ORIGINAL

IN THE SUPREME COURT OF OHIO

	:	
IN THE MATTER OF THE GUARDIANSHIP OF JOHN SPANGLER	:	**CASE NO. 2009-0121**
	:	**On Appeal from the Geauga County Probate Court of Appeals, Eleventh Appellate District**
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	:	

APPELLEE GABRIELE AND JOSEPH SPANGLER'S MOTION TO DISQUALIFY FRANKLIN J. HICKMAN AND JUDITH C. SALTZMAN AS COUNSEL FOR GEAUGA COUNTY BOARD OF MR/DD

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Now come Gabriele and Joseph Spangler and hereby move this Court for an order disqualifying Franklin J. Hickman and Judith C. Saltzman as counsel for the Board for the reason that Mr. Hickman had a previous attorney/client relationship with Gabriele Spangler in the course of which he received confidential information from her. Additionally, he received confidential information from Ms. Spangler that would be significantly harmful to her and he received that information from her as a potential client, and therefore he and his firm should be disqualified under the Ohio Rules of Professional Conduct. The reasons for this motion are laid out more fully in the accompanying memorandum and affidavit in support of this motion, attached hereto and incorporated herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

This issue in this matter presents two possible analytical approaches. The essential facts, as set forth in the accompanying Affidavit of Gabriele Spangler, attached hereto as Exhibit A and incorporated herein (hereafter "Affidavit"), involve Gabriele Spangler, Appellee, and Frank Hickman, Counsel for Appellant. Mrs. Spangler had previous approached Mr. Hickman regarding representation in the matter that is the subject of this action. This was not a casual contact with Mr. Hickman. Mrs. Spangler actually sat down in Mr. Hickman in a meeting for two hours on June 21, 2006, that was set up as a formal appointment. Affidavit, ¶11, 14. During the meeting she sought both his legal advice and to employ him as counsel for her. Affidavit, ¶12. She disclosed confidential information to him. Id. She consulted with him as a professional, not as a friend. Affidavit, ¶13. Mr. Hickman did in fact provide her with legal advice, which she acted on. Affidavit, ¶14, 15. Mr. Hickman also indicated that he anticipated representing her in the matter and asked her to take some steps on her own in anticipation of that representation. Affidavit, ¶14.

At this point, in Mrs. Spangler's mind, the attorney client relationship had been established. Subsequently, on November 13, 2006, five months after the initial contact, Mrs. Spangler caught up with Mr. Hickman at a conference. This was not a formal appointment, nor was it a casual contact. Mr. Hickman agreed to meet with Mrs. Spangler following the conference. Affidavit, ¶21. At this point she updated him on the status of the situation, again providing him with confidential information. Affidavit, ¶21, 23. It was not until they were on their way out into the parking lot that Mr. Hickman advised Mrs. Spangler that he could not represent her because he had represented Geauga MRDD. Affidavit, ¶22.

Subsequently, Mr. Hickman made an appearance in the case on behalf of an *amicus*, but did not directly represent Geauga MRDD. The *amicus* was limited to procedural arguments, and was not in a position to use the confidential information provided by Mrs. Spangler in that context. Because he was representing the amicus on a limited issue, and had not duty to disclose information to Geauga MR/DD, there was not a clear conflict.

The role of an amicus is clearly different than the role of a party in a case:

> [Amicus] . . . '"is a term applied to a bystander, who without having interest in the cause, of his own knowledge makes a suggestion on a point of law or of fact for the information of the presiding judge.' A more recent definition is"[a] person with strong interest in or views on the subject matter of the action [who] . . . petition[s] the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views."
>
> - Reagan Wm Simpson, Mary R. Vasaly, American Bar Association. Tort and Insurance Practice Section, *The Amicus Brief*, (2004), page 1-2, citing Samuel Krislov, *The Amicus Curaie Brief: From Friendship to Advocacy,* 72 Yale L.J.694 (1963) and Black's Law Dictionary 75 (5th ed. 1979)

Thus, the amicus is really advancing its own views, not the views of one of the parties. In the case at bar, Mr. Hickman represented an amicus who had strong views on the point of law pertaining to the standing of Geauga MR/DD to even file the motion. He was not an advocate for Geauga MR/DD, but rather was advancing the views of the organization.

As Chief Justice Rehnquist said, "[Amicus curaie is a] phrase that literally means 'friend of the court' – someone who is not a party to the litigation, but who believes that the court's decision may affect its interest." William H. Rehnquist, *The Supreme Court*, p. 89, available at http://en.wikipedia.org/wiki/Amicus_curiae and accessed on July 10, 2009.

The role of an advocate for a party is quite different. An advocate "has a duty to use legal procedure for the fullest benefit of the client's cause." R. Prof. Cond. 3.1, comment 1. Further," [a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction,

or personal inconvenience to the lawyer. A lawyer also must act with commitment and dedication to the interests of the client" .R. Prof. Cond. 1.3, comment 1.

Mr. Hickman has made an appearance on behalf of the very entity that has brought the action against Mrs. Spangler. Now there is a clear conflict. He is now an actual advocate in an adversarial role against his former client regarding her relationship with the Board and the Board's obligation to provide services to her son, and it is this adversarial relations that gave rise to this case.

The conflict presented in this case is complicated, because it appears that there are two. The first is that Geauga MRDD was a former client, which would explain Mr. Hickman's statement to Mrs. Spangler regarding his ability to represent her in November, after he had met with her, provided her with legal advice and agreed to provide representation in the future to her. Mrs. Spangler's relationship with Mr. Hickman is either as former client or potential client. Each of these characterizations require a slightly different analysis under the Rules of Professional Conduct, but each analysis leads to the same conclusion: Mr. Hickman should be disqualified from representing Geauga MRDD. Each of these approaches will be analyzed separately.

Issue 1: Whether Mr. Hickman and Mrs. Saltzman should be disqualified as counsel for Geauga MRDD as Mrs. Spangler is a former client of Mr. Hickman.

Admittedly, it is unlikely that Mrs. Spangler under these circumstances will continue to retain Mr. Hickman, but she certainly left the meeting of June 21, 2006, anticipating that he would be providing her representation in the future. Mr. Hickman apparently had the same idea, since he agreed to sit down with Mrs. Spangler following the conference to be updated on the status of things. It was only after that meeting that he indicated that he could not represent her

due to a conflict. However, in the interim, Mrs. Spangler had followed his advice regarding the issues she had with Geauga MRDD, based on the earlier two hour meeting with him.

As this Court held in *Land Title Abstract & Trust Co. v. Dworken* (1934), 129 Ohio St. 23, 1 O.O. 313, 193 N.E. 650, at paragraph one of the syllabus:

> "The practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general ***all advice to clients*** and all action taken for them in matters connected with the law."

See *Disciplinary Counsel v. Brown (2009),* 121 Ohio St.3d 423, 2009-Ohio-1152.

It is clear from this that Mr. Hickman was acting in the capacity of a lawyer practicing law by rendering advice to Mrs. Spangler regarding the very case that is now pending before this Court.

The prerequisite to disqualifying an attorney due to a conflict of interest is the existence of a prior or current attorney-client relationship between the party moving for disqualification and the attorney being sought for disqualification. *Skycasters LLC v. J. W. Didado Elec. Inc.* (September 24, 2008), 2008-Ohio-4849 (9th Dist. Ct. App.), citing *Witschey v. Medina County Bd. of Comm'rs,* 169 Ohio App. 3d 214, 2006-Ohio-5135, at ¶32 (citing *Morgan v. N. Coast Cable Co.,* 63 Ohio St. 3d 156, 159 (1992))

> The type of evidence necessary to support the determination can vary with the circumstances. However, the ultimate issue is whether the putative client ***reasonably believed that the relationship existed*** and that the attorney would therefore advance the interests of the putative client.

Henry Filters, Inc. v. Peabody Barnes, Inc. (1992), 82 Ohio App.3d 255, 260-261, 260, 611 N.E.2d 873, 875-876 (citing *Westinghouse Elec. Corp. v. Kerr-McGee Corp.* (C.A.7, 1978), 586 F.2d 1311) [Emphasis supplied.]

In reviewing this case law, it is clear that Mrs. Spangler reasonably believed under the circumstances that the relationship of attorney-client existed.

Having established the existence of an attorney-client relationship, the analysis must then focus on Rule of Professional Conduct 1.9, which involves duties to former clients. The pertinent section of that rule is as follows:

> (a) Unless the former client gives informed consent, confirmed in writing, 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.

Under subsection (a), Mr. Hickman cannot represent another party in the same or a substantially related matter in which the party's interests are materially adverse to the interests of Mrs. Spangler. Clearly, Mr. Hickman had rendered advice and counsel to Mrs. Spangler regarding problems and issues that she was having with Geauga MRDD and problems she was having with respect to her son's legal rights. Affidavit, ¶12-14. Subsequently Geauga MRDD filed a motion to remove her as guardian, citing many of the same issues that Mrs. Spangler had discussed with Mr. Hickman. As noted in the Affidavit, Mrs. Spangler reasonably believed that the attorney-client relationship existed and was therefore comfortable disclosing confidential information to Mr. Hickman. Affidavit, ¶ 14, 23.

While there is clear evidence through Mrs. Spangler's affidavit that she disclosed confidential information, it should be noted that "[w]here an attorney himself represented a client in matters substantially related to those embraced by a subsequent case he wishes to bring against the former client, he is ***irrebuttably presumed*** to have benefitted from confidential information relevant to the current case. In such limited situations there is no necessity to demonstrate actual exposure to specific confidences which would benefit the present client." *Carr v. Acacia Country Club* (Feb. 12, 2009) 2009-Ohio-628, (*citing Cleveland v. Cleveland*

Electric Illuminating Co. (1976), 440 F.Supp. 193, 210) [Emphasis supplied.] With this irrebuttable presumption, it is clear that Mr. Hickman is irrebuttably presumed to have benefitted from the confidential information relevant to the current case.

Furthermore, this case is the same or a substantially related matter in which that Geauga MRDD's interests are materially adverse to the interests of Mrs. Spangler. '"Substantially related matter' denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter." R. Prof. Cond. 1.0. Mrs. Spangler's communications with Mr. Hickman included conveying to him confidential factual information that might be used to advance the position of Geauga MR/DD. In order to preserve the confidential nature of the information, it is not possible to elaborate any further, which is why the irrebuttable presumption exists.

This definition of substantially related matter does not include a provision that the attorney agree to provide representation without using the confidentialinformation on behalf of the new client or could somehow screen the information. The Rules of Professional Conduct, while permitting some screening, have set forth the particular steps that must be followed, and these have not been met here.

Mr. Hickman has indicated to the undersigned that he takes the position that the issue before the Ohio Supreme Court is a procedural issue involving Geauga MRDD's rights to bring an action against Mrs. Spangler, and is therefore not a substantially related matter. [1] However, it is impossible to segregate the procedural issue from the underlying case. In fact, it is anticipated

[1] It should be noted that over the course of the past several days the undersigned counsel has discussed this matter directly with Mr. Hickman, has shared the affidavit and an earlier draft of this motion and both attorneys have had frank discussions about these issues, which is why it is presumed that Mr. Hickman has been careful about not disclosing confidential information obtained from his former client to his current client.

that one of the issues before this Court will be a determination of whether Geauga MRDD's right to bring the motion is harmless, since the basis for bringing the motion was without merit, requiring an analysis of the merits of the underlying case. The Rule speaks in terms of a related matter and does not dissect it further into the procedural or substantive aspects of the case.

More importantly, as an advocate for Geauga MR/DD, Mr. Hickman has a duty to use legal procedure for the fullest benefit of the client's cause. R. Prof. Cond. 3.1, comment 1. The fullest benefit of the client's cause would include using any and all pertinent information that he has received in order to advocate on behalf of his client. It is the very use of this information that is at the heart of the Motion. It is presumed at this point that Mr. Hickman has not disclosed any of the confidential information to Geauga MR/DD at this point, but it is clear that his continued representation gives rise to a duty to use that information for the benefit of his new client. This is why he must be disqualified as counsel for Geauga MR/DD.

Given that Mrs. Spangler is a former client and this is the same or substantially related matter in which she sought Mr. Hickman's advice, this Court has no choice but to disqualify Mr. Hickman.

Issue 2: Whether Mr. Hickman and Mrs. Saltzman should be disqualified as counsel for Geauga MRDD as Mrs. Spangler was a prospective client of Mr. Hickman.

Under R. of Prof. Cond. 1.18, Mrs. Spangler is, at a minimum a prospective client because she met with Mr. Hickman to discuss "the possibility of forming a client-lawyer relationship with respect to a matter..."

This means that Mr. Hickman is not permitted to use or reveal information learned in the consultation. R. 1.18 (b). Furthermore, section (c) indicates:

> (c) A lawyer subject to division (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 division (d).

Division (d) involves written consent or screening, neither of which is applicable here as Mrs. Spangler is not giving written consent and Mr. Hickman cannot screen himself from himself and there is clearly no effort to screen himself from Ms. Saltzman as they are serving as co-counsel.

Thus the only analysis required is whether the lawyer received information from Mrs. Spangler that could be significantly harmful to Mrs. Spangler. Given the irrebuttable presumption of the confidentiality of the information provided, and given that Mrs. Spangler wishes to retain the confidential nature of the information, we must look to the circumstances of the situation to determine if the information received could be significantly harmful.

This entire case arose because of the difficult relationship between Geauga MRDD and Mrs. Spangler. Geauga MRDD asked for the removal of Mrs. Spangler because of complaints she had made about services that were being provided to her son. Affidavit, ¶ 17. Specifically, Mrs. Spangler had expressed concern that the care providers were not following the plan and that Geauga MRDD was not supervising her son's care. Id. These are the same issues that Mrs. Spangler discussed with Mr. Hickman under circumstances where she felt that the information that she was providing were being provided to her attorney and in a confidential setting. There can be no doubt that what she revealed to Mr. Hickman could be used against her and be significantly harmful to her. The potential for harm is clear. Even though the motion to remove the Spanglers as guardians had not yet been filed, the adversarial relationship between the parties had already been established and Mrs. Spangler was clear that she had concerns about the Board's supervision of the caregivers.

Mrs. Spangler is concerned that the confidential information she provided Mr. Hickman and that it will be compromised. Affidavit, ¶ 27. In fact, Mr. Hickman advised her regarding this matter, she followed his advice, and as a result may be suffering the consequences of following the advice. Affidavit, ¶ 27-28.

For the reasons set forth above, Mr. Hickman and Ms. Saltzman should be disqualified to serve as counsel for Geauga MRDD in this matter. The duty to advocate on behalf of their new client will put the confidentiality of the information Mr. Hickman received from Mrs. Spangler in jeopardy, and disqualification is the only available remedy under these circumstances.

Further, Gabriele and Joseph Spangler seek attorneys fees for the prosecution of this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion was served this 10th day of July, 2009, upon the following counsel of record by U.S. Mail, postage prepaid, addressed as follows:

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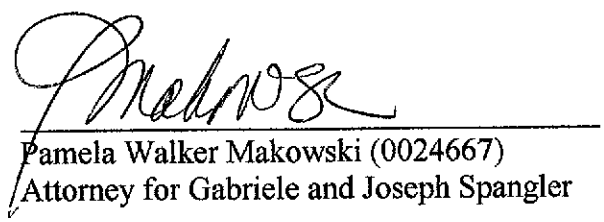

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