

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0303

On Appeal from the Eighth Appellate District
Cuyahoga County, Ohio

Court of Appeals Case No. CA-11-097598

JEFFREY A. BORING
Plaintiff-Appellant,

vs.

FOWLER ELECTRIC CO., et al.,
Defendants-Appellees

**MEMORANDUM IN OPPOSITION TO JURISDICTION AND
REQUEST FOR SANCTIONS**

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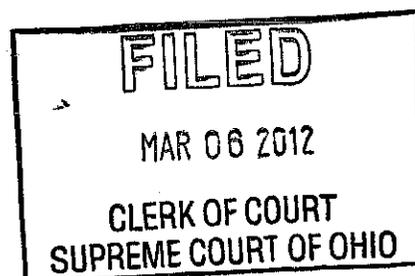


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I. EXPLANATION AS TO WHY THIS CASE DOES NOT INVOLVE A CONSTITUTIONAL QUESTION AND/OR AN ISSUE OF GREAT PUBLIC INTEREST.

The issue sought to be presented before this court is whether the denial of a motion to disqualify counsel constitutes a final appealable order under Ohio law. This is neither a novel issue of Ohio law nor a matter which has not previously been addressed by this Court. In fact, this precise issue was addressed within the past year by this court in *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317. Therein, the court was asked to determine whether the denial of a motion to disqualify opposing counsel constituted a final appealable order in the context of a divorce proceeding. In concluding that the ruling did not constitute a final appealable order, this court held:

We have previously held that a decision granting a motion to disqualify opposing counsel is a final, appealable order that a party deprived of counsel can immediately appeal. See *Russell v. Mercy Hospital* (1984), 15 Ohio St.3d 3739, 15 OBR 126, 472 N.E.2d 697 (“in the civil context, the grant of a motion to disqualify counsel * * * constitutes a final appealable order under R.C. 2502.02”). See also *State v. Chambliss* 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, syllabus (“a pretrial order removing a criminal defendant’s retained counsel of choice is a final appealable order subject to immediate appeal”). We now address whether in the special proceeding of a divorce, an order denying a motion to disqualify opposing counsel also qualifies as a final, appealable order under R.C. 2505.02(B)(2).

Orders granting and denying disqualification of counsel differ in two key aspects. First, an order granting disqualification immediately and definitely affects the party it deprives of chosen counsel; the purpose of appealing such an order is to prevent the removal itself. By contrast, an order denying disqualification, standing alone, affects no right held by the unsuccessful movement because there is no substantial right to disqualify an opposing counsel. *Id.* at ¶¶ 8-9.

Numerous other courts have likewise concluded that in the context of a civil proceeding, a denial of the motion to disqualify does not constitute a final, appealable order. *In re Estate of Cullen*, 118 Ohio App.3d 256, 261 (1997) holding that a motion to disqualify counsel in a civil proceeding has been characterized as a request for ancillary relief, the denial of which is not a

final appealable order); *Bouzaher v. Wahba*, 6 Dist. No. E-09-034, 2010-Ohio-1593 (noting that, in the context of a civil proceeding, the denial of a motion to disqualify counsel is not a final appealable order). As such, the fact that the order sought to be appealed contains a Civ. R. 54(B) finding that there is “no just reason for delay” is irrelevant. *In the Estate of: L.P.B.*, 2011-Ohio-4656, at ¶ 13.

Faced with this precedent, appellant has endeavored to differentiate this case from that addressed in *Wilhelm-Kissinger* by claiming concerns about the alleged disclosure of “confidential” or “privileged” information. This alleged distinction is without merit. In the first place, the order on appeal does not call for the disclosure of privileged material. A ruling on privilege cannot be deemed a final, appealable order under R.C. 2502.02 unless it compels the disclosure of privileged material. See *Medina v. Medina General Hospital*, 2011-Ohio-3990 at ¶ 7. Furthermore, this Court’s decision in *Wilhelm-Kissinger* was rendered in spite of a claim that the lawyer sought to be disqualified had improper access to confidential illegally obtained information on a computer. These similar allegations of confidentiality and privilege did not impact the *Wilhelm-Kissinger* Court’s conclusion that the denial of a motion to disqualify was a non-appealable order.

In sum, appellant seeks to have this Court revisit an issue which it has conclusively resolved in a decision not yet a year old. As such, this case should not be deemed to involve substantial constitutional question and/or an issue of great and general public interest.

II. STATEMENT OF FACTS IN THE CASE

In responding to appellant’s memorandum in support of jurisdiction, a chronology of events leading up to plaintiff’s motion to disqualify is helpful.

1. On August 24, 2011, Mr. Spitz sent an email to Leon Weiss, a partner at Reminger Co., L.P.A. ("Reminger"), wherein Mr. Spitz alleged that Adriann Garland, an associate at Reminger hired in July of 2011 (who had previously worked at the Spitz firm) had been accused of improperly disclosing client confidences regarding a Spitz law firm client. This alleged improper disclosure was said to have occurred after Ms. Garland began working at the Reminger firm. In the same email, Mr. Spitz requested that Reminger confirm that it had put in place all necessary and appropriate protocols to insulate Ms. Garland from any cases the Spitz firm had where Reminger was defending another party.

2. On August 24, 2011, Mr. Weiss emailed a correspondence back to Mr. Spitz and advised that: (1) Mr. Weiss had confirmed that Adriann Garland had not talked with any attorneys regarding any Spitz clients since starting her employment at Reminger; and (2) the Reminger firm had implemented all necessary and appropriate protocol regarding any cases that were active at the Spitz firm which are being defended by a Reminger attorney.¹

3. On August 25, 2011, Mr. Spitz sent a letter to the attention of Steve Walters, Leon Weiss, and Adriann Garland wherein Mr. Spitz: (1) placed Adriann Garland on notice that certain claims against her would be forthcoming; (2) demanded that Reminger withdraw from all cases that Ms. Garland worked on during her employment at the Spitz firm; and (3) demanded that Reminger place Ms. Garland on immediate leave pending Reminger's withdrawal from the cases. The underlying basis of these requests was the allegation that Ms. Garland had improperly divulged confidences while employed at the Spitz firm. Mr. Spitz now claimed that Reminger's prior assurance of the implementation of appropriate screening protocols would not

¹ Ms. Garland has not been involved in the representation of any Spitz firm files since working at Reminger.

be sufficient “as the repeated breaches of confidence and privileges create far too great of an appearance of problems.”

4. On August 29, 2008, Clifford Masch, in his capacity as general counsel for Reminger, responded to the allegations in Mr. Spitz’ August 25th correspondence. Mr. Spitz was advised that Reminger was of the belief that the Ohio Rules of Professional Conduct did not support his demand that Reminger withdraw from the cases and/or that Ms. Garland should be placed on leave from her employment with Reminger. Mr. Spitz was specifically advised that he had failed to cite an ethical rules to support such a request.

5. On September 22, 2011, plaintiff filed the motion to disqualify the Reminger firm in this case.

6. The Spitz firm filed similar motions to disqualify the Reminger firm in *Weldon v. Presley*, U.S. District Court for the Northern District of Ohio, Case No. 1:10CV01077, *Symonette v. Burlington Coat Factory*, Franklin County Court of Common Pleas Case No. 11 CVC 01-589, and *Whelan v. Fowler Electric Co.*, Cuyahoga County Court of Common Pleas Case No. CV 11 751302.

7. After a full evidentiary hearing, plaintiff’s motion to disqualify the Reminger law firm was denied in the *Whelan* and in this case. Plaintiff’s motion to disqualify in *Weldon* case was dismissed by order of the court.

8. The Spitz law firm was also sanctioned in the *Weldon* case for asserting that Ohio Rule of Professional Conduct 1.10(A) applied to a situation where the requested disqualification was based on a lawyer switching firms. In granting sanctions in response to the assertion of this legal position, the *Weldon* court held:

While the court is inclined to provide the Spitz firm a certain degree of leeway for its initial motion for disqualification, however misguided, it cannot overlook the

frivolous nature of the Spitz law firm's reply brief (Document 33) and motion for sanctions (Doc. 36). Both filings represent frivolous conduct worthy of Rule 11 sanctions. Neither filings were warranted as reasonable under the circumstances and both caused Reminger to incur unnecessary costs. The Spitz law firm knew or should have known that its arguments regarding Rule 1.10(A) and the decision in *OneBeacon American Ins. Co. v. Safeco Ins. Co.* 1:07-cv-358, 2008 WL 4059836 (S.D. Ohio Aug. 25, 2008), were wholly without merit.

A copy of the federal court's order denying the motion to disqualify and granting sanctions is attached hereto as Exhibit "A."

9. Plaintiff filed an appeal to the Eighth District Court of Appeals of the trial court's order denying plaintiff's motion to disqualify Reminger.

10. Prior to filing the motion to dismiss before the Eighth District Court of Appeals, appellant's counsel was notified of this court's holding in *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, (2011).

11. In spite of this information, appellant continued the pursuit of this appeal which was dismissed as a non-appealable order based on this court's holding in *Wilhelm-Kissinger*.

III. LAW AND ARGUMENT

Appellant asserts that the trial court's denial of the motion to disqualify Reminger is a final appealable order under R.C. 2505.02(B)(2). This cited statutory provision provides:

- (B) An order is a final order that may be reviewed, affirmed, modified, or reversed with or without retrial, when it is one of the following:
 - (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

In seeking to convince this Court to accept jurisdiction, appellant argues that the Eighth District Court of Appeals misapplied this Court's decision in *Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St.3d 1(1998), and *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317. These contentions are without basis in law or fact. With respect to

appellant's reliance on *Kala*, appellant ignores the fact that the *Kala* decision was rendered before the Ohio Supreme Court formally promulgated the Rules of Professional Conduct, including Rule 1.10(C) and (D) which address ethical issues which may arise when a lawyer switches firms. The Supreme Court's promulgation of the Rules of Professional Conduct are premised on this Court's constitutional authority to regulate the discipline of lawyers on all matters related to the practice of law. *Dickens v. J&R Customs Homes, Inc.*, 189 Ohio App.3d 627, 628 (2010). Admittedly, the official comments to Rule of Professional Conduct 1.10 indicates that the rule is "consistent with the holding in *Kala* that imputes to a new law firm the disqualification of a lawyer who has substantial responsibility for a matter that prevents any lawyer in that firm from representing, in that matter, a client whose interests are materially adverse to the former client." This adopted aspect of *Kala*, however, is only relevant when the lawyer switching firms is established to have had "substantial responsibility" for the matter in issue. Appellant presented no evidence to establish such a position.² Furthermore, courts have recognized that the special standards for disqualification in Rule of Professional Conduct 1.10 "supersedes those announcing *Kala*, which are slightly different." See *Dickens v. J&R Customs Homes* at ¶ 4.

Along the same lines, appellant's attempt to differentiate this case from the *Wilhelm-Kissinger* decision is disingenuous. In *Wilhelm-Kissinger*, the party seeking disqualification similarly argued that the lawyer sought to be removed allegedly had access to privileged material obtained on a computer available to him. Despite this argument, the *Wilhelm-Kissinger* Court nevertheless concluded that the denial of a motion to disqualify does not constitute a final, appealable order under R.C. 2505.02(B)(2).

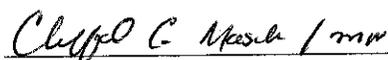
² Ms. Garland was not counsel of record in this matter while at the Spitz firm and testified that she conducted no work on the file.

Lastly, this Court should take note of the fact that appellant has asserted a legal position in the memorandum in support of jurisdiction which was found to constitute sanctionable conduct by the federal court in *Whelan* under Rule 11. (See appellant's citation to Rule of Professional Conduct 1.10(A) as applicable to this case in Appellant's Memorandum in Support of Jurisdiction, pg. 3, second full paragraph and pg. 7, second full paragraph). As noted in the discussion of relevant facts, the federal court in *Weldon* found that appellant's presentation of the legal position that Ohio Rule of Professional Conduct Rule 1.10(A) was applicable to a situation where a lawyer switched firms was "wholly without merit" and warranted sanctions under Rule 11. (See Exhibit A, pgs. 10-13). Despite the prior issuance of sanctions, appellant reasserts this same argument before this Court. Appellee respectfully submits that appellant's assertion of a legal position before this Court which has been previously determined to constitute sanctionable conduct under Federal Rule 11 justifies the award of additional sanctions under Sup. Ct. R. 14.5.

IV. CONCLUSION

For all the reasons set forth herein, this court should deny jurisdiction of this matter and consider appropriate actions as it relates to appellant's assertion of a legal position for which he has already been sanctioned in another proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail this 6th day of March,

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The gravamen of Weldon's disqualification motion centers on an allegation of conflict of interest arising from Ms. Garland's departure from the Spitz Firm, representing Weldon, and subsequent employment with Reminger, representing the Defendants in the instant matter. (Doc. 31). Incorrectly premising its argument on Ohio common law rather than upon the applicable Rules of Professional Conduct, the Spitz Firm represents that Ms. Garland should be placed on leave and Reminger disqualified from representation in this matter because Ms. Garland "regularly worked on and was involved in discussions regarding" the instant matter. *Id.* (Doc. 33, Affidavit of Brian Spitz, ¶¶ 4-8). The Spitz Firm also acknowledges the existence of a compensation dispute between Ms. Garland and her former firm involving the non-payment of a claimed "discretionary bonus". (Doc. 31).

In opposing the petition for disqualification, Reminger contends, pursuant to Rule of Professional Conduct 1.10(c), that Ms. Garland's posture vis-a-vis the instant matter while employed at the Spitz Law Firm does not warrant the disqualification of Reminger or the requested suspension of Ms. Garland. (Doc. 32). Through argument and affidavit evidence, Reminger maintains Ms. Garland did not possess the requisite "substantial responsibility" over the instant matter sufficient to trigger Rule 1.10(c)'s disqualification sanction. (Doc. 32, Affidavit of Adriann Garland). Further, Reminger provides affidavit evidence and correspondence attesting to Ms. Garland's sequestration from any work or case specific discussions with any lawyers at Reminger working on matters involving opposing representation by the Spitz Firm. (Doc. 32, Affidavit of Kenneth P. Abbarno; Affidavit of Clifford C. Masch; Doc. 37, Affidavit of Clifford C. Masch).

In responding to the motion for disqualification, Reminger seeks sanctions against the Spitz Firm for alleged frivolous conduct under O.R.C. 2323.51 and Fed. R. Civ. P. 11. Reminger specifically seeks recoupment of attorney fees and expenses incurred in connection with the Spitz Firm's petition, contending: (1) that the Spitz Firm's briefs failed to rely upon the appropriate law, noting the applicable statutory law was discussed in correspondence with the Spitz Firm prior to the instant filings; (2) that the Spitz Firm failed to support its disqualification request with the requisite evidence of "substantial responsibility" in the matter by Ms. Garland; and, (3) that the Spitz Firm improperly relied upon alleged unrelated events involving Ms. Garland outside the ambit of the instant matter. (Doc. 32, pp. 7-9).

The briefing continued apace, with the Spitz Firm accusing Reminger of attempting to "manipulate the Court" in moving for sanctions and further calling for Reminger's disqualification under Rules of Professional Conduct 1.10(a) and 1.10(d). (Doc. 33). In a Court permitted surreply, Reminger pointedly discusses the inapplicability of Rules 1.10(a) and 1.10(d) to the instant circumstances. (Doc. 35).

In further response, the Spitz Firm moved for sanctions of attorney fees against Reminger, pursuant to O.R.C. 2323.51 and Fed. R. Civ. P. 11, alleging "egregious and frivolous actions". (Doc. 36). Reminger provided a brief in opposition. (Doc. 37).

The Court gleans the following from the briefs on these issues. As a former associate at the Spitz Firm, Ms. Garland attests that she was never assigned the instant matter, she disavows any hand in representing the Plaintiffs, and maintains that she did not draft any pleadings, briefs or motions, nor carry out any legal research in this case. Ms. Garland recalls one brief conversation with an associate at the Spitz Firm after he

had mediated the instant matter. Ms. Garland left the Spitz Firm in July 2011 and began working as an associate at Reminger. While at her new firm, the uncontested evidence indicates that Reminger properly inoculated Ms. Garland from involvement with any case handled by the Spitz Firm and she attests to not having had any discussions regarding the Weldon case with any of the Reminger attorneys. The Spitz Firm acknowledges Ms. Garland was not the attorney on the instant matter but alleges, nevertheless, that she "participated" in "round table discussions" was "aware of critical strategic planning" and "did research into the selection of experts to be used in this case." (Doc. 33 Affidavit of Brian D. Spitz). The Spitz Firm provides no evidence of billable hours attributed to Ms. Garland.

Law and Argument

It is part of a court's duty to safeguard the sacrosanct privacy of the attorney-client relationship. See American Can Company v. Citrus Feed Co., 436 F.2d 1125, 1128 (5th Cir. 1971). In doing so, a court helps to maintain public confidence in the legal profession and assists in protecting the integrity of the judicial proceeding. United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982). Disqualification of counsel is but one of several avenues available to a court in its attempt to ensure that the Rules of Professional Responsibility are not violated. On the other hand, disqualification as a prophylactic device for protecting the attorney-client relationship is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing.

This balancing is not meant to infer that motions to disqualify counsel may not be legitimate, for there obviously are situations where they are both legitimate and necessary; nonetheless, such motions should be viewed with extreme caution for they can be misused as techniques of harassment. Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1577 (Fed. Cir. 1984) ("Motions for attorney disqualification 'should be viewed with extreme caution for they can be misused as a technique of harassment.'") (quoting Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982)), disapproved on other grounds by Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985).

The power to disqualify an attorney from a case is "incidental to all courts, and is necessary for the preservation of decorum, and for the respectability of the profession." Ex Parte Burr, 22 U.S. (9 Wheat.) 529, 531, 6 L.Ed. 152 (1824). However, the ability to deny one's opponent the services of her chosen counsel is a potent weapon. Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 224 (6th Cir. 1988). Confronted with such a motion, courts must be sensitive to the competing public interests of requiring professional conduct by an attorney and of permitting a party to retain counsel of her choice. In order to resolve competing interests, the court must balance the interest of the public in safeguarding the judicial process together with the interests of each party. General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704, 711 (6th Cir. 1982).

While it previously followed common-law precedent, the Sixth Circuit now relies upon the codified Rules of Professional Conduct when adjudicating questions of lawyer disqualification in a given case. See National Union Fire Ins. Co. of Pittsburgh, Pa. v.

Alticor, Inc., 466 F.3d 456, 457 (6th Cir. 2006), vacated in part on other grounds, 472 F.3d 436 (6th Cir. 2007) ("applying these accepted rules will lead to greater uniformity and predictability with regard to the ethical code of conduct"). For purposes of this case, the Ohio Rules of Professional Conduct govern whether disqualification of counsel is warranted because of an alleged conflict of interest over the Weldon matter, arising from the movement of an associate from the Spitz Firm to the firm of opposing counsel Reminger.

Ms. Garland does not Warrant Being Placed on Leave

The Ohio Rules of Professional Conduct placed before the Court for consideration include the following as it pertains to the disqualification of an attorney due to a conflict of interest with a prior firm:

RULE 1.9(c): DUTIES TO FORMER CLIENTS

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter do either of the following:

- (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known;
- (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Ohio R. Prof. Conduct 1.9.

The notes to ORPC 1.9 indicate that "[t]he rule articulates the substantial relationship test adopted by the Supreme Court in Kala v. Aluminum Smelting & Refining Co., Inc. (1998), 81 Ohio St.3d 1[, 688 N.E.2d 258]." As set forth in Kala, to

determine whether counsel should be disqualified from representing a client in an action against a former client, the court should use the following three-part analysis:

(1) Is there a substantial relationship between the matter at issue and the matter of the former firm's prior representation;

(2) If there is a substantial relationship between these matters, is the presumption of shared confidences within the former firm rebutted by evidence that the attorney had no personal contact with or knowledge of the related matter; and

(3) If the attorney did have personal contact with or knowledge of the related matter, did the new law firm erect adequate and timely screens to rebut a presumption of shared confidences with the new firm so as to avoid imputed disqualification?

Kala, 81 Ohio St.3d 1, 688 N.E.2d 258, at syllabus.

Recognizing that Rule 1.9 is only tangentially related in this matter because Ms. Garland does not represent the Defendants in the Weldon matter, the record clearly demonstrates that matters are substantially related. Nevertheless, the evidence before the Court rebuts the presumption of shared confidences with Ms. Garland who has attested to having not worked on the case. The record in this case demonstrates that Garland did not represent Weldon while at the Spitz Firm. Ms. Garland's affidavit testimony that she did not work on the case is sufficient to rebut the presumption of shared confidences with respect to the matter, particularly in light of the Spitz Firm's vague and generalized affidavit testimony that information was shared.

The presumption of Garland's shared confidences with her new firm, Reminger, is further rebutted by evidence that the law firm erected "an adequate and timely screen" so as to prevent the flow of any presumed confidential information from the quarantined attorney to other members of the new law firm. The evidence indicates that

Ms. Garland has not worked on or talked about this case to anyone at Reminger. Further affidavit evidence from Reminger attorneys and email evidence of prophylactic measures set up at Reminger to inoculate the firm from any presumed confidences held by Ms. Garland regarding the Weldon case provide the "strict standard of proof" to rebut the presumption of shared confidences. Kala, 81 Ohio St.3d at 11, 688 N.E.2d 258. citing LaSalle Natl. Bank v. Lake Cty. (7th Cir. 1983), 703 F.2d 252, 257. Accordingly, the Court will find that Garland and Reminger have proven the third step of the analysis needed to rebut the presumption of the conflict of interest raised in Weldon's motion to disqualify counsel. Thus Garland's disqualification is not warranted, nor should she be placed on leave as requested by the Spitz Firm.

The Evidence Does not Warrant the Disqualification of Reminger

As to the disqualification of a firm, the Ohio Rules of Professional Conduct direct the Court, in relevant part to ORPC 1.10(c), which reads as follows:

When a lawyer has had substantial responsibility in a matter for a former client and becomes associated with a new firm, no lawyer in the new firm shall knowingly represent, in the same matter, a person whose interests are materially adverse to the interests of the former client.

ORPC 1.10(c).

Rule 1.10(c) applies in circumstances involving the movement of counsel from one firm to another. In this instance, the threshold question posed by the Rule is whether Ms. Garland had substantial responsibility in the Weldon matter prior to her departure from the Spitz Firm. Rule 1.0(m) designates "substantial" as "denot[ing] a matter of real importance or great consequence." Further, pursuant to Comment 5B

regarding the meaning of "substantial responsibility":

Determining whether a lawyer's role in representing the former client was substantial involves consideration of such factors as the lawyer's level of responsibility in the matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client and the former client's personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the matter.

Rule 1.10(c), Comment 5B

The evidence falls short of a finding that Ms. Garland had "substantial responsibility" in the Weldon matter. As the Spitz Firm itself acknowledges, Ms. Garland was not primary counsel, nor is there any evidence that she performed any work on the Weldon matter. Ms. Garland contends she had no exposure to the matter save a brief conversation with an associate mediating the case. The Court has before it no evidence of Ms. Garland's time being billed to the Weldon matter. Finally, it is uncontested that Ms. Garland had no contact with the client and did not brief the matter. Whether, as the Spitz Firm contends, Ms. Garland was exposed to the firm's strategy involving this matter through "round table discussions regarding all cases currently being handled" by the firm, the degree of Ms. Garland's involvement, without more, does not rise to the level of "substantial" needed to bring the Court to disqualify Reminger from representing the Defendants.

Further, the ORPC address instances in which Rule 1.10(c) may not apply when considering whether to disqualify a firm due to attorney movement. Rule 1.10(d) notes the following:

(d) In circumstances other than those covered by Rule 1.10(c), when a lawyer becomes associated with a new firm, no lawyer in the new firm shall knowingly represent a person in a matter in which the lawyer is

personally disqualified under Rule 1.9 unless both of the following apply:

(1) the new firm timely screens the personally disqualified lawyer from any participation in the matter and that lawyer is apportioned no part of the fee from that matter;

(2) written notice is given as soon as practicable to any affected former client.

ORPC 1.10(d).

The application of Rule 1.10(d) requires the court to find that Ms. Garland was personally disqualified under Rule 1.9. While the Court has made no such finding, it is nevertheless instructive to recount the uncontested evidence that Ms. Garland's new firm has adhered to the strictures of Rule 1.10(d) and properly screened their new associate from involvement with the Weldon matter and the attorney engaged in representing the Defendants in Weldon.

Sanctions are Warranted Against the Spitz Firm

Upon review, the Spitz Firm's allegations, contained in its motion for sanctions, are as impassioned as they are incoherent. An even cursory reading of the Sixth Circuit's decision in National Union Fire Ins. Co. of Pittsburgh, Pa. v. Alticor, Inc. 472 F.3d 436 (6th Cir. 2007) indicates that in this instance, where the effort at disqualification involves, at its most basic, the movement of an attorney from one firm to another, Rule 1.10(a) simply does not apply. National Union at 438-39. To build a request for sanctions around the accusation that Defendants "frivolously misrepresented that [Rule] 1.10(a) does not apply" is frivolous in and of itself. Accordingly, the Spitz Firm's motion for sanctions will be denied as misguided.

Instead, the Court concludes the Spitz Firm's motion for sanctions (Doc. 36) amounts to frivolous conduct pursuant to Fed. R. Civ. P. 11. Rule 11 provides in relevant part as follows:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a belief or a lack of information.

Fed.R.Civ.P. 11(b). The rule also provides that:

[i]f, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Fed.R.Civ.P. 11(c)(1).

"[I]n this circuit, the test for the imposition of Rule 11 sanctions is whether the individual attorney's conduct was reasonable under the circumstances." Mann v. G & G Mfg., Inc., 900 F.2d 953, 958 (6th Cir. 1990). A district court exercises wide discretion in determining whether an attorney's conduct was unreasonable, thereby justifying an

award of sanctions under Rule 11. Ridder v. City of Springfield, 109 F.3d 288, 293 (6th Cir. 1997); Runfola & Assocs., Inc. v. Spectrum II, Inc., 88 F.3d 368, 372 (6th Cir. 1996).

In moving for sanctions in response to the Spitz Firm's initial filing for disqualification, the Defendants contend such sanctions are appropriate under Rule 11 where the Plaintiffs' motion "does not cite the appropriate law, is not supported by the requisite evidence to support such a request, and improperly relies on events which have nothing to do with this case." (Doc. 32, p. 8). While the Court is inclined to provide the Spitz Firm a certain degree of leeway for its initial motion for disqualification, however misguided, it cannot overlook the frivolous nature of the Spitz Firm's reply brief (Doc. 33) and motion for sanctions (Doc. 36). Both filings represent frivolous conduct worthy of Rule 11 sanctions. Neither filings were warranted as reasonable under the circumstances and both caused Reminger to incur unnecessary costs. The Spitz Firm knew or should have known that its argument regarding Rule 1.10(a) and the decision in OneBeacon America Ins. Co. v. Safeco Ins. Co., 1:07-cv-358, 2008 WL 4059836, (S.D. Ohio Aug.25, 2008), were wholly without merit.

The sanction for a violation of Rule 11(b) "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed.R.Civ.P. 11(c)(4). In an effort to determine an appropriate sanction, the Court has considered the following factors; namely, (1) deterrence; (2) compensating the aggrieved party; (3) whether the aggrieved party

failed to mitigate its expenses; and (4) the sanctioned party's ability to pay. See Danvers v. Danvers, 959 F.2d 601 (6th Cir. 1992). "Although deterrence is the primary goal of sanctions, reimbursement of fees and costs incurred by the other side is proper absent equitable considerations calling for a contrary amount." Colton v. Memorial Drive Trust, 986 F.3d 1421, 1993 WL 29663, at *3 (6th Cir. 1993).

In this instance, the Court finds that the Rule 11(c)(4) factors support an award to Reminger of its costs and attorney fees incurred in the filing of the surreply (Doc. 35) and responsive brief to the Spitz Firm's motion for sanctions (Doc. 37). Accordingly, Reminger is directed to submit appropriate documentation to the Court within a period of fourteen days from the date of this Order that will detail the attorney fees and costs it incurred in filing Docs. 35 & 37. In turn, the Spitz Firm is authorized to submit its opposition papers to Reminger's documentation. However, the Spitz Firm's opposition pleadings (1) must be filed with the Court within a period of fourteen days from the date of Reminger's submission of its documentation papers, and (2) shall be limited to its challenge relating to the validity, accuracy, or reasonableness of the requested attorney fees and costs, as well as the inclusion of a financial declaration which sets forth its relevant financial information.¹

Conclusion

¹The Court notes that inability to pay sanctions is an affirmative defense, the burden of proving which rests squarely on the Spitz Firm. Garner v. Cuyahoga Cnty. Juvenile Court, 554 F.3d 624, 642 (6th Cir. 2009).

Accordingly, the Court denies the Plaintiffs' motion to disqualify (Doc. 31) and its motion for sanctions (Doc. 36). Further, the Court grants, in part, the Defendants' motion for sanctions (Doc. 32) pursuant to the terms of this Order.

IT IS SO ORDERED.

/s/Lesley Wells
UNITED STATES DISTRICT JUDGE

Date: 2 December 2011