

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

JOSEPH IMBESI, LAWRENCE IMBESI,
MARK IMBESI, and ANTONIA IMBESI
ROTELLE, and GLOUCESTER GROUP, INC.,
formerly known as IMBESI BOTTLING
GROUP, INC.,

Plaintiffs,

v.

JOHN CHARLES IMBESI, JLM CORPORATION,
CLICK CORPORATION OF AMERICA, INC.,
and NORTH AMERICAN BEVERAGE
COMPANY,

Defendants.

CIVIL ACTION

NO. 01-1259

MEMORANDUM

ROBERT F. KELLY, J.

OCTOBER 30, 2001

Presently before this Court is the Motion to Disqualify Defendants' Counsel, Dilworth Paxson, LLP ("the Dilworth firm"), filed by the Plaintiffs, Joseph Imbesi, Lawrence Imbesi, Mark Imbesi, Antonia Imbesi Rotelle, and Gloucester Group, Inc., formerly known as Imbesi Bottling Group, Inc. ("The Plaintiffs"). In the underlying Complaint, the Plaintiffs accuse their brother, the Defendant John Imbesi, of various improprieties involving their jointly owned family businesses. The other Defendants, JLM Corporation, Click Corporation of America, Inc., and North American Beverage Co. are owned by John Imbesi. For the following reasons, the Motion is granted.

I. BACKGROUND

The Imbesi siblings jointly own the Gloucester Group, which in turn is the parent

corporation of many of the Imbesi family's enterprises. John Imbesi is alleged to have administered substantial control over what was then the Imbesi Bottling Group and served as CEO. His position allegedly allowed him to engage in various improprieties and misconducts to the detriment of his siblings and their family businesses and which resulted in his gain. All of the Defendant companies are alleged to be wholly controlled and owned by John Imbesi.

From 1991 onward, the Dilworth firm represented both the Plaintiffs and Defendants in all but a few of their personal and business matters. These matters included many of the matters involved in the current suit such as the pension under-funding, absence of worker's compensation insurance, diversion of corporate opportunities, John Imbesi's retention of trademarks and franchises for his sole benefit, and the resolution of sexual harassment claims against John Imbesi. While, as of 1997, the Dilworth firm no longer represented the Plaintiffs, it does continue to represent the Defendants in this action and in other capacities.

In 1997, during a meeting with the Dilworth firm regarding a sexual harassment suit against John Imbesi, the Plaintiffs presented John Imbesi with a list of the alleged improprieties entitled "Issues with John Imbesi" which ultimately laid the foundation for the instant Complaint. In 1999, the Plaintiff's counsel presented the Dilworth firm with a draft Complaint against John Imbesi. The parties discussed settlement and entered into a tolling agreement as a condition of further negotiations. Eventually, the settlement negotiations were abandoned and the Plaintiffs filed their Complaint on March 16, 2001. An Amended Complaint was filed on May 7, 2001. The instant Motion to Disqualify the Dilworth firm was filed on July 31, 2001. In the instant Motion, the Plaintiffs claim that the Dilworth firm should be disqualified from representing the Defendants under Rules of Professional Conduct 1.7 and 1.9 ("RPC") in

light of the fact that the Dilworth firm previously represented the Plaintiffs in substantially related matters. The Plaintiffs also claim that because members of the Dilworth firm must be witnesses in the action, its representation of the Defendants violates RPC 3.7.

II. STANDARD

The federal courts have the inherent power to supervise the conduct of attorneys practicing before them. In re Corn Derivatives Antitrust Litig., 748 F.2d 157, 160 (3d Cir. 1984); Henry v. Delaware River Joint Toll Bridge Comm'n, No. 00-6415, 2001 WL 1003224, at *1 (E.D. Pa. Aug. 24, 2001). Under this power, a court may disqualify counsel if the court determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule, given the ends that the disciplinary rule is designed to serve. United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980).

In determining whether disqualification is appropriate, the Court must also consider countervailing policies, such as permitting a litigant to retain his chosen counsel and enabling attorneys to practice without excessive restrictions. Id. As a general rule, motions to disqualify opposing counsel are disfavored. Shade v. Great Lakes Dredge & Dock Co., 72 F. Supp.2d 518, 520 (E.D. Pa. 1999). Furthermore, the party seeking disqualification bears the burden of showing that the representation is impermissible. In re Rite Aid Corp. Sec. Litig., 139 F. Supp.2d 649, 656 (E.D. Pa. 2001). However, any doubts regarding the existence of a violation of an ethical rule should be construed in favor of disqualification. Int'l Bus. Mach. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978); In re Rite Aid Corp., 139 F. Supp.2d at 656; Henry, 2001 WL 1003224, at *1; Reading Anthracite Co. v. Lehigh Coal & Navig. Co., 771 F. Supp. 113, 115 (E.D. Pa. 1991).

III. DISCUSSION

A. Conflicts of Interest Exist

The Plaintiffs argue that an attorney and his firm have a disabling conflict of interest whenever they must prepare a case against, cross-examine, or impeach a former client on subject matters related to those of the earlier representation. Plaintiffs also claim that a conflict arises when attorneys from a firm representing a party must be called as witnesses.

1. RPC 1.9

The United States District Court for the Eastern District of Pennsylvania has adopted the Rules of Professional Conduct, as adopted by the Supreme Court of Pennsylvania. U.S.D.C., E.D. Pa., Local R. Civ. P. 14(IV)(B). Under RPC 1.9:

[a] lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or 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; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

RPC 1.9. RPC 1.9(a) focuses on whether the prior and present matters are substantially related, whether the clients have materially adverse interests, and whether the clients consent after consultation. Henry 2001 WL 1003224, at *2 (citing U.S. v. Moscony, 927 F.2d 742, 749 (3d Cir. 1991)).

a. The Matters Are Substantially Related

First, as the Plaintiffs point out, it is the substantial relationship between the matters at issue that creates the conflict of interest and not proof of access to, or actual use of, confidential

communications. See Richardson v. Hamilton Intern. Corp., 469 F.2d 1382, 1384 (3d Cir. 1972)(stating that “in order to protect the communications between attorney and client, [courts] have generally disqualified an attorney whenever the subject matter of the second representation is so closely connected with the subject matter of the earlier representation that confidences *might* be involved”)(internal quotations omitted). In Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F. Supp. 1200 (E.D. Pa. 1992) the court stated that:

the test in this circuit is whether the information acquired by the attorney in his former representation is substantially related to the subject matter of the subsequent representation. If the attorney “might” have acquired confidential information related to the subject matter of his subsequent representation, then Rule 1.9 would prevent the attorney from representing the second client.

Commonwealth Insurance Co., 808 F. Supp. at 1204. The court further stated that:

[i]n performing the substantial relationship analysis, however, the court need not, nor should it, inquire into whether an attorney actually acquired confidential information during the prior representation related to the current representation. Rather, the court's primary concern is whether confidential information that might have been gained in the first representation may be used to the detriment of the former client in the subsequent action.

Id. (internal quotations omitted).

The substantial relationship analysis involves three factors that the court must consider: (1) the nature of the present lawsuit against the former client; (2) the nature and scope of the prior representation at issue; and (3) whether in the course of the prior representation, the client might have disclosed to its attorney confidences which could be relevant in the present action.

Henry, 2001 WL 1003224, at *2; Brennan v. Independence Blue Cross, 949 F. Supp. 305, 308 (E.D. Pa. 1996); Commonwealth Ins. Co., 808 F. Supp. at 1204-05.

Here, the nature of the present law suit involves misconduct allegedly committed by

John Imbesi which damaged the Imbesi Bottling Group and the other Imbesi family businesses. The nature and scope of the Dilworth firm's prior representation included almost all of the matters dealing with the Imbesi Bottling Group, other family businesses, and the Plaintiffs' personal matters. The Dilworth firm was greatly involved in almost every aspect of the family businesses including many of the matters which form portions of the Complaint. Lastly, as in Reading Anthracite Co., in the course of the prior representation, the Plaintiffs might have disclosed to the Dilworth firm confidences which could be relevant in the present action. In Reading Anthracite Co., the court stated that "[t]he fact that the Law Offices performed RAC's general legal services throughout the time period encompassing the disputed transactions strongly suggests that the Law Offices were privy to confidential information relevant to the case at bar." Reading Anthracite Co., 771 F. Supp. at 117. The court went on to state that even though the "nexus between the prior representation and the present case is not entirely clear . . . [a]ny doubts [] must be resolved in favor of the movant." Id. Here, the Plaintiffs have established that the scope of the prior representation and the present adverse representation are substantially related.

The Defendants argue that before the substantial relationship test is administered, the Court must first determine that the Plaintiffs had an expectation that information given to the Dilworth firm would be kept secret from John Imbesi. The Defendants contend that because John Imbesi was the "liaison" between the family businesses and the Dilworth firm, the Plaintiffs could not have had any expectation that information concerning the family businesses would have been kept secret from John Imbesi. Therefore, the Defendants argue that this Court should find that there is no conflict of interest and should not ask if the matters at issue are substantially related.

The Defendants rely heavily on Allegeart v. Perot, 565 F.2d 246 (2d Cir. 1977), a

Second Circuit case which held under Canon 4, a precursor to RPC 1.9, that before the substantial relationship test was even implicated, it had to be shown that the attorney was in a position where he or she could have received information which his or her former client might reasonably have assumed the attorney would withhold from his or her present client.¹ Allegaert, 565 F.2d at 250; Guzewicz v. Eberle, 953 F. Supp. 108, 113 (E.D. Pa. 1997)(denying the Motion for Disqualification and finding that even if the firm did obtain confidential information from the former clients, it was information that was known and available to all of the parties).

The Plaintiffs have in fact shown that the Dilworth firm was in a position where it could have received information which the Plaintiffs might reasonably have assumed the Dilworth firm would withhold from John Imbesi. Allegaert, 565 F.2d at 250. For example, the Dilworth firm represented both John Imbesi and Larry Imbesi in connection with criminal charges arising from the alleged pension under-funding. Certainly, during this representation, the Dilworth firm could have received information which Larry Imbesi might reasonably have assumed that the Dilworth firm would withhold from John Imbesi. Therefore, the Defendants' argument fails, and the application of the substantial relationship test is proper.

b. Materially Adverse Interests Exist

As stated above, it is appropriate to apply the substantial relationship test in this case. Furthermore, after analyzing the factors of that test, this court finds that it has been met. However, in order to violate RPC 1.9, the former and current clients must have materially adverse interests. Here the former clients of the Dilworth firm are suing its current clients. This situation

¹ Canon 4 stated, "(a) lawyer should preserve the confidences and secrets of a client." ABA Code of Professional Responsibility, Canon 4.

by definition includes materially adverse interests. As stated in Union 1332 v. International Longshoremen's Ass'n, 909 F. Supp. 287 (E.D. Pa. 1995), when faced with a similar situation, “[t]his court cannot imagine a situation where clients' interests could be more ‘materially adverse.’” Int’l Longshoremen's Ass'n, 909 F. Supp. at 291.

c. Plaintiffs Have Not Consented to or Waived the Conflict

First, there has been no consent to the representation “after a full disclosure of the circumstances and consultation.” RPC. 1.9(a). However, the Defendants contend that the Plaintiffs have waived their right to assert disqualification. The Defendants argue that “[h]aving brought the Dilworth Firm into this dispute over four years ago, and having delayed an additional four months into actual litigation before bringing a motion to disqualify, plaintiffs have waived their right to object to the Dilworth Firm’s defense of John Imbesi in this case.” (Resp. to Mot. to Disqualify, 18). However, as the Plaintiffs point out, they stated numerous times to the Dilworth firm, orally and in writing, that they believed its representation of John Imbesi was improper. Furthermore, the Plaintiffs told the Dilworth firm, and the Dilworth firm acknowledged, that the Plaintiffs would pursue disqualification if the case was brought to trial. It was only after the Complaint was filed, however, that the Plaintiffs had an opportunity to legally address this issue. The Plaintiffs filed the current Motion to Disqualify four months after the first Complaint was filed and before the Amended Complaint was answered.

The Defendants argue that in Zimmerman v. Duggan, 81 B.R. 296, 300 (E.D. Pa. 1987), the court found that a delay in filing a Motion to Disqualify of three months after the Complaint was filed was enough of a delay to create a waiver. Zimmerman, 81 B.R. at 300. However, in Zimmerman, the delay was not actually three months, but three years after the issue

was initially raised during court proceedings. Id. Furthermore, it is not simply delay which creates a waiver of the disqualification issue. Montgomery Academy v. Kohn, 82 F. Supp.2d 312, 318-319 (D.N.J. 1999). Instead waiver can occur when the delay is so severe as to be undue, such as when the motion is filed far after the initiation of the litigation and close to the trial date. Id. In Montgomery Academy, the plaintiff argued that the defendant had waived the right to disqualify by failing to raise the issue for two years. Id. at 318. The court disagreed with the plaintiff and explained that “the cases in which an undue delay was deemed to be a waiver of the conflict objection involved parties seeking to disqualify an attorney long after the litigation was commenced.” Id. (citing Commonwealth Ins. Co., 808 F. Supp. at 1208-09 (two year delay); Zimmerman, 81 B.R. at 300-01 (almost three year delay); Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 87-88 (9th Cir. 1983) (two and one half year delay); Central Milk Producers Co-op. v. Sentry Food Stores, Inc., 573 F.2d 988, 992 (8th Cir. 1978)(over two year delay); Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 1115-16 (D.N.J. 1993)(three year delay); Warpar Mfg. Corp. v. Ashland Oil, Inc., 606 F. Supp. 852, 858- 59 (N.D. Oh. 1984) (delay of one year and nine months); Glover v. Libman, 578 F. Supp. 748, 767 (N.D. Ga. 1983) (delay of thirteen months); Jackson v. J.C. Penney Co., Inc., 521 F. Supp. 1032, 1034-35 (N.D. Ga. 1981)(delay of fifteen months)).

The Montgomery Academy court further explained that the defendant’s Motion to Disqualify:

was made less than three months after the suit was filed and soon after defendants filed their answer to the complaint. During the two-year "delay" asserted by plaintiff, there was no lawsuit to which [the defendant] could object. [The defendant] had no practical forum in which to assert [counsel’s] conflict of interest before she actually became the target of plaintiff’s lawsuit. The three-month time from

filing of the lawsuit to filing of the disqualification motion does not approach the magnitude of delay required by the case law to find a waiver of the objection.

Id., at 318-319. This Court, based on an almost identical situation, comes to a similar conclusion.

The Plaintiffs repeatedly told the Dilworth firm that the representation was improper and that if litigation commenced they would file a Motion to Disqualify. Plaintiffs filed their Motion to Disqualify four months after the first Complaint was filed. This amount of delay is insufficient to constitute a waiver of their right to assert disqualification.

Lastly, this Court finds that the purposes of RPC 1.9, such as the Plaintiffs' interest in attorney loyalty and the Court's interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system outweigh the countervailing policies, such as the Defendants' interest in retaining their chosen counsel, the risk of prejudice to the Defendants, and the public's interest in permitting attorneys to practice without excessive restrictions. Henry 2001 WL 1003224, at *6. Therefore, the conflict of interest is great enough that this Court must disqualify the Dilworth firm from representing the Defendants.

2. RPC 3.7

The Plaintiffs also argue that aside from the RPC 1.9 conflict of interest, the Dilworth firm should be disqualified on the ground that many members of the Dilworth firm will be necessary witnesses at the trial. Therefore, the Dilworth firm's representation of the Defendants violates RPC 3.7 which states:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship

on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

RPC 3.7. As discussed above, RPC 1.9 is at issue in this case. Furthermore, from the facts presented, it is likely that members of the Dilworth firm will be called as witnesses in this case. Therefore, under RPC 3.7(b), another attorney at the Dilworth firm cannot act as advocate at this trial. Furthermore, under RPC 1.10(a), "[W]hen lawyers are associated in a law firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." RPC 1.10(a); see Int'l Longshoremen's Ass'n, 909 F. Supp. at 291. Therefore, because the Dilworth firm's representation of the Defendants violates RPC 1.9 and 3.7, it must be disqualified from further representing the Defendants. Moreover, under both RPC 1.10 and 3.7, the entire Dilworth firm must be disqualified, not just those who have represented the Plaintiffs and the Defendants in the past.

An appropriate Order follows.

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

JOSEPH IMBESI, LAWRENCE IMBESI,
MARK IMBESI, and ANTONIA IMBESI
ROTELLE, and GLOUCESTER GROUP, INC.,
formerly known as IMBESI BOTTLING
GROUP, INC.,

Plaintiffs,

v.

JOHN CHARLES IMBESI, JLM CORPORATION,
CLICK CORPORATION OF AMERICA, INC.,
and NORTH AMERICAN BEVERAGE
COMPANY,

Defendants.

CIVIL ACTION

NO. 01-1259

ORDER

AND NOW, this 30th day of October, 2001, upon consideration of Plaintiffs' Motion to Disqualify Defendants' Counsel, Dilworth Paxson ("the Dilworth firm"), any Responses and Replies thereto, and after oral argument on October 1, 2001, it is hereby ORDERED that the Motion is GRANTED and the Dilworth firm is disqualified from participating in the representation of the Defendants in this matter.

It is further ORDERED that this case will be placed in suspense for thirty (30) days to allow Defendants the opportunity to obtain new counsel. Within twenty (20) days after new counsel enters an appearance, he or she will file a statement informing this Court and opposing counsel whether new counsel wishes to withdraw or amend any of the pleadings previously filed by or on behalf of the Defendants in this action. The Dilworth firm is further directed not to reveal

to the new counsel any confidential communications it received from any of the Plaintiffs during its representation of the Plaintiffs.

BY THE COURT:

Robert F. Kelly, J.