

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ROBERT W. HERRING, JR. M.D.,)
)
 Plaintiff,)
)
vs.) **No. 17-0732-BC**
)
NASHVILLE GASTROINTESTINAL)
SPECIALISTS, LLC,)
)
 Defendant/Counter-Plaintiff.)

MEMORANDUM AND ORDER HOLDING IN ABEYANCE
RULING ON MOTION TO DISQUALIFY FOR COUNSEL
TO PROVIDE MORE DETAILED FACTS

Presently before the Court is the Defendant/Counter-Plaintiff's *Motion To Disqualify Counsel* Ron Pursell and the law firm of Pursell & Ramos, PLC, pursuant to Tennessee Supreme Court Rule 8, Rules of Professional Conduct ("RPC") 1.9 and 1.10(a), from serving as litigation Counsel for the Plaintiff in this case.

After studying the law, it is apparent that the decision to disqualify Counsel is a fact-intensive inquiry turning on the particular details of Counsel's involvement and activities with the opposing party. Sometimes even an evidentiary hearing is necessary. In this case thus far, Counsel have filed affidavits on the disqualification issue. Yet, more detail is needed. It is therefore ORDERED that the Defendant/Counter-Plaintiff's *Motion to Disqualify Plaintiff's Counsel* Ron Pursell and the law firm of Pursell & Ramos, PLC

is held in abeyance for the filing of additional affidavits and/or declarations by the parties addressing these three specific matters.

- (1) **Defendant's Failure To Remit Funds Related To Accounts Receivable** – In paragraphs 24, 25, 29, 30, 31, 36, 37, and 38 of the *Complaint* and paragraphs 3, 4, 5, 8, 9, and 10 of the *Prayer For Relief*, the Plaintiff alleges that Defendant breached its obligation under the Share Exchange Agreement by failing to remit to Dr. Herring all funds that the Defendant received as payments for accounts receivable related to Dr. Herring's Business within 30 days of receipt of the payment pursuant to Paragraph 9 of the Share Exchange Agreement, quoted as follows:

Post-Closing Accounts Receivable. Commencing on the Closing Date and continuing for six (6) months after the Closing Date, NGS agrees to send to Dr. Herring all funds that NGS receive as payments for accounts receivable related to Dr. Herring's Business within 30 business days of receipt of the payment. After the six (6) months period referenced in the previous sentence, NGS will assign to Dr. Herring any remaining accounts receivable related to Dr. Herring's Business, and NGS will have no obligations relating to billing or collecting such accounts receivable. Such funds shall be sent to Dr. Herring at the address in Section 12(i). In exchange for billing and collecting services provided by NGS, Dr. Herring agrees to pay NGS Ten Thousand Dollars (\$10,000) upon the Closing Date.

Additional Information Needed – While the obligation and duty to remit payment to the Plaintiff may have arisen under Paragraph 9 of the Share Exchange Agreement which Attorney Pursell did not prepare, it is unclear from the *Complaint* for disqualification purposes, whether there is an undisputed method, calculation or formula to be applied to the remittance of payments to be made to Dr. Herring which would not implicate disqualification; or, alternatively, whether the method of calculation is disputed, and deciding that dispute depends upon interpreting a separate corporate document that was drafted by Attorney Pursell or to which Attorney Pursell had provided legal advice to the Defendant. Additional information is needed on the issues relating to calculating the Paragraph 9 payments.

- (2) **Count II: Breach of Contract (Employment Agreement) in the Amended Counterclaim** – The *Amended Counterclaim* in Count II seeks recovery for breach of contract by the Plaintiff related to an *Employment Agreement* separate and apart from the Share Exchange Agreement. This *Employment Agreement*

was not attached to the Counterclaim as required by Rule 10.03 of the Tennessee Rules of Civil Procedure. According to paragraphs 9, 10, 11, 12, 13, 14, 15, 19, 20, and 21 of the *Amended Counterclaim*, the Defendant alleges that the Plaintiff breached the policies and procedures of the Defendant's *Employment Agreement*. The conduct alleged to have been a breach of the *Employment Agreement* includes: the unauthorized use of NGS's banking account, allowing physicians who were not employees of NGS to perform surgeries at NGS facilities, soliciting NGS employees, and covering call for NGS competitors. None of this conduct alleged appears to relate to the Share Exchange Agreement.

Additional Information Needed – whether the Employment Agreement referenced in Count II was one of the corporate documents which Attorney Pursell either drafted or provided legal advice to the Defendant.

- (3) **Threat of Immediate Termination If Plaintiff Did Not Close the Transaction** – In paragraphs 12, 13, 32 of the *Complaint*, the Plaintiff makes the allegation that the Defendant threatened immediate termination of the Plaintiff as an employee physician of the Defendant if the Plaintiff did not close the transaction under the Share Exchange Agreement. This threat, according to the *Complaint*, was a breach by the Defendant of the duty of good faith and fair dealing.

Additional Information Needed – whether the “corporate governance documents” to which Attorney Pursell provided legal advice to the Defendant addressed the issue of termination. If, for example, Attorney Pursell participated in the drafting of the corporate governance documents that detail the legal issue of termination, then Attorney Pursell could have potentially had confidential information pertaining to the rights and obligations of termination as it related to the Plaintiff when he was advising the Plaintiff regarding the “Defendant’s threat to terminate his employment.”

As shown above, each of these items could potentially present grounds for disqualification under RPC 1.9. At this time, however, the Court does not have sufficient information in the record regarding these items to determine, pursuant to the applicable law, (1) the scope of the former representation as to these items, (2) whether it is reasonable to infer that confidential information would have been provided to Attorney Pursell regarding these items, and (3) whether the items listed are relevant to the issues

being raised in this litigation against the Defendant. Without these facts regarding the specific role of Attorney Pursell, the Court is unable at this stage of the proceedings to determine whether RPC 1.9 is implicated in this lawsuit.

It is therefore ORDERED that by January 12, 2018, the Defendant shall file supplemental information, if any, with the Court regarding Attorney Pursell's involvement with the three items identified above, and by January 19, 2018, the Plaintiff shall file responsive affidavits and/or declarations, if any. After that the Court shall issue a ruling on the Defendant/Counter-Plaintiff's *Motion to Disqualify Counsel* or schedule an evidentiary hearing.

It is additionally ORDERED that based on the foregoing ruling, the Defendant/Counter-Plaintiff's *Motion To Strike The Reply Of The Defendant Nashville Gastrointestinal Specialists, LLC To The Declaration Of Robert W. Herring, Jr. M.D.* is denied.

It is further ORDERED that with the exception of the three matters listed above for supplementation, the Court concludes as a matter of fact that the remainder of the claims and defenses in this lawsuit directly relate to the interpretation and application of the Share Exchange Agreement between the Plaintiff and Defendant which is unrelated to Mr. Pursell's previous representation of the Defendant.

Lastly, it is ORDERED that the Plaintiff's argument that any potential conflict surrounding the Share Exchange Agreement was waived by the Defendant is dismissed. According to the Plaintiff, "[d]uring the negotiation process, which lasted approximately

a year and a half between the start of negotiations and closing, NGS never raised any issues about counsel for Dr. Herring representing him in the negotiations. Moreover, after the closing counsel for Dr. Herring continued to represent Dr. Herring in his efforts to resolve issues under the Agreement without any complaint from NGS.” *Plaintiff’s Response To Defendant/Counter-Plaintiff’s Motion To Disqualify Counsel*, p.2 (Nov. 27, 2017).

Waiver in the context of RPC 1.9 applies when a litigant fails to timely seek disqualification *after* a lawsuit is filed. *See, e.g., Buckley v. Airshield Corp.*, 908 F. Supp. 299, 308 (D. Md. 1995) (“Moreover, the Court knows of no cases, and the parties have provided none, wherein a party waived his right to object to counsel because he failed to do so prior to filing suit.”). Here, the Plaintiff’s argument on waiver appears to challenge the Defendant’s knowledge of Mr. Pursell’s involvement with the Share Exchange Agreement prior to the lawsuit being filed. This pre-litigation knowledge is irrelevant for determining whether the Defendant has waived his legal right to challenge Attorney Pursell pursuant to RPC 1.9 because the issue of waiver under RPC 1.9 only applies to facts and circumstances after the lawsuit was filed. *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, No. CA 1232, 1989 WL 62405, at *4 (Tenn. Ct. App. June 13, 1989), *aff’d*, 813 S.W.2d 400 (Tenn. 1991) (“Once a party is aware that a conflict has arisen he must object promptly; the motion may not be held in reserve for tactical purposes until it will be most helpful to the movant. *See Redd v. Shell Oil Co.*, 518 F.2d 311 (10th Cir.1975).”).

The law and analysis for these orders are provided below.

This lawsuit was filed by a physician, the Plaintiff, who was both a stockholder in and an employee physician of the corporate predecessor to the Defendant.

The lawsuit arises out of a Share Exchange Agreement (the “Agreement”) entered into by the parties. The Agreement was intended to qualify as a tax-free reorganization to transfer all the assets associated with the Plaintiff’s practice into a wholly owned subsidiary corporation (referred to herein as “NGH”) to be formed by Defendant. The Agreement provided that after the Defendant would perform certain formation tasks of NGH such as obtaining licensures and contributing assets of the Plaintiff’s practice to NGH. The agreement provided after Defendant had completed the formation tasks the Plaintiff would deliver his shares in the Defendant LLC in exchange for the Defendant delivering to the Plaintiff shares the Defendant owned in NGH.

The Plaintiff asserts that the Defendant failed to perform the formation tasks. The Plaintiff seeks a declaratory judgment that the correct construction of the Agreement establishes the Defendant breached the Agreement by not performing the formation tasks, recovery of damages and attorneys fees, and an accounting.

The Defendant denies Plaintiff’s claims and has filed a counterclaim asserting it is the Plaintiff who first breached the Agreement and interfered with the Defendant’s performance. The Defendant has sued the Plaintiff for damages and a declaration that Plaintiff breached the Agreement. The Defendant’s Counterclaim also introduces another

contract into the lawsuit, the Plaintiff's Employment Agreement with the Defendant, and asserts breach of that. Lastly the Defendant asserts the Plaintiff converted data and possibly payments from third parties intended for the Defendant.

Parties' Position

The Defendant argues that Mr. Pursell should be disqualified from representing the Plaintiff based on his previous representation of the Defendant.

Mr. Pursell previously represented NGS and provided legal advice to NGS corporate governance documents and various lease and contract issues. He provided specific advice concerning provisions of the bylaws that deal with departing shareholders whose employment has been terminated and whose share must be repurchased by NGS.

Now, Mr. Pursell represents Dr. Herring, who was an employee and shareholder of NGS when Mr. Pursell represented NGS. The Complaint at issue addresses, among other things, the termination of Dr. Herring as an employee and a shareholder and whether Dr. Herring is owed any money for service provided before surrendering his rights as a shareholder.

Likewise, the Amended Counterclaim concerns whether Dr. Herring violated his duties to NGS and NGS's policies and procedures and whether he interfered with the business of NGS. Because Mr. Pursell had the confidences of NGS concerning such business matters, he is disqualified from representing Dr. Herring against NGS.

Defendant/Counter-Plaintiff's Memorandum in support of Motion to Disqualify Counsel,
pp. 1-2 (Nov. 4, 2017).

In opposition, the Plaintiff argues that disqualification is not warranted because "counsel for Dr. Herring was not privy to any confidential information that is materially

or substantially related to the current matter and, in fact, the services were totally unrelated to the matter currently pending before the court.”

The action pending before this Court is a Declaratory Judgment Action to determine the rights of the parties under the Share Exchange Agreement (the “Agreement”) executed by the parties on October 20, 2014. Counsel for Dr. Herring assisted Dr. Herring in negotiating the Agreement. During the negotiation process, which lasted approximately a year and a half between the start of negotiations and closing, NGS never raised any issues about counsel for Dr. Herring representing him in the negotiations. Moreover, after the closing counsel for Dr. Herring continued to represent Dr. Herring in his efforts to resolve issues under the Agreement without any complaint from NGS. Notwithstanding any assertions by NGS to the contrary, the Court need not look at any other documents outside the four corners of the Agreement to resolve any claims asserted by NGS in its counterclaim or any other issues between the parties. Moreover, any action that NGS asserts as a basis for the claims asserted by NGS in its counterclaim occurred years after counsel for Dr. Herring had terminated any services to NGS and are totally unrelated to the current matter before the Court.

As previously stated the Agreement was not executed until October 20, 2014 over eight years after counsel for Dr. Herring had provided some general legal services for NGS related to some lease and contract matters. Moreover, NGS has failed to provide the Court with any specific information that would demonstrate that any information that may have existed in 2006 would have any substantial or material impact on the prosecution or that any information that may have been available a decade ago is of material matter of clear and weighty importance. The legal services provided to NGS a decade ago are totally unrelated to the issues currently before the Court in this Declaratory Judgment action.

Plaintiff's Response to Defendant/Counter-Plaintiff's Motion to Disqualify Counsel,
pp. 2-3, 5 (Nov. 27, 2017).

Applicable Law

It is undisputed by the parties that the Defendant was a former client of Mr. Pursell; therefore, pursuant to RPC 1.9¹ the test for disqualification in this case involves whether the scope of representation in this case by Attorney Pursell on behalf of the Plaintiff is the same or substantially related such that the Plaintiff's interests are materially adverse to the interest of the Defendant.

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

TN R S CT Rule 8, RPC 1.9(a) (West 2017).

Clinard v. Blackwood, No. 01A01-9801-CV-00029, 1999 WL 976582, at *12 (Tenn. Ct. App. Oct. 28, 1999), *aff'd*, 46 S.W.3d 177 (Tenn. 2001), provides the analysis for determining whether there is a “substantial relationship” between the former representation of a client and the present representation.

While it has several formulations, the inquiry examines (1) the scope of the former representation, (2) whether it is reasonable to infer that confidential information would have been given to a lawyer representing a client in such matters, and (3) whether the information is relevant to the issues being raised in the litigation pending against the former client. *See LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 255-56 (7th Cir.1983). If the court finds that there is no substantial relationship between the subject matter of

¹ The Defendant/Counter-Plaintiff has also sought disqualification of Attorney Pursell's law firm pursuant to RPC 1.10(a). If the Court ultimately determines that Attorney Pursell should be disqualified pursuant to RPC 1.9, Tennessee law provides that the firm should be disqualified if certain preventative measures are not taken. There is no proof in the record regarding whether the measures of RPC 1.10(a) have been satisfied in the event Attorney Pursell is disqualified under RPC 1.9. In *Pravak v. Meyer Eye Grp., PLC*, the Court of Appeals discussed the legal standard for RPC 1.10. No. 2:07-2433-MLV, 2008 WL 11320041, at *7 (W.D. Tenn. Aug. 21, 2008).

the former and present representations, the inquiry ends because there can be no conflict of interest between the lawyer and his or her former client or between the former client and the lawyer's new law firm. If, however, the court finds that a substantial relationship exists, then the court must determine whether the lawyer should be disqualified.

Further guidance on applying the “substantially related” test is found in

AMERICAN JURISPRUDENCE:

A three-part test is utilized to determine whether an attorney's prior and present representations are substantially related for purposes of disqualifying an attorney: (1) the trial judge must make a factual reconstruction of the scope of the prior legal representation, (2) it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been to a lawyer representing a client in those matters, and (3) it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client. Stated similarly, courts consider three factors when they determine, under the professional conduct rule regarding an attorney's duties to former clients, whether a substantial relationship between a former client's matter and a subsequent client's matter exists: (1) the nature and scope of the prior representation, (2) the nature of the present lawsuit, and (3) whether the client might have disclosed a confidence to his or her attorney in the prior representation which could be relevant to the present action. A case is also "substantially related" to a prior representation, so as to warrant disqualification of an attorney from representing a party against a former client, if the two have material and logical connections. A substantial relationship between successive legal representation of parties with adverse interests exists, requiring disqualification of the attorney, whenever the subjects of the prior and the current representations are linked in some rational manner. Where a substantial relationship is shown between an attorney's prior representation and adverse representation in the present case (1) it is presumed the attorney received confidential information, and (2) the attorney's disqualification is mandatory.

7 AM. JUR. 2D *Attorneys at Law* § 186 (West 2017) (footnotes omitted).

Also relevant for purposes of analyzing Rule 1.9 are the Official Comments to the Rule. These provide examples when analyzing the scope of representation in both the

former and present matter as well as whether confidential information obtained during the prior representation and whether these would materially advance the Plaintiff's position in this case.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The appropriateness of the subsequent representation will depend on the scope of the representation in the former matter, the scope of the proposed representation in the current matter, and its relationship to the former matter. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Substantially Related Matters

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or other work the lawyer performed for the former client or if there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter, unless that information has become generally known [emphasis added]. Any conclusion or presumption concerning the type of confidential factual information that would normally have been obtained in the prior representation may be overcome or rebutted by the lawyer by proof concerning the information actually received in the prior representation.

Loyalty to Former Client

[3a] Matters are substantially related if they involve the same transaction or legal dispute or other work the lawyer performed for the former client. For

example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. Similarly, a lawyer may not represent a debtor in bankruptcy in seeking to set aside a security interest of a creditor that is embodied in a document that the lawyer previously drafted for the creditor. Although the subsequent representation is a different matter, it is substantially related to the former matter because it involves work done for the former client. The lawyer's duty of loyalty survives the termination of the former representation to the extent that it precludes the lawyer from acting to deprive the former client of the benefit of the lawyer's prior work on the former client's behalf.

Protecting Confidentiality

[3b] Even where the current matter does not involve the work previously done by the lawyer for the former client, it may still be substantially related to the former matter if there is a substantial risk that confidential factual information that would normally be obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a business person and learned extensive private financial information about that person may not then ordinarily represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

Thus, a lawyer may master a particular substantive area of the law while representing a client, but that does not preclude the lawyer from later representing another client adversely to the first in a matter involving the same legal issues, if the facts are not substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. For example, a lawyer might also have learned a former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, or financial ability to withstand extended litigation or contract negotiations. Only when such information will be

directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship [emphasis added].

[3e] The substantial relationship test attempts to avoid requiring actual disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation. Thus, a former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. In the first instance, a preliminary conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services. Consistent with the preservation of the former client's confidentiality, however, the inquiry into the issues involved in the prior representation should be as specific as possible, so as to avoid undue impairment of the subsequent client's interest in selection of counsel of choice and the capacity of the lawyer, within appropriate limits, to defeat any presumption or inference concerning the lawyer's receipt or exchange of confidential information.

TN R S CT Rule 8, RPC 1.9 (West 2017) (emphasis added).

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efilng as applicable to:
Ron H. Pursell
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