UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JUAN BARRERA, JOSE CABRERA, DANIEL CHAVEZ, JOSE DUMA, JOSE LLIBISUPA, ISAAC MALDONADO, EDGAR REDROVAN, NICHOLAS SEGUNDO SANCHEZ, JUAN CARLOS SIMBANA, and DANILO BRITO VARGAS	:	CIVIL ACTION NO. 3:07cv01436(RNC)
Plaintiffs,	:	
V.	:	FEBRUARY 1, 2008
MARK BOUGHTON, ALAN BAKER, JOSE AGOSTO, RICHARD DEJESUS, JAMES FISHER, JAMES LALLI, CRAIG MARTIN, JOSEPH NORKUS, JOHN DOES, CITY OF DANBURY, RONALD PREBLE, RICHARD McCAFFREY, JAMES BROWN, JOHN DOES and USA	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISQUALIFICATION

The undersigned Defendant, Mark Boughton, the Mayor of the City of Danbury ("Mayor Boughton"), submits this memorandum of law in support of his motion, pursuant to Federal Rule of Civil Procedure 7(b) and Local Rules 7(a) and 83.2(a), for an order disqualifying Jerome N. Frank Legal Services Organization (the "Frank Organization") from its continued representation

of the plaintiffs in the present action (the "Barrera lawsuit") because such representation constitutes an ethically impermissible concurrent conflict of interest in violation of Connecticut's Rules of Professional Conduct.

Preliminary Statement

The Frank Organization currently represents an organization called The Connecticut Coalition for Justice in Education Funding ("CCJEF"). Mayor Boughton has been president of CCJEF since December, 2006. He is also president of CCJEF's steering committee, and plays a very active role in this organization. The Frank Organization filed an education adequacy lawsuit on CCJEF's behalf in November, 2005 (the "education lawsuit"). The Frank Organization and Mayor Boughton communicate on a regular basis with regard to the current status of the education lawsuit and legal strategies pertaining thereto. The Mayor has placed his trust and confidence in the Frank Organization and has relied upon the legal counsel and advice the Frank Organization provides to him.

In September, 2007, the Frank Organization brought suit against Mayor Boughton, who is the Mayor of the City of Danbury, on behalf of the Barrera plaintiffs. The Frank Organization has sued Mayor Boughton in both his official and individual capacities. Its Amended Complaint accuses Mayor Boughton of instituting a racially discriminatory immigration enforcement campaign that targeted Ecuadorian day-laborers that resided in the City of Danbury. Although the Frank Organization was fully aware of the potential conflict of interest, it accepted

employment as counsel for the Barrera plaintiffs, in complete disregard of Rule 1.7 of Connecticut's Rules of Professional Conduct.

In short, the Frank Organization has created a directly adverse relationship with Mayor Boughton as a result of its decision to represent the plaintiffs in the Barrera lawsuit in violation of Rule 1.7, and, therefore, the Danbury Defendants' motion to disqualify should be granted.

Statement of Facts

CCJEF is a non-profit organization that was formed on November 22, 2004. (See Certificate of Incorporation, attached as Exhibit A to the Affidavit of Defendant Mark Boughton ("Boughton Affidavit".) (The Boughton Affidavit, in its entirety, has been attached as Exhibit 2 to this Motion to Disqualify.) The Frank Organization is listed as the registered agent for service of process on CCJEF's Certificate of Incorporation. (Id.) Mayor Boughton, who was first elected Mayor in November 2001, was one of the founding members of CCJEF. (See Press Release dated Dec. 20, 2006, attached as Exhibit 3 to this Motion to Disqualify.) To date, the Frank Organization has received $30,000 from the City of Danbury to partially defray the costs of its representation of CCJEF. (See CCJEF Invoices Totaling $30,000, attached as Exhibit C to the Boughton Affidavit; see also Boughton Affidavit at ¶ 6.) CCJEF is a "broad-based coalition of municipalities, local boards of education, statewide education associations, advocacy organizations, parents and others intent upon modernizing the state's fiscal infrastructure necessary for ensuring suitable and equal educational opportunity for all Connecticut

schoolchildren. . . . CCJEF communities . . . educate more than two-thirds of all minority, poor, and limited-English proficient schoolchildren." (See Press Release dated Dec. 20, 2006, attached as Exhibit 3 to this Motion to Disqualify.)

In November, 2005, the Frank Organization filed an education adequacy lawsuit on behalf of CCJEF against Governor Jodi Rell, certain members of the State Board of Education, the Commissioner of Education of the State of Connecticut, and the Treasurer and Comptroller of the State of Connecticut ("CCJEF Complaint" or "education lawsuit"). (See CCJEF Complaint, attached as Exhibit B to the Boughton Affidavit.) The CCJEF Complaint also named several school children and their parents as plaintiffs, and it alleged that these plaintiffs were not receiving "suitable and substantially equal educational opportunities" in certain school districts in Connecticut, including Danbury's school district. (CCJEF Complaint, at ¶ 37.)

As a result of its representation of CCJEF, the Frank Organization has had a series of communications with Mayor Boughton concerning the education lawsuit. (Boughton Affidavit at ¶ 8.) As mentioned earlier, Mayor Boughton is president of CCJEF's steering committee. (Id.) Attorneys from the Frank Organization attend these committee meetings to discuss relevant issues and legal strategies pertaining to the education lawsuit, and they also keep record of the meeting minutes. (Id.) Mayor Boughton, in his capacity as president of the steering committee, has been working with the Frank Organization's attorneys to discuss legal strategies for the

education lawsuit. (Id.) He relies upon the Frank Organization's guidance, advice and counsel. (See Boughton Affidavit at ¶ 16.)

The events leading up to the filing of the Barrera lawsuit by the Frank Organization stem from the arrest of eleven day laborers in the vicinity of Kennedy Park and Main Street in Danbury by several officers of the Danbury Police Department ("DPD") on September 19, 2006. In October, 2006, the Frank Organization submitted two Freedom of Information Act ("FOIA") requests on behalf of itself and several interest groups, for all records related to the arrest of the Barrera plaintiffs. (See FOIA Requests, attached as Exhibit E to the Boughton Affidavit). The first FOIA request was directed to the Office of the Mayor of Danbury, and the second was directed to the DPD. (Id.) The first FOIA request sought records that were presumed to be at the Office of the Mayor of Danbury, including, *inter alia*:

1. All records relating to the planning, coordination, execution and follow-up on the September 19, arrests.
2. All records of any communication with any officer or staff of the DPD, Corporation Counsel, or any other municipal agency, pertaining to the September 19 arrests.
3. Al records of any communication with the U.S. Department of Homeland Security, or any other federal or state agency or official regarding the September 19 arrests.
4. All records of any communication with the press about the September 19 arrests.

…

1. All records [that were in effect since December 1, 2001] pertaining to City of Danbury policies, practices or attempts to enforce municipal ordinances, including traffic ordinances, in and around Kennedy Park.
2. Any and all complaints received about the activities of any individuals or groups of people, in or around Kennedy Park, or elsewhere in Danbury, Connecticut, and

> all records pertaining to any follow-up action taken in response to such complaints.
>
> …
>
> 4. All records pertaining to City of Danbury policies or practices dealing with undocumented immigrants in Danbury, Connecticut. …

(Id.) In an effort to comply with the Frank Organization's FOIA requests, the City of Danbury permitted the Frank Organization to inspect the records kept at the offices of the Corporation Counsel in Danbury. (Boughton Affidavit at ¶ 10.) The Frank Organization inspected these records on November 15, 2006. (Id.) After reviewing the records and considering them to be partly unresponsive to their FOIA requests, the Frank Organization sent another letter on November 21, 2006, requesting the records they deemed to be outstanding. (See Appeal of Denial of FOIA Request, attached as Exhibit F to Boughton Affidavit.)

On December 14, 2006, the Frank Organization filed a complaint against the U.S. Department of Homeland Security ("DHS"), seeking declaratory and injunctive relief to compel the disclosure and release of agency records pertaining to "[Immigration and Custom Enforcement ("ICE")]'s immigration enforcement polices, practices and activities in and around Danbury, Connecticut, including ICE's cooperation with local elected officials and the local police department to accomplish such enforcement." (See Complaint against DHS at ¶ 2, attached as Exhibit G to the Boughton Affidavit [emphasis added].) The DHS complaint alleged that: "Through state and national lobbying efforts as well as the implementation of local policies directed at immigrant communities, Mayor Boughton has taken several affirmative steps to limit

new immigration in Danbury . . . and to drive out immigrants already living in Danbury." (Id. at ¶ 12). The DHS complaint further alleged that:

> 17. Mayor Boughton and the DPD have also systematically targeted immigrant communities through numerous policies including discriminatory enforcement of city ordinances, such as housing code and vehicle registration regulations, shutting down neighborhood volleyball games, encouraging police harassment of day laborers, encouraging direct police enforcement of civil immigration laws upon stopping motorists for moving violations …
>
> 18. With Mayor Boughton's support, code inspectors have discriminatorily enforced Danbury's fire and building codes and parking regulations against Danbury's immigrant and Latino communities ….
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> 19. In April 2005, with Mayor Boughton's support, the Danbury Common Council considered an ordinance banning 'repetitive outdoor group activities.' The purpose of this ordinance was to shut down the Ecuadorian community's volleyball games. Mayor Boughton also requested that the DPD aggressively police the volleyball games to achieve the same end.
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> …
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> 22. Most recently, the Mayor announced a campaign to crack down on Danbury residents whose vehicles are registered out of state. Mayor Boughton claims that out-of-state registrations cheat the city out of tax dollars. However, the community is acutely aware that this campaign is actually designed to target immigrants, some of whom find it easier to register a vehicle out of state ….

(Id. at ¶¶ 17-19; 22 (internal quotation marks omitted.)) The Frank Organization then filed an appeal of their first FOIA request that was directed to the Office of the Mayor of Danbury with the Freedom of Information Commission on December 19, 2006.[1] (See Appeal of FOIA

[1]On January 4, 2007, the City of Danbury provided the Frank Organization with documentation in an effort to further comply with its FOIA request. (See Corporation Counsel letter dated Mar. 6, 2007 at p. 3, attached as Exhibit H to the Boughton Affidavit.)

Request, attached as Exhibit F to the Boughton Affidavit.) The appeal was filed on the ground that "there likely existed other records responsive to [its] requests that had not yet been provided" and that as of December 14, "neither the Mayor's office nor the [DPD] . . . provided access to any additional records" and that its FOIA request, therefore, had been denied. (Id. at p. 2.)

The following day, the Deputy Corporation Counsel for the City of Danbury sent a letter to the Frank Organization, notifying the firm of the potential conflict of interest concerning its representation in the CCJEF and FOIA matters. (See Corporation Counsel letter dated Dec. 20, 2006, attached as Exhibit H to the Boughton Affidavit.) The letter stated that, in light of the fact that Mayor Boughton is president of CCJEF as well as chief elected officer of the City of Danbury, the Frank Organization's filing of the DHS Complaint and the two FOIA requests created a concurrent conflict of interest: "It appears to us that . . . [the Frank Organization] must review its apparent dual and conflicted position with respect to these two matters. . . . While the [Frank] organization may proclaim that there is no actual or pending suit or action against the City of Danbury, [the Frank] organization's recent actions are tantamount to a potential pending claim or preparation for the same." (See id. (emphasis added.))

On February 7, 2007, the Frank Organization responded, indicating that under Rule 1.13, neither Mayor Boughton nor the City of Danbury was a client of the Frank Organization, and that the Frank Organization owed a duty of loyalty only to CCJEF, and not any of its constituents. (See Frank Organization letter dated Feb. 7, 2007 at pp. 2-3, attached as Exhibit H to the

Boughton Affidavit.) Deputy Corporation Counsel replied on March 6, 2007, and requested that the Frank Organization withdraw from its representation: "It is the City [of Danbury]'s position that, since the CCJEF representation is not only earlier in time, has drawn substantial time, effort and resources, involves a larger client base and, most importantly would most negatively impact the City were [the Frank Organization] to withdraw, that [the Frank Organization] . . . must withdraw from the FOIA matter and obtain other representation for those clients." (See Corporation Counsel letter dated Mar. 6, 2007 at p. 2, attached as Exhibit H to the Boughton Affidavit.) It is undisputed that the FOIA matter concerned the parties that later became the plaintiffs in the Barrera lawsuit.

On March 19, 2007, the Frank Organization filed a Notice of Intention to Commence an Action with the Clerk of the City of Danbury. (See Notice of Intention to Commence an Action, attached as Exhibit I to the Boughton Affidavit.) The next day, the Frank Organization, Mayor Boughton, Deputy Corporation Counsel, and a representative from CCJEF had a meeting to discuss the potential conflict of interest issue. (Boughton Affidavit at ¶ 14.) Again, the Frank Organization stated that it did not believe there was a "bona fide conflict," and that it "would not withdraw from the immigration matter, but rather would consider the risks of continuing the representation of the CCJEF matter instead." (Id.) Several months later, on September 26, 2007, the Frank Organization filed a complaint on behalf of the Barrera plaintiffs. An Amended Complaint was then filed on November 26, 2007.

To assist in understanding what he perceives to be a conflict of interest on the part of the Frank Organization, Mayor Boughton, through counsel, has retained Professor Charles W. Wolfram to be an expert witness in this matter to review and comment. Upon reviewing the Amended Complaint, Prof. Wolfram stated: "[i]n this Barrera litigation, the Frank Organization lawyers are accusing Mayor Boughton's City of Danbury administration of unlawful and unconstitutional activities concerning Latino immigrants. They are doing so in language that strongly suggests an actively discriminatory and unjust frame of mind on the part of Mayor Boughton personally. Most dramatically . . . the Frank Organization has framed the complaint in this proceeding in a way that charges Mayor Boughton 'in his *official and personal capacities*' [Amended Complaint at ¶ 13] with committing wrongful and objectionable acts." (Declaration of Professor Charles W. Wolfram ("Wolfram Declaration") at ¶ 12 [emphasis in original; internal quotation marks omitted], attached as Exhibit 1 to this Motion to Disqualify)

The Amended Complaint alleges that the unlawful arrest of the plaintiffs was the result of an "undercover immigration sting operation." (Amended Complaint at ¶ 61.) More importantly, the Amended Complaint is replete with references to Mayor Boughton's alleged implementation of discriminatory immigration policies, and, with the help of the DPD officers, the enforcement of those policies, which targeted day-laborers on the basis of their race, ethnicity and perceived national origin, in an effort to encourage Ecuadorian immigrants to leave the City of Danbury. For example, the Amended Complaint alleges that "[t]he arrival of new Latino immigrants . . .

has sparked a backlash from Mayor Bougton's administration, which has targeted, harassed and intimidated these new city residents . . . . Mayor Boughton has especially directed these discriminatory polices against Danbury's Ecuadorian community." (Amended Complaint at ¶¶ 33-34.) "The centerpiece of Danbury's harassment campaign under Mayor Boughton . . . has been the City of Danbury's escalating involvement in the enforcement of federal immigration laws . . . through the [DPD]." (Id. at ¶ 37.) "Mayor Boughton and the DPD have singled out the day-laborer community in Danbury's Kennedy Park for special harassment. . . . on the basis of their race, ethnicity, and perceived national origin." (Id. at ¶¶ 48-49.) "Mayor Boughton also allowed the [September 19, 2006] arrests to occur out of total disregard for the constitutional interests of the arrestees." (Id. at ¶ 110.)

"[These] adversary activities are both obviously against [Mayor Boughton's] personal interests and are being planned and carried out by the same Frank Organization lawyers who purport to be entitled to Mayor Boughton's trust and confidence in their zealous and client-centered advice and other services in the CCJEF Equal Funding Litigation." (Wolfram Declaration at ¶ 12.)

In his affidavit, Mayor Boughton responds to the allegations made against him in the Barrera lawsuit by the Frank Organization:

> I am very concerned about the Frank Organization's role as both counsel for CCJEF and the Barrera plaintiffs. … As President of [CCJEF], I believe in the policy that all children must be educationally protected, regardless of their immigration status.

> As President of CCJEF and as President of the Steering Committee, I work with the Frank Organization lawyers to further those goals in which I strongly believe. It is extraordinarily disconcerting and troublesome to me that the same lawyers with whom I work to further the laudatory goals of CCJEF have turned around and sued me in the Barrera case, alleging that I have 'targeted, harassed, and intimidated' new Latino immigrants in Danbury through a number of discriminatory polices . . . in an effort to drive unwanted immigrants from Danbury and to deter future immigrants from making Danbury their home ….

(Boughton Affidavit at ¶ 15 (emphasis added)). Mayor Boughton further states: "The Frank Organization's dual representation results in a chilling effect on my ability to discuss legal strategy, pending motions, and public message with the Frank Organization, its students, and its lawyers. So long as the Frank Organization continues to represent the Barrera plaintiffs, I will be guarded in my communications with them, fearing that my words and actions would or could somehow be used in the Barrera case." (Id. at ¶ 16.)

It is Professor Wolfram's opinion that "the Frank Organization has seriously departed from the standard of conduct that would be followed by lawyers of ordinary care and prudence in undertaking representation of the Plaintiffs in a lawsuit targeted directly and personally against Mayor Boughton with whom the Frank Organization maintains a fiduciary relationship in its extensive dealings with him personally in representing the CCJEF in the [education lawsuit]. That course of conduct warrants disqualification of the Frank Organization from further participation in this matter." (Wolfram Declaration at ¶ 3.)

Argument

It is well recognized that "[t]he district court bears the responsibility for the supervision of the members of its bar. . . . The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. . . . Moreover, in the disqualification situation, any doubt is to be resolved in favor of disqualification." Hull v. Celanese Corp. et al., 513 F.2d 568, 571 (2d Cir. 1975) (citations omitted.)

The issue in the present case is governed by Rule 1.7 of the Rules of Professional Conduct. Rule 1.7 (a) provides in relevant part: "[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 . . . . " Conn. Rules Prof'l Conduct R. 1.7 (a) (2007).[2]

[2]Rule 1.7 (b) provides: "Notwithstanding the existence of a concurrent conflict of interest under subsection (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 the same proceeding before any tribunal; and (4) Each affected client gives informed consent, confirmed in writing." Conn. Rules Prof'l Conduct R. 1.7 (b) (2007).

The Frank Organization has argued that Rule 1.13, rather than Rule 1.7, applies in the present case. (See Frank Organization letter dated Feb. 6, 2007, attached as Exhibit H to the Boughton Affidavit; Boughton Affidavit at ¶ 14.)

Rule 1.13 (a) of the Rules of Professional Conduct provides: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Conn. Rules Prof'l Conduct R. 1.13 (a) (2007) (emphasis added.) Expanding on this principle, the Commentary to Rule 1.13 provides in relevant part: "An organizational client is a legal entity, but it cannot act except through its officers, directors . . . and other constituents. Officers, directors . . . are the constituents of the corporate organizational client. . . . When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful." Conn. Rules Prof'l Conduct R. 1.13 cmt. (2007). Mayor Boughton is more than just a mere constituent of CCJEF. As discussed later, cases have considered those in similar situations as the Mayor as if they were clients. As Professor Wolfram states in his Declaration, other courts have found conflicts to exist and have ordered the disqualification in cases such as this. (Wolfram Declaration at ¶¶ 13-16) As Professor Wolfram opines in his Declaration:

> The situation here is . . . much more aggravated because of the need of Mayor Boughton to deal *simultaneously* with the same Frank Organization lawyers both as zealous advocates for the interest of the CCJEF and as adversary against the Mayor. Morever . . . the Frank Organization lawyers, in the course of their discussions of the Equal Funding Litigation with Mayor Boughton, will have ample occasions to gain

> what might be critically important insights into the Mayor's litigation strategies, his ways of dealing with litigation risks, and his attitudes toward settlement - among many other matters - that could prove important to this [Barrera] litigation. No person should be put to the risk by his or her own lawyers that words and ideas that they might reasonably share with their own counsel will be put to use against the same person's important interests in contemporaneous litigation.

(Wolfram Declaration at ¶ 17 (emphasis in original; emphasis added))

1. Rule 1.13 of the Rules of Professional Conduct does not shield the Frank Organization from the concurrent conflict of interest created by its representation of CCJEF and the Barrera plaintiffs, because Mayor Boughton must be viewed as a client of the Frank Organization for concurrent conflict of interest purposes.

It is undisputed that the Frank Organization is suing Mayor Boughton, while at the same time it represents CCJEF in the education lawsuit. It is also undisputed that Mayor Boughton is president of CCJEF's steering committee, which is intimately involved in the education lawsuit, and he regularly meets with the Frank Organization to discuss the status of the education lawsuit and available legal strategies. The Frank Organization takes direction from Mayor Boughton on behalf of CCJEF's steering committee on how to proceed in the education lawsuit, as a result of these meetings. The Frank Organization has chosen to ignore the relevance of the above facts for purposes of a concurrent conflict of interest analysis. "[T]he Frank Organization's position . . . is incomplete and unduly formalistic in view of the facts here, and it ignores the important and highly relevant human elements involved in representations of, even entity clients such as CCJEF." (Wolfram Declaration at ¶ 8)

The Frank Organization cites to Rule 1.13 in support of its position that it does not represent Mayor Boughton because he is only a constituent of CCJEF. (See Frank Organization letter dated Feb. 6, 2007, attached as Exhibit H to the Boughton Affidavit; Boughton Affidavit at ¶ 14.) However, the Frank Organization's reliance on Rule 1.13 is misplaced. Although the Commentary to Rule 1.13 explains that a lawyer's representation of an organization does not necessarily mean that the lawyer also represents the organization's constituents, under the facts and circumstances presented in this case, as Professor Wolfram points out, such a view is overly formalistic. (See Wolfram Declaration at ¶ 8.)

"The facts indicate that Mayor Boughton is serving as far more than a figurehead leader of CCJEF." (Wolfram Declaration at ¶ 10.) In his capacity as president of both the organization and the steering committee, Mayor Boughton makes decisions on behalf of CCJEF with respect to the CCJEF litigation, based upon the legal advice and guidance he receives from the Frank Organization. CCJEF's steering committee meets on a monthly basis. (Boughton Affidavit at ¶ 8.) The Frank Organization coordinates and attends these meetings, to provide Mayor Boughton with updates as to the status of the education lawsuit, and to discuss legal strategies that are available to CCJEF in the case. (Id.) Based on the information provided by the Frank Organization, the steering committee decides how the organization should proceed with the education lawsuit. (Boughton Affidavit at ¶ 8; Wolfram Declaration at ¶ 10.)

As evidence of his dedication in furtherance of CCJEF's ultimate goals and purpose, Mayor Boughton authored the preface of a document on behalf of CCJEF's steering committee in February 2007, entitled "A Framework for Adequately and Equitably Funding Connecticut's Public Schools." The preface explains that the Framework illustrates a means by which increased funding can be provided to Connecticut students, so that all Connecticut schoolchildren can have access to adequate educational opportunities. (See Framework, attached as Exhibit D to Boughton's Affidavit.)

"[T]he Steering Group, with Mayor Boughton as its head and serving that important function actively, represents the practical and personal embodiment of the theoretical 'entity' that is CCJEF." (Wolfram Declaration at ¶ 11.) Mayor Boughton's "role as president of CCJEF and president of its Steering Committee in the Equal Funding Litigation finds him . . . involved in a direct and personal way in dealing with the same law firm, if on factually unrelated matters, as is suing him personally in this Barrera litigation. And, the charges that the Frank Organization lawyers have brought against him in this [Barrera] litigation threaten both obvious personal and political interests of Mayor Boughton." (Wolfram Declaration at ¶ 13.) In short, Mayor Boughton must be viewed as a client of the Frank Organization.

In North Star Hotels Corp. v. Mid-City Hotel Assocs., 118 F.R.D. 109 (D. Minn. 1987), the court disqualified counsel in a similar situation. In that case, plaintiff North Star Hotels Corp. managed and operated a hotel that was owned by defendant Mid-City Hotel Associates, in

accordance with a management contract. Id. at 110. The law firm of Faegre & Benson represented the plaintiff in connection with this contract. Id. The defendant filed a motion to disqualify after Faegre & Benson refused to voluntarily withdraw from its representation of the plaintiff. Id. The defendant was a partnership comprised of two general partners, one of whom was Harry A. Johnson. Id. The defendant claimed that Faegre & Benson's representation of the plaintiff created a conflict of interest with respect to two of Faegre's other clients, St. Louis Centre Partners and Burnsville Woods Partnership, because Johnson was also a principal owner in these two partnerships. Id. Specifically, three general partners owned St. Louis Centre: AP Development, Rosewood Corporation (another client of Faegre & Benson), and Pineapple Management, of which Johnson was a 96 percent owner. Id. Concerning Burnsville Woods Partnership, Rosewood Corporation and an entity known as HAJ Construction were each 50 percent owners. Id. HAJ Construction was entirely owned by Johnson. Id. In support of its motion for disqualification, counsel for the defendant represented to the court that Johnson, its general partner, was denied a letter of credit that would have predicated a certain real estate transaction for Burnsville Woods, because of a lis pendens Faegre & Benson filed in connection with its representation of the plaintiff North Star Hotels. Id.

The court, relying on Minnesota's Rules of Professional Conduct Rule 1.7 (which is substantially similar to Connecticut's Rule 1.7),[3] concluded that: "Faegre & Benson represents a plaintiff who has the potential for collecting a large judgment which would be financially adversarial to its other clients. If the suit is successful, a judgment for which Harry Johnson is personally liable puts [St. Louis Centre and Burnsville Woods] at a direct financial risk." Id. at 111. The court further reasoned: "Harry Johnson is a key principal in St. Louis Centre, Burnsville Woods, and [the defendant Mid-City Hotel Assocs.]. . . . As assets belonging to him, Harry Johnson's interests in the two partnerships represented by Faegre & Benson could be impaired or reduced. His financial position is clearly significant to the two partnerships represented by Faegre & Benson." Id. at 112. For these reasons, the court granted the defendant's motion to disqualify Faegre & Benson from its representation of the plaintiff. Id. at 113.

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[3]"Rule 1.7 of Minnesota's Rules of Professional Conduct provides: (a) 'A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation. (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.'" North Star Hotels Corp. v. Mid-City Hotel Associates, supra, 118 F.R.D. at 111 (internal quotation marks omitted.)

In the present case, just as in North Star Hotels, Mayor Boughton can be viewed as a key principal of CCJEF, as a result of his active participation in the CCJEF organization, as well as his interactions with the Frank Organization on a personal level, justifying the disqualification of the Frank Organization.

2. An adversarial relationship exists between the Frank Organization and Mayor Boughton, and it results in a direct violation of Rule 1.7 of the Rules of Professional Conduct.

"[T]he maintenance of public confidence in the bar requires an attorney to decline employment adverse to his client, even though the nature of such employment is wholly unrelated to that of his existing representation." Cinema 5, Ltd., v. Cinerama, Inc. et al., 528 F.2d 1384, 1386-87 (2d Cir. 1976). When the issue is that of a concurrent conflict of interest, as is present here, the "substantial relationship" test (where the court determines whether the central issue in both cases is essentially the same) is inapplicable. Id. at 1385-86. Rather, to properly analyze a potential concurrent conflict of interest, "the propriety of [the lawyer's] conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients." Id. at 1386.

The Frank Organization's actions soon after the September 19, 2006 incident helped create the adversarial relationship which now exists between itself and Mayor Boughton. Approximately one month after the September 19, 2006 arrests, the Frank Organization submitted two FOIA requests on behalf of itself and several interest groups for all records related

to the arrest of the Barrera plaintiffs, one of which was directed to the Office of the Mayor of Danbury, and the other to Danbury's Police Department. (See FOIA Requests, attached as Exhibit E to the Boughton Affidavit.) After having inspected the records kept at the office of the Corporation Counsel in Danbury and deeming them to be incomplete, the Frank Organization filed an appeal with the Freedom of Information Commission on December 19, 2006, on the ground that its FOIA request had been denied because "neither the Mayor's Office nor the Danbury Police Department had provided access to any additional records." (See Appeal of Denial of FOIA Request, attached as Exhibit F to Boughton Affidavit.)

However, several days before filing its appeal, the Frank Organization filed a complaint against DHS, which essentially was a third FOIA request, seeking the disclosure and release of agency records pertaining to "ICE's immigration enforcement polices, practices and activities in and around Danbury, Connecticut, including ICE's cooperation with local elected officials and the local police department to accomplish such enforcement." (See Complaint against DHS at ¶ 2, attached as Exhibit G to the Boughton Affidavit [emphasis added].)

Even before the Barrera lawsuit was filed, the conflict of interest issue was addressed. In response to the Frank Organization's actions, the City's Deputy Corporation Counsel, acting on Mayor Boughton's behalf, discussed the potential conflict of interest issue with the Frank Organization on three separate occasions: 1) via letter dated December 20, 2006, 2) via letter dated March 6, 2007, which expressly requested that the Frank Organization withdraw from its

representation concerning the FOIA matters, and 3) during a meeting on March 20, 2007, one day after the Frank Organization filed its Notice of Intention to Commence an Action. The Frank Organization's position remained the same: there was no actual or bona fide conflict of interest, and it represented CCJEF, not Mayor Boughton. (See all letters attached as Exhibit H to the Boughton Affidavit; Boughton Affidavit at ¶ 14.) Despite having been given ample notice of the potential conflict of interest, the Frank Organization filed the Barrera lawsuit against Mayor Boughton.

Indeed, the Barrera suit was filed more than six months after the City's Deputy Corporation Counsel requested that the Frank Organization withdraw as counsel. In light of the rule recognized in Cinema 5, Ltd., v. Cinerama, Inc. et al., supra, the Frank Organization's conduct was improper. See id. at 1386-87 ("[T]he maintenance of public confidence in the bar requires an attorney to decline employment adverse to his client, even though the nature of such employment is wholly unrelated to that of his existing representation.")

Mayor Boughton has been sued in his official and individual capacities. (Amended Complaint at ¶ 13.) The Amended Complaint filed by the Frank Organization accuses Mayor Boughton of racially discriminatory conduct that constitutes a personal attack on Mayor Boughton, as well as his administration. In essence, the complaint blames Mayor Boughton for the September 19, 2006 arrests, and seeks to hold him personally responsible for the alleged implementation of immigration policies that were intended to intimidate, harass and force out the

Latino immigrant community from Danbury. It alleges that "[t]he arrival of new Latino immigrants … has sparked a backlash from Mayor Bougton's administration, which has targeted, harassed and intimidated these new city residents …. (Amended Complaint at ¶ 33.) Mayor Boughton has especially directed these discriminatory polices against Danbury's Ecuadorian community." (Id. at ¶ 34.) "The centerpiece of Danbury's harassment campaign under Mayor Boughton … has been the City of Danbury's escalating involvement in the enforcement of federal immigration laws, especially through the [DPD]." (Id. at ¶ 37.) "Mayor Boughton and the DPD have singled out the day-laborer community in Danbury's Kennedy Park for special harassment." (Id. at ¶ 48.) "Mayor Boughton and the DPD have targeted them for harassment on the basis of their race, ethnicity, and perceived national origin." (Id. at ¶ 49.) "Mayor Boughton also allowed the [September 19, 2006] arrests to occur out of total disregard for the constitutional interests of the arrestees." (Id. at ¶ 110.)

Viewing the totality of the circumstances presented here, it is clear that an adversarial relationship exists between the Frank Organization and Mayor Boughton. In accordance with Rule 1.7 (a)(1), this relationship constitutes a concurrent conflict of interest. Additionally, under Rule 1.7 (a)(2), there is a significant risk that Mayor Boughton's ability to work with the Frank Organization on behalf of CCJEF in the education lawsuit has been severely compromised, thus materially limiting the Frank Organization's representation of CCJEF. As Professor Wolfram opines:

> [T]he Steering Group, with Mayor Boughton as its head and serving that important function actively, represents the practical and personal embodiment of the theoretical 'entity' that is CCJEF. Given that capacity, it is clear that, at a future point, Mayor Boughton well might find himself listening to advice of the Frank Organization lawyers about their recommendations concerning such critical matters as a proposed settlement offer. At that and many similarly important decision points, clients are entitled to be able to rest complete trust and confidence in the loyalty and commitment of their counsel. As would any person, whether sophisticated in dealings with lawyers or not, Mayor Boughton would most likely find it extremely uncomfortable if forced to continue to rely on lawyers who are also his present and ongoing adversaries in [the Barrera lawsuit] brought personally against him.

(Wolfram Declaration at ¶ 11.)

3. Disqualification of the Frank Organization from continued representation of the Barrera plaintiffs is warranted, and the conflict cannot be cured.

"Where the relationship is a continuing one, adverse representation is prima facie improper . . . and 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." Cinema 5, Ltd., v. Cinerama, Inc. et al., supra, 528 F.2d at 1387 (citation omitted; emphasis added.) This standard is a heavy burden for the Frank Organization to meet. Again, it is important to mention that Mayor Boughton has been sued by the lawyers who advise him. He is concerned that whatever is discussed at CCJEF, or whatever decisions he makes on behalf of CCJEF, will be used against him in the Barrera lawsuit. (Boughton Affidavit at ¶ 16.) Mayor Boughton's fears are not unreasonable, considering the antagonistic approach the Frank Organization has taken

toward Mayor Boughton since October 16, 2006. (See discussion in part 2, supra, concerning the allegations made against Mayor Boughton personally in the Amended Complaint.)

"Mayor Boughton's discomfort would be shared by any person of normal sensibilities in the same or a similar position. In this Barrera litigation, the Frank Organization lawyers are accusing Mayor Boughton's City of Danbury administration of unlawful and unconstitutional activities concerning Latino immigrants. They are doing so in language that strongly suggests an actively discriminatory and unjust frame of mind on the part of Mayor Boughton personally. … The [Barrera] complaint clearly accuses Mayor Boughton of personal acts that are wrongful, illegal, and abhorrent. … There can be little wonder why Mayor Boughton feels, as he states in his affidavit, that his ability to work with the same Frank Organization lawyers in the CCJEF Equal Funding Litigation is severely compromised by their representation of his adversaries in this Barrera litigation." (Wolfram Declaration at ¶ 12.)

In Colorpix Systems of America v. Broan Mfg. Co., Inc., 131 F.Supp.2d 331 (D. Conn. 2001), which was a fire subrogation case, the plaintiff alleged that certain fires were caused due to defective products manufactured by the defendant. Id. at 333. The law firm of Robinson & Cole represented the plaintiff. However, Robinson & Cole also represented the defendant's parent company and affiliated company in a prior fire subrogation case. Id. The defendant moved for an order to disqualify Robinson & Cole from representing the plaintiff in the Colorpix

case, alleging that there was a conflict of interest that prevented Robinson & Cole from continuing to represent the plaintiff. Id.

The defendant, its parent company and affiliated company all shared the same legal department to defend fire subrogation cases. Id. at 334. As a result, all three companies had adopted a uniform legal strategy and approach in defending such cases. Id. Additionally, there was significant overlap in the three companies' use of expert witnesses and other legal resources to defend such cases. Id. Kevin Donnelly was the vice president, secretary and general counsel of all three companies, and he hired Robinson & Cole to represent the defendant's parent company and affiliated company in the prior case. Id. Robinson & Cole regularly corresponded with Donnelly concerning the status of the defenses and litigation strategy in the prior case. Id. at 334-35. Donnelly also had supervised the defendant's defense of the current case, and had been in regular contact with the defendant's counsel and officers to discuss legal strategies in the Colorpix case. Id. at 335.

The court noted that, in light of all three companies' shared use of legal resources, and Donnelly's active supervision and involvement in developing the litigation strategy and defense in both the former and current cases, Robinson and Cole was likely to have had access to information that would potentially disadvantage' the defendant's defense, and, therefore, the

defendant's motion to disqualify Robinson and Cole from continuing to represent the plaintiff in the Colorpix case should be granted. Id. at 339-40 (emphasis added.)[4]

The situation in Colorpix is similar to the siguation here. The Frank Organization is likely to have learned valuable information with regard to Mayor Boughton concerning legal tactics, strategies and approaches to particular situations as they arose during the course of the education lawsuit, which could now be used to potentially disadvantage Mayor Boughton in the Barrera lawsuit. As Professor Wolfram opines:

> The situation here is very similar to [the Colorpix case] except that it is much more aggravated because of the need of Mayor Boughton to deal *simultaneously* with the same Frank Organization lawyers both as zealous advocates for the interests of the CCJEF and as adversary against the Mayor. Morever, as was found objectionable in Colorpix, the Frank Organization lawyers, in the course of their discussions of the Equal Funding Litigation with Mayor Boughton, **will have ample occasions to gain what might be critically important insights into the Mayor's litigation strategies, his ways of dealing with litigation risks, and his attitudes** toward settlement - among many other matters - that could prove important to this litigation. No person should be put to the risk by his or her own lawyers that words and ideas that they might reasonably share with their own counsel will be put to use against the same person's important interests in contemporaneous litigation.

(Wolfram Declaration at ¶ 17 [emphasis in original] [emphasis added])

Finally, the Frank Organization has already indicated that it cannot satisfy the standard enunciated in Cinema 5, Ltd., v. Cinerama, Inc. et al., supra. During the meeting that was held

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[4] Before performing this analysis, the court had first determined that a substantial relationship existed between the prior representation and the current representation. Id. at 338. However, as discussed in section 2, infra, the "substantial relationship" test is inapplicable in situations, where as here, there is a concurrent conflict of interest.

on March 20, 2007, the Frank Organization lawyers stated that they would not consider withdrawing from the Barrera lawsuit, and that they would just consider the risks associated with its continued representation of CCJEF. (Boughton Affidavit at ¶ 14.) They also stated at this meeting that CCJEF could commence a grievance process against the Frank Organization if it so chose. (Id.) These statements are not indicative of any efforts on the Frank Organization's part to show that "there will be no actual or apparent conflict in loyalties or diminution in the vigor of [its] representation" of Mayor Boughton or CCJEF. Cinema 5, Ltd., v. Cinerama, Inc. et al., supra, 528 F.2d at 1387. Rather, the Frank Organization's position appears to be that it will accept any adverse consequences that might arise as a result of their continued representation in both the education lawsuit and the Barrera lawsuit. The Frank Organization's current position is unacceptable in light of the principles established by Rule 1.7 and its Commentary.

4. The Frank Organization cannot cure the conflict under either the "hot potato" principle or the "flexible approach" method.

In Eastman Kodak Co. v. Sony Corp., No. 04-CV-6095, 04-CV-6098, 2004 U.S. Dist. LEXIS 29883, at *1 (W.D.N.Y. Dec. 27, 2004) (attached as Exhibit 4 to this Motion to Disqualify), the court considered application of the hot potato principle as well as the flexible approach method for purposes of considering a disqualification motion. The facts of that case are relevant for the purposes of the discussion here. In that case, the law firm of Woods Oviatt Gilman, LLP represented Heidelberg Digital LLC (hereinafter Heidelberg). Id. at *1. For several

years, Woods Oviatt handled two employment discrimination matters for Heidelberg (*Jackson* and *McEwen*). Id. Subsequently, Eastman Kodak Company (hereinafter Kodak) acquired Heidelberg. Id. Woods Oviat was aware of the acquisition before it occurred, and the firm continued to represent Heidelberg in the *Jackson* and *McEwen* cases. Id. As a result of the acquisition, Heidelberg was wholly owned by Kodak, and Kodak's legal department assumed responsibility for all litigation matters involving Heidelberg, including the *Jackson* and *McEwen* cases. Id. at *2-3. After the acquisition, Woods Oviat appeared as local counsel in two cases in which Kodak was the opposing litigant: *Sony Corporation* and *Employees Committed for Justice* ("*ECJ*"). Id. at *2. Kodak filed motions to disqualify Woods Oviat from continuing representation in these two cases. Id.

The court found that a prima facie conflict of interest existed, because by accepting employment as local counsel in the *Sony Corp*. and *ECJ* cases, Woods Oviatt essentially agreed to participate in two lawsuits in which Kodak was an adverse party. Id. The court further reasoned: "Because such concurrent representation could weaken Woods Oviatt's fiduciary and fundamental duty of undivided loyalty owed to Kodak, it is 'prima facie improper.'" Id. After considering the Cinema 5 standard, the court noted that Kodak clearly did not consent to the conflict, and the court found that it would be "ethically impermissible" for Woods Oviat to continue to represent Kodak's adversaries in the *Sony Corp*. and *ECJ* cases, due to the parent/subsidiary relationship between Kodak and Heidelberg. Id. at *5.

The court then considered whether the hot potato rule should be applied to the facts of that case. Under the "hot potato" rule, a lawyer may not "avoid disqualification . . . merely by 'firing' the disfavored client, dropping the client like a hot potato, and transforming a continuing relationship to a former relationship by way of client abandonment." Id. at **5-6. The court noted that under the hot potato rule, Woods Oviat's continued representation of *Sony Corp*. and *ECJ*. would be "ethically problematic." Id. at *7.

In the present case, at a meeting on March 20, 2007, where Mayor Boughton and Robert Solomon, supervising attorney for the Frank Organization, and others were present, the parties attempted to reach a mutual understanding concerning the conflict of interest issues. (Boughton Affidavit at ¶ 14.) The Frank Organization responded that it did not feel that there was a "bona fide conflict," and that it "would not withdraw from the immigration matter, but rather would consider the risks of continuing the representation of the CCJEF matter instead." (Boughton Affidavit at ¶ 14. Under the hot potato rule, the Frank Organization cannot cure the conflict simply by withdrawing from the CCJEF case.

The court in Eastman Kodak also applied the flexible approach rule to Kodak's motion to disqualify. Under the flexible approach, the court takes several factors into consideration in order to determine the disqualification issue: "(1) prejudice to the parties, including whether confidential information has been conveyed, (2) costs and inconvenience to the party being required to obtain new counsel, (3) the complexity of the various litigations, and (4) the origin of

the conflict." Id. at *6. The court concluded that under the flexible approach method as well, Woods Oviat would have to be disqualified from its continued representation of *Sony Corp*. and *ECJ*. Id. at *7. In reaching this conclusion, the court noted that Kodak's labor department had assumed supervisory responsibility over both the *Jackson* and *McEwen* cases, which raised concerns as to whether Woods Oviat might have received confidential information in the course of its representation of Heidelberg that could unfairly disadvantage Kodak in the *Sony Corp*. and *ECJ* cases. Id. Additionally, the court noted that the *Sony Corp*. and *ECJ* cases were still in the early stages of litigation, whereas in the *Jackson* and *McEwen* cases, Woods Oviat had already filed a summary judgment motion which was currently pending. Id. Finally, the court noted that the conflict of interest was created because of an affirmative act on the part of Woods Oviat, who accepted employment in the *Sony Corp*. and *ECJ* cases, after being made fully aware of the Kodak-Heidelberg acquisition. Id. at *8.

Similarly, in the present case, prejudice to the parties is clearly a significant factor, due to Mayor Boughton's and the Frank Organization's joint participation in the monthly meetings of CCJEF's steering committee, where legal strategies were discussed, and during which time confidential information may have been transferred. As for the second and third factors of the flexible approach, the immigration lawsuit is still in the early stages of litigation. Although the Complaint was filed on September 26, 2007, Mayor Boughton was not served with the Complaint until October 19, 2007. (Boughton Affidavit at ¶ 13.) Subsequently, an Amended

Complaint was filed on November 26, 2007. None of the defendants has filed an answer to the Amended Complaint and discovery has not yet begun. In short, the Danbury Defendants' motion to disqualify is being filed at the very outset of the litigation proceedings. In light of these circumstances, any inconvenience to the Barrera plaintiffs stemming from the court's granting of the Danbury Defendants' motion to disqualify would be relatively mild. The CCJEF litigation, on the other hand, is over two years old and the Frank Organization has recently filed an appeal with the Connecticut Supreme Court on behalf of CCJEF.

As for the fourth and final factor, the conflict of interest was created by an affirmative act on the part of the Frank Organization, which brought the Barrera lawsuit against Mayor Boughton in his official and individual capacities after having been put on notice that such conduct could give rise to a potential conflict of interest. By letter dated December 20, 2006, Laszlo Pinter, Deputy Corporation Counsel for the City of Danbury, requested that the Frank Organization review its "apparent dual and conflicted position" with respect to the education lawsuit and its attempts to obtain information from the City of Danbury concerning the September 19, 2006 arrest of the plaintiffs. (Corporation Counsel letter dated Dec. 20, 2006, attached as Exhibit H to the Boughton Affidavit.) Subsequently, in March 2007, the Frank Organization was then asked to withdraw from further representation in the FOIA matters. (Corporation Counsel letter dated Mar. 6, 2007, attached as Exhibit H to the Boughton Affidavit.) Despite having been given ample notice of the conflict, on March 19, 2007, the Frank

Organization submitted its Notice of Intention to Commence an Action to the Clerk of the City of Danbury. (Boughton Affidavit at ¶ 13; Exhibit I to the Boughton Affidavit.) The following day, CCJEF, the Frank Organization and Mayor Boughton had a meeting to discuss the potential conflict of interest issue, but the issue could not be resolved because the Frank Organization opted to just accept the risks associated with its course of conduct. (See id. at ¶ 14.) The Frank Organization brought this action approximately six months later. Therefore, under either the hot potato rule or the flexible approach method, this motion to disqualify should be granted.

Conclusion

For the foregoing reasons, the Defendant, Mayor Boughton, respectfully requests that the Court grant his Motion to Disqualify.

THE DEFENDANT,
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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2008, a copy of the above was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

_____/s/_____
Charles A. Deluca, Esq.

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