

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

CASE NO. 10-mj-0071 (FLN)

IN RE SEARCH AND SEIZURE )	
WARRANTS )	<b>MOTION TO DISQUALIFY ATTORNEY</b>
)	<b>MARK KALLENBACH</b>
)	

The United States of America, by and through its attorneys, B. Todd Jones, United States Attorney for the District of Minnesota, and Assistant United States Attorney John Docherty, hereby respectfully moves the Court for an order disqualifying Mark Kallenbach from serving as counsel for any of the individuals or companies involved in this case. This motion is brought because Mr. Kallenbach has made himself a necessary witness in this case. This motion is premised upon Minnesota Rule of Professional Responsibility 1.7, Local Rule 83.6(d)(2), and this Court's inherent supervisory authority over its bar.

**ATTORNEY KALLENBACH IS A NECESSARY WITNESS**

On March 25, 2010 Steven Renner filed a Motion for Return of Property (Docket No. 46). The motion was filed under Federal Rule of Criminal Procedure 41(g), and was accompanied by a Memorandum of Law (Docket No. 47). The factual assertions in Mr. Renner's Memorandum of Law were drawn from a twenty page affidavit submitted by Mark J. Kallenbach. Attached to Mr. Kallenbach's affidavit were

an additional twelve pages of exhibits.<sup>1</sup> Mr. Kallenbach stated in paragraph seven of his affidavit that he had been hired on January 13, 2010 by Inter-Mark Corporation "to assist it with legal matters."

In his affidavit, Mr. Kallenbach states that his "investigation shows that Inter-Mark and its subsidiary iNetGlobal and its other subsidiaries are clean, legitimate and profitable businesses." Mr. Kallenbach goes on to describe several visits he has made to iNetGlobal's website and to recount what he observed on that website (Kallenbach Affidavit, paragraphs 20 - 22); to describe what he observed when he used the V-Local business index to look up "coffee shop" in the Minneapolis area (Kallenbach Affidavit, paragraphs 28 and 29), and to give the number of businesses listed on V-Local (Kallenbach Affidavit, paragraph 30) which is one of several assertions that Mr. Kallenbach labels as "true facts." Mr. Kallenbach also takes issue with several of the facts set out in the affidavit of US Secret Service Special Agent Katherine Wespetal that was submitted to this Court in support of the application by the United States for search and seizure warrants (See, for example, Kallenbach Affidavit paragraphs 68, 69, and 70).

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<sup>1</sup> As this motion was being finalized in preparation for filing, the undersigned received notification via CM/ECF of a second factual affidavit by Mr. Kallenbach, this one filed on the afternoon of April 7, 2010. This heightens the government's concern about Mr. Kallenbach attempting to serve as both lawyer and witness.

Mr. Kallenbach also includes in his affidavit several averments about Mr. Renner's actions and intended actions, for example at paragraph 58, where Mr. Kallenbach describes the expansion plans Mr. Renner had for his businesses.

The memorandum of law states flatly that "the facts are in the Affidavit of Mark J. Kallenbach. They are woven in below." Memorandum of Law, Docket No. 47, at page one. The facts in the Kallenbach Affidavit are essential to Mr. Renner's claim. Mr. Renner states, in his memorandum of law, that if there is an evidentiary hearing in this matter he will call witnesses. The only witness specifically identified is Mr. Kallenbach. The other potential witnesses are lumped together as "possibly other witnesses." Memorandum of Law, Docket No. 47, at page three.

On April 5, 2010, Mr. Kallenbach noticed his appearance in this matter as counsel for Inter-Mark Corporation; Virtual Payment Systems, LLC; V-Media Marketing, LLC; Cash Cards International, LLC; and iNetGlobal, LLC. Notice of Appearance (Docket No. 52). Mr. Kallenbach then filed and served a "Motion for Return of Property Under Fed. R. Crim. P. 41(g)" (Docket No. 53), which was signed by Mr. Kallenbach as counsel for the various companies on whose behalf he had entered an appearance.

**BECAUSE HE IS AN ESSENTIAL WITNESS, MR. KALLENBACH CANNOT  
REPRESENT PARTIES IN THIS LITIGATION**

Minnesota Rule of Professional Responsibility 1.7 flatly forbids an attorney from being a witness in a case in which that attorney also represents a client. There are three exceptions to

this prohibition, none of which are germane to this case.<sup>2</sup> The Local Rules of this Court make this Minnesota ethical rule binding on attorneys practicing before it, LR 83.6(d)(2).

There are a number of reasons why it is a bad idea for one person to combine the role of witness and lawyer. "A witness is supposed to present the facts without a slant, while an attorney's job is to advocate a partisan view of the significance of the facts. One person trying to do both things is apt to be a poor witness, a poor advocate, or both." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1148 (7th Cir. 1993). There is a presumption that when an attorney represents a client, the attorney comes into receipt of confidential communications. *United States v. Shepard*, 675 F.2d 977, 979-80 (8th Cir. 1982). Should Mr. Kallenbach testify, he will be cross-examined. The Court will have to decide whether Mr. Kallenbach's voluntary assumption of the role of witness works as a waiver of the attorney-client privilege on cross-examination, or whether the government's cross-examination of Mr. Kallenbach will be limited, in ways it might not be limited if the witness was not counsel to several parties, in order to preserve the privilege. It

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<sup>2</sup> The three exceptions are (1) the testimony relates to an uncontested issue - that does not apply here, because the statements made by Mr. Kallenbach in his affidavit are contested by the government; (2) the testimony relates to the nature and value of legal services rendered in the case - this is not a fee dispute; and (3) disqualification of the lawyer would work substantial hardship on the client. The government's assessment of this exception is, of necessity, limited to a review of the pleadings that have been publicly filed so far. No reason seems apparent why disqualification of Mr. Kallenbach would work "substantial hardship" on his clients.

will be difficult, to put it mildly, to know who will conduct a direct examination of Mr. Kallenbach on behalf of his clients, or who will object on cross-examination to questions to which Mr. Kallenbach's clients might have valid objections - were their lawyer not on the witness stand, rather than at counsel table.

These questions lead inevitably into the issue of whether Mr. Kallenbach's clients can be provided constitutionally effective assistance from an attorney who is not able to discharge his duties as an advocate for their cause because he is simultaneously attempting to perform the role of necessary witness.

The government did not bring this situation about; the government has not subpoenaed Mr. Kallenbach, or raised questions about whether he, and only he, can testify as to certain facts. This is a case in which Mr. Kallenbach conducted his own investigation and then voluntarily drew up a lengthy affidavit setting forth his observations. Nor may Mr. Kallenbach, at this juncture, announce that he will henceforth act only as an advocate, because the choice to be a witness was made when the affidavit was filed.

For all these reasons, the government respectfully asks that Mr. Mark J. Kallenbach be ordered by this Court to cease acting as legal counsel to any party in this case in which he has recently filed a notice of appearance.

Dated: April 7, 2010

B. TODD JONES  
United States Attorney

s/ John Docherty

BY: JOHN DOCHERTY  
Assistant U.S. Attorney  
Attorney ID No. 17516X