

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JAY M. GROSS, EXECUTOR OF THE
ESTATE OF ESTELLE GROSS,
DECEASED

v.

EILEEN B. GROSS, EXECUTRIX OF
THE ESTATE OF NATHANIEL D.
GROSS, DECEASED

CIVIL ACTION

NO. 97-883

Broderick, J.

October 20, 1997

MEMORANDUM

The Defendant in this case filed a motion to disqualify attorneys Herbert Linsenberg and Sergio Scuteri from representation of the Plaintiff on the grounds that their representation violates the Pennsylvania Rules of Professional Conduct 1.7(a) and 1.9, adopted by the United States District Court for the Eastern District of Pennsylvania by Local Rule 83.6, Part IV.B. This Court ordered a hearing to be held on October 14th, 1997, at which Plaintiff was ordered to appear and show cause why attorneys Herbert Linsenberg and Sergio Scuteri should not be disqualified from representing Plaintiff in this matter.

I. BACKGROUND

The evidence presented at the hearing revealed very little not already contained in the parties' briefs on the motion before the Court. Those briefs reveal a bitter, litigious

history between the parties which the Court deems relevant and thus will summarize in some detail. In the matter currently before this Court, the Defendant Eileen Gross is being sued in her capacity as the executrix of the estate of her late husband, Nathaniel Gross. The Plaintiff, Jay Gross, is suing in his capacity as the executor of the estate of his late wife, Estelle Gross. The issue in this case is whether the estate of Nathaniel Gross is liable on a mortgage note signed by Nathaniel Gross and allegedly held by the estate of Estelle Gross. The mortgage in question is on a property in Philadelphia owned by a partnership called Gross Realty and Construction Company ("Gross Realty"). Until Nathaniel Gross's death in 1992, he and his cousin Jay Gross were business partners for many years, and they were involved in various banking and real estate ventures, including Gross Realty. Two partners now comprise Gross Realty: Jay Gross; and The Nathaniel and Eileen Gross Irrevocable Trust, of which Eileen Gross is one of three trustees. Mr. Linsenberg has in the past and continues to represent Gross Realty.

Since Nathaniel Gross's death, Eileen and Jay Gross have been involved as antagonists in at least eight lawsuits, in their individual capacities and as executors of their late spouses' estates. In one of these suits, Eileen Gross sued Jay Gross and the Estate of Estelle Gross. Jay Gross later successfully sued Eileen Gross for wrongful use of civil proceedings in that suit

and was awarded a judgment of \$26,367.80. In all of these legal actions, Mr. Linsenberg has represented Jay Gross. Eileen Gross has filed four other motions to have Mr. Linsenberg disqualified from representing Jay Gross, and three state court judges have denied all of these motions.

Mr. Linsenberg has also represented both Jay Gross and Eileen Gross, as the executrix of Nathaniel Gross's estate, in approximately five lawsuits in which Eileen Gross's interests were identical to Jay Gross's. In one of those cases, Spring Garden Associates, L.P. v. Bell Savings Bank, Pa SA, a thrift subsidiary of Bell Savings Holdings, Inc., Jay M. Gross, Nathaniel D. Gross and Gary L. Wilson (the "Spring Garden Associates case"), currently pending in Montgomery County Court of Common Pleas, Mr. Linsenberg represented Eileen Gross, as executrix of Nathaniel Gross's estate, at the time the case before this Court was initiated. This suit was originally brought in 1990, two years before Nathaniel Gross died. Sometime in 1996 or 1997, Mr. Linsenberg filed a motion to withdraw his representation of Eileen Gross in the Spring Garden Associates case, which was granted in July of 1997, after the motion to disqualify him in this case was filed.

II. DISCUSSION

The Defendant argues that Mr. Linsenberg has in the past represented Eileen Gross in her capacity as the executrix of the

estate of Nathaniel Gross. Eileen Gross claims that this past representation was in matters that are substantially related to the matter currently before this Court. Thus, Defendant argues, Mr. Linsenberg is in violation of Rule 1.9 of the Rules of Professional Conduct, which provides in relevant part:

A lawyer who has formerly represented a client in a matter shall not thereafter ... represent another person in ... a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation.

The burden of establishing a "substantial relationship" falls upon the moving party. E.g., National Souvenir Center v. Historic Figures, Inc., 728 F.2d 503, 517-18 (D.C.Cir. 1984); Government of India v. Cook Industries, Inc., 569 F.2d 737, 739 (2d Cir. 1978); Richardson v. Hamilton International Corp., 469 F.2d 1382, 1385 (3rd Cir. 1972); INA Underwriters Ins. v. Nalibotsky, 594 F.Supp. 1199, 1207 (E.D.Pa. 1984). Two matters are "substantially related" when an attorney might have acquired confidential information in the first representation that could be used to the detriment of a former client in a subsequent action. Richardson, 496 F.2d at 1385; Commonwealth Insurance Co. v. Graphix Hot Line, Inc., 808 F.Supp. 1200, 1204 (E.D.Pa. 1992). The standard is not whether confidential information was actually

disclosed in the prior representation which could be used in the subsequent one, but rather whether it might have been disclosed. Commonwealth Insurance Co. at 1204.

The Defendant argues that a "substantial relationship" exists between Mr. Linsenberg's prior representation of her and the matter before this Court because the instant case involves a mortgage note on property owned by Gross Realty & Construction Company, a company which Mr. Linsenberg represented for many years. However, Defendant fails to provide any details of Mr. Linsenberg's representation of Gross Realty from which the Court could determine that those matters are substantially related to the issue currently before it, that is whether the estate of Nathaniel Gross is liable on a mortgage note signed by Nathaniel Gross and held by the estate of Estelle Gross (Jay Gross's late wife).

In addition, Eileen Gross has submitted an affidavit stating that in the course of his prior representation of her, Linsenberg was privy to confidential information regarding her interests in pension funds, interests in family partnerships, and details concerning her late husband's estate. Mr. Linsenberg has also submitted an affidavit categorically denying that Eileen Gross ever shared any of these confidences with him. However, even assuming that Mr. Linsenberg was privy to this confidential information as Defendant claims, no evidence was presented at the

hearing in this matter showing that any information he may have obtained is "substantially related" to the litigation before this Court. Thus, Defendant has failed to carry her burden in establishing that Mr. Linsenberg did or might have had access to confidential information which could be damaging to Defendant in this case.

The Defendant also argues that Mr. Linsenberg should be disqualified because he is in violation of Rule 1.7(a) of the Rules of Professional Conduct, which provides:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client;
- and
- (2) each client consents after consultation.

The Third Circuit has held that "[a]lthough disqualification ordinarily is the result of a finding that a [rule] prohibits an attorney's appearance in a case, disqualification never is automatic." United States v. Miller, 624 F.2d 1198, 1201 (3rd Cir. 1980). In Miller, the Third Circuit noted that a district court "has a wide discretion in framing its sanctions to be just and fair to all parties involved." Id. (quoting IBM v. Levin, 579 F.2d 271, 279 (3rd Cir. 1978)). In exercising its

discretion, the Third Circuit held, a district court "should disqualify an attorney only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable ... rule. It should consider the ends that the ... rule is designed to serve and any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions." Id.

In IBM v. Levin, 579 F.2d 271 (3rd Cir. 1978), the Third Circuit discussed the ends that Rule 1.7(a) is designed to serve. Specifically, in cases such as this one where there has been no showing of injury to the moving party, disqualification "is primarily justified as a vindication of the integrity of the bar" and out of a concern for the "maintenance of the integrity of the legal profession and its high standing in the community." IBM v. Levin, 579 F.2d at 283.

Because Mr. Linsenberg represented Eileen Gross as executrix of the estate of Nathaniel Gross in the Spring Garden Associates case at the time he initiated the instant suit against her; and because Mr. Linsenberg did not disclose this conflict to Eileen Gross and obtain her consent; it seems clear that Mr. Linsenberg was in violation of Rule 1.7(a) at the time he initiated the suit currently before this Court. See IBM v. Levin, 579 F.2d 271, 280 (3rd Cir. 1978). The Court finds it significant, however, that

Mr. Linsenberg voluntarily withdrew his representation of Eileen Gross in the Spring Garden Associates case. Defendant argues that Mr. Linsenberg should not be allowed to drop Eileen Gross like a "hot potato" in order to represent Jay Gross against her in this suit. Defendant cites Judge Brody, who refused to allow an attorney to withdraw from representing one client in order to accept representation from another more remunerative client in a matter adverse to the first client. International Longshoremen's Association, Local Union 1332, v. International Longshoremen's Association, 909 F.Supp. 287, 293 (E.D.Pa. 1995). However, the Court finds that, given the litigious history between the parties, this is not the "hot potato" case that Judge Brody described. Thus, in this case disqualification is not an appropriate means of enforcing Rule 1.7(a).

The record in this case does not describe a simple situation in which a trusting client was betrayed by her attorney who unexpectedly filed suit against her on behalf of another client. Rather, this is a case of a protracted feud among family members. For instance, the record shows that in 1995, Eileen Gross filed suit against Jay Gross and the Estate of Estelle Gross in the Philadelphia Court of Common Pleas. Despite her argument that Mr. Linsenberg is and has long been her attorney, Eileen Gross selected other counsel to represent her in that case. Mr. Linsenberg, not surprisingly, represented Jay Gross, whom he has

represented for the past five years. In that case, Eileen Gross moved to have Mr. Linsenberg disqualified on the ground that there was a conflict, but her motion was denied. In 1996, Jay Gross sued Eileen Gross for wrongful use of civil proceedings in the 1995 suit and obtained a verdict against her. Jay Gross was represented in that case by Mr. Linsenberg as well, to which Eileen Gross did not object. Thus, it was already clearly established in 1995 and 1996 that there was no confidential relationship between Eileen Gross and Mr. Linsenberg, and that there was no conflict in Mr. Linsenberg's representation of Jay Gross.

It is in the context of this litigious history among these feuding family members that Defendant asks the Court to disqualify Mr. Linsenberg from representing Jay Gross, his client of many years. Given this context, it seems highly unlikely that Defendant's motion is primarily motivated by a sense of betrayal or a concern for the vindication of the integrity of the bar. Having considered the facts of this case, the Court is unable to see how disqualification of Jay Gross's long-standing attorney will serve the interests of justice and fairness, or how it will serve to maintain the integrity of the legal profession in the eyes of the public. Thus, the Court finds that in this case, disqualification is not an appropriate means of enforcing Rule 1.7(a) of the Rules of Professional Conduct, and it will exercise

its discretion and deny Defendant's motion to disqualify Herbert Linsenberg from representing the Plaintiff in the matter before it.

An appropriate Order follows.

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ORDER

AND NOW, this 20th day of October, 1997; Defendant having filed a Motion and two Supplemental Memoranda of Law in Support of her Motion to Disqualify Herbert Linsenberg and Sergio Scuteri from representing Plaintiff in the above captioned case due to a conflict of interest in violation of Rules 1.7(a) and 1.9 of the Pennsylvania Rules of Professional Conduct; Plaintiff having filed a Response and a Supplemental Memorandum of Law Contra Defendant's Motion; the Court having held a hearing on this motion on October 14th, 1997; and for the reasons set forth in this Court's Memorandum of October 20, 1997;

IT IS ORDERED: Defendant's motion to disqualify Herbert Linsenberg and Sergio Scuteri from representing Plaintiff in the above captioned case is **DENIED**.

RAYMOND J. BRODERICK, J.