Avoiding Conflicts Among Trust Clients

Hon. Teresa B. Whelan
Suffolk County Surrogate's Court, Riverhead

Eric W. Penzer, Esq.
Farrell Fritz, P.C., Uniondale

Fact Pattern/Questions

In 2010, Robert,[1] then 85 years of age, executed a pour-over Last Will & Testament along with a Revocable Trust. Both instruments were drafted by Natalia,[2] Robert's close friend and trusted attorney for many years. The trust provides that during Robert's lifetime, and that of his (second) wife, Jennifer,[3] the trustees – Robert and his son and daughter from his previous marriage, Laurence and Jill[4] -- have absolute discretion to distribute income and/or principal to Robert and/or Jennifer, as they may determine in their sole and absolute discretion or as Robert may direct in writing.

The trust agreement provides that, upon Robert's death, the assets of the trust are to be held in a continuing marital trust for Jennifer's lifetime benefit. Laurence and Jill are the nominated trustees. The marital trust provides for the payment of all income, and discretionary distributions of principal, to Jennifer. Upon Jennifer's death, the trust principal is payable in equal shares to Laurence's daughter, Ilene, and Jill's son, Ron; Jill's other son, Phillip, is currently incarcerated in connection with a non-violent felony and the trust contains no provision for his benefit.[5]

Shortly after its creation, Robert funded the trust with all of his assets, or so he thought. Robert, Laurence, and Jill administered the trust until Robert's death in 2015, after which Laurence and Jill administered the marital trust. At all times, Natalia provided legal counsel to the trustees.

Since Robert's death, Jill, a non-practicing lawyer and investment advisor, has been the laboring oar in the administration of the trust; Laurence has been passive. Jill has managed the investment of trust assets and fielded Jennifer's frequent requests for distributions of principal. Jill invested the trust assets conservatively, with the goal of providing a generous stream of income for Jennifer. She granted the majority of Jennifer's distribution requests, without regard for her other assets. As a result, the trust has significantly decreased in value over its term. In connection with the principal invasions, Jill did not consult with Laurence before agreeing to Jennifer's requests

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[1] Not to be confused with the Section Chair, Robert M. Harper, Esq.
[2] No relation to the Section's Immediate Past Chair, Natalia Murphy, Esq.
[3] Definitely not our Secretary, Jennifer Hillman, Esq.
[4] Not our Section's Chairperson-Elect Jill Beier, Esq., or Treasurer Laurence Kaiser, Esq.
[5] Neither Ilene nor Ron have ever served as Chairs of the Section, unlike Ilene Cooper, Esq., and Ronald Weiss, Esq. Moreover, our Past Chair Phillip Burke has, to our knowledge, never been incarcerated.

Jennifer has now died. Laurence's estranged daughter, Ilene, through her counsel Marion,[6] brought a Surrogate's Court proceeding seeking to compel Jill and Laurence to account for their proceedings as trustees of the trust. It is anticipated, based on preliminary discussions with her counsel, that Ilene will object to the accounting. She is of the opinion that the investment of trust assets was improper as the trustees disregarded the interests of the remainder beneficiaries. She also believes that the trustees abused their discretion in making excessive principal distributions to Jennifer, who had sufficient assets of her own and died with a substantial estate (which largely benefits her son from a prior marriage, Carl[7]). Ron does not share Ilene's opinions concerning the administration of the trust and seeks to support his mother and uncle.

[6] No relation to Past Chair Marion Fish, Esq.
[7] Carl, unlike our Past Chair Carl Baker, Esq., is an actor/waiter in Hollywood.

Questions

1. After an initial meeting, Jill seeks to retain you to represent her and Laurence, as well as Ron (Jill's son and remainder beneficiary of the marital trust), in the accounting proceeding. Can you take on the joint representation of all three prospective clients?

2. A conflict check has revealed that in the mid-1990's, your law partner, Meg,[8] represented Ilene and her husband, Gary.[9] After speaking with Meg, you learn that she represented them in the purchase of their home and also drafted their wills. Does Meg's prior representation of Ilene and Gary preclude you from undertaking representation of Jill and Laurence, adverse to Ilene, in the trust proceeding?

3. You have appeared in the proceeding on behalf of Jill and Laurence. In conference with the Court-Attorney Referee on the return date of citation, you learn from Ilene's counsel, Marion, that before Ilene hired her, Ilene discussed this matter with her friend, Betsy,[10] who is an employment law partner in your law firm, over a social lunch at the country club that they both belong to, disclosing her thoughts, strategies, and objectives. Separately, Ilene consulted, but did not hire, your law partner Ira. According to Marion, Ilene had several telephone conversations with Ira and met with him once. During that meeting, she showed him various documents concerning the matter and disclosed her thoughts, strategies, and objectives. She ultimately decided not to hire Ira and retained Marion instead. Marion has demanded that you withdraw as Jill and Laurence's counsel of record, threatening a disqualification motion if you refuse. Is there merit to Marion's position?

4. Jill and Laurence recently discovered a relatively small, but still substantial, bank account owned by Robert and never retitled to his trust. Accordingly, they hired Natalia to commence a proceeding on their behalf to probate Robert's will. Phillip (who was cited in the probate proceeding by reason of a bequest to him of Robert's valuable collection of duck decoys in a prior will), having served his prison sentence, appeared on the return date of citation though counsel, who requested examinations pursuant to SCPA §

[8] Meg is not related to our Past Chair Magdalen Gaynor, Esq.
[9] A genealogist has concluded that Gary is, coincidentally, a distant relative of Past Chair Gary Freidman, Esq. The two have never met.
[10] Not our Past Chair Elizabeth Hartnett, Esq.

1404 and made clear in conference Phillip's intention to object to probate and, additionally, to commence a proceeding to invalidate the trust. Counsel objects to Natalia's continued representation of Jill and Laurence in the probate proceeding, arguing that she is disqualified because she drafted the will and supervised its execution, and by reason of her representation of the trustees of the trust.

RULES OF
PROFESSIONAL CONDUCT

RULE 1.7:
CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (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 other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.9:
DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

RULE 1.18:
DUTIES TO PROSPECTIVE CLIENTS

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person who:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a).

RULE 3.7:
LAWYER AS WITNESS

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

CASE LAW

46 Misc.3d 1207(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Supreme Court, New York County, New York.

GEM HOLDCO, LLC, Gem Ventures, Ltd., Global Emerging Markets North America, Inc., Christopher Brown, Edward Tobin, and Demetrios Diakolios, Plaintiffs,
v.
CHANGING WORLD TECHNOLOGIES, L.P., CWT Canada II Limited Partnership, Resource Recovery Corporation, Jean Noelting, Ridgeline Energy Services, Inc., Dennis Danzik, Bruce A. MacFarlane, Tony Ker, Richard Carrigan, Douglas Johnson, and Kelly Sledz,, Defendants.

No. 650841/2013.
|
Jan. 9, 2015.

Attorneys and Law Firms

Greenberg Traurig LLP, for the Ridgeline Defendants.

Schlam Stone & Dolan LLP, for the CWT Defendants.

Opinion

SHIRLEY WERNER KORNREICH, J.

***1** Motion sequence numbers 008 and 009 are consolidated for disposition.

Defendants Changing World Technologies, L.P. (CWT), Ridgeline Energy Services, Inc. (Ridgeline) and Dennis Danzik (the Ridgeline Defendants) move to disqualify Schlam Stone & Dolan LLP (Schlam Stone) from serving as counsel for defendants CWT Canada II Limited Partnership (CWT Canada), Resource Recovery Corporation (RRC), and Jean Noelting (the CWT Defendants). Seq. 008. [1] The CWT Defendants oppose and move to supplement the record on the disqualification motion. Seq. 009. The motions are denied for the reasons that follow.

Background & Procedural History

The court assumes familiarly with its decisions on the motions to dismiss the first and third amended complaints (respectively, the FAC and the TAC), which set forth the allegations in this case. *See* Dkt. 120 & 201. When this action was originally commenced on March 11, 2013, the only alleged wrongdoers named as defendants were CWT Canada and RRC. CWT also was named as a defendant because plaintiff GEM Holdco, LLC (GEM) sought to enjoin the CWT Defendants from selling CWT to the Ridgeline Defendants. [2] Schlam Stone was retained and appeared on behalf of those originally named defendants. Bruce A. MacFarlane, RRC's director, chose to retain Schlam Stone because of his decade-long satisfaction with the legal services of its lead counsel, Jeffrey M. Eilender, Esq.

On April 29, 2013, GEM filed the FAC, asserting claims against the Ridgeline Defendants. Under the UPI (discussed in the prior decisions), the CWT Defendants have to pay for the Ridgeline Defendants' legal costs in this action. MacFarlane, therefore, suggested to Danzik, Ridgeline's principal, that Schlam Stone represent all defendants in this litigation. At the time, GEM's claims against both sets of defendants concerned the same issues (the subscription requests) and, hence, their incentives in this litigation appeared aligned.

After meeting with Mr. Eilender, Danzik signed a retainer letter dated May 2, 2013 (the Retainer Letter). *See* Dkt. 212. The Retainer Letter expressly and extensively contemplates future conflicts between the CWT Defendants and the Ridgeline Defendants:

> At the present time, based upon the facts known to us, including those supplied to us by you, we do not perceive any actual conflict of interest among CWT, RRC, CWT Canada, Ridgeline, you personally, and Mr. Noelting. We understand, of course, that in this case of joint representation, **there is a possibility that RRC, CWT Canada's and Mr. Noelting's status as ongoing clients of our firm could be perceived as adversely affecting our ability to represent you, Ridgeline, and CWT with complete loyalty and exercise**

> **of independent judgment. Certainly, joint representation can result in shared and divided loyalty.** Although we are not currently aware of any actual or reasonably foreseeable adverse effects of such shared or divided loyalty because everyone's interests appear to be aligned, **it is possible that issues may arise as to which our representation of you, Ridgeline, or CWT may be materially limited by our representation of RRC, CWT Canada, or Mr. Noelting.** We bring this possibility to your attention **so that you can decide for yourself whether you are sufficiently concerned with this possibility that you do not wish joint representation.** We also believe that there are significant advantages of joint representation. These include economy, efficiency, and the presentation of a united front based on the common interests of everyone in vigorously defending against GEM's claims.

***2** Dkt. 212 at 3 (emphasis added). The Retainer Letter continues:

> We anticipate that **if a conflict or dispute were to arise or if for any other reason joint representation does not continue, we would continue to represent RRC, CWT Canada, and Mr. Noelting.** Accordingly, we are now asking you, Ridgeline, and CWT to consent to our continued and future representation of RRC, CWT Canada, and Mr. Noelting, and to **agree not to assert any such conflict of interest or seek to disqualify us from representing RRC, CWT, and Mr. Noelting in this or any other matter, notwithstanding any adversity or litigation that may exist or develop.** By signing and returning to us the agreement and consent set forth at the end of this letter, you, Ridgeline, and CWT **are consenting to such an arrangement and waive any conflicts regarding that arrangement.**

Id. (emphasis added).

The Retainer Letter further clarifies what would happen if Schlam Stone withdrew from representing the Ridgeline Defendants:

> Notwithstanding such waiver and consent, depending on the circumstances, there remains some degree of risk that we would be disqualified from representing anyone, including RRC, CWT Canada, and Mr. Noelting, in the event of a dispute.
>
> In the event of our withdrawal from representation of you, Ridgeline, or CWT in this matter, you, Ridgeline, or CWT would likely be required to retain new counsel who might not be as familiar with the case as our firm would be, and substantial expense may be involved as such new counsel familiarizes him/herself with the case.

Id. at 4. The Retainer Letter discloses that the Ridgeline Defendants' confidential, attorney-client communications would be shared with the CWT Defendants. *Id.*

Immediately thereafter, Schalm Stone began representing the Ridgeline Defendants. On June 10, 2013, Schalm Stone filed a motion to dismiss the FAC, which the court decided in an order dated December 24, 2013. At a February 6, 2014 preliminary conference, a discovery schedule was ordered, which set a June 30, 2014 deadline for the production of ESI and a compliance conference for July 31, 2014. *See* Dkt. 135. Three weeks before that conference, on July 10, 2014, the parties called the court with ESI disputes. *See* Dkt. 182. Apparently, among other issues, defendants did not produce their ESI by the June 30 deadline. Following the court's instructions, on July 29, 2014, the parties filed a joint letter outlining their disputes. *See* Dkt. 192. Additionally, as directed by the court, Mr. Eilender filed an affirmation explaining why certain defendant custodians' ESI was not produced. *See* Dkt. 189. Mr. Eilender explained that he did not produce any ESI from the Ridgeline Defendants because his relationship with them had broken down, leading Mr.

Eilender to file a motion to withdraw on July 25, 2014. Mr. Eilender continues to represent the CWT Defendants.

After the letter and affirmation were filed, the parties (plaintiffs' counsel, Mr. Eilender, and Mr. Danzik, who participated *pro se*) called the court to discuss adjourning the motion to withdraw and the July 31 conference. The court adjourned the motion until August, but it was agreed that plaintiffs and the CWT Defendants would appear on July 31 to discuss their ESI, but all disputes concerning the Ridgeline Defendants' ESI would be resolved at a September 11, 2014 conference, at which time new counsel for the Ridgeline Defendants had to be ready to discuss such matters. *See* Dkt. 193. The July 31 conference was held. Two weeks later, the parties resolved Mr. Eilender's withdrawal motion by stipulation dated August 12, 2014, pursuant to which Greenberg Traurig LLP appeared as new counsel on behalf of the Ridgeline Defendants. *See* Dkt. 196. Additionally, in an order dated August 28, 2014, the court decided the pending motion to dismiss the TAC.

***3** On September 10, 2014, the parties submitted another joint discovery letter in advance of the September 11 conference. *See* Dkt. 204. In that letter, the parties informed the court that plaintiffs and the Ridgeline Defendants had reached a settlement. At the September 11 conference, many of the discovery disputes were resolved, and further production deadlines were agreed to in a stipulation filed the following day. *See* Dkt. 207. However, at that conference, counsel for the Ridgeline Defendants discussed moving to disqualify Schalm Stone from representing the CWT Defendants, even though the Ridgeline Defendants had already settled with plaintiffs. A continuing conflict supposedly still existed due to forthcoming cross-claims by the CWT Defendants against the Ridgeline Defendants and recently commenced Canadian litigation between the parties, in which the Ridgeline Defendants allege they were fraudulently induced to enter into the UPI because they were supposedly lied to about CWT's plant producing renewable diesel fuel (even though Danzik was running the company and likely was in a position to conduct due diligence to ensure that the plant was producing the right kind of fuel). That lawsuit was commenced in Canada pursuant to the UPI's forum selection clause.

The Ridgeline Defendants filed the instant motion to disqualify on September 19, 2014. On September 22, 2014, Schlam Stone, on behalf of the CWT Defendants, filed an answer and third-party complaint, asserting counterclaims, cross-claims, and third-party claims. *See* Dkt. 217 & 219. The CWT Defendants opposed the instant motion on October 14, and the Ridgeline Defendants replied on October 22. Oral argument was scheduled for October 28.

However, two days before oral argument, on October 26, 2014, the CWT Defendants filed a sur-reply [Dkt. 251–257], which the court has not considered. After oral argument on October 28, the court reserved decision on the instant motion, and expressly denied Mr. Eilender's request to consider his sur-reply papers. *See* Dkt. 277 (10/28/14 Tr. at 16–17). To ensure an appeal of right under CPLR 5701(a)(2), [3] on November 4, 2014, Mr. Eilender filed a motion for leave to consider his sur-rely, which the court is now denying, with one caveat. As discussed below, the court has considered the case of *Zador Corp. v. Kwan,* 31 CalApp4th 1285 (1995) as persuasive authority; it was discussed at oral argument. [4] All other arguments made in the sur-reply have not been considered and, in any event, are irrelevant because the motion is, as explained below, decided in the CWT Defendants' favor based on arguments made in the original briefing.

Discussion

It is well established that the right to be represented by counsel of one's choice is "a valued right [and] any restrictions must be carefully scrutinized." *Ullmann–Schneider v. Lacher & Lovell–Taylor PC,* 110 AD3d 469, 469–70 (1st Dept 2013), quoting *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.,* 69 N.Y.2d 437, 443 (1987). Moreover, "in the context of an ongoing lawsuit, disqualification ... can [create a] strategic advantage of one party over another." *Id.* "[M]otions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts Such motions result in a loss of time and money, even if they are eventually denied. This Court and others have expressed concern that such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused." *Solow v. W.R. Grace & Co.,* 83 N.Y.2d 303, 310 (1994); *see Mayers v. Stone Castle Partners, LLC,* 2015 WL 94652, at *3 (1st Dept Jan. 8, 2015) (disqualification motions made for "tactical purposes" should be denied, even if confidential information was transmitted). For these reasons, "movant

must meet a heavy burden of showing that disqualification is warranted." *Ullmann–Schneider,* 110 AD3d at 470, citing *Broadwhite Assocs. v. Truong,* 237 A.D.2d 162 (1st Dept 1997).

***4** As the Second Department recently explained:

> The disqualification of an attorney is a matter which rests within the sound discretion of the court. A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion. [It is improvident] to disqualify [a law firm when the former clients/current defendants executed a waiver in which they] specifically waived any conflict of interest that might arise from [the law firm's] representation of the plaintiff [if t]he waiver fully informed [ ] defendants of the potential conflict of interest[. B]y executing the waiver, [ ] defendants consented to have [the law firm] represent [plaintiff] notwithstanding that conflict.

Grovick Props., LLC v. 83–10 Astoria Blvd., LLC, 120 AD3d 471, 473–74 (2d Dept 2014) (citations and quotation marks omitted).

The Ridgeline Defendants argue that Schlam Stone may not represent the CWT Defendants because doing so would run afoul of Rules 1.7 and 1.9 of the New York Rules of Professional Conduct. *See* 22 NYCRR 1200. As the CWT Defendants correctly aver, Rule 1.7 governs conflicts of interest between current clients and, hence, is inapplicable because the instant motion concerns conflicts between current and former clients.[5] The Ridgeline Defendants concede this point. Rule 1.9, however, is applicable, since it governs duties to former clients. Rule 1.9 provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> (b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
>
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

It is undisputed that Rule 1.9 applies. It is further undisputed that, in the absence of a conflict waiver, Rule 1.9 would prohibit Schlam Stone from further representing the CWT Defendants in this action.

***5** The issue here is whether the conflict wavier in the Retainer Letter permits Schlam Stone to continue representing the CWT Defendants. The Ridgeline Defendants aver that the sort of confidential information shared with an attorney in a joint representation inherently gives rise to the very unfair advantages that Rule 1.9 seeks to prohibit. This concern, they argue, warrants disqualification. In opposition, the CWT

Defendants rightly explain that the Ridgeline Defendants have it backwards for reasons best articulated in *Zador:*

> [W]hen the prior representation involves joint clients, and the subsequent action relates to the same matter, the substantial relationship test adds nothing to disqualification analysis. This is because a substantial relationship between the former representation and the subsequent action is inherent in such situations. In other words, clients A and B are jointly represented by C until C discovers a conflict between the legal position of A and B. Client B retains separate counsel. Client A then sues Client B. In these circumstances, a substantial relationship will always exist between C's prior representation of B and the litigation between A and B In addition, although the substantial relationship test determines whether confidences were likely disclosed, in a joint client situation, confidences are necessarily disclosed. In fact, the joint client relationship is an exception to the attorney-client privilege.

Zador, 31 CalApp4th at 1294 (emphasis added).

Though the parties dispute whether confidential information was transmitted, this is both unremarkable and irrelevant for the reasons set forth in *Zador.* If the transmission of confidential information in a joint representation vitiated the validity of conflict waiver, notwithstanding the Retainer Letter's disclaimers to the contrary, virtually all conflict waivers would be ineffectual.

Unsurprisingly, as a result, New York courts have recognized that, where a valid conflict wavier exists, the traditional concerns about confidential information are inapposite. *See St. Barnabas Hosp. v. New York City Health & Hosps. Corp.,* 7 AD3d 83, 90 (1st Dept 2004). [6]

Indeed, the validity of conflict waivers is well established. *See Centennial Ins. Co. v. Apple Bldrs. & Renovators, Inc.,* 60 AD3d 506 (1st Dept 2009), citing *St. Barnabas,* 7 AD3d at 91; *see also Grovick,* 120 AD3d at 604. For a conflict waiver to be valid, the former client must provide informed consent. *St. Barnabas,* 7 AD3d at 9, citing *Schneider v. Saiber Schlesinger Satz & Goldstein, LLC,* 260 A.D.2d 321 (1st Dept 1999) and *Yasuda Trust & Banking Co., v. 250 Church Assocs.,* 206 A.D.2d 259 (1st Dept 1994); *see Snyder v. Snyder,* 57 AD3d 1528 (4th Dept 2008); *see also Ferolito v. Vultaggio,* 99 AD3d 19, 27 (1st Dept 2012) ("an attorney may represent such clients where a disinterested lawyer would believe that the lawyer can competently represent the interest of each client and that each consents to the representation after full disclosure of the implications of simultaneous representation as well as the advantages and risks involved").

***6** The Ridgeline Defendants further argue that the alleged fraud at issue in the new Canadian lawsuit merits deeming the conflict waiver unenforceable. [7] The Ridgeline Defendants maintain that at the time Danzik signed the conflict waiver, he was not in a position to provide informed consent because he assumed the interests of both sets of defendants were aligned. This, however, does not matter. Aside from the questionable nature of the fraud claim, [8] the very point of a conflict waiver is that some future, unforeseen conflict may arise, misaligning the incentives underlying the joint defense. That was made clear in the Retainer Letter.

Indeed, if the conflict was expected, it is unlikely a joint defense agreement would have been entered into. It is to no avail to allege that the other defendant secretly knew about a conflict, since if that mere allegation warranted disqualification, disqualification would be a *fait accompli.* Prior knowledge of the conflict is inherently intertwined with the merits of the claim giving rise to it, making it virtually impossible to adjudicate on a disqualification motion. Since, as here, it is premature to reach the merits on a disqualification motion, there is no way to rebut the alleged conflict. Ergo, if a claim of knowledge of the conflict were enough to warrant disqualification, disqualification would almost always result.

The Ridgeline Defendants, nonetheless, argue this does not matter and that equity militates in favor of disqualification in this case. The court disagrees. As the CWT Defendants persuasively argue, if disqualification

were warranted in this case, it would follow that virtually all conflict waivers would be unenforceable, a result which is at odds with this state's legal policy. Such a result would significantly impair the ability of co-defendants to mount a joint defense, leading to significant litigation inefficiencies and increased legal costs for litigants, who would unnecessarily have to hire more lawyers to perform duplicative and expensive work.

A review of the portion of the Retainer Letter cited earlier makes clear that Danzik provided informed consent. In fact, the Ridgeline Defendants do not meaningfully quibble with the general sufficiency of the waiver language in the Retainer Letter. Rather, they argue, disqualification is warranted because "[t]he facts here are extreme." *See* Dkt. 249 at 6. Simply put, they contend the joint defense agreement was predicated on the litigation being about a non-payment dispute with plaintiffs, not a fraudulent inducement case between defendants. *See id.* at 6–7 ("Had Danzik known the underlying transaction was a complete sham he would never have signed the [Retainer Letter] and agreed to a joint defense."). [9]

Leaving aside the merits of the fraud claim (which, additionally, may well have a reasonable reliance problem since Danzik was running the very company with the alleged bad diesel fuel for approximately 4 months before the UPI was executed and 6 months before agreeing to a joint defense), it is of no moment that the specifics of the conflict may not have been foreseen. The Retainer Agreement expressly contemplated unforeseen conflicts. *See* Dkt. 212 at 3 ("joint representation can result in shared and divided loyalty. Although we are not currently aware [10] of any actual or reasonably foreseeable [conflicts], it is possible that issues may arise as to which our representation of you may be materially limited by our representation of [the CWT Defendants] **We bring this possibility to your attention so that you can decide for yourself whether you are sufficiently concerned with this possibility that you do not wish joint representation.**") (emphasis added).

***7** Even though the specific nature of the conflict (i.e. dispute over the fuel) may not have been expressly foreseen, it was quite foreseeable a dispute may arise under the UPI. The UPI contains approximately 15 pages of robust representations and warranties, pre-closing covenants, and conditions precedent to closing. *See* Dkt. 241 at 21–35. The UPI also contains extensive provisions concerning disputes arising under the UPI, including choice of law and forum selection clauses. *See id.* at 35–42. Conflicts arising from the sale of a company are not rare occurrences, and Danzik knows that. After all, Danzik, aside from being a sophisticated businessman, represents himself to be both a lawyer and a scientist. *See* Dkt. 234 at 8 (Danzik told MacFarlane that he is a scientist and "an experienced litigator").

Of course, at the time of sale, one cannot predict every possible permutation of conflict that may lead to litigation. If such foresight were required, conflict waivers would be ineffectual. There is no rule that the specific details of a conflict be itemized in a waiver for it to be valid. Rather, the rule of informed consent simply requires the client to be in a position to make an informed decision about whether a potential conflict is a risk worth taking on for the benefits of joint representation. Here, a dispute over the sale was not unforeseeable, and therefore, the wavier covers it. For these reasons, regardless of the existence of a conflict between the CWT Defendants and the Ridgeline Defendants and regardless of the fact that Schlam Stone may be privy to the Ridgeline Defendants' confidential information, by signing the Retainer Letter, Danzik waived his right to seek Schlam Stone's disqualification. "To fail to give effect to [Danzik's] consent under these circumstances would constitute an unwarranted interference with [the CWT Defendants'] right to retain counsel of [their] choice, and with [Mr. Eilender's] ability to retain a longstanding client." *See St. Barnabas,* 7 AD3d at 84. Accordingly, it is

ORDERED that the motion by defendants Changing World Technologies, L.P., Ridgeline Energy Services, Inc., and Dennis Danzik to disqualify Schlam Stone & Dolan LLP from serving as counsel for defendants CWT Canada II Limited Partnership, Resource Recovery Corporation, and Jean Noelting is denied; and it is further

ORDERED that a status conference will be held on January 29, 2015 after oral argument on Motion 10, before which the parties must meet and confer about all outstanding discovery disputes, which will be resolved at the conference.

All Citations

46 Misc.3d 1207(A), 7 N.Y.S.3d 242 (Table), 2015 WL 120843, 2015 N.Y. Slip Op. 50014(U)

Footnotes

1 Former defendants Tony Ker and Richard Carrigan were part of this motion, but since there are no longer any outstanding claims against them, they have withdrawn from the motion without prejudice. *See* Dkt. 249 at 7 n. 2.

2 The court denied GEM's injunction motion in an order dated March 13, 2013. *See* Dkt. 53.

3 *See 1471 Second Corp. v. Nat of N.Y. Corp.,* 2014 WL 7372925 (2d Dept Dec. 30, 2014), citing *Serradilla v. Lords Corp.,* 12 AD3d 279, 280 (1st Dept 2004).

4 Though *Zador* is a California case decided under California law, New York law is similar. More importantly, as set forth below, *Zador,* which involved similar circumstances and a virtually identical conflict waiver, contains an excellent discussion of how to approach conflicts arising during a joint representation. It should be noted that *Zador,* decided in 1995, continues to be widely cited by California state and federal courts. *See, eg., S.E .C. v. Tang,* 831 FSupp2d 1130, 1140 (ND Cal 2011) (noting that *Zador* is the leading California case on joint representations); *see also Sharp v. Next Entm't, Inc.,* 163 CalApp4th 410, 429–30 (2008).

5 *See Anderson & Anderson LLP–Guangzhou v. N. Am. Foreign Trading Corp.,* 45 Misc.3d 1210(A), at *3 (Sup Ct, N.Y. County 2014) (noting that the Rule covers, *inter alia,* conflicts between the lawyer and the client).

6 Therefore, the Ridgeline Defendants' policy based arguments, such as preventing “the appearance of impropriety” [*see Solow,* 83 N.Y.2d at 309], are also irrelevant. *See Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.,* 31 AD3d 144, 153 (1st Dept 2006) (“the motion court erred in finding that the appearance of impropriety' warranted disqualification of [ ] counsel. In doing so, the court ignored three basic principles of law on this subject: that if the representation does not violate another ethical or disciplinary rule, there can be no appearance of impropriety”) (emphasis added); *see also Mayers,* 2015 WL 94652.

7 They also argue that the CWT's Defendants' cross-claims, which, *inter alia,* also concern alleged breaches of the UPI, warrant disqualification. However, as discussed herein, disputes under the UPI were foreseeable and, thus, are not grounds for disqualification.

8 Section 3.6 of the UPI states that, except as otherwise warranted in the contract, the buyer is accepting the assets as is, with no warranty as to their condition or suitability for any purpose. *See* Dkt. 241 at 24.

9 It should be noted that the Ridgeline Defendants cite no authority supporting the arguments that the date the conflict arose or that it involved related litigation are bases for disqualification. To the contrary, such arguments have been rejected by the First Department. *See St. Barnabas,* 7 AD3d at 92 (rejecting argument “that the retention letter waives only those future conflicts that might arise from the employment matters, for which St. Barnabas retained the Rosenman firm at the time the letter was executed, and not conflicts arising from the SMS matter, for which St. Barnabas did not retain the Rosenman firm until two years later”).

10 Mr. Eilender, in a sworn affirmation, represents that he did not know about the fuel issue at the time. *See* Dkt. 240 at 17. The court takes him at his word, since there is no reason to believe that Mr. Eilender would risk his reputation or license by lying. Additionally, in reply, Danzik protests that Mr. Eilender never discussed the express terms of the Retainer Letter with him. However, Danzik, who is quite sophisticated, is not legally entitled to maintain ignorance of the express terms of the Retainer Agreement and the conflict waiver contained therein. *See Golden Stone Trading, Inc. v. Wayne Electro Sys., Inc.,* 67 AD3d 731, 732 (2d Dept 2009) (“A party who executes a contract is presumed to know its contents and to assent to them”), accord *Metzger v. Aetna Ins. Co.,* 227 N.Y. 411, 416 (1920); *see also Holcomb v. TWR Express, Inc.,* 11 AD3d 513, 514 (2d Dept 2004) (even those illiterate in English are not excused from understanding the contract). This is particularly true here given Danzik's sophistication, education and law degree. Moreover, all Rule 1.9 requires is written consent. *See Grovick,* 120 AD3d at 604 (“The waiver fully informed the Astoria defendants of the potential conflict of interest and, by executing the waiver, the Astoria defendants consented to have Brooks represent them notwithstanding that conflict”). In other words, it is the content of the writing and the client's signature that matters. An inquiry into what was discussed between the attorney and the client would be burdensome, intrusive, and utterly irrelevant. Rule 1.9, like most writing requirements (e.g., the statute of frauds), obviates the need to test the veracity of alleged subsequent or contemporaneous oral representations that contradict the writing.

130 A.D.3d 506, 14 N.Y.S.3d
14, 2015 N.Y. Slip Op. 06040

**1 Gem Holdco, LLC, et al., Plaintiffs
v
Ridgeline Energy Services, Inc., et al., Appellants-Respondents, and CWT Canada II Limited Partnership et al., Respondents-Appellants, et al., Defendants. (And a Third-Party Action.)

Supreme Court, Appellate Division,
First Department, New York
15694N, 650841/13
July 9, 2015

CITE TITLE AS: Gem Holdco, LLC
v Ridgeline Energy Servs., Inc.

HEADNOTE

Attorney and Client
Disqualification
Waiver of Conflict of Interest

Greenberg Traurig, LLP, New York (William C. Silverman of counsel), for appellants-respondents.
Schlam, Stone & Dolan LLP, New York (Jeffrey M. Eilender of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 9, 2015, which denied defendants Changing World Technologies, L.P., Ridgeline Energy Services, Inc. and Dennis Danzik's (the Ridgeline defendants) motion to disqualify Schlam Stone & Dolan LLP from representing defendants CWT Canada II Limited Partnership, Resource Recovery Corporation, and Jean Noelting (the CWT defendants), and denied the CWT defendants' motion to supplement the record, unanimously affirmed as to the motion to disqualify, and the appeal therefrom otherwise dismissed, without costs, as moot.

The motion court properly denied the Ridgeline defendants' motion to disqualify Schlam Stone & Dolan LLP from representing the CWT defendants, since in their retainer agreement with Schlam Stone & Dolan LLP, the Ridgeline defendants specifically waived any conflict of interest that might arise from the firm's representation of both them and the CWT defendants (*see St. Barnabas Hosp. v New York City Health & Hosps. Corp.*, 7 AD3d 83 [1st Dept 2004]). The Ridgeline defendants' contention that they did not give informed consent to the firm's asserting claims against them in this litigation is belied by the clear language of the retainer agreement and the unit purchase agreement. They "cannot now compel the disqualification of . . . counsel simply because the representation to which [they] consented has since devolved into litigation" (*see id.* at 92 [internal quotation marks omitted]).

Nor does the fact that the firm obtained confidential information from the Ridgeline defendants warrant disqualification ***507** since the Ridgeline defendants knowingly and expressly agreed in the retainer agreement to the firm's use of their confidential information and the disclosure of that information to the CWT defendants (*see id.* at 90).

**2 We have considered the Ridgeline defendants' remaining contentions and find them unavailing. Concur —Mazzarelli, J.P., Sweeny, Saxe, Richter and Manzanet-Daniels, JJ.

Unreported Disposition
40 Misc.3d 1234(A), 980 N.Y.S.2d 276 (Table), 2013 WL 4605989 (N.Y.Sur.), 2013 N.Y. Slip Op. 51420(U)

***1** In the Matter of the Application of Allen M. Kaufman, M.D., As Co-Executor of the Estate of

v.

Ruth Kaufman, Deceased, and Co-Trustee of the Trust Created Under Article Third (B) of the Last will and Testament of Ruth Kaufman, To Revoke the Letters Testamentary and Letters of Trusteeship Issued to Kenneth Kaufman, as Co-Executor and Co-Trustee. In the Matter of the Application of Allen M. Kaufman, M.D., As Co-Executor of the Estate of RUTH KAUFMAN, Deceased, and Co-Trustee of the Trust Created Under Article Third (B) of the Last will and Testament of Ruth Kaufman, To Revoke the Letters Testamentary and Letters of Trusteeship Issued to Kenneth Kaufman, as Co-Executor and Co-Trustee. In the Matter of the Application of Allen M. Kaufman, M.D., As Co-Executor of the Estate of HYMAN KAUFMAN, Deceased, To Revoke the Letters Testamentary Issued to Kenneth Kaufman, as Co-Executor.

355054/H
Sur Ct, Nassau County
Decided on August 28, 2013

CITE TITLE AS: Matter of Kaufman

ABSTRACT

Attorney and Client
Disqualification

Kaufman, Matter of, 2013 NY Slip Op 51420(U). Attorney and Client—Disqualification. (Sur Ct, Nassau County, Aug. 28, 2013, McCarty III, J.)

APPEARANCES OF COUNSEL

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OPINION OF THE COURT

Edward W. McCarty III, J.

This is a motion for an order disqualifying the law firm of Farrell Fritz, P.C. as counsel for Allen M. Kaufman, the executor of the estate of Ruth Kaufman and the estate of Hyman Kaufman and the trustee of the Trust Created under Article Third (B) of the last will and testament of Ruth Kaufman.

FACTS:

Allen M. Kaufman (hereinafter "Allen"), and his brother, Kenneth Kaufman (hereinafter "Ken"), are co-executors, co-trustees and the sole beneficiaries of the estates of their parents, Ruth Kaufman and Hyman Kaufman. On May 15, 2013, Ken filed a notice of motion to disqualify Farrell Fritz, P.C., as attorneys for Allen, on the grounds that Ken had met with two Farrell Fritz, P.C. (hereinafter "Farrell Fritz") attorneys, Michael Stafford and Frank Santoro (hereinafter "Stafford" and "Santoro"), on October 6, 2011. The meeting was for the purpose of Ken retaining Farrell Fritz to represent him in his litigation against Allen in connection with his parents' estates.

Prior to the meeting with Stafford and Santoro, Ken had several telephone conversations with Stafford and sent Stafford six emails with attached documents relating to Ken's parents' estates and trusts. Ken's emails also addressed what he was "most concerned about" regarding

the litigation. Stafford responded to Ken's emails by stating, "thanks for the six emails containing the background of your matter. Frank Santoro, Esq. and [I] will review the material before our meeting on Thursday." At the meeting, Ken provided Stafford and Santoro with "four tote bags full of documents" concerning his parents' estates, which were reviewed by Stafford and Santoro. Additionally, at the meeting Ken "disclosed his inner most fears and concerns relating to the pending litigation." After the meeting, Ken emailed Santoro asking for advice about a particular issue and ***2** Santoro responded that he will "talk to John about it" [1] to determine what would be a "sore for Allen to pick at" regarding the litigation. Ultimately however, Ken did not retain Farrell Fritz. Therefore, Farrell Fritz did not open a new file, bill Ken for the firm's time, prepare memoranda or retain any documents other than the documents Ken sent to Stafford via email.

In February 2013, Allen retained Farrell Fritz to represent him in the ongoing litigation against Ken in connection with his parents' estates. John R. Morken, (hereinafter "Morken") the lead attorney on the matter, performed a conflict check at Farrell Fritz upon his retention. The conflict check did not yield any results because Farrell Fritz had not opened a new file for Ken. For over two months, Farrell Fritz represented Allen and participated in conferences and a mediation session. Ken was unaware that Morken was from the same firm as Stafford and Santoro and therefore did not object to Farrell Fritz's representation of Allen during this time period.

Once Ken was advised that Morken worked with Stafford and Santoro, Ken requested that Farrell Fritz voluntarily withdraw from representing Allen. Farrell Fritz declined to withdraw as counsel, on the grounds that the meeting with Ken was held 16 months prior, Stafford and Santoro did not recall the details of their meeting or the documents that they had reviewed, and they had never discussed the meeting with any other Farrell Fritz attorney. Additionally, once Farrell Fritz became aware of the conflict they proceeded with screening measures and erected a "Chinese Wall" [2] around Stafford and Santoro. Farrell Fritz advised Stafford and Santoro not to work on Allen's matter or discuss their earlier meeting with Ken with any member of Farrell Fritz's trust and estates department. The members of Farrell Fritz's trust and estates department were also instructed not to discuss Allen's case with Stafford and Santoro. Ken, however, unsatisfied with these measures, proceeded with this motion.

ANALYSIS:

According to Ken, " the Court must disqualify Farrell Fritz from representing Allen against Ken Farrell Fritz clearly has a conflict of interest which warrants its immediate ***3** disqualification." Although "the Court takes the issue of a potential conflict of interest very seriously" (*Susan K. v Thomas C.* 25 Misc 3d 1207(A) 2 [Fam Ct, Monroe County 2009]), the assertion that a consultation between an attorney and a prospective client can lead to per se disqualification is erroneous.

Lawyers have an ongoing duty of loyalty and confidentiality to former clients, thus "lawyers may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter" (*Kassis v Teacher's Ins. & Annuity Assoc.,* 93 NY2d 611, 615-16 [1999]). Therefore, if a party can establish 1) the existence of a prior attorney-client relationship and 2) that the former and current representations are both adverse and substantially related, then such party can seek to disqualify the attorney (*Solow v Grace & Co.,* 83 NY2d 303, 308 [1994]). Moreover, the conflict may be imputed to the entire firm, because there is a presumption of shared confidences across a law firm (*Solow v Grace & Co.,* 83 NY2d 303, 309 [1994]).

However, the Court of Appeals in *Solow v Grace* made it clear that such a presumption is rebuttable and that the entire law firm is not subject to a "per se disqualification" as it "is unnecessarily preclusive as it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of former client's [sic] confidences and secrets" (*Solow v Grace & Co.,* 83 NY2d 303, 309 [1994]). Therefore, a law firm can rebut the presumption as long as it can establish that any information acquired by the disqualified lawyer is "unlikely to be significant or material in the litigation" (*Kassis v Teacher's Ins. & Annuity Assoc.,* 93 NY2d 611, 678 [1999]). If the presumption is rebutted, then a "Chinese Wall" must be erected around the disqualified lawyer in order to avoid firm disqualification (*Kassis v Teacher's Ins. & Annuity Assoc.,* 93 NY2d 611, 678 [1999]).

Here, an attorney-client relationship was established between Ken and Farrell Fritz because an initial

consultation creates an attorney-client relationship even if the lawyer is not subsequently retained (*Burton v Burton,* 39 AD2d 554 [2d Dept 1988]). Moreover, a substantial relationship is defined as matters that are "essentially the same" (*Sgromo v St. Joseph's Hosp. Health Ctr.*, 245 AD2d 1096, 1097 [4th Dept 1997]). Farrell Fritz's representation of Allen and the prior meeting between Ken and the two Farrell Fritz attorneys concerned the same matter. Furthermore, it is undisputed that Ken and Allen's interests are adverse, thus satisfying the second prong of the analysis. However, although Ken has been able to meet his burden for disqualifying Stafford and Santoro, individually, Farrell Fritz is not thereby automatically disqualified (*Kassis v Teacher's Ins. & Annuity Assoc.,* 93 NY2d 611, 677 [1999]). Instead, Farrell Fritz has the burden of rebutting the presumption that the entire firm should be disqualified based on Stafford and Santoro's disqualification. Therefore, the court must determine if Farrell Fritz can rebut the presumption by establishing that the information acquired by Stafford and Santoro is not significant or material to the current litigation (*Kassis v Teacher's Ins. & Annuity Assoc.,* 93 NY2d 611, 618 [1999]).

Farrell Fritz has submitted affirmations, which reflect that Stafford and Santoro do not recall the details of the meeting with Ken or their review of any of his documents. Therefore, Farrell Fritz asserts that the lack of recollection renders the information immaterial or insignificant. However, lack of recall is not an indication that the material learned is insignificant or immaterial. In a case similar to the present matter, the defendant met with two attorneys from the same firm for an initial ***4** consultation that lasted an hour and twenty minutes but did not culminate in retention. When the opposing plaintiff retained this same firm, mid-proceeding, the defendant moved to disqualify the firm. The firm, however, believed that disqualification was not necessary because the attorneys were unable to recall the meeting and what was discussed. The court held that because the defendant had met with two attorneys it "doubles the likelihood" that a memory can be triggered, as "one never knows what event will stimulate one's memory and bring recollections to the surface." Therefore, lack of recall was not a persuasive argument to avoid firm disqualification. (*I Heng Ngan v Wei Su,* 13 Misc 3d 1229(A) [Sup Ct, Queens County 2006]).

Moreover, although Farrell Fritz asserts that it is not clear what details were discussed during the consultation "it is reasonable to infer that, during the course of the interview with the defendant [the attorney] obtained confidential or strategically valuable information about the parties ..." (*Burton v Burton,* 39 AD2d 554, 555 [2d Dept 1988]). In the present case, Ken provided "four tote bags full of documents" necessary for the litigation proceeding and Ken's emails addressed his utmost concerns about the litigation. Under *Kassis* "all a movant must show is a risk that client confidences were acquired" (*Rodeo Family Enterprises, LLC v Matte*, 31 Misc 3d 1227(A), 4 [Sup Ct, Nassau County 2011]). Here however, Ken has unequivocally established that the material obtained by Stafford and Santoro was confidential and strategically valuable.

Furthermore, Farrell Fritz relies heavily on *Cummin v Cummin*, 264 AD2d 637 [1st Dept 1999], believing it to be particularly instructive in this matter. However, even if the court were to apply *Cummin,* the facts in the instant case are essentially different. In *Cummin,* an attorney retained by the plaintiff discovered that the firm's managing partner had a consultation with the defendant six years earlier that did not culminate in retention. Although the firm billed the defendant, a new file was not opened and the firm did not have any notes or memoranda on the matter. The court found that because the firm did not have any notes or memoranda regarding the consultation, and there was no indication that the conflicted attorney shared any information with his colleagues, the presumption of shared confidences was rebutted. However, Ken's consultation with Farrell Fritz took place only 16 months prior to Allen's retention of Farrell Fritz and, unlike the attorney in *Cummin*, Santoro actually retained documents relating to the consultation. Additionally, whereas in *Cummin* it was clear that no confidences were shared, in this case Santoro did advise Ken that he "will speak to John" [3] about Ken's matter. Although Santoro avers in his affirmation that he did not share this information with John it is certainly not sufficient to "free [Ken] from apprehension and certainty that [his] interests will not be prejudiced" (*Cardinale v Golinello,* 43 NY2d 288, 296 [1977]).

Based on the foregoing, the court cannot conclude that Farrell Fritz has established that the material acquired by Stafford and Santoro is unlikely to be significant or material in the current litigation. Farrell Fritz is unable

to rebut the presumption of disqualification; accordingly the court does not need to discuss the erection of the "Chinese Wall" or an adequate screen. Based on all the facts presented here and because "doubts as to the existence of a conflict of interest must be resolved in favor of disqualification" (*Sperr v. Gordon L. Seaman, Inc.,* 284 AD2d 449, 457 [2d Dept 2001]), the motion to disqualify Farrell Fritz, P.C., is granted.

Dated: August 28, 2013 ***5**

EDWARD W. McCARTY III

Judge of the

Surrogate's Court

FOOTNOTES

Footnotes

1 The reference to "John" is apparently a reference to John R. Morken, a Farrell Fritz partner who is a member of the firm's trust and estates department.

2 A "Chinese Wall" is a screening device that separates a disqualified attorney from a conflicting case and enables the other attorneys in the firm to proceed with the representation; "These procedures aim to isolate the disqualification to the lawyer or lawyers infected with the privileged information that is the source of the ethical problem, and thereby to allow other attorneys in the firm to carry on the questioned representation free of any taint of misuse of confidences. Typical walling procedures include prohibiting the tainted attorney(s) from having any connection with the case or receiving any share of the fees attributable to it, banning relevant discussions with or the transfer of relevant documents to or from the tainted attorney(s), restricting access to files, educating all members of the firm as to the importance of the wall, and separating, both organizationally and physically, groups of attorneys working on conflicting matters."(The Chinese Wall Defense to Law-Firm Disqualification, 128 U. PA. L. REV.
677, 678 [1980]).

3 Farrell Fritz does not concede that this reference to "John" was a reference to John R. Morken, who currently represents Allen.

44 Misc.3d 1216(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Surrogate's Court, County.

In the Matter of the ESTATE OF
Hyman KAUFMAN, Deceased.

No. 2011–368209/C.
|
July 30, 2014.

Attorneys and Law Firms

Damianos Markou, Esq., Moritt Hock & Hamroff, LLP, Garden City, NY, for respondent, Kenneth Kaufman.

Howard Meyers, Esq., Meyers Meyers & Tonachio, LLP, New York, NY, for respondent, Merrill Lynch.

James M. Wicks, Esq., Farrell & Fritz, P.C., Uniondale, NY, for petitioner, Allen M. Kaufman.

Donald Novick, Esq., Novick & Associates, Huntington, NY, co-counsel for Allen Kaufman.

Opinion

EDWARD W. McCARTY III, J.

***1** In these proceedings concerning the estate of Hyman Kaufman, the motion to renew and reargue is granted and upon reargument the court confirms its prior decision (40 Misc.3d 1234[A] [2013]), which granted a motion to disqualify counsel.

These proceedings involve disputes between Kenneth Kaufman and Allen Kaufman executors/beneficiaries of the estate of their father Hyman Kaufman. In its prior decision, the court granted the motion of Kenneth Kaufman to disqualify the firm of Farrell Fritz, P.C., on the grounds that he had previously consulted with the firm and thereafter the firm represented his adversary, Allen Kaufman. In the decision, the court concluded that Kenneth Kaufman was a prior client who communicated significant confidential information to the firm. The motion to disqualify Farrell Fritz was granted, pursuant to Rule 1.9 of the New York Rules of Professional Conduct (22 NYCRR 1200.0 et seq).

The applicable rule, however, is Rule 1.18 pertaining to prospective clients, as there was never a formal attorney-client relationship between Farrell Fritz and Kenneth Kaufman.

In October 2011, two attorneys from Farrell Fritz, Michael Stafford and Frank Santoro met with Kenneth Kaufman. It is undisputed that the subject of the consultation related to the administration of the estate of Hyman Kaufman. Kenneth Kaufman delivered documents (which were returned) and exchanged e-mails with counsel. There was a subsequent meeting on October 6, 2011. The firm was not retained by Kenneth Kaufman and no file was opened. In February 2013, Farrell Fritz attorney John Morken met with Allen Kaufman, an engagement letter was signed and the firm commenced representation in connection with a petition to revoke letters testamentary which had been issued to Kenneth Kaufman. A conflicts check performed by Farrell Fritz was negative, as no file had been opened after the consultation with Kenneth. On May 6, 2013, Henry Klosowski, attorney for Kenneth Kaufman, informed Morken of the prior consultation with Farrell Fritz and Kenneth Kaufman then made this motion to disqualify. Morken states and it is undisputed that he was previously unaware of the consultation as it was never entered into the firm's computer. Kenneth Kaufman alleges that in the first months after the petition was filed, he did not realize that Morken was associated with the same firm as Stafford and Santoro.

Rule 1.18 was promulgated, in part, in response to the practice of consulting an attorney for the purpose of disqualifying the attorney from representing an adversary. The rule limits the protection afforded a prospective client as opposed to a former client (Restatement [Third] of the Law Governing Lawyers, sec 15, Comment [1][b]). Rule 1.18 provides in part:

> "(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."

Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

***2** A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)."

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client; (ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm; (iii) the disqualified lawyer is apportioned no part of the fee therefrom; and (iv) written notice is promptly given to the prospective client; and (3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter, (e) A person who: (1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client—lawyer relationship; or (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a).

Under Rule 1.18 the threshold for disqualification is raised. In circumstances involving a former client, the standard is whether the information conveyed is significant or material (*Town of Oyster Bay v. 55 Motor Ave. Co., LLC,* 109 AD3d 549 [2d Dept 2013]). Under Rule 1.18, disqualification is required only where the information is significantly harmful. Where the information is significantly harmful, the conflict affecting the participating attorney is imputed to other lawyers in the firm (Rule 1.18[c]).

The description of the initial consultation with Kenneth Kaufman, coupled with the production of documents and exchange of e-mails which contained confidential information, gives rise to a reasonable inference that the information conveyed was significantly harmful (*Zalewski v. Shelroc Homes, LLC,* 856 F Supp 2d 426 [NDNY 2012]).

***3** Rule 1.18[c] provides for the imputation of knowledge to other attorneys in the firm. Allen Kaufman attempts to overcome the presumption by the submission of the affidavits of Santoro and Stafford which state that they did not communicate confidential information. In addition, the "non-consulting" attorneys have provided affidavits stating that they did not receive information concerning the estate.

Allen Kaufman challenges the accuracy of the affidavits. In particular, there is a vigorous dispute as to whether a discussion of "John" in an e-mail refers to a member of Farrell Fritz or another firm.

In *Arista Records LLC v. Lime Group LLC* (2011WL 672254 [SDNY]), there was a delay in implementing a formal screen around an attorney who possessed confidential information acquired at his previous employment. The attorney's affidavit stated that confidential information was not disclosed to attorneys in the current firm. The motion to disqualify was denied, primarily on the grounds that the affidavit was not disputed. Here, where the affidavits are disputed, they cannot be accepted as conclusive proof that Santoro and Stafford were the only attorneys who received confidential information.

Rule 1.18 requires that the knowledge of the client's confidences be imputed to the other attorneys in the firm unless effective screening procedures were implemented, as provided in subdivision [d][2][ii]. These procedures are

generally referred to as a "Chinese wall." The effectiveness of the screen is customarily determined without a hearing.

Among the factors to be considered in determining the effectiveness of a Chinese wall are the frequency of communications between attorneys and access to records § NYC Eth. Op.2013–1 [2013]).

A Chinese wall is intended to be pre-emptive. Therefore, timeliness is the pre-dominant factor in determining its effectiveness (*Decora, Inc. v. DW Wallcovering, Inc.,* 899 F Supp 132 [SDNY1995]; *Papanuicolaou v. Chase Manhattan Bank, N.A.,* 720 F Supp 1080 [SDNY1989]).

Ideally, a screen should be erected when the firm accepts a case which presents an ethical problem (*LaSalle Nat. Bank v. Lake County,* 703 F.2d 252 [7th Cir.1983]).

In this case, the failure of the conflicts check to reveal the first consultation resulted in the representation of Allen Kaufman without any checks in place. It appears that the firm made a serious attempt to construct a screen immediately upon learning of the conflict. However, a screen must foreclose the possibility of disclosures. In March 2013, when the screen was constructed, the opportunity for the dissemination of information had already been extant for approximately two and a half years.

In addition, between February 2013, when Farrell Fritz was retained, and May 2013, when the prior consultation was revealed, the attorneys in the firm were not forewarned to avoid discussion of the Kaufman estate. During this period, none of the attorneys in the firm, including Santoro and Stafford, were aware of the impending conflict and there was no impediment to the free disclosure of information.

***4** In assessing the effectiveness of a screen, consideration is given to the size and structure of the firm. It is expected that attorneys in a small firm are likely to exchange confidences and ideas about pending cases (see *Kassis v. Teacher's Ins. and Annuity Assn.,* 93 N.Y.2d 611 [1999]; *Solow v. W.R. Grace & Co.,* 83 N.Y.2d 303 [1994]). Here, it is not the size of the firm as a whole, which is relevant. The initial consultation and subsequent representation involved attorneys within a single department, thus increasing the likelihood of communications concerning the estate.

In this case, all of the attorneys had the opportunity to access the e-mails, prior to the construction of the screen (*Poma v. Ipek,* 27 Misc.3d 1206[A] [Sup. Ct, New York County 2010]). In addition, the effectiveness of the screen was undermined by the transfer of the emails to general counsel. The information necessary to defend the motion to disqualify should have been extracted and then forwarded.

Further, the fact that the e-mails continued between the attorneys and the prospective client suggest that the initial consultation was not limited in its scope, as required by Rule 1.18

A former prospective client is entitled to freedom of apprehension and to certainty that his interests will not be prejudiced by disclosure of confidential information (*Nationwide Associates, Inc. v. Targee Street Internal Medicine, P.C,* 303 A.D.2d 728 [2d Dept 2003]); *P.C. Forest Park Associates Ltd. Partnership v. Kraus,* 175 A.D.2d 60 [1st Dept 1991]).

For the foregoing reasons, the court adheres to its original conclusion.

This is the decision and order of the court.

All Citations

44 Misc.3d 1216(A), 997 N.Y.S.2d 99 (Table), 2014 WL 3739575, 2014 N.Y. Slip Op. 51133(U)

126 A.D.3d 1
Supreme Court, Appellate Division,
First Department, New York.

Matthew R. MAYERS, Plaintiff–Respondent,
v.
STONE CASTLE PARTNERS, LLC,
et al., Defendants–Appellants.
Stone Castle Partners, LLC, Plaintiff–Appellant,
v.
Matthew R. Mayers, et al.,
Defendants–Respondents.

Jan. 8, 2015.

Synopsis

Background: In two joined lawsuits, employee commenced action against company alleging that he was wrongfully terminated without cause, and seeking injunctive and declaratory relief, as well as damages, and company commenced action against employee asserting for engaging in numerous illegal schemes while employed there. The Supreme Court, New York County, Shirley Werner Kornreich, J., 2014 WL 1258259, granted employee's motion to disqualify employer's counsel. Employer appealed.

Holdings: The Supreme Court, Appellate Division, Saxe, J., held that:

[1] telephone interview involved confidential information, but

[2] disqualification of employer's counsel was not warranted under the circumstances.

Reversed.

West Headnotes (5)

[1] Attorney and Client
Disqualification proceedings;standing

Movant seeking disqualification of opponent's counsel bears heavy burden.

4 Cases that cite this headnote

[2] Attorney and Client
Disqualification in general

Party has right to be represented by counsel of its choice, and any restrictions on that right must be carefully scrutinized. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[3] Attorney and Client
Interests of former clients

Where prospective client consults attorney who ultimately represents party adverse to prospective client in matters that are substantially related to the consultation, prospective client is entitled to obtain attorney's disqualification only if it is shown that the information related in the consultation could be significantly harmful to him or her in the same or substantially related matter. Rules of Prof.Conduct, Rule 1.18, N.Y.Ct.Rules, § 1200.0.

5 Cases that cite this headnote

[4] Attorney and Client
Labor relations

Telephone interview between employee and attorney for law firm which represented company more than a year and a half later in litigation against that employee involved confidential information, for purposes of employee's motion to disqualify company's counsel; employee made call to attorney for firm after employer's prospective sale of collateralized debt obligation investment had fallen through, and in call employee allegedly informed attorney that he was calling in his personal capacity and not in connection with his employment or association with his employer and of his company's present ownership of preferred shares in that investment and his future

plans regarding preferred shares, and asked if attorney would represent his company against bank based on trustee's failure to follow instructions in Direction to Sell.

1 Cases that cite this headnote

[5] Attorney and Client

Labor relations

Disqualification of employer's counsel was not warranted in two joined actions; conveyed information did not have potential to be significantly harmful to employee in matter from which he sought to disqualify counsel. Rules of Prof.Conduct, Rule 1.18, N.Y.Ct.Rules, § 1200.0.

3 Cases that cite this headnote

Attorneys and Law Firms

****59** Quinn Emanuel Urquhart & Sullivan, LLP, New York (Sanford I. Weisburst, Kevin S. Reed and David M. Cooper of counsel), and Morrison Cohen LLP, New York (Danielle C. Lesser of counsel), for appellants.

Jaffe & Asher, LLP, New York (Marshall T. Potashner and Michael L. Ihrig, II of counsel), for respondents.

DAVID FRIEDMAN, J.P., ROLANDO T. ACOSTA, DAVID B. SAXE, SALLIE MANZANET–DANIELS, and JUDITH J. GISCHE, JJ.

Opinion

SAXE, J.

***3** Stone Castle Partners, LLC (SCP) and its affiliates challenge a ruling disqualifying their chosen counsel. We hold that counsel's disqualification was not required under these circumstances.

SCP, defendant in Action # 1 and plaintiff in Action # 2, manages more than $5 billion in assets. Matthew R. Mayers, plaintiff in Action # 1 and defendant in Action # 2, as well as George Shilowitz and Joshua S. Siegel, defendants in Action # 1, were members and "Management Investors" with SCP; their rights and obligations were defined under SCP's Fifth Amended and Restated Limited Liability Company Agreement (LLC Agreement). In 2009, through a subsidiary, SCP acquired a supermajority position in the preferred shares of Tropic CDO IV (Tropic IV), a collateralized debt obligation investment. Under Tropic IV's governing documents, the owner of a supermajority of its preferred shares was entitled to direct the CDO's trustee to sell the underlying collateral. Relying on that authority, SCP attempted to bring about the sale of Tropic IV's collateral at deeply discounted prices in exchange for a "consent payment," so called because it is paid to holders of the preferred shares by the collateral buyers in exchange for their consenting to the collateral's sale. However, Tropic IV's other investors, including Hildene Capital Management, a holder of Tropic IV notes and a client of SCP, protested that SCP's actions constituted a scheme to defraud them by stripping Tropic IV's collateral in exchange for a bribe. The trustee, Wells Fargo, when presented with SCP's directive to sell and the other investors' objections to the sale, commenced a federal ****60** interpleader action on November 2, 2009 to resolve the issue. SCP caused its subsidiaries to withdraw their consent to the buyer's offer for the ***4** Tropic IV collateral, and the prospective buyer eventually withdrew its offer.

By the fall of 2010, SCP had decided to avoid the expressed concerns of antagonized investors and important clients by arranging for its subsidiaries to divest themselves of their holdings of Tropic IV preferred shares, which totaled 2 million preferred shares. In an auction conducted by the SCP subsidiaries in November 2010, Mayers, through his wholly owned entity RRWT, purchased those 2 million preferred shares of Tropic IV.

While it is Mayers's position that SCP must have known that he was the shares' purchaser, it is SCP's position that the purchase was made secretly and without its knowledge, that, having given up its involvement with Tropic IV equity in the interest of maintaining its investors' trust, it would not knowingly have permitted one of its managers to engage in the very conduct that had undermined the investors' trust.

Thereafter, Mayers continued to purchase Tropic IV preferred shares in order to acquire a supermajority. In early 2011 he formed TP Investments LLC to hold those Tropic IV preferred shares, and by June 2012 he had acquired control of a supermajority of Tropic IV preferred

shares, allowing him to carry out the plan that SCP had attempted and then abandoned.

In November 2012, through RRWT and TP Investments and under the assumed name "Kricket Hound," Mayers solicited a $750,000 consent payment from a prospective purchaser of certain securities held by Tropic IV as collateral, and sent a "Direction to Sell" letter to the trustee. Although this communication did not contain Mayers's name, it included his personal telephone number. The Direction to Sell was provided by the trustee to interested parties, including holders of Tropic IV notes, one of whom forwarded it to Joshua Siegel of SCP, with an inquiry regarding whether SCP was connected to the Direction to Sell.

By December 5, 2012, having learned of Mayers's attempt to arrange the sale of Tropic IV collateral in exchange for a $750,000 consent payment, SCP retained Quinn Emanuel Urquhart & Sullivan, LLP, which it had used in other legal matters, to represent SCP against Mayers.

By letter dated January 22, 2013, SCP demanded that Mayers sell his interests in Tropic IV preferred shares, and Mayers complied within three weeks, allegedly without gain. Nevertheless, ***5** on January 29, 2013, SCP terminated Mayers for cause on the grounds that he had personally engaged in transactions adverse to SCP's interests, had concealed those activities from SCP, and had failed to answer honestly SCP's questions about his disputed activities.

Mayers commenced an action on February 6, 2013, alleging that he was wrongfully terminated without cause, and seeking injunctive and declaratory relief, as well as damages. On November 25, 2013, SCP, represented by Quinn Emanuel, commenced an action against Mayers, claiming that Mayers engaged in illegal schemes while employed at SCP.

Mayers's motion to disqualify Quinn Emanuel as counsel for SCP arose out of a telephone call Mayers made to Quinn Emanuel attorney Jonathan Pickhardt in May 2011, after SCP's prospective sale of Tropic IV collateral had fallen through, in which Mayers allegedly informed Pickhardt that he was calling in his personal capacity and not in connection with his ****61** employment or association with SCP. According to Mayers's complaint, he informed Pickhardt of his company's present ownership of Tropic IV preferred shares and his future plans regarding the CDO's preferred shares, and asked if Pickhardt would represent RRWT against Wells Fargo based on the trustee's failure to follow the instructions in the Direction to Sell.

It is undisputed that Pickhardt declined the representation. However, Pickhardt admittedly discussed the Mayers telephone call with Quinn Emanuel attorney Kevin S. Reed, who was lead counsel for SCP.

In seeking Quinn Emanuel's disqualification, Mayers claimed that Pickhardt had received confidential information from him during their consultation and that, after SCP retained the firm, the firm used that information in SCP's action against him. Mayers argued that the disclosure of his communications to Pickhardt regarding his purpose in the Tropic IV investment went to the heart of the SCP's counter-suit asserting that Mayers had breached his duties under the LLC Agreement, since the communication divulged a scenario that Mayers "was trying to go around the back of [SCP]." Mayers also contended that without the information in his communications to Pickhardt, Quinn Emanuel might not have come up with the strategy, in SCP's action against him, of subpoenaing for deposition certain people that he dealt with.

[1] **[2]** A movant seeking disqualification of an opponent's counsel bears a heavy burden (*Ullmann–Schneider v. Lacher & Lovell–* ***6** *Taylor PC,* 110 A.D.3d 469, 973 N.Y.S.2d 57 [1st Dept.2013]). A party has a right to be represented by counsel of its choice, and any restrictions on that right "must be carefully scrutinized" (*id.* at 469–470, 973 N.Y.S.2d 57, *quoting S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.,* 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 508 N.E.2d 647 [1987]). This right is to be balanced against a potential client's right to have confidential disclosures made to a prospective attorney subject to the protections afforded by an attorney's fiduciary obligation to keep confidential information secret (*see* New York Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.18; *see also Jamaica Pub. Serv. Co. v. AIU Ins. Co.,* 92 N.Y.2d 631, 637, 684 N.Y.S.2d 459, 707 N.E.2d 414 [1998]; *Sullivan v. Cangelosi,* 84 A.D.3d 1486, 923 N.Y.S.2d 737 [3d Dept.2011]). Courts should also examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and

deprive an opponent of quality representation (*see e.g. Solow v. Grace & Co.,* 83 N.Y.2d 303, 310, 610 N.Y.S.2d 128, 632 N.E.2d 437 [1994]). The decision of whether to grant a motion to disqualify rests in the discretion of the motion court (*see Macy's Inc. v. J.C. Penny Corp., Inc.,* 107 A.D.3d 616, 968 N.Y.S.2d 64 [1st Dept.2013]).

Issues relating to the prospective client relationship based on events that occurred after April 2009 are governed by Rule 1.18 of the Rules of Professional Conduct (22 NYCRR 1200.0), rather than the repealed DR 5–108 (22 NYCRR 1200.27). Cases from this Court addressing conduct that occurred prior to the April 2009 enactment of the new rules are not controlling here (*see e.g. Justinian Capital SPC v. WestLB AG, N.Y. Branch,* 90 A.D.3d 585, 934 N.Y.S.2d 807 [1st Dept.2011]; *Bank Hapoalim B.M. v. WestLB AG,* 82 A.D.3d 433, 918 N.Y.S.2d 49 [1st Dept.2011]).

[3] The former Code of Professional Responsibility did not have a specific rule that governed disclosures during a prospective client consultation. Rule 1.18 of the Rules of Professional Conduct fills that void. It provides:

> ****62** "(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a 'prospective client.'
>
> "(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> ***7** "(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter *if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter,* except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)" (emphasis added).

Thus, where a prospective client consults an attorney who ultimately represents a party adverse to the prospective client in matters that are substantially related to the consultation, the prospective client is entitled to obtain the attorney's disqualification only if it is shown that the information related in the consultation "could be significantly harmful" to him or her in the same or substantially related matter (*id.,* Rule 1.18[c]).

[4] Initially, we reject the contention of SCP and its affiliates that the May 2011 telephone interview did not involve confidential information. Rule 1.6(a) of the new Rules of Professional Conduct (22 NYCRR 1200.0) defines "[c]onfidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." Notwithstanding SCP's observation that Mayers ultimately disclosed the same information in his June 2013 complaint, the telephone communication between Mayers and Pickhardt at least fits within subdivision (b), since the information imparted was likely to be detrimental to Mayers.

[5] Nevertheless, disqualification is not warranted because the conveyed information did not have the potential to be significantly harmful to Mayers in the matter from which he seeks to disqualify counsel. The affidavits and the parties' respective pleadings establish that Mayers's plans with regard to the Tropic IV investment had been made generally known, and Mayers even attests that SCP, Siegel and Shilowitz were cognizant of his Tropic IV investment purchase via his wholly owned entity (at the SCP auction of Tropic IV preferred shares), that they knew of his investment strategy, and that he had offered ***8** them an opportunity to participate in the investment. Mayers did not meet the heavy burden he bore as a prospective client seeking to disqualify Quinn Emanuel, a year into the litigation, from representing the SCP parties.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 28, 2014, which granted Matthew R. Mayers's motion to disqualify Quinn Emanuel Urquhart & Sullivan, LLP as counsel for the SCP parties should be reversed, on the law and the facts, without costs, and the motion denied. The appeal from the order, same court and Justice, entered on or about April 24, 2014, which denied the motion of the SCP parties for reargument,

**63 should be dismissed, without costs, as taken from a nonappealable order.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 28, 2014, reversed, on the law and the facts, without costs, and the motion denied. Appeal from order, same court and Justice, entered on or about April 24, 2014, dismissed, without costs.

All concur.

All Citations

126 A.D.3d 1, 1 N.Y.S.3d 58, 2015 N.Y. Slip Op. 00295

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------x

Probate Proceeding, Will of : File No.: 2016-1114

SOPHIE DZIUBKOWSKI, :

: **DECISION and ORDER**

Deceased. :

----------x

LÓPEZ TORRES, S.

The following submissions were considered on this motion:

Papers	Number
Notice of Motion by proponent dated August 10, 2016, Affirmation of Edwin I. Gorski, Esq., dated August 10, 2016, and Exhibits	1, 2, 3
Affirmation of Richard B. Feldman, Esq., in Opposition and Exhibits	4, 5
Affirmation of Edwin I. Gorski, Esq., in Reply dated September 20, 2016	6
Notice of Motion by objectant dated September 28, 2016 Affirmation of Richard B. Feldman, Esq., in Opposition and Exhibits	7, 8, 9
Objectant's Memorandum of Law dated September 28, 2016	10
Affirmation of Edwin I. Gorski, Esq., in Opposition dated October 17, 2016	11
Affidavit of Lucius Tyrasinski dated October 14, 2016	12

Before the court is the motion of the proponent, Lucius Tyrasinski (proponent), for an order disqualifying Rosenberg Feldman Smith LLP (Rosenberg) from serving as counsel to the objectant, Barbara Hunter (objectant), and to dismiss her objections.

Also before the court is the motion of objectant which seeks the continuation of the depositions of the proponent and the attorney-drafter, now counsel for the proponent (attorney-drafter), and the production of documents pursuant to a Demand For Inspection and Production, dated April 22, 2016 (the demand), and two subpoenas served on the attorney-drafter dated June 29, 2016 and August 2, 2016 (subpoenas).

Background

The proponent filed a petition seeking to admit to probate an instrument purporting to be the last will and testament of Sophie Dziubkowski (decedent) dated April 16, 2013 (the propounded instrument) that names proponent as executor and Our Lady of Czestochowa (beneficiary), a religious institution, as the sole beneficiary. The objectant, who is the decedent's sole distributee, is not a beneficiary.

The objectant appeared by Rosenberg and filed objections verified on May 13, 2016, which were amended on May 25, 2016, to the propounded instrument.[1] The proponent was issued preliminary letters testamentary pending the probate contest.

On April 22, 2016, the objectant served the demand seeking pre-objection disclosure pursuant to SCPA 1404. SCPA 1404 examinations of two of the subscribing witnesses were conducted on May 12, 2016, despite the proponent's failure to produce the demanded documents with his initial response dated May 13, 2016. Thereafter, the attorney-drafter was served with a subpoena, on June 29, 2016, to take his deposition. The subpoena also called for the production at the deposition of certain documents contained in an annexed Schedule A. On August 2, 2016, a second subpoena was served on the attorney-drafter requesting essentially the same documents. [2]

The attorney-drafter neither appeared to be deposed nor provided documents demanded by the subpoenas. Thereafter on August 31, 2016, the proponent served an amended response to the demand (amended response), which amended the proponent's answers to his initial response. For

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[1] Initially, Rosenberg had appeared and filed objections for both the objectant and Suzanne Williams, a niece of the decedent. Rosenberg later amended the objections to name only the objectant, and not Williams, who is not a distributee, and therefore, has no standing to pursue objections .

[2] The documents requested in the subpoenas and the demand are virtually identical, except that the final subpoena also requests the decedent's medical records.

example, when asked to supply "all drafts of the April 16, 2013 will," the initial response provides "no drafts of the last will and testament of the decedent of April 16, 2013 are in custody or possession." In contrast, the amended response states that the attorney-client privilege and the attorney-work product rule set forth under CPLR 3101(b) and (c) preclude such production.

As the parties' disclosure dispute continued, on August 10, 2016, the proponent moved for an order seeking the disqualification of Rosenberg as counsel to the objectant and for the dismissal of objections. Despite the pending motion to disqualify Rosenberg, the parties finally scheduled the deposition of the attorney-drafter on September 7, 2016. During the deposition, the attorney-drafter declined to answer and objected to most of the questions posed.

As a result, the objectant filed a separate motion seeking an order compelling the proponent and the attorney-drafter to comply with the subpoenas and the demand and to continue their depositions.

The proponent's motion to disqualify Rosenberg and to dismiss objections was heard on October 4, 2016. The proponent relies upon the affirmation of counsel, the pleadings, disclosure demands and responses, subpoenas, a partial deposition transcript of a subscribing witness to the propounded instrument, portions of the propounded instrument, and other sundry documents. The objectant relies on his counsel's affirmation, and various disclosure demands and responses.

The objectant's motion to compel disclosure was heard on October 18, 2016. The objectant relies upon the affirmation of counsel, disclosure demands and responses, subpoenas, and deposition transcripts. The proponent relies on proponent's affidavit and the attorney-drafter's affirmation.

The two motions are now consolidated for decision.

Proponent's Motion for Disqualification

The proponent seeks the disqualification of the objectant's counsel. The proponent states that while no actual conflict exists between the proponent and objectant's counsel, he is concerned about a purported "conflict" between the objectant and Suzanne Williams (Williams), both, it is asserted, are represented by Rosenberg. Williams, a niece of the decedent, is not a distributee in this proceeding, and therefore is not an interested party in this litigation. Nonetheless, Rosenberg had initially filed objections on behalf of both the objectant and Williams, which were thereafter amended to remove Williams as an "objectant." The proponent asserts that

despite the amendment, Rosenberg is still acting as counsel for both the objectant and Williams in this proceeding. The proponent avers that this constitutes a "conflict" between the objectant and Williams, because Williams' standing to inherit would only take effect if objectant's interest was eliminated. The proponent also alleges that Williams is financing the litigation on the objectant's behalf. The objectant avers that there has never been an attorney-client relationship between the proponent and the objectant's counsel, and therefore, no basis for disqualification rests.

A party seeking to disqualify an attorney based on conflict of interest must establish (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the former client and current client are materially adverse. *Scafuri v DeMaso*, 71 A.D. 3d 755 (2nd Dep't 2010). Here, it is undisputed that no attorney-client relationship exists or existed between the proponent, as movant, and opposing counsel. The proponent's sole basis for disqualification is that opposing counsel may have a conflict with his own client, an allegation that does not form a basis for the relief sought. Accordingly, since the proponent has filed to satisfy even the first prong of this three part test, the branch of proponent's motion to disqualify Rosenberg is denied.

Proponent's Motion To Dismiss Objections

The branch of proponent's motion for an order dismissing objections is also denied.

First, the proponent states that objectant has failed to respond to its document demand dated June 20, 2016. As it appears that the objectant has now responded to the disclosure demands, the proponent's motion to dismiss based on the failure of the objectant to comply with disclosure is denied as moot.

Next, the proponent avers that the objectant has not stated a case of actual fraud. Generally, an objection is a responsive pleading that must be in writing and verified and must conform to all the requirements of responsive pleadings. SCPA 302(1)(a). Such pleadings must be sufficiently particular to give the court and parties notice of what is intended to be proved. SCPA 302(2). *See, Matter of Dixon,* 7 Misc. 2d 812 (Surr. Ct. Westchester County 1956), *order aff'd*, 2 A.D. 2d 987 (2nd Dep't 1956); *Matter of Payson*, 5/20/86 N.Y.L.J. 14, col. 4 (Surr. Ct. Nassau County); *see also, Matter of Schneider*, 64 Misc. 2d 299 (Surr. Ct. Westchester County 1970). Here, the objection for fraud is sufficiently plead, and the proponent is not precluded from

demanding a bill of a particulars for an amplification of the pleadings. Therefore, the proponent's motion to dismiss the fraud objection due to a failure to state "actual fraud" is denied.

Finally, the proponent avers that dismissal is warranted because he has established the due execution of the propounded instrument by a preponderance of the evidence. Although the proponent has not expressly set forth the statutory basis for the relief that he seeks, the court surmises that proponent seeks summary judgment under CPLR 3212. In opposition, the objectant avers that the proponent's entire motion is premature, because discovery is ongoing. She avers that significant document disclosure is outstanding, and that the attorney-drafter has been extremely uncooperative in her efforts to obtain disclosure necessary for the prosecution of objections.

Summary judgment may be premature as disclosure has not been concluded, and thus a further analysis is unecessary. *Aurora Loan Services, LLC v. LaMattina & Associates, Inc.*, 59 A.D.3d 578 (2nd Dep't 2009) ("A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment.") Accordingly, the proponent's motion to dismiss objections on this basis is denied.

Objectant's Motion for Disclosure and Continued Depositions

The objectant alleges that the proponent has failed to adequately respond to the demand and the subpoenas, specifically, the attorney-drafter has failed to provide the demanded documents, has raised invalid objections during depositions, and has deliberately and purposefully refused to answer questions during his deposition. For instance, objectant alleges that the attorney-drafter refused to answer:

> [a]ny questions regarding his relationship to the Decedent, the Petitioner or the Shrine. In fact he became agitated when certain questions were asked. He repeatedly interrupted the questioning and stonewalled certain obviously relevant areas of inquiry.

Therefore, the objectant seeks an order directing compliance with the demand and subpoenas and granting the objectant an opportunity to continue the depositions of both the proponent and the attorney-drafter after the documents sought are produced.

The proponent asserts that the attorney-client privilege and attorney-work product under CPLR 3010 (b) and (c) precludes the disclosure sought by the objectant.

Post-objection disclosure is governed by the CPLR, which provides that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR 3101(a). Supervision of disclosure is generally left to the sound discretion of the trial court.

Argumedo v 303 Tenants Corp., 246 A.D. 2d 616 (2nd Dep't 1998). Generally, the language "material and necessary" is "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Publ. Co.*, 21 N.Y. 2d 403, 406 (1968), *Matter of Beryl*, 1118 A.D. 2d 705 (2nd Dep't 1986). It has been interpreted as nothing more or less than relevant. *See*, Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3101:5.

In will contests, relevant matters are those which may be the basis of objections to the probate of the propounded instrument. *Matter of Delisle*, 149 A.D. 2d 793 (3rd Dep't 1989), *Matter of Ettinger*, 7 Misc. 3d 316 (Surr. Ct. Nassau County 2005) (both examination and discovery permitted under SCPA 1404 are broad), 2 *Harris N.Y. Estates: Probate Admin. & Litigation* § 24:144 (6th ed.). Documents obtained may include, but are not limited to, the attorney-drafter's copies of prior wills, billings, federal and state tax returns, inventories, and the decedent's financial documents. *Matter of Delisle*, *supra*. Since requests for documents contained in the disclosure demand and the two subpoenas are nearly identical, the court will examine 14 document requests sought to be compelled in Schedule A of the objectant's subpoena.

Requests Numbered 1, 2, 5, and 7
Prior Testamentary Instruments and Drafts of the
Propounded Instrument and Related Documents

The objectant may seek disclosure of prior testamentary instruments and drafts of the propounded instrument. A will can be compelled from any person under SCPA 1401 regardless of its date. Further, prior testamentary instruments should be discoverable unless there is some other basis for issuing a protective order. *Matter of Manoogian*, 2014 W.L. 726923 (Surr. Ct. New York County 2014). Moreover, the production of drafts of the propounded instrument are permissible and relevant, and are not privileged as claimed by the proponent. Indeed, pursuant to CLPR 4503 (b):

> In any action involving the probate, validity or construction of a will or, after the grantor's death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

Pursuant to this statute, production of the requested documents is permissible and clearly not shielded by the attorney-client privilege. Further, assuming such disclosure would tend to

disgrace the memory of the decedent, the party asserting privilege bears the burden of establishing the application of privilege. *People v. Mitchell*, 58 N.Y.2d 368, 373 (1983). Aside from the conclusory allegation of preclusion by virtue of the attorney-client privilege, proponent offers no other assertion justifying the failure to respond to this request. Moreover, drafts of the propounded instrument, and notes taken by the attorney-drafter concerning the propounded instrument clearly fall under "preparation" of any will. Likewise, any communications between the attorney-drafter and the decedent are also relevant and material to the objections of the propounded instrument. Accordingly, the proponent and attorney-drafter shall produce copies of all drafts of the propounded instrument and all prior wills and codicils prepared for and/or executed by the decedent, and all documents as enumerated in Schedule A of the subpoena numbered 1, 2, 5, and 7, if any, within 30 days of service of this decision and order with notice of entry.

Requests Numbered 3, 4, 10, 11, and 12
Retainer Agreements and Invoices

Production of a copy of the retainer agreement, invoices and evidence of payments between the decedent and the attorney-drafter are relevant and material. Further, payments from the proponent and the residuary beneficiary under the propounded instrument to the attorney-drafter are entirely discoverable. *Matter of Delisle*, *supra*. Accordingly, the proponent and attorney-drafter shall produce a copy of documents requested in Schedule A of the subpoena numbered 3, 4, 10, 11, and 12, if any, within 30 days of service of this decision and order with notice of entry.

Requests Numbered 6, 8, and 9
Documents pertaining to conversations between the attorney-drafter, the proponent and the beneficiary under the propounded instrument concerning the decedent.

The proponent has not established that these requests, which pertain to conversations that the attorney-drafter may have had with the proponent and the beneficiary about the decedent, are properly shielded by the attorney-client privilege in light of the provisions of CPLR 4503(b) and in light of the fact that the attorney-drafter represented the decedent concerning her estate plan. *Matter of Mitchell*, *supra*. Accordingly, the proponent and attorney-drafter shall produce a copy of documents requested in Schedule A of the subpoena numbered 6, 8 and 9, if any, within 30 days of service of this decision and order with notice of entry.

Request Numbered 13
Financial Records

The proponent shall produce a copy of the financial records in Request 13 of Schedule A within 30 days of service of this decision and order with notice of entry. *See Matter of Delisle, supra.* If the proponent is not in possession of such records, he shall provide properly executed authorizations to the objectant in compliance with 22 NYCRR 207.27 within 30 days of service of this decision and order with notice of entry.

Medical Records

The decedent's medical records during the period permitted by 22 NYCRR 207.27 are entirely discoverable. If the proponent is in possession of such medical records, copies of same shall be provided within 30 days from the notice of entry of this decision and order. If the proponent is not in possession of such records, he shall provide properly executed HIPAA authorizations to the objectant in compliance with 22 NYCRR 207.27 within 30 days of service of this decision and order with notice of entry.

Responses to Disclosure and Depositions

With respect to all disclosure demands set forth above, if a request has been complied with, or if there are no such documents, the court directs proponent to provide a sworn statement to the effect that there are no other documents in his possession or within his control that would satisfy a particular request within 30 days of service of this decision and order with notice of entry. If the proponent is not in possession of documents, but has control of same by virtue of his having been appointed preliminary executor, he shall provide objectant with appropriately executed authorizations so that objectant may obtain such documents within 30 days of service of this decision and order with notice of entry.

The depositions of the attorney-drafter and the proponent shall continue within 30 days after the aforementioned documents, including financial and medical records, if any, are received by the objectant.

Conclusion

For all the foregoing reasons, the proponent's motion is denied and the objectant's motion is granted to the extent set forth herein.

This constitutes the decision and order of the court.

Dated: December 20, 2016

HON. MARGARITA LÓPEZ TORRES

Surrogate

124 A.D.3d 1266
Supreme Court, Appellate Division,
Fourth Department, New York.

In the Matter of the ESTATE OF
David C. PETERS, Deceased.

Jan. 2, 2015.

Synopsis

Background: Daughter of testator brought action seeking to prohibit Surrogate's Court from exercising jurisdiction over any real property situated within Native American reservation territory that was bequeathed to her in testator's will. The Surrogate's Court, Genesee County, Robert C. Noonan, S., denied motion by testator's mother, who challenged probate of testator's will, to disqualify attorney of testator's daughter. Mother appealed.

[Holding:] The Supreme Court, Appellate Division, held that testator's mother waived her objection to opposing counsel's representation of testator's daughter.

Affirmed.

West Headnotes (8)

[1] Evidence
Records and decisions in other actions or proceedings

On motion by testator's mother to disqualify attorney of testator's daughter during probate proceedings, Appellate Division would take judicial notice of records submitted to Appellate Division in related appeals.

Cases that cite this headnote

[2] Attorney and Client
Interests of former clients

Attorney and Client
Disqualification proceedings;standing

A party seeking disqualification of its adversary's lawyer must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse; only where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise.

3 Cases that cite this headnote

[3] Attorney and Client
Disqualification in general

Inasmuch as the right to counsel of choice, while not absolute, is a valued right, any restrictions thereon must be carefully scrutinized.

Cases that cite this headnote

[4] Attorney and Client
Disqualification in general

A court reviewing a party's motion to disqualify its adversary's lawyer must balance the vital interest in avoiding even the appearance of impropriety with a party's right to representation by counsel of choice and the danger that such motions can become tactical derailment weapons for strategic advantage in litigation.

Cases that cite this headnote

[5] Attorney and Client
Disclosure, waiver, or consent

In determining whether a party has waived any objection to opposing counsel's conflict of interest, courts consider when the challenged interests became materially adverse to determine if the party could have moved for disqualification at an earlier time.

Cases that cite this headnote

[6] Attorney and Client

Disclosure, waiver, or consent

If a party moving for disqualification of opposing counsel was aware or should have been aware of the facts underlying an alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party's representation.

1 Cases that cite this headnote

[7] Attorney and Client

Disclosure, waiver, or consent

Where a party's motion to disqualify opposing counsel is made in the midst of litigation where the moving party knew of the alleged conflict of interest well before making the motion, it can be inferred that the motion was made merely to secure a tactical advantage.

1 Cases that cite this headnote

[8] Attorney and Client

Disclosure, waiver, or consent

Testator's mother waived her objection to opposing counsel's representation of testator's daughter during probate proceedings; daughter's interests were materially adverse to mother's interests inasmuch as mother had consistently maintained that, pursuant to tribal law, she was entitled to all real property and businesses located within Native American tribal territory that were to pass to daughter under testator's will, and, although mother was not named party in any proceeding, she and her attorney actively participated in litigation for over one year before filing motion to disqualify, with full knowledge of potential conflict of interest involving daughter's attorney.

Cases that cite this headnote

Attorneys and Law Firms

****606** Colucci & Gallaher, P.C., Buffalo (Paul G. Joyce of Counsel), for Respondent–Appellant.

Law Offices of John P. Bartolomei & Associates, Niagara Falls (John P. Bartolomei of Counsel), for Petitioner–Respondent.

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

Opinion

MEMORANDUM:

***1266** Respondent appeals from an order denying her motion seeking, inter alia, to disqualify petitioner's attorney and his law firm from representing petitioner. We conclude that Surrogate's Court properly denied that motion.

[1] In support of her motion, respondent contended that petitioner's attorney had once represented her and her son, David C. Peters (decedent), in an action related to ownership of one of the pieces of real property at issue in this proceeding. That real property is situated within the borders of the Tonawanda Seneca Nation Territory (Territory), and was purportedly owned by decedent when he died. Through his will, which was offered for ***1267** probate in September 2011, decedent sought to devise and bequeath that same piece of real property, as well as businesses situated thereon, to his brother and petitioner, who is decedent's daughter. Respondent is decedent's mother, and she challenged various provisions of decedent's will, contending that she had a superior right of ownership over all of the real property situated on the Territory based on "matriarchal tribal law." Since decedent's death, there has been ongoing litigation related to decedent's estate and the Surrogate's authority to preside over that litigation (*see e.g. Peters v. Noonan,* 871 F.Supp.2d 218; *Matter of Tonawanda Seneca Nation v. Noonan,* 122 A.D.3d 1334, 996 N.Y.S.2d 446), and we take judicial notice of the records submitted to this Court in related appeals (*see Edgewater Constr. Co., Inc. v. 81 & 3 of Watertown, Inc.* [Appeal No. 2], 24 A.D3.d 1229, 1231, 806 N.Y.S.2d 817). In the midst of that litigation, respondent filed the instant motion to disqualify petitioner's attorney.

[2] "The Code of Professional Responsibility does not in all circumstances bar attorneys from representing parties in litigation against former clients. Rather, DR 5–108 sets out two prohibitions on attorney conduct relating to former clients. First, an attorney may not represent 'another person in the same or a substantially related

matter in which that person's interests are materially adverse to the interests of the former client' ... Second, an attorney may not use 'any confidences or secrets of the former client except as permitted by DR 4–101(C) or when the confidence or secret has become generally known' " (*Jamaica Pub. Serv. Co. v. AIU Ins. Co.,* 92 N.Y.2d 631, 636, 684 N.Y.S.2d 459, 707 N.E.2d 414). "A party seeking disqualification of its adversary's lawyer pursuant to DR 5–108(A)(1) must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse. Only 'where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise' " (*id.*).

****607** **[3]** **[4]** Of particular concern to the courts, however, is the fact that "motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts by forcing disqualification even though the client's attorney is ignorant of any confidences of the prior client. Such motions result in a loss of time and money, even if they are eventually denied. [The Court of Appeals] and others have expressed concern that such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused" (*Solow v. Grace &* ***1268** *Co.,* 83 N.Y.2d 303, 310, 610 N.Y.S.2d 128, 632 N.E.2d 437). Inasmuch as the right to counsel of choice, while not absolute, "is a valued right[,] ... any restrictions [thereon] must be carefully scrutinized" (*S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.,* 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 508 N.E.2d 647). We must therefore balance "the vital interest in avoiding even the appearance of impropriety [with] a party's right to representation by counsel of choice and [the] danger that such motions can become tactical 'derailment' weapons for strategic advantage in litigation" (*Jamaica Pub. Serv. Co.,* 92 N.Y.2d at 638, 684 N.Y.S.2d 459, 707 N.E.2d 414).

Contrary to petitioner's contention, respondent established that she had a prior attorney-client relationship with petitioner's attorney, that the issues in the two litigations are substantially related, each involving ownership of the same parcel of property, and that her interests are adverse to those of petitioner (*see id.* at 636, 684 N.Y.S.2d 459, 707 N.E.2d 414; *Tekni–Plex, Inc. v. Meyner & Landis,* 89 N.Y.2d 123, 132, 651 N.Y.S.2d 954, 674 N.E.2d 663, *rearg. denied* 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503; *Solow,* 83 N.Y.2d at 313, 610 N.Y.S.2d 128, 632 N.E.2d 437). Usually, that would create an "irrebuttable presumption of disqualification" (*Tekni–Plex,* 89 N.Y.2d at 132, 651 N.Y.S.2d 954, 674 N.E.2d 663; *see Jamaica Pub. Serv. Co.,* 92 N.Y.2d at 636, 684 N.Y.S.2d 459, 707 N.E.2d 414), but many courts have nevertheless denied disqualification upon finding that a party has waived any objection to the purported conflict of interest (*see e.g. Hele Asset, LLC v. S.E.E. Realty Assoc.,* 106 A.D.3d 692, 693–694, 964 N.Y.S.2d 570; *Gustafson v. Dippert,* 68 A.D.3d 1678, 1679, 891 N.Y.S.2d 842; *Lake v. Kaleida Health,* 60 A.D.3d 1469, 1470, 876 N.Y.S.2d 800).

[5] **[6]** **[7]** In determining whether a party has waived any objection to a conflict of interest, "courts consider when the challenged interests became materially adverse to determine if the party could have moved [for disqualification] at an earlier time ... If a party moving for disqualification was aware or should have been aware of the facts underlying an alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party's representation ... Further, where a motion to disqualify is made in the midst of litigation where the moving party knew of the alleged conflict of interest well before making the motion, it can be inferred that the motion was made merely to secure a tactical advantage" (*Hele Asset, LLC,* 106 A.D.3d at 694, 964 N.Y.S.2d 570; *see Gustafson,* 68 A.D.3d at 1679, 891 N.Y.S.2d 842; *Lake,* 60 A.D.3d at 1470, 876 N.Y.S.2d 800).

[8] Under the circumstances of this case, we conclude that respondent waived her objection to the attorney's representation of petitioner. Respondent "was aware ... of the facts underlying [the] alleged conflict of interest for an extended period of time before bringing the motion" (*Hele Asset, LLC,* 106 A.D.3d at 694, 964 N.Y.S.2d 570). Decedent passed away in August 2011, and the will was ***1269** offered for ****608** probate in September 2011. The executors appointed by the will refused to transfer to petitioner any of the real or personal property located within the Territory that was devised and bequeathed to her because respondent was asserting a superior right to all of the real property located within the Territory as well as the businesses situated thereon under the claimed authority of tribal law. In December

2011, petitioner sought, inter alia, a hearing to determine whether respondent had lost any bequests pursuant to the in terrorem clause of decedent's will.

Respondent "made a 'special appearance' " in the probate proceeding on January 17, 2012 to assert her claims that the real property and businesses located within the Territory were not decedent's property to distribute. She claimed title and ownership of the property and the business interests "pursuant to matriarchal tribal law and clan interests." The Surrogate noted, however, that despite her assertions, respondent was refusing to submit to the jurisdiction of Surrogate's Court.

On January 30, 2012, respondent's attorney again appeared in court, at which time he was advised that respondent needed to file an intervenor pleading and pay a filing fee. Respondent refused to do so and, in March 2012, the Surrogate warned that the continued failure to do so would result in the Surrogate finding her in default on her attempted intervention. "Rather than intervene, on March 22, 2012, [respondent] filed a Federal lawsuit against [the Surrogate]." In the context of that federal action, respondent moved for a temporary restraining order prohibiting the Surrogate from probating decedent's will. That motion was denied on May 18, 2012 (*see Peters,* 871 F.Supp.2d at 220).

In August 2012, the Surrogate removed the coexecutors based on their refusal to comply with orders issued by the Surrogate, and he appointed petitioner as administratrix C.T.A. In December 2012, petitioner filed a petition seeking disgorgement and forfeiture of any and all bequests, devised properties and gifts under the will received by respondent. One month later, in January 2013, respondent filed the instant motion to disqualify petitioner's attorney and his law firm from representing petitioner.

Petitioner's attorney has represented petitioner in this matter since November 2011. At all times, petitioner's interests have been materially adverse to respondent's interests inasmuch as respondent has consistently maintained that, pursuant to matriarchal tribal law, she is entitled to all of the real property and businesses located within the Territory that were to pass to ***1270** petitioner under the will. Although respondent was technically not a named "party" in any proceeding, she and her attorney actively participated in the litigation for over one year with full knowledge of the identity of petitioner's attorney and the potential conflict of interest involving that attorney. Given the complexity of the litigation, the hardship that would be inflicted on petitioner and the estate, and the one-year delay in bringing the motion, we conclude that this motion was made "as an offensive tactic" (*Solow,* 83 N.Y.2d at 310, 610 N.Y.S.2d 128, 632 N.E.2d 437), i.e., for the purpose of "secur[ing] a tactical advantage" in the proceeding (*Hele Asset, LLC,* 106 A.D.3d at 694, 964 N.Y.S.2d 570), and that "there is no real concern that a confidence has been abused" (*Solow,* 83 N.Y.2d at 310, 610 N.Y.S.2d 128, 632 N.E.2d 437).

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

All Citations

124 A.D.3d 1266, 1 N.Y.S.3d 604, 2015 N.Y. Slip Op. 00042

Matter of Milbauer

Surrogate's Court of New York, Nassau County

April 6, 2015, Decided

351171/A

Reporter
2015 N.Y. Misc. LEXIS 2675 *; 2015 NY Slip Op 31300(U) **

[1]** Probate Proceeding, Will of JEANETTE MILBAUER, Deceased.Probate Proceeding, Will of JEANETTE MILBAUER, Deceased.In the Matter of the Petition of Joan Husserl to Compel an Accounting of Karen Silverman as Preliminary Executor of the Estate of JEANETTE MILBAUER, Deceased.Miscellaneous Proceeding, Estate of JEANETTE MILBAUER, Deceased.Accounting by Karen Silverman as Preliminary Executor of the Estate of JEANETTE MILBAUER, Deceased.Accounting by Karen Silverman as Preliminary Executor of the Estate of JEANETTE MILBAUER, Deceased. **[**2]** Accounting by Karen Silverman as Preliminary Executor of the Estate of JEANETTE MILBAUER, Deceased.Accounting by Karen Silverman as Preliminary Executor of the Estate of JEANETTE MILBAUER, Deceased.Miscellaneous Proceeding Pursuant to SCPA 2103 by Joan Husserl, as Limited Administrator, for Discovery and Turnover of Assets Belonging to the Estate of JEANETTE MILBAUER, Deceased.In the Matter of the Petition of Joan Husserl and Kenneth Husserl to Compel Accounting of Karen Silverman, as Preliminary Executor of the Estate of Jeanette Milbauer, Successor Trustee of the Trust dated November 1, 2000 Made by HAZEL R. FLICKER, Deceased.In the Matter of the Petition of Joan Husserl to Compel Accounting of Karen Silverman, as Preliminary Executor of the Estate of Jeanette Milbauer, First Successor Trustee of the Trust July 1, 1995 Made by HAZEL R. FLICKER, Deceased. **[**3]** Miscellaneous Proceeding - Supreme Court Action of Karen Milbauer Silverman, individually as Beneficiary and Trustee of the HAZEL R. FLICKER IRREVOCABLE TRUST, July 1, 1995, -against- Kenneth Husserl, individually, Kenneth Husserl, as the Pretexted and Successor Trustee in the Purported Document "named" the Irrevocable Trust made by Hazel R. Flicker (Trustor) and Stanley Milbauer (Trustee) dated November 1, 2000.In the Matter of the Petition of Joan Husserl to Compel Accounting of Karen Silverman, as Preliminary Executor of the Estate of Jeanette Milbauer, First Successor Trustee of the Trust dated July 1, 1995, made by HAZEL R. FLICKER, Deceased.In the Matter of the Petition of Joan Husserl to Compel Accounting of Karen Silverman, as Preliminary Executor of the Estate of Jeanette Milbauer, Successor Trustee of the Trust dated November 1, 2000, made by HAZEL R. FLICKER, Deceased.In the Matter of the Petition of Joan Husserl and Kenneth Husserl to Compel Accounting of Karen Silverman, as Preliminary Executor of the Estate of Jeanette Milbauer, Successor Trustee of the Trust dated November 1, 2000, made by HAZEL R. FLICKER, Deceased.

Prior History: *Matter of Milbauer, 40 Misc. 3d 1202(A), 972 N.Y.S.2d 144, 2013 N.Y. Misc. LEXIS 2637 (2013)*

Core Terms

disqualify, disqualification, movant, proceedings, matters, conflicting interest, participated, recusal, argues, law law law, parties, disqualification motion, rule rule rule, promptly, waived, attorney-referee, conferences, involvement, third-party, arbitrator, settlement, knowingly, mediator, opposing, letters, probate, courts, circumstances, transferred, attorneys

Judges: [*1] EDWARD W. McCARTY III, Judge of the Surrogate's Court.

Opinion by: EDWARD W. McCARTY III

Opinion

[4]** In connection with multiple proceedings filed in connection with the Estate of Jeanette Milbauer and trusts created by Hazel R. Flicker, an order to show cause has been filed on behalf of Karen Silverman seeking:

1. An order disqualifying Sally Donahue and the

firm of Jaspan Schlesinger, LLP as attorneys for Kenneth Husserl and Joan Husserl;
2. An order of recusal by Surrogate Edward W. McCarty III;
3. An order of judicial disqualification of Surrogate Edward W. McCarty III; and
4. An order transferring all pending matters to Judge Thomas A. Adams, the Administrative Judge for the Tenth Judicial District Supreme Court, Nassau County; and
5. A stay of all proceedings pending a determination of the application.

In addition, Karen Silverman filed a petition for an extension of preliminary letters issued to her in the estate of Jeanette Milbauer.

Opposition to all of the relief requested has been filed on behalf of Joan Husserl and Kenneth Husserl.

BACKGROUND

The complete background and history of these proceedings are recited in the prior decisions and orders of this court and are incorporated into this decision by reference. **[*2]** Briefly, the court notes that Jeanette Milbauer died on February 18, 2008, survived by her two daughters, Karen Silverman and Joan Husserl. Joan Husserl is married to Kenneth Husserl. Hazel R. Flicker is the aunt of Ms. Silverman and Ms. Husserl. The decedent, Jeanette Milbauer, served as a trustee of two trusts created by Hazel Flicker. Ms. Silverman offered an instrument for probate, dated December 20, 2007, as the will of the decedent, in which Ms. Silverman is nominated as the executor. Ms. Husserl objected to probate. Preliminary letters testamentary issued to Ms. **[**5]** Silverman on April 6, 2010 and were subsequently extended, despite objections filed by Ms. Husserl.

ANALYSIS

1. Disqualification of Sally Donahue and Jaspan Schlesinger, LLP

The disqualification of Sally Donahue and Jaspan Schlesinger, LLP (Jaspan) as counsel for Kenneth Husserl and Joan Husserl is sought pursuant to New York State Unified Court Systems Part 1200 Rules of Professional Conduct, Rules 1.10, imputation of conflict of interest; Rule 1.11, special conflicts of interest for former and current government offices and employees; and Rule 1.12, specific conflicts of interest from former judges, arbitrators, mediators or other third-party neutrals. **[*3]** The basis for the requested relief is Ms. Donahue's prior professional position as a court attorney-referee with this court (the Court), in which capacity she worked on an earlier proceeding brought in connection with the estate of Jeanette Milbauer, including supervising discovery and conducting conferences.

Ms. Donahue argues that there is no legitimate reason to grant this relief. She further maintains that Ms. Silverman waived any rights she might have in connection with the requested disqualification of Ms. Donahue and Jaspan by waiting until two years after Ms. Donahue began representing Joan Husserl and Kenneth Husserl.

While Ms. Donahue concedes that she was employed at the Court as a court attorney-referee from November 2006 until June 1, 2011, she argues that she had only ministerial involvement with the sole Jeanette Milbauer proceeding ongoing at that time, which was the probate petition filed by Ms. Silverman and contested by Ms. Husserl. All parties agree that in Ms. Donahue's position as a court attorney-referee, she conducted several conferences regarding the Jeanette Milbauer estate which counsel for Ms. Silverman, G. Ronald Hoffman, appeared on behalf of Ms. Silverman. **[*4]**

[6]** In December 2012, Ms. Donahue began working for Jaspan. In that capacity, she appeared on behalf of Joan Husserl and Kenneth Husserl in opposition to Mr. Hoffman at multiple conferences at the Court. As counsel for the Husserls, Ms. Donahue communicated with Mr. Hoffman and with the Court in writing and by telephone, and participated with Mr. Hoffman in settlement conferences, both at Jaspan and at Mr. Hoffman's law firm. Ms. Donahue states that at the start of her representation of Joan and Kenneth Husserl, she disclosed to Mr. Hoffman the extent of her involvement in the Milbauer probate proceeding while she was a court employee, a contention which Mr. Hoffman does not expressly refute. She argues that it is only now, two years later, after mutual attempts at settlement were unsuccessful, that Mr. Hoffman brought the order to show cause to disqualify her and Jaspan, and thus deny Joan and Kenneth Husserl the counsel of their choice.

In connection with the Hazel Flicker proceedings pending in the Court, Ms. Donahue argues that none of these proceedings were pending during her tenure at the Court, and that there are therefore no grounds for disqualifying her or Jaspan in connection **[*5]** with these matters. She argues further that since Ms. Silverman waited two years to argue for the

disqualification of Ms. Donahue and Jaspan in the Hazel Flicker matters, the delay amounts to Ms. Silverman's waiver of this relief.

There is no disagreement among the parties that the applicable standard for disqualification of a court attorney-referee based on these present facts is whether the attorney personally and substantially participated in the matter before the Court. Rule 1.11 provides, in relevant part:

> "Rule 1.11 Special conflicts of interest for former and current government officers and employees.
>
> (a) Except as law may otherwise expressly provide, a lawyer who has formerly **[**7]** served as a public officer or employee of the government:
> (1) shall comply with Rule 1.9(c); and
> (2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).
>
> (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly **[*6]** undertake or continue representation in such a matter unless:
> (1) the firm acts promptly and reasonably to:
> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
> (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
> (iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and
> (2) there are no other circumstances in the particular representation that create an appearance of impropriety."

[8]** (Rules of Professional Conduct [*22 NYCRR 1200.0*] rule 1.11).

Rule 1.12 provides, in relevant part:

> Rule 1.12 Specific conflict of interest for former judges, arbitrators, mediators or other third-party neutrals.
> (a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.
>
> (b) Except as stated in paragraph (d), and unless all parties to the proceeding give informed consent, confirmed **[*7]** in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:
> (1) an arbitrator, mediator or other third-party neutral; or
> (2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral. . . .
> (d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm which with that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
> (1) the firm acts promptly and reasonably to:
> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
>
> (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; **[**9]** and
> (iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and
>
> (2) there are no other circumstances **[*8]** in the particular representation that create an appearance of impropriety."

(Rules of Professional Conduct [*22 NYCRR 1200.0*] rule 1.12).

Not surprisingly, the parties disagree as to whether Ms. Donahue's level of involvement with the case as a court attorney was such that she could be found to have "participated personally and substantially" with the case as a court attorney. Because the court finds that the movant has waived the right to move to disqualify Ms. Donahue or Jaspan, it need not reach that issue.

There is a dearth of case law on the issue of waiver in the context of attorney disqualification in the New York

courts where the disqualification is sought on the basis that the attorney had previously been involved in the case as a public officer or employee. There are, however, quite a number of federal court cases on the analogous basis that the attorney had previously represented another party to the litigation or otherwise had a conflict. A state court, in deciding a case before it, may, of course, consider how the federal courts have resolved the same or a similar issue (*see* *Brady v Williams Capital Group, L.P., 14 NY3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 [2010]*).

The courts have recognized that "disqualification has an immediate adverse effect on the client by separating him from counsel **[*9]** of his choice, and ... disqualification motions are often interposed for tactical reasons" (*Board of Ed of City of New York v Nyquist, 590 F2d 1241, 1246 [2d Cir 1979]*). Furthermore, "[c]ourts have disallowed disqualification on the basis of waiver or estoppel where the moving party has failed to move for disqualification in a timely manner. 'It is **[**10]** well settled that a former client who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly is deemed to have waived that right'" (*Official Unsecured Creditors Comm. of Valley-Vulcan Mold Company v Ampco-Pittsburgh Corp, 5 Fed Appx 396 *401 [6th Cir 2001]*, quoting *Trust Corp of Montana v Piper Aircraft Corp, 701 F2d 85, 87 (9th Cir 1983)*.

"[T]he Court must also bear in mind that the court's authority to disqualify an attorney or craft appropriate relief to punish or deter attorney misconduct derives from the court's equitable powers, and as such equitable considerations like waiver and estoppel apply. The California Supreme Court has similarly noted that a disqualification motion may involve such considerations as a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. Thus, where delay in making the disqualification motion is unreasonable and **[*10]** the resulting prejudice is great, the court will assume an implied waiver of the right to disqualify. [A] former client who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly is deemed to have waived that right" (*Sirisup v It's Thai, L.L.C., 2015 US Dist LEXIS 11360 *5 [CD CA 2015]*[internal citations and quotations omitted]).

In another case, the court, in denying the motion to disqualify counsel and rejecting the movant's contention that it acted to remove counsel "at the first reasonable opportunity" held that "[w]aiting five months before raising the issue with opposing counsel cannot be characterized as "the first reasonable opportunity" under any circumstances. If [movant] had genuine concerns regarding whether confidences would be shared with [opposing] counsel, it would have acted immediately" (*Matter of National Century Financial Enterprises, Inc. 2010 US Dist LEXIS 39524 *41 [SD OH 2010]*).

[11]** Courts have identified several criteria to be considered in determining whether a party moving to disqualify an attorney has waived the right to do so based on waiver. They are:

(1) the length of the delay in bringing the motion to disqualify

(2) when the movant learned of the conflict

(3) whether the movant was represented by counsel during the delay

(4) why **[*11]** the delay occurred, and

(5) whether disqualification would result in prejudice to the non-moving party (*Lyon v Goldstein, 2006 US Dist LEXIS 71274 *17 [D NJ 2006]*[internal citation omitted]).

Here, movant delayed not merely five months but nearly two years from the date she knew or should have known of Ms. Donahue's prior involvement in the case as a court attorney. Movant's affidavit in support of her motion is noticeably silent on when she learned of Ms. Donahue's representation of her sister but her attorney clearly knew immediately and to suggest, as has not even been done, that Mr. Hoffman failed to advise his client of Ms. Donahue's representation of her sister would be completely incredible. Movant was represented by counsel throughout the period of delay by the same attorney who had conferenced the case with Ms. Donahue when she was a court attorney; he continues to represent movant at the current time. Depriving Ms. Donahue's client of her attorneys of nearly eight years in this litigation would clearly be prejudicial to their interests. Any argument that the movant delayed moving timely for disqualification in the hopes of a settlement would be unavailing as the fact that settlement negotiations may have been ongoing does not relieve **[*12]** the movant of the obligation to move promptly to disqualify counsel where a basis for disqualification exists (*Safe-T-Products, Inc. v Learning*

*Resources, Inc. 2002 US Dist LEXIS 20540 *24 [ND Il 2002])*. Finally, arguing against the possibility of a finding of waiver, Mr. Hoffman alleges that he delayed making the instant motion at Ms. Donahue's request. However, a movant cannot "rely on evidence **[**12]** submitted for the first time in its reply papers in support of its motion" (*L'Aquila Realty , LLC v Jalyng Food Corp., 103 AD3d 692, 692, 959 N.Y.S.2d 724 [2d Dept 2013]*; *see also GJF Construction Corp. v Cosmopolitan Decorating Co., Inc., 35 AD3d 535, 828 N.Y.S.2d 409 [2d Dept 2006])*.

Accordingly, those branches of the motion which seek to disqualify Ms. Donahue or Jaspan Schlesinger LLP as counsel for Joan and Kenneth Husserl are denied.

2. Disqualification of, or Recusal by, Surrogate Edward W. McCarty III

The order of judicial disqualification is sought pursuant to *Judiciary Law § 14*, which provides in part: "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel." Mr. Hoffman bases this request for relief on the fact that my Principal Law Clerk served as counsel to Joan and Kenneth Husserl while employed at Jaspan and worked on the matters presently pending before me. While conceding that I never served as counsel to Joan and Kenneth Husserl, counsel argues that **[*13]** since my current Principal Law Clerk served in that capacity, mandatory judicial disqualification is required.

Mr. Hoffman's argument for my disqualification fails to account for the fact that I never represented the parties in these proceedings and have no interest in these matters.

> "The disqualification statute . . . is an adaptation of the common-law rule forbidding a Judge to sit in or take part in a cause or matter in which he is interested. The rule is based on the maxim that no man can be a Judge in his own cause and on the rule that a Judge not be, or appear to be, aligned with a party appearing before him. . . . [T]he nature of the interest required to disqualify a Judge is an interest as a party or in a pecuniary or property right from which he might profit or lose. It must be an interest in the subject matter of the suit. The interest need not be large, but it must be real; it must be certain, and not merely **[**13]** possible or contingent; it must be one which is visible, demonstrable, and capable of precise proof. It must be a present interest and not merely one that formerly existed."

Matter of Sherburne, 124 Misc 2d 708, 709-710, 476 N.Y.S.2d 419 [Sur Ct Queens County 1984] [citations omitted]).

At the same time, I am being asked to recuse myself from this matter pursuant **[*14]** to Code of Judicial Conduct Canons 2 and 3 (1992). Mr. Hoffman notes that pursuant to Canon 2 of the Code of Judicial Conduct, a Judge must "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Code of Judicial Conduct [2.1] [2A]).

"[W]here an appearance of improper judicial interest emerges, the integrity of the judiciary requires that a Judge disqualify herself . . . No matter what the outcome of the case and the ultimate fairness of her judgment, the integrity of the court will be called into question because of defendant's doubt as to the Judge's impartiality. We deem it appropriate that the Judge disqualify herself in such case [citation omitted]" (*Murray v Murray, 73 AD2d 1015, 1015-1016, 424 N.Y.S.2d 50 [3d Dept 1980])*.

I have no interest in these proceedings, past, present, or future, and my Principal Law Clerk has not been involved in any of these matters in her prior or current position at the Court. Nevertheless, I have concluded that the best interests of these proceedings will be furthered by my recusal from the matter, lest there be even the slightest question, even without a substantive basis, concerning the integrity of this Court.

Mr. Hoffman has requested, in the event of recusal, that these proceedings be transferred to Judge Thomas A. Adams, the Administrative **[*15]** Judge for the Tenth Judicial District Supreme **[**14]** Court, Nassau County. Ms. Donahue argues for transfer of these proceedings to another Surrogate's Court. Generally, when I recuse myself, the matter is transferred to one of two Acting Surrogates for Nassau County, who is then assisted by a member of my law department. A conference to address the practical implications of the transfer of these proceedings to another court has been scheduled with a member of my law department on April 29, 2015 at 2:15 p.m.

3. Application for Extension of Preliminary Letters

Preliminary letters testamentary issued to Ms. Silverman on April 6, 2010 and were extended since. Ms. Silverman again seeks a further extension of her letters, and Ms. Husserl objects. Having recused myself from

the matter, the decision on the request for an extension of preliminary letters shall be made by the judge to whom these matters are assigned.

This constitutes the decision and order of this court.

Dated: April 6, 2015

EDWARD W. McCARTY III

Judge of the Surrogate's Court

SURROGATE'S COURT : SUFFOLK COUNTY

Probate Proceeding, Estate of
Estate of

RUTH E HOWELL,

Deceased.

DECISION/ORDER

By: HON. JOHN M. CZYGIER, JR.,
.....
Surrogate
.....

Dated: DEC 15 2016
.....

File #: 2014-3328
.....

In this contested probate proceeding, objectant Edwin P. Howell, II has moved for disqualification of the law firm of Christopher J. Cassar, Esq. from serving as counsel for petitioners. For the following reasons, objectant's motion is denied.

Background

The record reflects that decedent died on June 19, 2014 survived by five children, including petitioners Patricia Prianti and Paul Howell, as well as objectant Edwin P. Howell, II. Petitioners have proffered an instrument dated June 6, 2014 as the last will and testament of decedent. On March 9, 2015, objectant filed his objections to the propounded instrument on the grounds that, *inter alia*: (1) the June 6, 2014 instrument was not duly executed; (2) the decedent lacked testamentary capacity; (3) the instrument was the result of undue influence; and (4) Patricia Prianti and Paul Howell committed "misconduct, fraud, and undue influence over the decedent," failed "to preserve and account for the property of the Estate," and failed "to fulfill their fiduciary duties to protect and preserve the interest[s] of the distributees and heirs of the Estate" (Objs. ¶ 4).

The parties entered into a discovery schedule, at the completion of which both sides sought summary judgment. Pursuant to this court's June 20, 2016 decision and order, the undersigned granted petitioners' motion for summary judgment with respect to the objection alleging lack of due execution and the objection to petitioners as fiduciaries. The court otherwise denied both petitioners' and objectant's motions for summary judgment, thus concluding that there are issues of fact regarding testamentary capacity and undue influence remaining for trial. Said decision

and order recounts the full background of this contested probate, which the court will not restate herein.

As is relevant here, the record indicates that on May 16, 2014, Richard C. Toscani, Esq., then an employee of the Cassar Office, met with petitioners and decedent to discuss decedent's estate planning. After their meeting, Mr. Toscani drafted the propounded instrument. On June 6, 2014, the Cassar Office received a phone call stating that decedent had been hospitalized and requesting that Mr. Toscani visit decedent at Huntington Hospital in order to complete the will execution ceremony. Mr. Toscani obliged that request on the same day, bringing with him Courtney Ahlsen and Alexandra Brunswick, two paralegals from the Cassar Office. Ms. Ahlsen and Ms. Brunswick each testified during their depositions in this case that they witnessed the will execution ceremony and signed the propounded instrument accordingly. Neither Mr. Toscani nor Ms. Brunswick currently work for the Cassar Office.

Presently, objectant moves to disqualify the law firm of Christopher J. Cassar, Esq. (the "Cassar Office") from serving as counsel for petitioners. Objectant argues that the Cassar Office is conflicted from serving as counsel for petitioners "on the ground[s] of conflict of interest, attorney-witness conflict[,] and a violation of Rule 3.7 of the New York State Rules of Professional Conduct" (Notice of Motion ¶ 2) due to the involvement of Cassar Office employees in the drafting and execution of the propounded instrument. Petitioners assert that Rule 3.7 does not apply because Mr. Toscani is no longer an employee of the Cassar Office, that disqualification at this stage would be prejudicial, and that objectant has failed to meet his burden of proving that disqualification is necessary.

In addition to the pleadings, pre-trial orders, and submissions in connection with the motions for summary judgment, the record on this motion consists of Walter D. Long, Jr., Esq.'s affirmation and accompanying exhibits; Joseph J. Karlya, III, Esq.'s affirmation in opposition and accompanying exhibits; and Walter D. Long, Jr., Esq.'s reply affirmation. The court notes that, although the reply affirmation appears to suggest that Ms. Ahlsen and Ms. Brunswick are both current employees of the Cassar Office, only Ms. Ahlsen's affirmation submitted in opposition to objectant's motion for summary judgment and in support of petitioners' cross-motion for summary judgment indicates her current employment with the Cassar Office.

Estate of Ruth E Howell, Deceased.

Applicable Law and Discussion

Pursuant to Rule 3.7 of New York's Rules of Professional Conduct, an attorney is prohibited from acting as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

> (1) the testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal.

(Rules of Professional Conduct [22 NYCRR 1200.0] Rule 3.7[a]).

The burden of proof is on the party seeking disqualification (*Tekni-Plex, Inc. v. Meyner & Landis*, 89 NY2d 123 [1996]), requiring a clear showing that counsel's removal is warranted (*Goldstein v. Held*, 52 AD3d 471 [2d Dept 2008]). Disqualification motions present competing concerns. The court must balance the vital importance of avoiding even the appearance of impropriety against the party's entitlement to be represented in an ongoing litigation by counsel of its own choosing and the danger that such motions can become tactical "derailment" weapons for strategic advantage in litigation (*see Jamaica Public Service Co. v. AIU Ins. Co.*, 92 NY2d 631 [1998] [citing *S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437]). The conflict rules therefore should not be "mechanically applied when disqualification is raised in litigation" (*Kassis v. Teacher's Inc. & Annuity Assn.*, 93 NY2d 611 [1999]). The party seeking disqualification must demonstrate that the expected testimony of the attorney is necessary and prejudicial to said attorney's client (*Estate of Khaze*, NYLJ 3/10/04 at 34, col. 3 [Sur Ct, Suffolk County]).

There is ample case law concerning an attorney draftsman representing a petitioner in a contested probate proceeding. This court has consistently followed the majority rule that, although the attorney draftsman may not represent petitioner at trial, he may serve as counsel for petitioner up until the time of trial (*Matter of Giantasio*, 173 Misc2d 100 [Sur Ct, Bronx County]; *Estate of Reilly*, NYLJ 1/27/09 at 34, col. 4 [Sur Ct, Kings County];

Estate of Kelner, NYLJ 1/25/96 at 29, col. 1 [Sur Ct, Westchester County]).

Here, though, the facts are not as straightforward as the attorney draftsman seeking to act as counsel for the petitioners at trial. To begin, the conflict pertains to Mr. Toscani as the attorney-draftsman, and objectant essentially seeks to have said conflict imputed to the Cassar Office in order to prevent Christopher Cassar, Esq. from acting as trial counsel. Rule 3.7(b), which addresses imputation in this context, provides that:

> [a] lawyer may not act as advocate before a tribunal in a matter if: (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

(Rules of Professional Conduct [22 NYCRR 1200.0] Rule 3.7[b]). "Disqualification by imputation under Rule 3.7(b) is an 'extreme remedy' and should be ordered 'sparingly'" *(BT Holdings, LLC v. Village of Chester*, NYLJ 12/18/15 at 46 [SDNY] [quoting *Murray v. Metro. Life Ins. Co.*, 583 F3d 173 [2d Cir 2009]).

Objectant argues that this court should disqualify the Cassar Office because the "case will turn on credibility of [the] witnesses" and "put Mr. Cassar in the position of vouching for his own employees and himself" (Long Disqualification Aff. ¶ 3). However, the concerns against which the witness-advocate rule is designed to protect, such as trial counsel appearing to vouch for his own credibility, are "'absent or, at least, greatly reduced'" in imputation cases (*In re MetLife Demutualization Litig.*, NYLJ 9/30/09 at 25, col. 3 [2d Cir] [quoting *Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F3d 269 [2d Cir 2004]). In this case, should Mr. Cassar act as trial counsel for petitioners, his credibility would not be at issue. Rather, any credibility issues would pertain to his former employee, Mr. Toscani, as well as to Ms. Ahlsen and Ms. Brunswick.

Other than raising the aforementioned concern, objectant has not identified how the expected testimony may be prejudicial as required under Rule 3.7(b)(1). Courts defined prejudice in this context as testimony that is "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the

lawyer's independence or in discrediting that testimony" (*Murray, supra* [citations omitted]; *see also Medford Petroleum LLC v. Quality Quick Mart, Inc. et al.*, 2012 NY Misc LEXIS 4463 [Sup Ct, Suffolk County 2012]; *Latimi v. New York City Transit Authority*, 2007 NY Misc LEXIS 5424 [Civ Ct, Kings County 2007]). In this case, Mr. Toscani's testimony is likely to be consistent with petitioners' position seeking probate of the propounded instrument. In particular, Mr. Toscani's affirmation in connection with the summary judgment submissions affirms that decedent was "undoubtedly of sound mind" (Toscani Aff. ¶ 3, attached as Ex. B to Long Disqualification Aff.) and that, while petitioners were present during the May 16, 2014 meeting, "they never spoke once" and Mr. Toscani discussed decedent's assets and estate planning only with decedent (Toscani Aff. ¶ 4).

In addition, Rule 1.9, addressed under Rule 3.7(b)(1) and entitled "Duties to Former Clients," states that

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client unless the former client gives informed consent, confirmed in writing.

(Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.9[a]). Typically, the party requesting disqualification must show "(1) the existence of a prior-attorney client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc., supra; see also McCutchen v. 3 Pirncesses & AP Trust Dated Feb. 3, 2004*, 138 AD3d 1223 [3d Dept 2016]).

Putting aside that fact that objectant does not allege a prior attorney-client relationship with opposing counsel, there has not, in any event, been any showing that the interests of the present and former clients are materially adverse. As with the lack of proof regarding prejudice, objectant has not demonstrated that the proffered testimony would harm petitioners or reflect poorly upon the integrity of the legal system.

Finally, given that Ms. Ahlsen and Ms. Brunswick are paralegals and not attorneys, the Rules of Professional Conduct do not necessarily apply in the same manner to them as they do to

attorneys (*see NYC Medical & Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 6 Misc3d 275 [Civ Ct, Kings County] [noting that former rule DR 5-102 refers only to lawyers, and that therefore disqualification rules do not apply to nonlawyer employees]; *see also Mulhern v. Calder*, 196 Misc2d 818 [Sup Ct, Albany County]). In any event, each testified similarly to Mr. Toscani, indicating that decedent appeared to have capacity on the date of the execution ceremony (*see generally* Ahlsen Aff.; Brunswick Aff.). As such, objectant's motion as to them suffers from the same defects mentioned above.

Conclusion

For the reasons set forth herein, it is

ORDERED that objectant's motion for disqualification of the law firm of Christopher J. Cassar, Esq. from serving as counsel for petitioners at trial is denied; and it is further

ORDERED that a pre-trial conference on this matter is hereby scheduled with a member of this court's law department on Wednesday, January 18, 2017, at which time a Note of Issue and Statement of Readiness and an order framing issues shall be due.

JOHN M. CZYGIER, JR., Surrogate

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SURROGATE'S COURT : SUFFOLK COUNTY

Probate Proceeding, Will of

HELENE RECCO, a/k/a

HELENE J. RECCO,

Deceased.

DECISION/ORDER

By: HON. JOHN M. CZYGIER, JR.,
Surrogate

Dated: 6/30 2015

File #: 2011-2918

In this contested probate proceeding, an instrument dated May 8, 2011, has been offered for probate as the last will and testament of the above named decedent by Mary Iadanza ("Iadanza"), decedent's niece and a co-executrix nominated therein. Objections have been filed to the probate of the propounded instrument by Helene Anzai-Tarter, decedent's niece and the other co-executrix nominated in the propounded instrument, Anne Anzai, Rose Recco-Esposito, Janice Recco-Louis, and Mary Recco-Santi, decedent's sisters.

Objectants now move pursuant to Rule 3.7(a) of the Rules of Professional Conduct to disqualify Anthony J. Colleluori, Esq., ("Colleluori") from representing respondents Lois Colleluori, Frank Colleluori, and Salvatore Colleluori.

For the reasons set forth below, obtectants' motion is granted in part and denied in part.

Background

Decedent died May 10, 2011, survived by her five sisters, four of whom are objectants named above; decedent's fifth sister is Lois Colleluori, petitioner's mother. Decedent was also survived by a brother, Angelo Recco, Jr., who has not appeared herein. An instrument purporting to be decedent's last will and testament was offered for probate on August 8, 2011 by Iadanza and Helene Anzai-Tarter ("Helene"). Shortly thereafter, Helene obtained new counsel, who advised the court she was no longer in favor of probating this will, and an amended petition was filed on February 28, 2012, in which Iadanza is the sole petitioner. As noted above,

Helene has filed objections to the probate of the propounded instrument.

A prior original will, dated July 14, 2005, was filed with the court. The will offered for probate is a departure from the earlier will, in that the new will increases the share passing to the Colleluori branch of the family.

On August 24, 2012 objections to probate were filed by the guardian ad litem appointed to represent infants who were adversely affected by the propounded instrument, and on August 28, 2012 "Amended Objections to Probate" were filed by movants asserting that at the time of execution, decedent lacked testamentary capacity; that the instrument was not duly executed; and that the execution of the propounded instrument was the result of fraud, mistake, and undue influence.

The objections filed herein relate to decedent's lack of capacity, undue influence exerted on decedent by Colleluori, his mother, and Iadanza (and possibly others), and lack of due execution. The propounded instrument, and other estate planning documents, were executed two days prior to decedent's death while she was hospitalized.

Pleadings

The motion is supported by the affirmation of counsel for movants, a second affirmation of counsel, and a memorandum of law. Anthony Colleluori, who represents his wife and two sons, is the brother of the petitioner, Iadanza. He has filed and affirmation in opposition.

In the memorandum of law, counsel for objectants states that Colleluori is "likely to be a witness on a significant issues of fact in this proceeding" [Memorandum of Law, ¶ A, page 2]. Counsel further states that:

> Mr. Colleluori is believed to have been the mastermind and implementer of the eve of death changes to the 2005 Will and the eve of death transfers of assets. He and his family were believed to have been around Helene during her two day stay at Huntington Hospital where the 2011 Will discussed on May 7, 2011 and then executed on May 8, 2011. Mr. Colleluori was the one who called the attorney-draftsman of the 2011 Will, Christopher Petillo,

> twice on Saturday May 7, 2011 to have Mr. Petillo meet with Helene at the emergency room of Huntington Hospital in the late afternoon of Saturday May 7, 2011 to discuss updating her will after Helene had been taken to the hospital earlier that day. Mr. Colleluori was the person who called Mr. Petillo on Sunday May 8, 2011 to have Mr. Petillo come to the hospital that day to supervise the execution of the 2011 Will. Mr. Colleluori was the person who had a prior relationship with Mr. Petillo, not Helene. Mr. Colleluori and Mr. Petillo met each other in 2006 through Mr. Petillo's wife, who worked for Mr. Colleluori. . . . In summary, Mr. Colleluori's testimony touches upon all the factual issues in this proceeding and will be crucial to the trier of fact in determining same.

[References to the Transcript of Mr. Petillo's 1404 examination omitted].

Colleluori argues that he "is not a necessary witness as to the issue of Helene Recco's mental capacity," in that his testimony would be cumulative. He downplays movants' assertions regarding the role he played in arranging the production and execution of the propounded instrument and the other estate planning documents which benefitted his family. The court does not accept, however, that movants should be barred from calling him as a witness simply because he has attempted to minimize his role.

It is movants' contention that Colleluori will most certainly be called as a witness in the will contest, as he has unique knowledge as to decedent's mental capacity and the possible exertion of undue influence at the time that he executed the will. In addition, in light of the role he played in calling the attorney-draftsman, his testimony will be relevant on the issue of undue influence.

Applicable Law and Discussion

Pursuant to Rule 3.7 of New York's Rules of Professional Conduct, which replaced all prior rules of professional responsibility effective April 1, 2009, an attorney is prohibited from acting as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

> (1) the testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 3.7 [a]).

Additionally, Rule 3.7 prohibits an attorney from advocating before a tribunal if precluded by Rule 1.9, entitled Duties to Former Clients.

The burden of proof is on the party seeking disqualification (*Tekni-Plex, Inc. V. Meyner & Landis*, 89 NY2d 123), requiring a clear showing that counsel's removal is warranted *(Goldstein v. Held*, 52 AD3d 471). Disqualification motions present competing concerns. The court must balance the vital importance of avoiding even the appearance of impropriety against the party's entitlement to be represented in ongoing litigation by counsel of its own choosing and the danger that such motions can become tactical "derailment" weapons for strategic advantage in litigation (see *Jamaica Public Service, supra at* 638, *citing S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437). The conflict rules therefore, should not be "mechanically applied when disqualification is raised in litigation" (*Kassis*, supra at 617). The party seeking disqualification must demonstrate that the expected testimony of the attorney is necessary and prejudicial to said attorney's client (*Estate of Khaze*, NYLJ 3/10/2004, p. 28, col. 5).

While not specifically raised in the papers, this court must consider the impact of the new Rules of Professional Responsibility on established case law. A careful comparison of the two rules show the preservation of much of the language and substance of the prior advocate witness rule, and in fact, the advocate witness rule, now embodied in Rule 3.7, is substantially the same to the prior rule (*see Gabayzadeh v. Taylor,* NYLJ 8/7/2009, p. 33, col. 3). Therefore, it is the court's conclusion that the new rule does not alter counsel's ability to represent the client up until the time of trial.

Estate of Helene Recco, a/k/a
Helene J. Recco, Deceased.

Accordingly, objectant's motion to disqualify Colleluori is denied in that Anthony J. Colleluori may serve as counsel to respondents up until the time of trial and granted in that Anthony J. Colleluori may not serve as counsel during the trial of this matter.

Counsel for the parties shall appear on Tuesday, July 28, 2015, at 9:30 a.m. at the Suffolk County Surrogate's Court, County Center, 320 Center Drive, Riverhead, New York, for a conference with a member of the Law Department.

This decision constitutes the order of the court.

JOHN M. CZYGIER, JR., Surrogate

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