necessary in order to uphold the integrity of our system where another remedy is available and more appropriate. This Court believes that the administration of justice can

best be served in this case by the striking of the appearance filed on February 19, 2004, by the Myron M. Cherry & Associates, LLC and by returning the case to Judge Peter Flynn with the request that Judge Flynn reconsider his recusal with Mr. Cherry's appearance stricken. This is precisely the type of Supervisory Order to which Judge Curry was referring, "a narrowly tailored hybrid order which checks the abuse but leaves the merits of the litigation to proceed unhampered." *The Dartmouth Plan, Inc. v. Delgado*, 87 CH 6676, Circuit Court of Cook County, Memorandum Opinion and Supervisory Order, June 24, 1992, at 23.

Judge Flynn, who has invested a tremendous amount of his time on this case and who obviously has a thorough understanding of the issues involved (*see* Record of Proceedings of February 17, 2004), will now have an opportunity to decide the pending Motion to Reconsider his discovery rulings, should he choose to do so. (If Mr. Cherry still wishes to seek, upon proper notice and written motion, leave to file an appearance for the Defendants in this case, he may seek to do so before Judge Flynn. Judge Flynn will then have the opportunity, of which he has thus far been deprived, to either allow or disallow the filing of the appearance.)

In order to accomplish the transfer back to Judge Flynn, it was necessary for this Court to request the currently assigned judge to transfer the case back to the Presiding Judge for reassignment. On May 20, 2004, a third substitution of judge as a matter of right was taken by the Defendants' side. The case was randomly assigned that day to Judge Aaron

Jaffe, Calendar No. 7. At the request of this Court, Judge Jaffe, on May 25, 2004, administratively returned the case to this Court for reassignment.

ACCORDINGLY, Plaintiffs' Motion for a Supervisory Order to Disqualify Defense Counsel and For Other Relief is granted in part and denied in part as follows:

1. The prayer for disqualification of all defense counsel is denied;
2. The prayer for the appointment of a Special Master is denied;
3. The prayer for a supervisory order prohibiting the Defendants from taking any further changes of judge as of right is denied;
4. The prayers regarding prior rulings made by Judge Flynn are denied;
5. The prayers for attorney's fees and costs is denied; and
6. The Additional Appearance filed on February 19, 2004, by Myron M. Cherry & Associates, LLC is hereby stricken. This case is transferred instanter to Judge Peter Flynn (with separate transfer Order executed this day). With the Additional Appearance of Myron M. Cherry & Associates, LLC having been stricken, Judge Flynn is requested to reconsider his recusal of February 24, 2004.

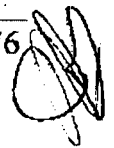
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ENTER:

MAY 26 2004

JUDGE  
DOROTHY KIRIE KINNAIRD - 276

Judge Dorothy Kirie Kinnaird, No. 276  
Presiding Judge  
Chancery Division



May 26, 2004