UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

B351619

In the Matter of	)	
INTEL CORPORATION,	)	DOCKET NO 9288
a corporation.	)	

ORDER DENYING MOTION TO DISQUALIFY RICHARD G. PARKER, ESQ.

Respondent Intel Corporation ("Intel") moves to disqualify complaint counsel Richard G. Parker, the Senior Deputy Director of the Bureau of Competition, from further involvement in this adjudication or any related matter.

Mr. Parker for over twenty years had been a partner in the law firm of O'Melveny and Myers He was one of the lawyers from that firm who represented Intel's competitor, Advanced Micro Devices, Inc. ("AMD"), in litigation matters adverse to Intel. On November 26, 1997, Mr. Parker was one of four lawyers for O'Melveny who filed a response to a civil investigative demand in an investigation which resulted in the issuance of the Complaint in this matter. On February 13, 1998, Mr. Parker resigned from O'Melveny and joined the Commission on February 17, 1998.

Before participating in the Intel matter, Mr. Parker received an opinion from the FTC's Designated Agency Ethics Officer ("DAEO"). Mr. Parker met with the DAEO on several occasions and disclosed his prior representation on behalf of AMD. Declaration of Richard G. Parker ("Parker Decl ") ¶ 5.[1] The DAEO analyzed and determined that Mr. Parker's participation in this matter was consistent with the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.502 (1998) ("Standards of Conduct") The DAEO informed Mr Parker of this determination orally during March 1998, and again in writing on April 19, 1998. Memorandum from Christian S. White, DAEO to Richard G. Parker, ("DAEO Auth.") Parker Decl. ¶ 6. Mr. Parker did not participate in the Intel matter or the investigation leading up to it until he was authorized to participate by the DAEO. Parker Decl. ¶ 5.

On September 8, 1998, Mr. Parker filed a formal appearance in this matter. Parker Decl. ¶ 7 At least as early as November 25, 1998, when Intel raised questions about Mr. Parker's participation, counsel for Intel was informed that Mr. Parker had received the DAEO ruling authorizing Mr. Parker's participation. Declaration of Michael E. Antalics at ¶ 2.

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[1] The exhibits cited herein are all attached to Complaint Counsel's Opposition to Respondent's Motion to Disqualify Richard G. Parker.

According to the DAEO, Mr Parker is "authorized to participate as a Commission official in the Intel matter." DAEO Auth. at 1. The DAEO concluded: "A concern that your participation in the Intel matter would cause a reasonable person to question the integrity of the agency's actions seems spurious." DAEO Auth. at 4.[2]

On December 11, 1998, the DAEO requested advice from the Office of Government Ethics ("OGE") regarding Mr. Parker's continued participation in this matter. Letter from Christian White to Honorable Stephen D. Potts, Ex. D at 4. On January 13, 1999, OGE advised that it found "no reason to question [the DAEO's] authorization of Mr. Parker's participation in the Intel matter." Letter from Stephen Potts, Director OGE, to Christian White, DAEO, at 1 ("OGE letter," Ex. D).

The comments to the ABA Model Rules state that a disqualification motion "should be viewed with caution . . . for it can be misused as a technique for harassment." Model Rules of Professional Conduct Rule 1.7 cmt. 15. "Motions to disqualify opposing counsel are subject to strict judicial scrutiny because of the cost and inconvenience they may impose on the judicial system and the party whose attorney is disqualified. . . . Motions made on the eve of trial are subject to particular scrutiny because they may be a tactical move to disadvantage the other party." *Harker v. CIR*, 1994 Tax Ct. Memo LEXIS 598, *28 (Dec. 1, 1994), *aff'd*, 82 F.3d 806 (8th Cir 1996). In Harker, where the DOJ attorney had begun working on the case two months before trial, the court found that the filing of a disqualification motion two weeks before trial could be seen only as a "delay tactic." *Id.* Here Intel has known of Mr. Parker's participation for more than four months.

Intel argues that ABA Model Rule 1.11(c) supports disqualification. That rule is qualified, disallowing participation in certain cases "except as the law may otherwise expressly

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[2] The DAEO advised Mr. Parker to limit his interaction with AMD. DAEO Auth. at 4-5. To the extent AMD witnesses testify at trial in this matter, they will be prepared and put on the stand by attorneys other than Mr. Parker. Parker Decl. ¶ 8.

permit."[3] Here, Mr. Parker obtained express authorization as provided in the applicable federal law -- the Standards of Conduct -- and is therefore in full compliance with Rule 1.11(c).[4]

Moreover, Rule 1.11(c) is not controlling here. Although the Commission has on occasion looked to the ABA rules for guidance, the Commission has also consulted the District of Columbia Rules of Professional Conduct. Commission Rule 4.1(e)(1) provides that "all attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars *of which the attorneys are members*" (emphasis added).

Mr. Parker is a member of the D.C. Bar, which has not adopted ABA Model Rule 1.11(c). Under D.C.'s Rules, Mr. Parker's participation is permitted:[5]

> The District of Columbia's version of Model Rule 1.11 is important because it differs significantly from its ABA counterpart and because it probably governs more lawyers than any other non-federal rule. . . . *The rule does not provide prohibitions, as Model Rule 1.11 does, on lawyers moving from private to government employment, instead leaving this prohibition to Model Rule 1.7, which protects against lawyers representing adverse interests, and to Model Rule 1.9, which protects the interests of former clients.*

Dawson, "Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment," 11 *Geo. J. Legal Ethics* 329, 338 (1998) (emphasis added).

The Comments to the D.C. rules suggest that the rule proposed by Intel is inappropriate because other sanctions are available to regulate conduct by government attorneys:

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[3] Rule 1.11(c) states: "Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter. . . ."

It is worth noting that the Rule 1.11 comments state that Rule 1.11(c) does "not prohibit a lawyer from jointly representing a private party and a government agency when doing so is not otherwise prohibited by law." Thus, even in a situation far more likely than this one to create an appearance problem because divided loyalty is likely, the Model Rules would not support disqualification.

[4] The comments to Rule 1.11 confirm that "statutes and government regulations regarding conflict of interest" are paramount for government lawyers. ABA Rule 11 cmt. 2.

[5] Mr. Parker is also a member of the California bar, which also has not adopted ABA Rule 1.11(c).

> [i]n the District of Columbia, where there are so many lawyers for the federal and D.C. governments and their agencies, a number of whom are constantly leaving government and accepting other employment, particular heed must be paid to the federal conflict-of-interest statutes.

D.C. Rules of Prof. Conduct Rule 1.11 cmt. 2 (1996). In other words, the District of Columbia, with its uniquely extensive experience in dealing with revolving door issues, has determined that the Standards of Conduct and the criminal conflict of interest statute (18 U.S.C. § 208), in conjunction with D.C. Rules 1.7 and 1.9, not ABA Rule 1.11(c), should govern the conduct of government attorneys who have previously been in private practice. D.C. Bar Opinion No. 273, Ethical Considerations of Lawyers Moving from One Practice to Another (Sept. 17, 1997) (Ex. I).

Under the D.C. Rules, participation in a matter is precluded only where the successive representation presents an actual conflict or an adverse interest situation. Such would be the situation here only if Mr Parker previously had represented Intel, which he has not.

Intel argues that Mr. Parker's participation will deny it due process. This theory was rejected by the Commission in *Tyson's Corner Regional Shopping Center*, 82 F.T.C. 1459 (1973), where the Director of the Bureau of Competition participated "as a member of a private law firm in a related private antitrust suit against the respondents, which was settled prior to his assumption of his present position with the Commission. . . ." 82 F.T.C. at 1459-60. The Commission found that the charges were "really no more than an allegation of staff bias." The Commission explained: "we would be surprised if attorneys charged with prosecution of any matter in any agency could consistently maintain a position of complete impartiality much less an appearance of total impartiality." The Commission "fail[ed] to see how the mere appearance of impropriety, without more, could prejudice respondents." *Id.* at 1461-62.

Intel argues that since Mr. Parker has been on the case, complaint counsel "has recently shifted gears in an effort to adopt a theory advocated by the prosecutor's private client. . . ." Motion of Respondent Intel Corporation to Disqualify Complaint Counsel Richard G. Parker at 18 From what I have seen, however, complaint counsel's theory of the case has not fundamentally changed. The focus of this case is Intel's expropriation of computer technology, not from AMD, but from Digital Equipment Corporation, Intergraph Corporation, and Compaq Computer Corporation. The theory of the case is that Intel's conduct excludes competition and entrenches its monopoly position.

Intel asserts that *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), casts doubt on the *Tyson's* decision. In *Vuitton*, the petitioners had entered into a settlement, including an injunction, resolving claims that they had sold counterfeit Vuitton products. Subsequently, the district court appointed Vuitton's attorneys to prosecute a criminal contempt action for violation of the injunction against infringing Vuitton's trademark. *Id.* at 790. The Supreme Court held that the concurrent representation created actual conflicts: the prosecutor's client (Vuitton) stood to benefit substantially if the petitioners were found to have violated the injunction; Vuitton had various civil actions pending against some of the petitioners; and one of the prosecutors was a defendant in a defamation action filed by one of the respondents. *Id.* at

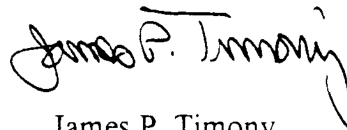
805-06 Using its "supervisory authority" over contempt proceedings, the Supreme Court held that the "beneficiary of a court order may not be appointed as prosecutor in a [criminal] contempt action alleging a violation of that order." *Id.* at 809. The rationale behind this ruling is inapplicable where the attorney-client relationship has been terminated:

> In a case where a prosecutor represents an interested party, however, the ethics of the legal profession *require* that an interest other than the Government's be taken into account. Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence.[6]

Id. at 807. Here, Mr. Parker's only duty of loyalty is to the Commission. Intel argues that Mr. Parker zealously pursued the case against Intel. Changes in trial tactics, choice of experts, and other litigation decisions obviously do not violate the due process clause. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) ("Prosecutors need not be entirely 'neutral and detached' . . . In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law.").

Because Mr. Parker does not represent any interests that could call into question his loyalty to the public interest, no due process issues arise.

Intel motion to disqualify is DENIED.



James P. Timony
Administrative Law Judge

Dated: February 9, 1999

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[6] The Court further explained:

> The concern that representation of other clients may compromise the prosecutor's pursuit of the Government's interest rests on recognition that a prosecutor would owe an ethical duty to those other clients. . . .
>
> Furthermore, such conduct would violate the ABA ethical provisions, since the attorney could not discharge the obligation of undivided loyalty to both clients where both have a direct interest.

481 U.S. at 804-05.