

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

JOANNE SKOWRONSKI JAMES,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TELEFLEX, INC., RONALD BOLDT,	:	
and RICHARD WOODFIELD,	:	
	:	
Defendants.	:	NO. 97-1206

MEMORANDUM

Reed, J.

February 24, 1999

Before the Court is the motion of defendants Teleflex, Inc. (“Teleflex”), Ronald Boldt, and Richard Woodfield to disqualify the law firm of Duane, Morris, and Heckscher (“Duane Morris”) as counsel for plaintiff Joanne Skowronski James (“James”). Because the Court finds that conflicts of interest are present that require disqualification of Duane Morris, the motion will be granted.

I. BACKGROUND

The motion to disqualify counsel arises out of the merger of the law firm of Miller, Dunham and Doering (“Miller, Dunham”) with Duane Morris. At the time of the merger, Miller Dunham represented Teleflex in an ongoing lawsuit against Aerofitters, Inc. for trade secrets and theft of business opportunities and served as a consultant to Teleflex on “Year 2000” issues. (Chance Aff. ¶¶ 2, 3). Edward Dunham (“Dunham”) was the lead counsel at Miller Dunham on

all Teleflex matters, and as of May 30, 1998, Edward Dunham was the attorney of record for Teleflex in the lawsuit against Aerofitters. (Chance Aff. ¶ 2). Teleflex claims that Dunham worked closely with Teleflex employees, reviewed extensive documentation from Teleflex, and obtained sensitive and proprietary business information about Teleflex in the course of his representation of Teleflex in these two matters. (Chance Aff. ¶¶ 2, 3). Specifically, Teleflex claims that Dunham obtained confidential information regarding Teleflex's "Seed and Feed" program in the context of his involvement in the hiring of a Year 2000 coordinator for Teleflex (Chance Aff. ¶ 4); plaintiff James cites the "Seed and Feed" programs at Teleflex as evidence of discrimination in the underlying lawsuit.¹

Dunham wrote a letter to Steven K. Chance, the vice president and general counsel of Teleflex, dated May 29, 1998 informing him that Miller Dunham would be merging with Duane Morris effective the following Monday, June 1, 1998, and requested authority to transfer Teleflex's matters to Duane Morris. (Chance Aff. ¶ 7 and Ex. A).

On May 29, 1998, Chance called Dunham and informed him that Duane Morris was handling James' lawsuit against Teleflex. Dunham told Chance he would look into the problem and contact him with a solution. (Chance Aff. ¶ 8). Several days later, Dunham informed Chance that Duane Morris was "very embarrassed about missing the conflict" and requested more time to resolve the issue, to which Chance agreed. (Chance Aff. ¶ 9).

On June 1, 1998, Dunham joined Duane Morris. (Dalton Aff. ¶ 4). On June 19, 1998, Dunham contacted Chance's office while Chance was on vacation and informed his secretary

¹ For a background of the discrimination claims of James against the defendants, see this Court's Memorandum and Order dated December 23, 1998 disposing of the motion for summary judgment. (Document No. 35).

that Duane Morris had decided to continue its representation of James in this lawsuit and that Dunham would withdraw as counsel for Teleflex in the Aeroutfitters case. (Chance Aff. ¶ 11). At the time the motion to disqualify, the response, and the reply were filed, and since then, there has been no evidence before this Court that Teleflex had received any written notice from Dunham or Duane Morris that they wished to discontinue their representation of Teleflex.² The defendants filed this motion to disqualify Duane Morris on July 1, 1998. (Document No. 28).³

The defendants maintain that Teleflex has never consented to Duane Morris' continued representation of James in this case. (Chance Aff. ¶ 12). Thus, the defendants contend that Duane Morris is ethically precluded from continuing to represent James because (1) under Pennsylvania Rule of Professional Conduct 1.7(a) their representation is in direct conflict with their representation of Teleflex in another lawsuit currently pending, (2) under Pennsylvania Rule of Professional Conduct 1.9 their representation is in direct conflict with Dunham's past representation of Teleflex in a substantially related matter which is at issue in this lawsuit, and (3) under Pennsylvania Rule of Professional Conduct 1.10 the above conflicts have not been waived by Teleflex, are imputed to the entire Duane Morris law firm, and cannot be remedied short of Duane Morris' disqualification in this case.

The plaintiff explains that Duane Morris did not initially detect the potential conflict with

² Dunham did affirm, however, in his affidavit dated July 20, 1998 that by that time Teleflex had directed him to turn over his files in the Aeroutfitters matter to substitute counsel, but the files had yet to be dispatched. (Dunham Aff. ¶ 10).

³ Plaintiff argues in her response that given the late stage in the proceedings and the amount of work that has been conducted by counsel for plaintiff in preparation of this case, the motion to disqualify should be viewed as a litigation strategy by the defendants to gain some tactical advantage. However, I find that there is no evidence of such a motive by the defendants; the fact that the general counsel of Teleflex alerted Dunham of the potential conflict before it was detected by Duane Morris and the fact that the defendants filed this motion within a very short period of time after Dunham left a message with Chance informing him that Duane Morris would no longer be representing Teleflex belie the suggestion of tactical motive on the part of the defendants.

Dunham's representation of Teleflex because the name "Teleflex" was inadvertently omitted from the list of Dunham's clients entered into the firm's computer to check for potential conflicts. (Dalton Aff. ¶¶ 6-8). The plaintiff maintains that even if "Teleflex" had not been omitted, however, the resulting action by the firm would have been the same, in that Dunham and others associated with the Miller Dunham firm have been screened and have had no contact with the attorneys, paralegals, or staff working at Duane Morris on this lawsuit or with files and documents maintained by Duane Morris in relation to this case. (Dalton Aff. ¶¶ 9-12; Bohner Aff. ¶ 2-3; Dunham Aff. ¶¶ 7-13; Manookian Aff. ¶¶ 2-5). In addition, the former Miller Dunham attorneys at Duane Morris, including Dunham, have been prohibited from receiving any fees that may be realized by Duane Morris as a result of this lawsuit. (Dalton Aff. ¶ 12; Dunham Aff. ¶ 14). Because of these "firewall" protections used by Duane Morris, the plaintiff argues that there is no reasonable risk that confidences of Teleflex will or could be used to the detriment of Teleflex. Further, the plaintiff argues that this lawsuit is not substantially related to the matters formerly handled by Dunham for Teleflex at Miller Dunham in that any discussion that Dunham had with Teleflex regarding hiring a Seed and Feed employee as the Year 2000 coordinator occurred at least two years after Teleflex fired James on May 2, 1994.

II. STANDARD FOR A MOTION TO DISQUALIFY

Federal courts have the inherent power to supervise the conduct of attorneys practicing before them. See Commonwealth Insurance Co. v. Graphix Hot Line, Inc., 808 F. Supp. 1200, 1203 (E.D. Pa. 1992) (citing In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 161 (3d Cir. 1984)). To further the courts' interests in protecting the integrity of their judgments,

maintaining public confidence in the integrity of the bar, eliminating conflicts of interest, and protecting confidential communications between attorneys and their clients, a court has the power to disqualify counsel from representing a particular client. See Commonwealth, 808 F. Supp. at 1203. A court should grant a motion to disqualify

“only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule. It should consider the ends that the disciplinary 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.”

Brennan v. Independence Blue Cross, 949 F. Supp. 305, 307 (E.D. Pa. 1996) (quoting United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980)).

The burden is on the party seeking disqualification under Rule 1.7 and 1.9 to show that the representation would be impermissible. See Brennan, 949 F. Supp. at 307. However, any doubts regarding the existence of a violation of the ethical rules governing attorneys favor disqualification. See id. The burden to prove compliance with the screening exceptions of Rule 1.10(b)(1) and (2) is on the law firm whose disqualification is being sought. See Dworkin v. General Motors Corporation, 906 F. Supp. 273, 279 (E.D. Pa. 1995).

III. ANALYSIS

A. Rule 1.9

Rule 1.9(a) of the Rules of Professional Conduct provides:⁴

A lawyer who has formerly represented a client in a matter shall not thereafter: (a)

⁴ The Pennsylvania Rules of Professional Conduct were adopted for use in the United States District Court for the Eastern District of Pennsylvania by Local Civil Rule 83.6 IV(B).

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.

The defendants argue that Duane Morris has a conflict of interest under Rule 1.9(a) because Dunham previously represented Teleflex. An analysis of a potential violation of Rule 1.9(a) focuses on (1) whether the matters are substantially related, (2) whether the clients have materially adverse interests, and (3) whether the clients consent after consultation.

1. Substantially Related

To determine if Dunham's prior representation of Teleflex is "substantially related" to the representation of James by Duane Morris in the present lawsuit, the Court should consider the nature and scope of the prior representation at issue, the nature of the present lawsuit against the former client, and whether in the course of the prior representation, the client might have disclosed to its attorney confidences which could be relevant or possibly detrimental to the former client in the present action. See Brennan, 949 F. Supp. at 308; International Longshoremen's Association Local Union 1332 v. International Longshoremen's Association, 909 F. Supp. 287, 291 (E.D. Pa. 1995); Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F. Supp. 1200, 1204-05 (E.D. Pa. 1992).

a. Nature and Scope of Prior Representation Compared to Nature of Present Lawsuit

According to the affidavit submitted by Chance to this Court, Dunham was involved with Teleflex in the process of hiring a Year 2000 coordinator. As part of that process, Dunham became familiar with the Seed and Feed program and was specifically involved with Teleflex

officials in discussions about whether or not to use a Seed and Feed employee as the Year 2000 coordinator. (Chance Aff. ¶ 4). In the Memorandum and Order of this Court dated December 22, 1998 resolving the defendants' motion for summary judgment, this Court concluded that the evidence presented by James, including evidence of the Seed and Feed Program at Teleflex, raised a reasonable inference of age discrimination. (Document No. 35 at 16). I conclude that the prior representation of Teleflex by Dunham is substantially related to this lawsuit for the purposes of Rule 1.9 because the details of the Seed and Feed Program are an important ingredient in both the prior work of Dunham for Teleflex and the instant litigation.

b. Possible Disclosures of Relevant or Detrimental Confidences of Former Client

To determine whether a lawyer "might have acquired" confidences which could be relevant to issues in the present lawsuit, a court should consider whether

(a) the lawyer and the client ought to have talked about particular facts during the course of the representation, or (b) the information is of such character that it would not have been unusual for it to have been discussed between lawyer and client during their relationship.

Brennan, 949 F. Supp. at 308 (quoting Realco Services, Inc. v. Holt, 479 F. Supp. 867 (E.D. Pa. 1979)). There is no requirement that the defendants prove that Dunham actually received confidential information in the course of his prior representation that is relevant to the current litigation. See Dworkin, 906 F. Supp. at 279 n. 7; Reading Anthracite Co. v. Lehigh Coal & Navigation Co., 771 F. Supp. 113, 117 (E.D. Pa. 1991) (noting that once a substantial relationship is established, an "irrebuttable presumption" arises that confidential information relevant to the current litigation might have been obtained in the prior representation).

Given the nature and scope of Dunham's representation of Teleflex as discussed above, I conclude that it would not have been unusual for Dunham and Teleflex to discuss information related to the Seed and Feed program that would be relevant to James' claims against Teleflex, even if the discussions occurred after James' employment was terminated.

2. Materially Adverse Interests

I conclude that James' interests are clearly materially adverse to the interests of Teleflex, particularly in regard to information about the Seed and Feed program. See International Longshoremen's Association, 909 F. Supp. at 291 (noting that the "court cannot imagine a situation where clients' interests could be more 'materially adverse'" than where a former client was suing a current client).

3. Consent after Consultation

It is clear that Teleflex was not counseled by Dunham or Duane Morris regarding the conflict nor was Teleflex's consent obtained for continued representation of James.

In summary, this Court concludes that the defendants' have established the presence of a conflict of interest in violation of Rule 1.9.

B. Rule 1.10

Rule 1.10 of the Rules of Professional Conduct provides:

- (a) While 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 Rules 1.7, 1.8(c), 1.9, or 2.2.
- (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about

whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter unless: (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

The defendants argue that Duane Morris should be disqualified under Rule 1.10 because the conflict of interest under Rule 1.9 is imputed to the whole firm. I conclude that the conflict of interest created by Dunham's previous representation of Teleflex is imputed to Duane Morris under Rule 1.10(a).

In addition, the defendants argue that Duane Morris did not fulfill the requirements of Rule 1.10(b). The analysis of whether the representation is "substantially related" to the present lawsuit and whether the clients' interest are "materially adverse" is the same as under Rule 1.9, and those elements of Rule 1.10 are satisfied here, as discussed above. According to the comment to Rule 1.10, paragraph (b) "operate[s] to disqualify a firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b)." There is no dispute that Dunham has actual knowledge of confidential information from Teleflex as lead counsel for Teleflex at Miller Dunham. Thus, Duane Morris has the burden of establishing that Dunham was screened from participation in the pending lawsuit before becoming associated with Duane Morris and that written notice was given to Teleflex promptly to enable it to ascertain compliance with Rule 1.10. See Dworkin, 906 F. Supp. at 279 (citing the comment to Rule 1.10).

Factors that may be considered by a court in determining whether a screening mechanism is effective include (1) the substantiality of the relationship between the attorney and the former

client, (2) the time lapse between the matters in dispute, (3) the size of the firm and the number of disqualified attorneys, (4) the nature of the disqualified attorney's involvement, (5) the timing of the wall. Dworkin, 906 F. Supp. at 279-80 (quoting Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1289 (Pa. 1992)). In addition, a court may consider the features of the screen itself, including: (1) the prohibition of discussion of sensitive matters, (2) restricted circulation of sensitive documents, (3) restricted access to files, (4) strong firm policy against breach, including sanctions, physical and/or geographical separation. Dworkin, 906 F. Supp. at 280 (quoting Maritrans, 602 A.2d at 1289).

While the features of the screen implemented by Duane Morris appear facially sufficient, other factors weigh against the sufficiency of the screen under Rule 1.10. There was no lapse of time between the representation of Teleflex by Dunham and the representation of James by Duane Morris; in fact, it appears that both clients were being concurrently represented for at least a period of time after the merger of the two law firms. The nature of the disqualified lawyer's involvement with Teleflex was at least in part directly related to an issue in the present lawsuit, as discussed above. Further, the relationship between Dunham and Teleflex was substantial in that Dunham was the lead counsel for Teleflex at Miller Dunham and counsel of record for Teleflex in the Aerofitters case. Most importantly, Duane Morris presented no evidence as to when the screen was implemented at the firm nor evidence that it sent prompt written notice of the presence and features of the screen to Teleflex such that it could assess Duane Morris' compliance with the provisions of Rule 1.10. Cf. Dworkin, 906 F. Supp. at 280 (denying motion for disqualification of firm and noting that the firm "took great care to implement its ethics screen before [the conflicted lawyer] began his employment at [the firm]"); LaSalle National

Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983) (noting the importance of implementing a screen “at the time when the potentially disqualifying event occurred, either when the attorney first joined the firm or when the firm accepted a case presenting an ethical problem”).

From these factors I find that Duane Morris has failed to prove that its attempt to comply with Rule 1.10(b) was effective. Accordingly, I conclude that Duane Morris’ continued representation of James in the lawsuit presents a conflict of interest that is imputed to the whole firm under Rule 1.10.

C. Balance of Interests

A finding that counsel is in violation of the Rules of Professional Conduct is not the end of the inquiry in deciding a motion to disqualify; a court must determine if disqualification will serve the purpose and goal of the ethical rules guiding lawyers. The interest in enforcing the Rules of Professional Conduct must be weighed against other factors, particularly in a case which is on the brink of trial and where disqualification would impose a hardship on plaintiff to retain new counsel. Factors this Court may consider in performing this balancing include Teleflex’s interest in attorney loyalty, James’ interest in retaining her chosen counsel, the risk of prejudice to James, and the Court’s interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system. See International Longshoremen’s Association, 909 F. Supp. at 293 (citing In re Corn Derivatives, 748 F.2d at 162).

I conclude that the Court’s interest in protecting the integrity of the proceedings and maintaining public confidence, as well as Teleflex’s interest in attorney loyalty, would best be

served by disqualification in this case. The fact that Duane Morris and Dunham purportedly have withdrawn their representation of Teleflex does not cure the conflicts presented by Duane Morris' representation of James in this lawsuit. The fact that Dunham withdrew, or at least told Teleflex that he was withdrawing, as counsel for Teleflex in the Aerofitters and other matters when the conflict of interest was brought to his attention indicates behavior that violates an attorney's duty of loyalty to his client. See International Longshoremen's Association, 909 F. Supp. at 293 ("However, an attorney may not drop one client like a 'hot potato' in order to avoid a conflict with another, more remunerative client."); Harte Biltmore Ltd. v. First Pennsylvania Bank, N.A., 655 F. Supp. 419, 422 (S.D. Fla. 1987) ("Public confidence in lawyers and the legal system must necessarily be undermined when a lawyer suddenly abandons on client in favor of another.")

I conclude that the risk of prejudice to James is not so great as to outweigh the interest in favor of disqualification. These conflicts had no effect on the resolution of the motion for summary judgment, and while the case stands ready to proceed to trial, no trial date has been set. This Court will allow James sufficient time to retain replacement counsel, and James' present counsel will be permitted to assist in the process of finding and transferring representation to replacement counsel. While a party's right to counsel of her choice is important, "[t]hese considerations must yield, however, to consideration of ethics which run to the very integrity of our judicial process." Brennan, 949 F. Supp. at 310 (internal quote omitted).

The Court concludes that the balance of factors weighs in favor of disqualification of

Duane Morris in this case.⁵

IV. CONCLUSION

Based on the foregoing analysis, the motion to disqualify will be granted.

An appropriate Order follows.

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The defendants also argued that Dunham's representation of Teleflex created a conflict of interest under Rule 1.7, 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 record reveals that at least between June 1, 1998 and June 19, 1998, Dunham, while at Duane Morris, was representing Teleflex in the Aerofitters case at the same time that Duane Morris was representing James in this lawsuit. It is clear that Teleflex has at no time consented to this concurrent representation. The defendants maintain that Dunham remained counsel of record in the Aerofitters case beyond June 19, 1998 while at Duane Morris. Because I have concluded that conflicts of interest violating Rule 1.9 and 1.10 justify disqualification, and in light of the fact that the record is not clear as to whether Dunham or Duane Morris are currently representing Teleflex in any matter, the Court need not reach the defendants' contention that Duane Morris' representation of James violates Rule 1.7.

**IN THE UNITED STATES DISTRICT COURT
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v.	:	
	:	
TELEFLEX, INC., RONALD BOLDT,	:	
and RICHARD WOODFIELD,	:	
	:	
Defendants.	:	NO. 97-1206

ORDER

AND NOW, this 24th day of February, 1999, upon consideration of the motion of defendants Teleflex, Inc., Ronald Boldt, and Richard Woodfield for disqualification of counsel (Document No. 28), the response of plaintiff Joanne Skowronski James (Document No. 30), the reply of the defendants (Document No. 31), and for the reasons given in the foregoing Memorandum, it is hereby **ORDERED** that the motion is **GRANTED**.

IT IS FURTHER ORDERED that this case is **STAYED** until **March 24, 1999** to allow James to obtain replacement counsel and her replacement counsel to enter their appearance on the docket. If necessary to complete these tasks, the stay may be extended by the Court upon a written request by the plaintiff and for good cause shown. Present counsel for James may remain counsel of record in this lawsuit until such time as replacement counsel is retained, may assist James in the process of retaining replacement counsel, and may assist the replacement counsel in the transfer of representation of James in this case.

LOWELL A. REED, JR., J.