

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

ROBERT E. ARGUE, III	:	CIVIL ACTION
	:	
v.	:	
	:	
DAVID DAVIS ENTERPRISES, INC.,	:	
t/a DAVIS ACURA, <u>et al.</u>	:	No. 02-9521

MEMORANDUM AND ORDER

HUTTON, S.J.

November 4, 2004

Defendant Davis Acura seeks the disqualification of Plaintiff's counsel Charles J. Weiss and the law firm of Timoney Knox, L.L.P. ("Timoney Knox"). Defendant argues that there is a conflict of interest violating Rule 1.7(a) of the Pennsylvania Rules of Professional Conduct that requires disqualification. See Def.'s Mot. to Disqualify at 3.

I. BACKGROUND

Plaintiff, Robert E. Argue, III, is currently represented by Charles J. Weiss and Timoney Knox in the matter before the Court. Timoney Knox has also represented Defendant Davis Acura and the Harleysville Insurance Company ("Harleysville") in the defense of a worker's compensation claim since June 10, 1994. Based on records before the Court, John P. Knox represented Davis Acura for Timoney Knox in 1994, and David Reno assumed responsibility

of the representation in June of 2003.¹ See Def.'s Mot. to Disqualify Ex. A; see also Pl.'s Resp. Ex. C ¶ 1. Charles Weiss has represented Plaintiff in the case before the Court since the filing of the complaint on December 31, 2002. Defendant argues that this dual representation is an impermissible conflict of interest.

II. LEGAL STANDARD

A district court has the inherent authority to supervise and disqualify the attorneys appearing before it. See Shade v. Great Lakes Dredge & Dock Co., 72 F. Supp. 2d 518, 519 (E.D. Pa. 1999) (citing United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980)). In determining whether disqualification is appropriate, the court must first consider whether the disciplinary rule has been violated and if it has, determine if disqualification is an appropriate penalty. See Int'l Longshoremen's Ass'n, Local Union 1332 v. Int'l Longshoremen's Ass'n, 909 F. Supp. 287, 290 (E.D. Pa. 1995). A court should grant a motion to disqualify counsel "only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule." Miller, 624 F.2d at 1201. The court should "consider the ends that the disciplinary rule is designed to serve and any countervailing policies, such as

¹ Based on affidavits provided to the Court, the worker's compensation matter involving Davis Acura settled in December of 1995. See Pl.'s Resp. Ex. C ¶ 1. The case was reopened in June of 2003 at the direction of Harleysville. See id. At the time of this Opinion, issues related to the worker's compensation case are still outstanding.

permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions." Brennan v. Independence Blue Cross, 949 F. Supp. 305, 307 (E.D. Pa. 1996) (quoting Miller, 624 F.2d at 1201). As a general rule, motions to disqualify opposing counsel are disfavored and the burden is on the party seeking the disqualification to demonstrate that continued representation would be impermissible. See Shade, 72 F. Supp. 2d at 520.

All counsel appearing before this Court must comply with the Pennsylvania Rules of Professional Conduct. See E.D. Pa. R. 83.6(IV)(B). Rule 1.7(a) discusses conflicts of interest as they relate to this case. The Rule 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." Pa. Rules of Prof'l Conduct R. 1.7(a). In addition, Rule 1.10 states that when "lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7." Pa. Rules of Prof'l Conduct R. 1.10.

III. DISCUSSION

In this case, there is a conflict that violates Rule 1.7(a) and Rule 1.10 because Timoney Knox currently represents Plaintiff in the matter before the Court and Defendant in an unrelated

worker's compensation matter. Timoney Knox has represented Defendant Acura and Harleysville in the defense of a worker's compensation claim since June 10, 1994. As mentioned above, John P. Knox originally represented Davis Acura, and David Reno assumed responsibility for the action in June of 2003. See Def.'s Mot. to Disqualify Ex. A; see also Pl.'s Resp. Ex. C ¶ 1. Charles Weiss, a third attorney at Timoney Knox, has represented Plaintiff in the case before the Court since the filing of the complaint on December 31, 2002. By representing Plaintiff in this matter, Timoney Knox's representation is "directly adverse to another client." Since there is no evidence that each client consented after consultation with their respective attorneys, the conflict is impermissible under Rules 1.7(a) and 1.10.

Plaintiff's counsel offers several arguments why there is no conflict. First, Plaintiff's counsel argues that Davis Acura is not actually a client of Timoney Knox because the actual client is Harleysville. However, it is well-settled that "when a liability insurer retains a lawyer to defend an insured, the insured is considered the lawyer's client." Point Pleasant Canoe Rental, Inc. V. Tinicum Township, 110 F.R.D. 166, 170 (E.D. Pa. 1986). Plaintiff also argues that Davis Acura has waived its right to consent by failing to object to the representation earlier. However, as this is a conflict governed by Rule 1.7, the clients must consent after consultation. Consultation requires "communication of information reasonably sufficient to

permit the client to appreciate the significance of the matter in question." Int'l Longshoremen's Ass'n, 909 F. Supp. at 293. It appears from the material before the Court that Timoney Knox never consulted with Davis Acura or Harleysville about the conflict. Apparently, Davis Acura did not learn of the conflict until June 4, 2004 when it received notice of a hearing in the worker's compensation matter. After consulting with its attorney in this case, Defendant declined to consent to the conflict. Defendant never waived its right to consent. Finally, Plaintiff argues that his attorney can cure the conflict by ceasing to represent Davis Acura in the worker's compensation matter. This will not cure the conflict because "an attorney may not drop one client like a 'hot potato' to avoid a conflict with another." Id. at 293. Further, Davis Acura expressly objects to this offer by Timoney Knox.

The Court must now decide if disqualification is the appropriate means to enforce the rule and further its purpose. The main purpose of Rule 1.7 is to encourage attorney loyalty. See Pa. Rules of Prof'l Conduct R. 1.7 cmt. In determining if disqualification is appropriate, the Court must balance: 1) Defendant's "interest in attorney loyalty," 2) Plaintiff's "interest in retaining his chosen counsel," 3) the "risk of prejudice" to Plaintiff, and 4) "the court's interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system." Int'l Longshoremen's

Ass'n, 909 F. Supp. at 293 (quoting In re Corn Derivatives, 748 F.2d 157, 162 (3d Cir. 1984)). In a close case, such as this one, any doubts regarding the existence of a violation of an ethical rule should be resolved in favor of disqualification. See In re Rite Aid Corp., 139 F. Supp. 2d 649, 656 (E.D. Pa. 2001).

After balancing these factors, the Court finds that disqualification is necessary. The purpose of the rule is to emphasize and encourage attorney loyalty. Timoney Knox has represented Davis Acura in the worker's compensation case since 1994 and cannot simply withdraw from that representation to cure this conflict. Timoney Knox's offer to withdraw from the worker's compensation case also fails to address the attorney-client relationship that would continue to exist between Timoney Knox and Davis Acura. As Timoney Knox has not indicated otherwise, it would continue to represent Harleysville even if it were permitted to withdraw from the worker's compensation matter at issue here. As long as Timoney Knox represents Harleysville, and Harleysville insures Davis Acura, Timoney Knox may be called on to represent Davis Acura. Furthermore, Timoney Knox argues that Harleysville will allow it to withdraw from the worker's compensation case and will "reassign the case to other approved counsel." Pl.'s Memo in Supp. of Answer to Def.'s Mot. to Disqualify at 8. However, there is no evidence that this is acceptable to Harleysville and Davis Acura has explicitly

objected to this offer. Timoney Knox's attempt to withdraw from representing Davis Acura "indicates behavior that violates an attorney's duty of loyalty to his client." James v. Teleflex, Inc., 1999 WL 98559, *7 (E.D. Pa. 1999).

In addition to preserving attorney loyalty, the Court has an interest in "protecting the integrity of the proceedings and maintaining public confidence in the judicial system." James, 1999 WL 98559 at *6. In this case, Timoney Knox has been representing Davis Acura, through Harleysville, since 1994. When Plaintiff first contacted Timoney Knox in 2001, that firm should have completed a conflict check and discovered the potential conflict. It is essential that a court avoid the "appearance as well as the actuality of professional impropriety." Int'l Longshoremen's Ass'n, 909 F. Supp. at 293 (quoting Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 544 (3d Cir. 1977)). Permitting Timoney Knox to continue to represent both Plaintiff here and Defendant Davis Acura in the worker's compensation case would not foster public confidence in the judicial system.

The Court is aware that Plaintiff has shown a substantial interest in retaining his chosen counsel and a high potential for prejudice if his counsel is disqualified. Additionally, the Court notes that discovery is nearly complete and the case is proceeding to trial. However, Plaintiff's concerns and the timing of Defendant's motion are not enough to outweigh the interests in favor of disqualification. See James, 1999 WL 98559

at *7. The majority of the factors here lean towards preserving the integrity of the judicial system and the legal profession. Therefore, Timoney Knox must be disqualified.

IV. CONCLUSION

For the reasons stated above, Defendants motion is granted. An appropriate Order follows.

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O R D E R

AND NOW, this 4 day of November, 2004, upon consideration of Defendant Davis Acura's Motion to Disqualify Plaintiff's Counsel (Docket No. 25), Plaintiff's Response thereto (Docket No. 27), and Defendant's Reply (Docket No. 28), IT IS HEREBY ORDERED that Defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED that this case is **STAYED** until January 1, 2005.¹

BY THE COURT:

S/ _____
HERBERT J. HUTTON, S.J.

¹ The stay will allow Plaintiff to obtain replacement counsel and provide time for replacement counsel to enter his or her appearance on the docket. If necessary to complete these tasks, the stay may be extended by the Court upon a written request by Plaintiff and for good cause shown. Present counsel for Plaintiff may remain counsel of record in this lawsuit until replacement counsel is retained, may assist Plaintiff in the process of retaining replacement counsel, and may assist the replacement counsel in the transfer of representation of Plaintiff in this case.