

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

R. SANDERS HICKEY, JAMES E. HICKEY,)
T. L. DAWSON, TRACY S. ANDERSON,)
DOUGLAS A. FREELEY, THOMAS A.)
McKINNON, KAY W. McKINNON,)
CHARLES F. JONES, and PETER V. PLATT,)
)
Plaintiffs,)
)
v.)
)
CHARLES J. COTTONE, and)
OCCIDENTAL TRADING, LTD.,)
)
Defendants.)
_____)

Civil Action No. 99-0125

ORDER

I. PROCEDURAL BACKGROUND

This matter came before the court on December 20, 2000, in Courtroom 220 at 9:00 a.m. on Defendants' Motion to Disqualify the Law Firm of White, Pierce, Mailman, & Nutting from representing Plaintiffs in the present matter. Eric S. Smith, Esq., appeared on behalf of the Defendants. Richard W. Pierce, Esq., appeared on behalf of the Plaintiffs. The court, having heard the arguments of counsel and being fully informed of the premises, now renders its decision. [p. 2]

II. FACTS

In 1992, Defendant Occidental Trading, Ltd. (Occidental Trading) was incorporated under the laws of the Commonwealth of the Northern Mariana Islands (CNMI).

On February 27, 1999, Plaintiffs, through counsel White, Pierce, Mailman & Nutting (WPMN), filed a Petition and Complaint for Assistance in Dissolution, Appointment of Custodian, Claim for Accounting, and Other Equitable Relief. Plaintiffs allege that Defendant Charles J.

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Cottone, now deceased, issued common and preferred shares in Occidental Trading to Plaintiffs in exchange for more than \$1,200,000.00. Plaintiffs allege that the money invested in Occidental Trading was to be used to fund a brokerage arrangement between Occidental Trading and Advanced Textiles Corporation (ATC), a CNMI garment manufacturer, whereby Occidental Trading would purchase fabric from Asia for the use of ATC in exchange for a purported five percent (5%) brokerage fee. Plaintiffs allege that Defendant Charles J. Cottone only purchased seven (7) shipments of fabric for ATC. Plaintiffs further allege that the majority of the invested funds were spent improperly by Defendant Charles J. Cottone, in his capacity as President and Treasurer of Occidental Trading, for his personal benefit.

On March 12, 1999, Plaintiffs filed a First Amendment to Petition and Complaint for Assistance in Dissolution, Appointment of Custodian, Claim for Accounting, and Other Equitable Relief incorporating the allegations set forth in the Original Petition and Complaint and seeking the following equitable relief from the court: (1) Accounting; (2) Appointment of a Custodian and Judicial Liquidation; (3) Court Ordered Shareholders' Meeting; (4) Declaration of Dissolution; (5) Declaration of Share Ownership; and (6) a Finding of Fraud. Plaintiffs further ask the court to use its equitable power to impose a Constructive Trust for the benefit of Plaintiffs.

On November 21, 2000, almost nineteen months after the initial filing of Plaintiffs original Petition and Complaint, Defendants filed a Motion to Disqualify WPMN from representing Plaintiffs in the present matter. **[p. 3]**

III. ISSUE

1. Whether Model Rule 1.9(a) of the A.B.A. Model Rules of Professional Conduct requires that WPMN be disqualified from representing Plaintiffs in the present manner on the ground that WPMN's current and former representation of ATC is "substantially related" to the present action

against Defendants, both of which claim to be ATC shareholders, and on the ground that WPMN “personally represented” the late Charles J. Cottone in the course of their representation of ATC in various corporate and litigation matters.

2. Whether Defendants waived the right to object to WPMN’s representation of Plaintiffs in the present matter by knowingly refraining from asserting grounds for objection in a prompt manner.

3. Whether the court shall grant Defendants’ motion to disqualify WPMN in the present matter on the ground that Defendant Occidental Trading is an ATC shareholder and WPMN’s current and former representation of ATC as a corporation violates the general rule that a corporation’s lawyers may not assist one group of shareholders to achieve an advantage over other shareholders with respect to ownership or control of a corporation.

IV. ANALYSIS

A. Rule 1.9 of the A.B.A. Model Rules of Professional Conduct.

Defendants assert that WPMN should be disqualified from representing Plaintiffs in the present matter because WPMN formerly represented the late Charles J. Cottone in his “personal capacity” when it acted as ATC’s corporate counsel. Defendants claim that WPMN rendered legal advice to both ATC and to the late Charles J. Cottone in his “personal capacity” in the context of WPMN’s representation of ATC in litigation unrelated to the present matter. Defendants argue that WPMN’s representation of Plaintiffs in the present matter violates WPMN’s duty of absolute loyalty to the alleged former client, the late Charles J. Cottone. [p. 4]

Plaintiffs contend that although WPMN represented ATC in various litigation and corporate matters, it never represented the late Charles J. Cottone in his “personal capacity” and “never

received any confidential or privileged communications from Mr. Cottone related to his personal, family, or business affairs.” See Plaintiffs’ Opposition to Motion to Disqualify, at 3.

The relevant test for disqualification of an attorney or law firm is set forth in Rule 1.9(a) of the A.B.A. Model Rules of Professional Conduct, which states:

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 interest are materially adverse to the interests of the former client unless the former client consents after consultation;

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1983). The relevant test for disqualification under Rule 1.9(a) is whether the former representation is “substantially related” to the current representation. *Feliciano v. Commonwealth Superior Court*, Appeal No. 98-0006, slip op. at 11, (N.M.I. Super. Ct. Feb. 4, 1999) (emphasis added) citing *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980). “Attorneys may not represent a client in any other matter that threatens the use of a former client’s confidences.” “If the existence of a substantial relationship between the two representations is established, the court will conclusively presume that the attorney possesses confidential information adverse to the former client and order disqualification.” *Feliciano, supra* at 11. *Id.* “Substantiality is present if the factual contexts of the two representations are similar or related.” *Trone, supra* at 998.

1. WPMN’s Former Representation of ATC.

WPMN maintains that its representation of ATC as a client was limited to various litigation and corporate matters. The litigation matters include: (1) representing ATC in a 1992 lease dispute in *ATC v. Yoshizawa and Inoue*, Civil Action No. 92-85, (N.M.I. Sup. Ct.); (2) an entry of appearance in *Man Lei Cheung v. ATC.*, Civil Action No. 93-0222 (D.N.M.I., 1994), a case primarily handled by the law firm of Eason & Halsell in defense of a matter filed on behalf of the plaintiff, Man Lei Cheung, by present counsel for Defendants, Eric S. Smith, Esq.; and (3) representing ATC

in a 1997 collection matter, *Alltex Industrial Co. Ltd. v. ATC*, Civil Action No. 97-0015 (D.N.M.I.). WPMN further notes that it currently represents ATC in two pending cases: *Does I, et al. v. ATC*, Civ. No. [p. 5] 99-0002 (D.N.M.I.) and *Does I, et al. v. The Gap, Inc., et al.*, CV 99-00329-CAS (D.Ha). Plaintiffs contend that the present and past litigation are wholly unrelated to the present matter involving the Administrators of the Estate of Charles J. Cottone and Occidental Trading.

2. WPMN's Present Representation of Plaintiffs.

In the present matter, Plaintiffs, through WPMN, filed a Petition and Complaint seeking the following equitable relief from the court related to the dissolution of Occidental Trading, including: (1) Accounting; (2) Appointment of a Custodian and Judicial Liquidation; (3) Court Ordered Shareholders' Meeting; (4) Declaration of Dissolution; (5) Declaration of Share Ownership; and (6) a Finding of Fraud.

3. Existence or Non-Existence of a "Substantial Relationship".

The court finds that WPMN's former and continuing representation of ATC is not "substantially related" to the present action against the Administrators of the Estate of Charles J. Cottone and Occidental Trading. WPMN has demonstrated that its current and former representation of ATC is unrelated to the present matter.¹ Furthermore, WPMN has demonstrated that any contact with the late Charles J. Cottone was solely in his capacity as an officer of ATC and did not involve any representation of the late Charles J. Cottone in his "personal capacity." Accordingly, the court finds that Rule 1.9(a) of the Model Rules of Professional Conduct does not mandate that WPMN be disqualified from representing Plaintiffs.

¹ See Plaintiffs' Opposition to Motion to Disqualify, Declaration of Richard W. Pierce, Declaration of Paul Zak.

B. Implied Waiver of Right to Object.

Even if the court were to find that WPMN's current and former representation was "substantially related" to the present matter, disqualification would still be unwarranted. "It is well settled that a [p. 6] former client who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly is deemed to have waived that right." *Trust Corp. of Montana v. Piper Aircraft Corp.*, *supra* at 87. Also, motions to disqualify are generally disfavored as such motions are often made for tactical reasons, may result in unnecessary delay, and interfere with a party's right to employ counsel of its choice and for these reasons a high standard of proof is required for those seeking disqualification. *See Szoke v. Carter*, 974 F.Supp. 360, 370 (S.D.N.Y. 1997).

In the present matter, Plaintiffs filed Petition and Complaint for Assistance in Dissolution, Appointment of Custodian, Claim for Accounting, and Other Equitable Relief on February 27, 1999. Defendants then waited until November 21, 2000, almost nineteen months after the initial filing of Plaintiffs original Petition and Complaint, to file the present motion to disqualify WPMN from representing Plaintiffs.² Accordingly, the court finds that Defendants have impliedly waived the right to object to WPMN's representation of Plaintiffs.

C. Rule 1.13(a) of the A.B.A. Model Rules of Professional Conduct / Organization as Client.

Defendants assert that WPMN must be disqualified from representing Plaintiffs in the present matter because it claims that a corporation's lawyers may not assist one group of shareholders to achieve an advantage over other shareholders with respect to ownership or control of the corporation.

See Defendants Motion to Disqualify WPMN, at 2.

² Charles J. Cottone passed away on May 14, 2000, almost fifteen months after the filing of the Petition and Complaint. Despite the fact that ethical obligations to a former client remain in effect, even if the former client is deceased, the late Charles J. Cottone never moved for the disqualification of WPMN from this present litigation during the almost fifteen months it was pending before his untimely death.

It is undisputed that WPMN represented ATC in certain corporate matters from 1992 to the present and that the majority of the current Plaintiffs, as well as Defendant Occidental Trading, own shares in ATC. The issue remains disputed as to whether the late Charles J. Cottone sold his shares in ATC prior to his untimely death, and whether the Administrators of the Estate of Charles J. Cottone now [p. 7] have a legitimate claim to shares in ATC. It is undisputed, however, that ATC is not a party to the present action.

Defendants cite several cases for the proposition that a law firm is barred from representing a shareholder in a dispute against other shareholders of the same corporation. *See* Plaintiffs' Motion to Disqualify the Law Firm of WPMN, *citing Egan v. McNamara*, 467 A.2d 733 (D.C.App. 1983); *In re Brownstein*, 602 P.2d 655, 656-657 (Or. 1979); *In re Entertainment, Inc.*, 225 B.R. 412 (Bankr. N.D. Ill. 1998); *Rosman v. Shapiro*, 653 F.Supp. 1441 (S.D.N.Y. 1987); and *Metro-Goldwyn-Mayer v. Tracinda Corp.*, 43 Cal.Rptr. 2d 327, 333 (1995). The court finds such cases to be unpersuasive.³

³ *Egan v. McNamara* based its admonition that it would be improper for an attorney to represent one group of shareholders with interests adverse to those of other shareholders of the same corporation, on the District of Columbia Code of Professional Responsibility. *See Egan v. McNamara*, 467 A.2d 733, 739 n.8 (D.C.App. 1983), *citing* Ethical Consideration 5-18 of the District of Columbia Code of Professional Responsibility. An attorney's ethical duties in the Commonwealth are governed by the A.B.A. Rules of Professional Conduct. *See* Com. Disc. R. 2.

The *In re Brownstein* decision has been widely criticized. *See McCarthy v. John T. Henderson, Inc.* 587 A.2d 280, 283 (N.J.Super.A.D.,1991) ("We are aware of only two instances in which a court has disregarded the corporate form and determined that the principals of the corporation were indistinguishable from the corporation itself for the purpose of determining who the client was in the context of the propriety of successive representation by counsel . . . *In re Brownstein*, (citation omitted) [and] *In re Banks*, 283 Or. 459, 584 P.2d 284 (1978)").

The *Rosman v. Shapiro* decision dealt specifically with a situation in which the corporation had only two shareholders with equal interests, and held that it was reasonable for each shareholder to believe the corporate counsel was effectively his own attorney. *See Rosman v. Shapiro*, 653 F.Supp. 1441 (S.D.N.Y. 1987); *see also Cohen v. Acorn Intern. Ltd.* 921 F.Supp. 1062, 1064 (S.D.N.Y.1995) (Criticizing and calling into doubt the *Rosman* decision). In the present matter, there are multiple shareholders.

Metro-Goldwyn-Mayer v. Tracinda Corp., relies on *Goldstein v. Lees* for the proposition that an attorney who formerly represented a corporation could not later represent a minority shareholder and director in a proxy fight over control of the corporation. *See Metro-Goldwyn-Mayer v. Tracinda Corp.*, *supra* at 333, *citing Goldstein v. Lees* 120 Cal.Rptr. 253 (1975). The *Metro-Goldwyn-Mayer v. Tracinda Corp.* decision failed to note that the attorney disqualified in the *Goldstein* decision served as Executive Vice President, Secretary, and general counsel to the corporation and as an

Rule 1.13(a) of the A.B.A. Model Rules of Professional Conduct provides that “[a] lawyer employed or retained by an organization represents the organization.” See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a). “Even though the only way to communicate with a juristic [p. 8] entity is through the people who are its constituent parts, **the lawyer owes his or her obligations to the organization itself, not any particular individuals.**” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. (1983) (emphasis added). “Although a lawyer is obligated not to disclose the information revealed by the client’s constituents or employees, ‘[t]his does not mean, ..., that constituents of an organizational client are the clients of the lawyer.’” *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1385 (10th Cir. 1994).

The court finds that WPMN’s representation of ATC in various corporate and litigation matters involved the representation of ATC as a corporate entity, and did not involve the late Charles J. Cottone “personally,” despite the fact that the late Charles J. Cottone was an officer of ATC.⁴ WPMN’s ethical obligations, therefore, are to ATC as a corporate entity, not to the shareholders of ATC, including Defendant Occidental Trading, which undisputably owns shares in ATC, or to the Administrators of the Estate of Charles J. Cottone, who claim an interest in shares in ATC.

Accordingly, the court finds that WPMN’s representation of Plaintiffs is not in violation of the A.B.A. Model Rules of Professional Conduct and does not warrant disqualification.

officer and as general counsel, became privy to its innermost secrets. In fact, the attorney “testified that he knew the operations of the corporation intimately . . . all of the subsidiaries had been acquired either as a result of [his] negotiations or as a result of [his] participation that [he] had as a member of the board of directors. . . .” *Goldstein v. Lees* 120 Cal.Rptr. 253, 254 (1975). In the present matter, WPMN never served as general counsel to ATC.

⁴ See Plaintiffs’ Opposition to Motion to Disqualify, Declaration of Paul Zak, at 2 (“WPMN did no work for Occidental Trading, Ltd., and only limited corporate work for ATC, other than litigating for ATC.”)

V. CONCLUSION

For the foregoing reasons, the court finds that WPMN's former and continuing representation is not "substantially related" to the present action against the Administrators of the Estate of Charles J. Cottone and Occidental Trading.

For the foregoing reasons, the court finds that Defendants have impliedly waived the right to object to WPMN's representation of Plaintiffs.

For the foregoing reasons, the court finds that WPMN's representation of ATC in various corporate and litigation matters involved the representation of ATC as a corporate entity, and did not involve any "personal representation" of the late Charles J. Cottone. [p. 9]

Accordingly, Defendants' Motion to Disqualify the Law Firm of White, Pierce, Mailman, & Nutting from representing Plaintiffs in the present matter is **DENIED**.

So ORDERED this 20 day of February, 2001.

/s/
JUAN T. LIZAMA, Associate Judge