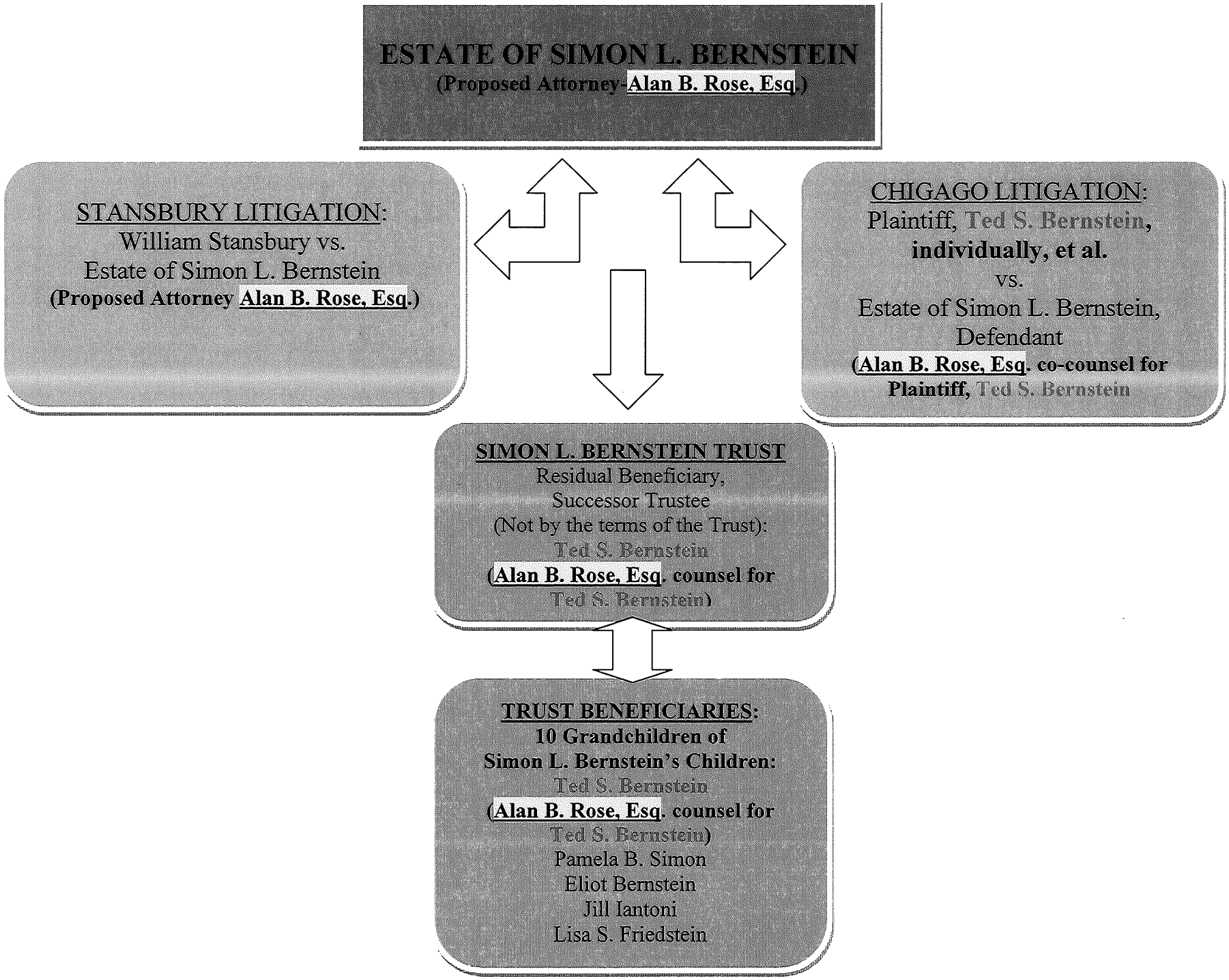
7.


ESTATE OF SIMON L. BERNSTEIN
(Proposed Attorney-Alan B. Rose, Esq.)
STANSBURY LITIGATION:
William Stansbury vs.
Estate of Simon L. Bernstein
(Proposed Attorney Alan B. Rose, Esq.)
CHIGAGO LITIGATION:
Plaintiff, Ted S. Bernstein,
individually, et al.
vs.
Estate of Simon L. Bernstein,
Defendant
(Alan B. Rose, Esq. co-counsel for
Plaintiff, Ted S. Bernstein
SIMON L. BERNSTEIN TRUST
Residual Beneficiary,
Successor Trustee
(Not by the terms of the Trust):
Ted S. Bernstein
(Alan B. Rose, Esq. counsel for
Ted S. Bernstein)
TRUST BENEFICIARIES:
10 Grandchildren of
Simon L. Bernstein's Children:
Ted S. Bernstein
(Alan B. Rose, Esq. counsel for
Ted S. Bernstein)
Pamela B. Simon
Eliot Bernstein
Jill Iantoni
Lisa S. Friedstein

8.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

PROBATE DIV.
CASE NO. 50 2012 CP 004391 XXXX NB

IN RE: ESTATE OF SIMON L. BERNSTEIN,
Deceased.
_____/

CASE LAW AUTHORITY

COMES NOW, Creditor and Interested Person, William E. Stansbury ("Stansbury"), by and through his undersigned counsel and hereby submits the following case law authority in connection with the matters to be heard on Thursday, February 16, 2017 at 2:30 p.m., pursuant to Paragraph 2 on Page 4 of this Court's Order dated December 13, 2016:

ISSUE:

I. WHETHER WILLIAM STANSBURY HAS STANDING TO CHALLENGE ALAN ROSE, ESQ. AND HIS LAW FIRM FOR REPRESENTATION OF THE ESTATE OF SIMON BERNSTEIN

A. *Bedoya v. Aventura Limousine & Transportation Service, Inc.*, No. 11-24432-CIV, 2012 WL 1534488, at *4 (S.D. Fla. Apr. 30, 2012).

"Where the conflict (between a lawyer and that lawyer's clients) is such as clearly to call in question the fair or efficient administration of justice opposing counsel may property raise the question..." (citing, *Fla. R. Professional Conduct 4-1.7 comment)* (Recognizing that someone other than a client or former client may move for disqualification in conflict of interest situations); (A party who is not a former client of opposing counsel nevertheless has standing to raise the issue of opposing counsel's conflict of interest if there is a violation of the rules which is sufficiently severe to call into question the fair and efficient administration of justice).

B. *Milton Carpter Center, Inc. v. Cincinnati Ins. Co.*, Case No. 3:13cv624/MCR/CJK, 2014 WL 12482616 (N.D. Fla. May 5, 2014).

(A non-client plaintiff had standing to move to disqualify defendant's attorney/appraiser on the grounds that attorney/appraiser could not

ethically represent the defendant. The court held that "an attorney has an ethical obligation to his or her client that does not admit of competing allegiances" and "loyalty to a client is impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests," quoting Rules Regulating the Fla. Bar 4-1.7 cmt.)

C. *Anheuser-Busch Companies, Inc. v. Staples*, 125 So. 3d 309 (Fla. 1st DCA 2013).

(The trial court noted that even if Respondent lacked prerequisite standing it would have raised the issue itself and reached the conclusion that disqualification was necessary).

II. WHETHER A CONFLICT OF INTEREST EXISTS REQUIRING A DISQUALIFICATION OF ALAN ROSE, ESQ. AND HIS LAW FIRM

A. *Anheuser-Busch Companies, Inc. v. Staples* (Supra) ("Under Rule 4-1.7 of the Florida Rules of Professional Conduct...it was unreasonable for the firm to believe that it would be able to provide competent and diligent representation to each affected client ...because the representation of Petitioners involved the assertion of a position adverse to Respondent's employer" *Staples,* at 310).

B. *Florida Bar Rule 4-1.7, Conflict of Interest; Current Clients* (Comment-Other conflict situations, "A lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are aligned in interest even though there are some difference of interest among them.")

C. *Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010) (Attorney violated Rules of Professional Conduct regarding conflicts of interests by representing multiple clients who all had claims to the same limited funds).

D. *Kolb v. Levy,* 104 So. 2d 874 (Fla. 3rd DCA 1958).

III. WHETHER THE CONFLICT CAN BE WAIVED

A. *Florida Bar v. Scott*, (Supra) ("Attorney violated Rules of Professional Conduct regarding conflict of interests representing multiple clients who all had claims to the same limited funds and froze an account REGARDLESS OF WHETHER CLIENTS SIGNED CONFLICT WAIVER. The conflicts were directly adverse to clients' interests and could not be waived.")

B. *Anheuser-Busch Companies, Inc. v. Staples* (Supra) (Citing third restatement of the law governing lawyers when clients are aligned directly against each other in the same litigation the institutional interest in vigorous development of each client's position renders the conflict not consentable. The Rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interest dividing them.)

C. *United States v. Culp*, 934 F. Supp. 394 (M.D. Fla. 1996) (Defendant could not waive either rights of attorney's former clients or interest of court in the integrity of its procedures and fair and efficient administration of justice for purposes of governments Motion to Disqualify Attorney based of conflict of interest).

/s Peter M. Feaman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to those listed on the attached service list, on this 9th day of February, 2017.

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861 F.Supp.2d 1346
United States District Court,
S.D. Florida.

Emigdio **BEDOYA**, et al., Plaintiffs,
v.
AVENTURA LIMOUSINE & TRANSPORTATION SERVICE, INC., et al., Defendants.

No. 11–24432–CIV.
|
May 16, 2012.

Synopsis

Background: In suit by drivers alleging that limousine and transportation company violated of the Fair Labor Standards Act (FLSA), company moved to disqualify drivers' attorney, and attorney's law firm.

Holdings: The District Court, Cecilia M. Altonaga, J., held that:

[1] although ex parte communication occurred in connection with a court-ordered arbitration in another case, plaintiff's attorney's ex parte statement to an officer of defendant company, that attorney would never settle with defendants as long as they were represented by a particular attorney, was sanctionable as violation of Florida Bar rule prohibiting ex parte communications with parties represented by another counsel;

[2] drivers' attorney's ex parte contact with an independent contractor, who performed greeting work for defendant company, in order to review and sign affidavit in support of drivers' motion for conditional collective action certification violated Florida Bar rule;

[3] proper remedy was disqualification of drivers' attorney and his law firm.

Motion granted.

West Headnotes (14)

[1] **Attorney and Client**
Disqualification in general

Under Florida law, an order involving the disqualification of counsel must be tested against the standards imposed by the Rules of Professional Conduct.

2 Cases that cite this headnote

[2] **Attorney and Client**
Disqualification proceedings;standing

Under Florida law, party moving to disqualify counsel bears the burden of proving the grounds for disqualification.

4 Cases that cite this headnote

[3] **Attorney and Client**
Disqualification in general

Faced with a motion to disqualify counsel, a court must be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant's right to freely choose counsel.

Cases that cite this headnote

[4] **Attorney and Client**
Disqualification in general

Because a party is presumptively entitled to the counsel of his choice, that right may be overridden under Florida law only if compelling reasons exist; furthermore, such motions are generally viewed with skepticism because they are often interposed for tactical purposes.

2 Cases that cite this headnote

[5] **Attorney and Client**

Relations, dealings, or communications with witness, juror, judge, or opponent

Since third party was not represented by another lawyer in Fair Labor Standards Act (FLSA) suit, Florida Bar Rule prohibiting lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer did not apply to plaintiff's counsel's contact with third party formerly represented by defendants' counsel. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; West's F.S.A. Bar Rule 4–4.2(a).

Cases that cite this headnote

[6] **Attorney and Client**

Disqualification in general

Court will not disqualify any attorney on the basis of former Canon of Professional Ethics, unless a specific violation of the Florida Bar Rules is identified.

Cases that cite this headnote

[7] **Attorney and Client**

Relations, dealings, or communications with witness, juror, judge, or opponent

Although ex parte communication occurred in connection with a court-ordered arbitration in another case, plaintiff's attorney's ex parte statement to an officer of defendant company, that attorney would never settle with Fair Labor Standards Act (FLSA) defendants as long as they were represented by a particular attorney, was sanctionable as violation of Florida Bar rule prohibiting ex parte communications with parties represented by another counsel; for all intents and purposes, plaintiff's attorney's statement was conduct before the court because the statement applied equally to FLSA action as to the arbitration proceeding, and the statement profoundly undermined the client-attorney relationship between defendants and attorney in FLSA action, as well as the effective administration of the action. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; West's F.S.A. Bar Rules 4–4.2, 4–4.4.

2 Cases that cite this headnote

[8] **Attorney and Client**

Power of judge at chambers

Where attorney's conduct is neither before the district court nor in direct defiance of its orders, the conduct is beyond the reach of the court's inherent authority to sanction; however, court may look to such conduct, where relevant, as evidence in determining whether conduct properly before the court is sanctionable.

1 Cases that cite this headnote

[9] **Attorney and Client**

Relations, dealings, or communications with witness, juror, judge, or opponent

Drivers' attorney's ex parte contact with an independent contractor, who performed greeting work for defendant company, in order to review and sign affidavit in support of drivers' motion for conditional Fair Labor Standards Act (FLSA) collective action certification violated Florida Bar rule prohibiting lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer; independent contractor was a client of defendants' counsel for the purposes of the rule with respect to issues arising out of the affidavit, which could impute liability to company defendants under FLSA as affidavit contained information on defendants' training, policies, and procedures, and thus had a bearing on whether drivers were employees or independent contractors. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; West's F.S.A. Bar Rule 4–4.2.

Cases that cite this headnote

[10] **Attorney and Client**

Advertising or soliciting

As a general rule, lawyer's Internet web site does not constitute solicitation prohibited by Florida Bar Rule governing advertising. West's F.S.A. Bar Rule 4–7.6(b).

Cases that cite this headnote

[11] **Attorney and Client**
⇦ Advertising or soliciting

Fact that law firm's website referred to a particular Fair Labor Standards Act (FLSA) case did not convert the website into active solicitation prohibited by Florida Bar Rule governing advertising. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; West's F.S.A. Bar Rule 4–7.6(b).

Cases that cite this headnote

[12] **Attorney and Client**
⇦ Relations, dealings, or communications with witness, juror, judge, or opponent

In drivers' Fair Labor Standards Act (FLSA) action against limousine company, drivers' attorney's conduct in embarrassing or burdening company defendants and interfering with their privileged relationship with their attorney in intercepting an inadvertently disclosed email sent by defendant to his attorney in the context of another action violated Florida Bar rule requiring a lawyer to notify sender of inadvertently sent document. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; West's F.S.A. Bar Rule 4–4.4.

Cases that cite this headnote

[13] **Attorney and Client**
⇦ Disqualification proceedings;standing

As a general rule disqualification of counsel under Florida Bar rule prohibiting ex parte contact with party represented by another attorney is not presumptively required, and violations thereof should ordinarily be remedied in some other way. West's F.S.A. Bar Rule 4–4.2.

1 Cases that cite this headnote

[14] **Attorney and Client**
⇦ Disqualification in general

Attorney and Client
⇦ Partners and associates

Given the egregiousness of the Florida Bar rule violations, and the grave impact drivers' attorney's disparaging acts had on the attorney-client relationship between limousine company defendants and their attorney in Fair Labor Standards Act (FLSA) action, the only proper remedy was disqualification of drivers' attorney, who disparaged defendants' attorney in front of his clients and generally acted with flagrant disrespect exacerbate the situation and had ex parte contact with company's officer and an independent contractor who worked for company; furthermore, in light of the small size of drivers' attorney's seven lawyer labor law practice, it was appropriate to also disqualify law firm from representation of drivers. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; West's F.S.A. Bar Rules 4–4.2, 4–8.4.

Cases that cite this headnote

Attorneys and Law Firms

*1349 Angeli Murthy, Richard Bernard Celler, Steacey Schulman, Morgan & Morgan, P.A., Davie, FL, for Plaintiff.

Chris Kleppin, Kristopher W. Zinchiak, Glasser, Boreth & Kleppin, P.A., Plantation, FL, Jason Scott Coupal, Aventura, FL, for Defendants.

Emigdio **Bedoya**, Miami, FL, pro se.

Jason Scott Coupal, Aventura Limousine & Transportation Service, Inc., Aventura, FL, for Defendants.

ORDER

CECILIA M. ALTONAGA, District Judge.

THIS CAUSE came before the Court on Defendants' Motion to Disqualify Plaintiff's Counsel, Richard Celler, Esq. ("Celler") ("Motion to Disqualify Celler") [ECF No. 47], and Defendants' Motion to Disqualify Plaintiff's Counsel, Stacey Schulman, Esq. ("Schulman") and the Law Firm of Morgan & Morgan, P.A. ("Morgan & Morgan") ("Motion to Disqualify Morgan & Morgan") [ECF No. 82]. Plaintiff, Emigdio **Bedoya** ("**Bedoya**" or "Plaintiff"), through Celler,[1] filed a Class Action Complaint ("Complaint") [ECF No. 1] on December 9, 2011, on behalf of himself and other employees and former employees similarly situated, against Defendants, Aventura Limousine & Transportation Services, Inc. ("Aventura"), Scott Tinkler ("Tinkler"), Neil Goodman ("Goodman"), and Ron Sorci ("Sorci"), alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). Defendants now ask the Court to disqualify Celler, Schulman, and Morgan & Morgan. The parties have submitted abundant briefing and evidence to the Court on the Motion to Disqualify Celler and Motion to Disqualify Morgan & Morgan (collectively, "Motions").[2] The Court has carefully reviewed the Motions, the parties' submissions, the record, and the applicable law.

***1350 I. LEGAL STANDARD**

[1] [2] [3] [4] Under Florida law, "[a]n order involving the disqualification of counsel must be tested against the standards imposed by the Rules of Professional Conduct." *Morse v. Clark,* 890 So.2d 496, 497 (Fla. 5th DCA 2004) (citing *City of Lauderdale Lakes v. Enter. Leasing Co.,* 654 So.2d 645 (Fla. 4th DCA 1995); *Cazares v. Church of Scientology of Cal., Inc.,* 429 So.2d 348 (Fla. 5th DCA 1983)). "The party moving to disqualify counsel bears the burden of proving the grounds for disqualification." *Armor Screen Corp. v. Storm Catcher, Inc.,* 709 F.Supp.2d 1309, 1310 (S.D.Fla.2010) (citing *In re BellSouth Corp.,* 334 F.3d 941, 961 (11th Cir.2003)). Faced with a motion to disqualify, a court must "be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant's right to freely choose counsel." *Woods v. Covington Cnty. Bank,* 537 F.2d 804, 810 (5th Cir.1976). "Disqualification of one's chosen counsel is a drastic remedy that should be resorted to sparingly." *Armor Screen,* 709 F.Supp.2d at 1310 (citing *Norton v. Tallahassee Mem'l Hosp.,* 689 F.2d 938, 941 n. 4 (11th Cir.1982)). "Because a party is presumptively entitled to the counsel of his choice, that right may be overridden only if compelling reasons exist." *BellSouth,* 334 F.3d at 961 (internal quotation marks and citations omitted). Furthermore, "[s]uch motions are generally viewed with skepticism because ... they are often interposed for tactical purposes." *Yang Enters., Inc. v. Georgalis,* 988 So.2d 1180, 1183 (Fla. 1st DCA 2008) (internal quotation marks, brackets, and citations omitted).

II. ANALYSIS

Defendants state that since filing this action, Celler "has systematically engaged in inappropriate and offensive behavior," including violations of the Florida Bar Rules of Professional Conduct ("Florida Bar Rule [s]") 4–1.6, 4–4.2, 4–4.4, and 4–8.4. (Mot. to Disqualify Celler 1). Defendants further argue that Schulman and the entire firm of Morgan & Morgan must be disqualified on the additional basis of a violation of Florida Bar Rule 4–7.4. (Mot. to Disqualify Morgan & Morgan 8). Defendants' ***1351** arguments for the disqualification of Schulman and Morgan & Morgan largely mirror those for Celler's disqualification, with few exceptions. Defendants contend that Schulman is Celler's "underling, and takes all of her orders from him." (Mot. to Disqualify Morgan & Morgan). Defendants state:

> [W]hile much of [the Motion to Disqualify Morgan & Morgan] concerns Celler's actions (though Schulman is copied or a recipient of many of the e-mails), because his actions as managing partner bind the firm, Ms. Schulman and the firm should be disqualified, so as the [Motion to Disqualify Morgan & Morgan] is read [sic], "Celler" should be interpreted to mean Celler, Schulman, and Morgan & Morgan, P.A.

(*Id.* 2). Needless to say, the Court will not adopt this perplexing shorthand, which Defendants themselves apply less-than-consistently throughout their briefs on this matter. Rather, the Court shall attempt to discuss Celler, Schulman, and Morgan & Morgan separately, with respect to each purported basis for disqualification. The Court shall refer to "Plaintiff's counsel" where this distinction is not necessary. The Court addresses the parties' arguments on each basis for disqualification in turn, and first determines whether the various Florida Bar Rules invoked have been violated. The Court then turns to the separate issue of whether these violations merit disqualification, and of whom.

A. Florida Bar Rule 4–4.2

Defendants contend Plaintiffs counsel should be disqualified due to *ex parte* communications with multiple individuals in violation of Florida Bar Rule 4–4.2, which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer....

FLA. BAR R. PROF'L CONDUCT 4–4.2(a). The Court examines the parties' arguments regarding each individual with whom Plaintiff's counsel allegedly had an *ex parte* communication.

1. Padurjan

[5] Defendants contend Celler violated Florida Bar Rule 4–4.2 when he communicated with Sasa Padurjan ("Padurjan") regarding the latter's prior cases against Aventura in this District.[3] (*See* Mot. to Disqualify Celler 9). According to Defendants, Defendants' former counsel, Chris Kleppin ("Kleppin"),[4] represented Padurjan in these previous matters, "and therefore Kleppin and Padurjan enjoy an ongoing attorney-client relationship *with respect to the matter,*" with activity in one of Padurjan's cases as recently as September 2011. (*Id.* & 3) (emphasis added). Defendants further assert that "the way in which Celler did it is particularly reprehensible, because he invaded the attorney-client relationship Kleppin enjoyed with Padurjan solely in order to manufacture an argument to attempt to get Kleppin disqualified—by soliciting Padurjan to become ***1352** a witness by falsely suggesting to Padurjan that he may have some claim against Aventura." (*Id.* 10). Plaintiff has submitted an affidavit that Plaintiffs counsel had Padurjan sign ("Padurjan Affidavit") [ECF No. 99–2]. According to Defendants, the content of the Padurjan Affidavit itself is proof that Celler violated the attorney-client relationship between Kleppin and Padurjan. (*See* Mot. to Disqualify Celler 10).

Plaintiff states Padurjan reached out to Morgan & Morgan, not the other way around. (*See* Resp. 4). Plaintiff contends the attorney-client relationship between Padurjan and Kleppin is not ongoing, and the Padurjan Affidavit states Padurjan was not represented by counsel when Padurjan contacted Morgan & Morgan. (*See id.*). Plaintiff further cites an email communication by Padurjan showing that he did not consider himself Kleppin's client. (*See id.* 5 (citing Mar. 4, 2012 Email Exchange, Resp. Ex. 3 [ECF No. 99–3])). In this email exchange, Schulman writes to Padurjan, in part:

> Just to be clear, is Chris Kleppin still your attorney? He's recently referred to you as both a current client and a former client in his efforts to stay on the Aventura cases but what really controls is what you believe the relationship to be. When you contacted us a few weeks ago, it seemed apparent to me that you were not Kleppin's client nor had you been for awhile but—to be safe —I wanted to verify that I was not making an incorrect assumption. Please confirm.

(Mar. 4, 2012 Email Exchange). Padurjan replied, "He is NOT my attorney." (*Id.*).

The parties, as well as Padurjan, have all taken the position that Padurjan is no longer Kleppin's client. The Court understands Defendants now to argue that while the relationship no longer continues, there are certain attorney-client privileges attaching to Kleppin's previous representation of Padurjan. This was the basis for the Court's finding that Kleppin had an impermissible conflict

of interest in representing Defendants in this case, which is substantially related to Padurjan's matter. (*See* Apr. 30, 2012 Order 16). [5] However, all parties and Padurjan agree that Padurjan is currently an unrepresented third party in this action.

Since Padurjan is not "represented by another lawyer in the matter," Florida Bar Rule 4–4.2(a) does not apply to Plaintiff's counsel's contact with him. FLA. BAR R. PROF'L CONDUCT 4–4.2(a). Rather, potentially more relevant is Florida Bar Rule 4–4.4, which states, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person." FLA. BAR R. PROF'L CONDUCT 4–4.4(a). Thus, lawyers are subject to "legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." *Id.* cmt. Defendants, however, have not identified any legal rights of Padurjan that ***1353** were violated by Plaintiff's counsel's contact, since Padurjan was no longer Kleppin's client.

[6] Defendants cite a Florida Professional Ethics Committee opinion from 1965 as evidence that Canon 9 of the former Canons of Professional Ethics forbids Plaintiff's counsel's contact with Padurjan. (*See* Mot. to Disqualify Celler 9–10; Ethics Opinion, Mot. to Disqualify Celler Ex. 5 [ECF No. 47–5]). The Court will not disqualify anyone on the basis of Canon 9, unless a specific violation of the Florida Bar Rules is identified. *See Herrmann v. GutterGuard, Inc.*, 199 Fed.Appx. 745, 755 (11th Cir.2006) (stating that "in deciding whether to grant the motion to disqualify it [is] required to identify a specific rule of professional conduct applicable to that court and determine whether the attorney violated that rule" and holding Canon 9 is no longer the applicable standard). [6] Defendants have not otherwise identified an applicable Florida Bar Rule other than 4–4.2, which does not apply here, that would bar the mere fact of Plaintiff's counsel's contact with Padurjan. [7] Accordingly, the Court does not grant the Motions on this basis, but notes that other potential issues have been raised with respect to the content of the Padurjan Affidavit itself, which are addressed *infra.*

2. Tinkler

[7] Defendants also contend Celler had an inappropriate *ex parte* communication with Defendant Tinkler, an officer of Defendant Aventura. The substance of these troubling allegations is, for the most part, set forth in emails and affidavits and is undisputed by the parties. This communication took place in the context of a case brought against Defendants by another individual driver, Rodney Schatt ("Schatt"), in *Schatt v. Aventura Limousine & Transp. Serv. Inc.*, No. 10–22353–CIV–COOKE ("*Schatt* Action"). Defendants nevertheless argue that the purported communication applies equally to other FLSA actions in which Plaintiff's counsel is acting against Defendants, including the present action. (*See* Reply 3).

Tinkler testified before the undersigned that during an arbitration hearing in the *Schatt* Action, he was walking through a common area to the bathroom on a break in his testimony. He stated:

> Mr. Celler approached me from the rear.... He said, Scott, you are a big firm and you can afford better representation than Mr. Coupal and that he could never settle with him, and I walked away.

(Apr. 2, 2012 Hearing Tr. 4:16–21 [ECF No. 118]). Celler has submitted a signed affidavit ("Celler Affidavit") [ECF No. 99–4] giving his own account of his contact with Tinkler. Celler avers that throughout the *Schatt* Action he had frequent, even daily, casual contact with Tinkler, and ***1354** they "chatted about personal matters, offered to buy each other coffee or snacks, and repeatedly remarked how much [they] actually enjoyed speaking and how awkward it was to be litigating against each other." (Celler Aff. ¶ 6). With respect to the specific conversation at issue, Celler states:

> During one of the aforementioned breaks in arbitration, Scott Tinkler and I were in the open lobby of the American Arbitration Association. The Association's doors were pried open to the outside hallways where Mr. Coupal, Mr. Sorci, and Mr. Goodman were waiting to use the bathroom. While Mr. Tinkler and I were chatting, I specifically said to him: "Dude, you guys are a big company. You need to have outside counsel who

specializes in this stuff." Mr. Tinkler responded to me as follows: "I know. We are looking into it."

(*Id.* ¶ 7). According to Celler, the exchange "lasted no more than 10 seconds." (*Id.*).

There is some dispute between the parties as to whether the statement was truly *ex parte*. Plaintiff argues "it was a ten-second exchange, during a break in the proceedings, which occurred in the open and within view of Mr. Coupal." (Resp. 6). The evidence, however, establishes otherwise. Celler wrote Coupal the following:

> Jason,
>
> I have reviewed the email correspondence between you and Stacey over the last few weeks. No wonder you begged her not to have me on the next trial. It is apparent that your MO is trying to purposefully delay things as much as possible. This is because it appears (from what I observed at trial), you are not a trial lawyer. If you want to play in the sand box with trial lawyers, you are going to do it the right way or we are going to call you out to the judge—every time..
>
> *We are not interested, nor are our clients, in settlement discussions with you as long as you are the lawyer on the other side. You are causing your client a great disservice. If you were not on the other side of the table, we would have a better chance of any resolution and would sit with the principals of the company. I have told Scott Tinkler this.*
>
> ... Time to put your boots on and get to work. No more whining, no more complaining about how you have no support staff, no more complaining about how much work you have to do. Nobody on this side of the internet cares....

(Jan. 30, 2012 Email Exchange, Mot. to Disqualify Celler Ex. 1 [ECF No. 47–1]) (emphasis added). Coupal responded that if Celler had spoken to Tinkler without his consent, Celler had done so in violation of the Florida Bar Rules. (*See id.*). Celler wrote back:

> Yeah. *Scott approached me during the hearing and we talked about it.* If you feel a bar greivance [sic] is appropriate considering the fact that your clients have emailed me after I advised them to go through you, then do what you have to do.[8] I have the writings to back up my position. *Just to be clear in the future, tell your clients that we are willing* *1355 *to negotiate with them as long as you are not involved.* You are an impediment to all of these proceedings. It's a shame.

(*Id.*) (emphasis added). The email exchange between Celler and Coupal demonstrates Coupal was not previously aware of the communication to Tinkler, a fact that even Celler's own affidavit conclusively confirms. Celler declares, "it appears Mr. Tinkler thought so little of our exchange in the lobby regarding bringing in outside counsel, that he never even reported it to Mr. Coupal. It was not until two (2) weeks later when I mentioned it to Mr. Coupal that he had to reach out to investigate this communication and actually ask Mr. Tinkler whether the communication actually took place." (Celler Aff. ¶ 11).

When asked what effect Celler's statements had on him, Tinkler said

> Well, at the immediate time it cause me so much nauseam [sic] that I went and vomited in the bathroom because I was on the stand. I was extremely intimidated by this whole process. I don't know where that came from. I went and told Mr. Goodman and Mr. Sorci immediately after what had occurred and it was completely—it put me in a lot of distress based on the fact that I was testifying and from that point on, I don't know if I was as effective as I would have been if I hadn't been given that information.

(Apr. 2, 2012 Hearing Tr. 4:24–5:7). Tinkler further testified:

> Q: Has this ex parte communication negatively impacted your relationship with Mr. Coupal at all?
>
> A: Yes, it has.... When Mr. Coupal came to me regarding the communication, he was extremely upset and he asked me if Mr. Celler has said anything to me

about him, and I said yes, and I basically explained exactly what he said....

Q: How was it effected your relationship Mr. Coupal? [sic]

A: It has put a lot of pressure on it. There is a lot of tension between us now. It has caused a lot of angst between Mr. Coupal and I and I don't know if it is reparable.

(*Id.* 8:19–22). Sorci corroborated Tinkler's testimony and the content of Celler's communication. (*See id.* 79:4–9).

[8] Plaintiff contends that since it occurred in the context of the *Schatt* Action, Celler's statement has "absolutely nothing to do with this case." (Pl.'s Post–Hearing Br. 6). Where "conduct [is] neither before the district court nor in direct defiance of its orders, the conduct is beyond the reach of the court's inherent authority to sanction." *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 619 F.3d 458, 461 (5th Cir.2010) (finding district court lacked authority to sanction conduct in connection with court-ordered arbitration); *see also Dow Chem. Pac. Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 345 (2d Cir.1986) ("Violations of orders in other litigation should not be the basis for an award in the instant litigation; such violations are best dealt with in the actions in which they have occurred.").

Celler's statement to Tinkler admittedly occurred in connection with another forum—court-ordered arbitration in another case. While conduct in another forum may not be sanctionable by the Court, the Court may look to such conduct, where relevant, as evidence in determining whether conduct properly before the Court is sanctionable. *See* ***1356** *In re Lawrence,* No. 97–14687–BKC–AJC, 2000 WL 33950028, at *5 & n. 8 (Bankr.S.D.Fla. June 2, 2000) (holding that trustee could not seek sanctions for conduct during appeal in different forum, but that such conduct was relevant evidence to document issue of "course of bad faith conduct" before the court) (citing FED.R.EVID. 401).

There is little doubt that Celler's ill-advised statement to Tinkler has had a clear and discernible *effect* on the present action. Indeed, an all-encompassing statement that Defendant Aventura "can afford better representation than Mr. Coupal and that [Celler] could never settle with him" must have had an effect on this case, in which Coupal continues to represent Aventura. Tinkler made clear in his testimony that the *ex parte* communication affects his relationship with Coupal in general, including with respect to this action. There is moreover credible evidence Celler has not acted in good faith to settle with Coupal in the present action, a further indication that the scope of Celler's statement extended beyond the *Schatt* Action.[9] (Apr. 2, 2012 Hearing Tr. 4:16–21 [ECF No. 118]).

The Court finds that although the specific statement at issue did not occur in proceedings before the undersigned, that statement has so affected the administration of the current action that a remedy is warranted. "It is a given that federal courts enjoy a zone of implied power incident to their judicial duty." *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 702 (5th Cir.1990) *aff'd sub nom. Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). The Court's inherent power is "an implied power squeezed from the need to make the court function. It is power *necessary* to the exercise of all others ... and governed not by rule or statute but by the control *necessarily* vested in courts to manage their own affairs." *Id.* (internal quotation marks and citations omitted) (emphasis in original).

In particular, the Court is deeply troubled by Celler's *ex parte* statement to Tinkler that Celler would never settle with Defendants as long as they were represented by Coupal. The fact that Celler then made a questionable settlement offer to Defendants in this action strongly suggests the statement applied equally to this action as to the *Schatt* Action. Such a statement so profoundly undermines the client-attorney relationship between Defendants and Coupal in this action, as well as the effective administration of this action, ***1357** that the Court cannot turn a blind eye to it. Thus, the Court will not refuse to sanction Celler's *ex parte* conduct with Tinkler on the basis that it occurred in another forum. For all intents and purposes, Celler's statement is conduct before the Court, and the Court is empowered to grant relief to the extent necessary to protect the integrity of proceedings before it.

Plaintiff further contends it is "strange" Defendants did not mention the conduct to the arbitrator in *Schatt* immediately. (Pl.'s Post–Hearing Br. 11). Tinkler gave ample explanation as to why he did not initially report Celler's *ex parte* statement to Coupal. Tinkler emphasized

that this was not "a casual exchange" (Apr. 2, 2012 Hearing Tr. 5:14–15), and he was put in a challenging position since he "didn't want to subject Jason [Coupal] to any unneeded distress" given serious health issues Coupal was experiencing (*id.* 5:19–22). Tinkler stated:

> [I]t put me in a no-win situation and I didn't know what to do and the fact that I never told Jason caused me even more angst because I had to live with what was said and internalize it, so I never disclosed it to Mr. Coupal.

(*Id.* 5:24–6:2). Tinkler clarified that he "never told Mr. Coupal about it until [Coupal] came to [him] with Mr. Celler's email about it." (*Id.* 26:8–9). Tinkler stated that he had witnessed Celler "berat[ing]" Coupal throughout the proceedings. (*Id.* 6:7–8). Sorci confirmed that he and Tinkler were concerned about telling Coupal what had occurred, due to Coupal's health and the timing. (*See id.* 79:12–20). Indeed, the very nature of Celler's statement was to weaken Defendants' confidence in their attorney. The Court finds it unsurprising that this affected Defendants' ability to subsequently confide in Coupal.

Plaintiff makes other arguments, none of which are relevant to the issue at hand. [10] The Court will, however, specifically address Plaintiff's contention that Defendants' portrayal of Celler's character is "inconsistent" with another *ex parte* communication Celler had with Defendant Goodman. (Pl.'s Post–Hearing Br. 11). Plaintiff avers that in a previous instance in which a Defendant attempted to contact Celler *ex parte* on a matter of substance, "Mr. Celler recognized his obligations and insured that the contact was reported to opposing counsel." (Resp. 6 (citing Nov. 16, 2011 Email Exchange, Resp. Ex. 5 [ECF No. 99–5])). In the email correspondence Plaintiff cites, Goodman wrote to Celler:

> Just want to tell you that I appreciate all that you are trying to help with ... and understand the obstacles involved ... I in turn will try and persuade the team to make as many concessions as possible, without having a "mutiny" on our hands ... Thanks Richard ... this difficult [sic] because you're the type guy I could have a beer with, but I know business is business ... Please keep this confidential, thank you

(Nov. 16, 2011 Email Exchange) (ellipses in original). No one else was included as a ***1358** recipient of this message. Celler replied, solely to Goodman:

> I will and I appreciate the note. Honestly, I make enough money. I'm losing money on this file. *This one is more of a favor for Rod and to get you two guys to bury the hatchet. He is hurt deep down which I think is the ultimate driving motive.* I'm not allowed to email you directly because you are represented so if you could just let Jason [Coupal] know we emailed that would be appreciated. I don't want to violate ethics rules and don't want to burn a professional bridge by having him think I am going behind his back. Don't let the shorts and sneakers fool you:)

(*Id.*) (emphasis added). [11] In the first instance, whether or not Celler's *ex parte* communication with Tinkler occurred is beyond dispute, and any communication with Goodman cannot negate this fact. Moreover, the Court finds it all the more remarkable Celler would point to this exchange with Goodman as corroboration of Celler's character, when Celler's response to Goodman does not copy Goodman's attorney and actually contains remarks pertaining to the substance of that case, *i.e.*, his client's motives. [12] In any event, Celler's email to Goodman fails to controvert the established fact of Celler's improper communication with Tinkler.

The Court finds that Celler's *ex parte* communication with Tinkler violated Florida Bar Rule 4–4.2. Rule 4–4.4 is also implicated, as Celler "use[d] means that have no substantial purpose other than to embarrass ... or burden" Defendants and Coupal, FLA. BAR R. PROF'L CONDUCT 4–4.4(a), and made an "unwarranted intrusion[ ] into [a] privileged relationship[ ]," *id.* cmt.

3. Goetz

[9] According to Defendants, Schulman telephoned "former manager and current worker for Aventura," Michael Goetz ("Goetz"), and "told him that he needed

to come to her office for a 'deposition.' " (Mot. to Disqualify Morgan & Morgan 9). When Goetz arrived at Schulman's office, no deposition was held; rather, Schulman purportedly discussed the substance of this action with him and "goaded him into signing an affidavit that was not true." (*Id.*). As with Tinkler, the substance of Plaintiffs counsel's contact with Goetz is virtually undisputed. The issue is whether the contact violates Florida Bar Rule 4–4.2.

Goetz testified that he was a director of training for Aventura from 2002 to 2009. (*See* Mar. 13, 2012 Hearing Tr. [ECF No. 100] 22:4–11). He has not been a manager at Aventura since 2009. (*See id.* 29:25–30:5). The only service he currently provides Aventura is as an independent contractor operating as a "greeter at the airport." (*Id.* 30:6–12). He considers himself retired and free to work for Aventura or anyone else when he wants. (*See id.* 30:13–18). He was providing these greeting services for Aventura when Plaintiff's counsel contacted him to come to her office for a deposition. (*See* ***1359** *id.* 24:8–10). Goetz received a letter in December 2011 or January 2012 from Morgan & Morgan, as well as a follow-up phone call from Schulman. (*See id.* 24:12–22).

Goetz testified that when he arrived at Morgan & Morgan, he met with both Schulman and Celler, as well as Schatt. (*See id.* 27:5–9; 32:1–3). He was told they wished to speak to him about a deposition, but they "actually gave [him] an affidavit and asked if [he] would sign that." (*Id.* 25:14–19). He "[w]ent through the affidavit and they went through the whole testimony that they were asking." (*Id.* 25:24–25). Goetz told Schulman and Celler what his role at Aventura was at that point. (*See id.* 28:7–9). Goetz was never told by Schulman or Celler to speak to someone at Aventura before signing the affidavit. (*See id.* 29:1–3). Goetz further testified that when he came in for this meeting, he was not represented by counsel at the time. (*See id.* 31:15–17). During Schulman's cross-examination of Goetz, the following exchange occurred:

> Q: ... And the three of us sat in the office and you talked to us about what you would do with the training at Aventura?
>
> A: Yes.
>
> Q: You talked to us about the different manuals and things like that that were used during training?
>
> A: Yes.
>
> Q: Did anybody use the word "deposition" at that time?
>
> A: Yes.
>
> Q: Okay. In fact, we said this was instead of you having to do a deposition. You could come in and just talk to us and we could memorialize it in the form of an affidavit?
>
> A: Correct.

(*Id.* 32:3–14). Goetz went to Morgan & Morgan's office more than once in order to review and sign the affidavit with Celler. (*See id.* 33:1–15). Goetz also did some deposition preparation with Morgan & Morgan while he was there to sign the affidavit. (*See id.* 33:23–34:1). Goetz stated, "I thought I was coming for deposition, but it was [a] voluntary" decision to come to Morgan & Morgan's office. (*Id.* 35:21–22).

After Goetz's meeting at Morgan & Morgan, Coupal wrote to Celler:

> Richard, I understand that you had a meeting with Michael Goetz yesterday, and that you are in the process of "prepping" him for his deposition and/or trial testimony. As Stacey is aware, Mr. Goetz retains ties to this organization, and your "interview" may have run afoul of this company's attorney-client privilege in a number of respects. I would strongly suggest that you refrain from further *ex parte* contact with Mr. Goetz until the arbitrator or another adjudicative body can determine whether your contact with Mr. Goetz was ethically appropriate.

(Nov. 1, 2011 Email Exchange, Reply Ex. 7 [ECF No. 123–7]). Celler responded,

> You are wrong on all of this. Goetz is an independent.... I will meet with Goetz when I want. He is not an employee. He is a former employee.

(*Id.*).

When Coupal indicated he would request a hearing from the *Schatt* arbitrator, Celler stated that Goetz had said he was not represented by Coupal, and that Goetz "said he is retired and not working with you guys." (*Id.*). Coupal cited case law ***1360** and a Florida Bar ethics opinion to Celler, stating that Schulman had "conceded in writing" that "Goetz apparently provided services to the company as an independent contractor as recently as two weeks [before]," and Coupal himself had interviewed Goetz in the past on privileged matters. (*Id.*). Coupal further stated that "prepping" a non-party witness for deposition without notifying him was ethically suspect. (*Id.*). Celler reiterated that Goetz had "confirmed" he was retired and unaffiliated with Aventura. (*Id.*). Coupal pointed out that since the "interview" had happened without him or a court reporter present, he was unable to know what Goetz had said or cross-examine him, given his belief Goetz provides services from time to time. (*Id.*). From all this, the Court finds Coupal contemporaneously, and thoroughly, raised his concerns to Celler at the time. Schulman was copied on at least some, if not all, of these emails.

Plaintiff used the affidavit Goetz signed ("Goetz Affidavit") [ECF No. 39–12] in support of Plaintiff's motion for conditional collective action certification. In his affidavit, Goetz describes his previous work at Aventura as Director of Training, training drivers on Aventura policies and procedures. (*See* Goetz Aff. ¶¶ 5–6). Goetz discusses, *inter alia,* the booking practices, compensation, uniform policy, insurance policy, and communication policy applicable to Aventura drivers. (*See id.* ¶¶ 13–17). The Court briefly addressed the Goetz Affidavit in the April 20, 2012 Order denying conditional certification. (*See* Apr. 10, 2012 Order 10, 2012 WL 1933553).

Plaintiff offers several reasons why his counsel's contact with Goetz does not constitute *ex parte* contact within the meaning of Florida Bar Rule 4–4.2. First, Plaintiff suggests the Goetz Affidavit was obtained for the *Schatt* Action and is unrelated to the present case. (*See* Pl.'s Post–Hearing Br. 6–7). The fact that Plaintiff used the Goetz Affidavit in the current action, and its obvious relevance to issues in this action with respect to drivers' status as independent contractors or employees, renders this argument unconvincing. Plaintiff's use of the Goetz Affidavit in this action has brought it within the Court's purview. Plaintiff further contends, "Mr. Goetz provided only factual information about Defendants' training and policies, and it is undisputed that he did not provide any information to which he did not later testify at deposition." (*Id.* 14). Whether or not Defendants can prove Goetz provided Plaintiff's counsel with confidential (as opposed to publicly available) information, however, is not relevant to the inquiry under Florida Bar Rule 4–4.2, which forbids *all ex parte* "communicat[ions] about the subject of the representation" without requiring a showing of the confidential nature of those communications. FLA. BAR R. PROF'L CONDUCT 4–4.2(a).

Plaintiff also asserts that Goetz is not Defendants' counsel's client. Plaintiff avers Goetz's independent contractor work for Defendants ended "weeks before he met with Plaintiff's counsel." (Pl.'s Post–Hearing Br. 14). Plaintiff states that Goetz had to be subpoenaed by Defendants to appear at the evidentiary hearing on the Motions, indicating that Goetz's affiliation with Defendants must be limited. (*See id.*).

There is no dispute between the parties as to Goetz's current status as an independent contractor performing greeting work for Defendants. The question is whether Goetz was a client of Defendants' counsel for the purposes of Florida Bar Rule 4–4.2, with respect to issues arising out of the ***1361** Goetz Affidavit. In *Rentclub, Inc. v. Transamerica Rental Finance Corporation,* 811 F.Supp. 651 (M.D.Fla.1992), a case cited by Defendants and which Plaintiff attempts to distinguish on the facts, the court held:

> An organizational "party" is defined as including: (1) managerial employees, (2) *any other person whose acts or omissions in connection with the matter at issue may be imputed to the corporation for liability,* and (3) persons whose statements constitute admissions by the corporation.... While the first and third categories are clearly limited to current employees, several courts and commentators, however, have argued that the second category is broad enough to include *former employees whose acts could result in vicarious liability for the employer.*

Id. at 657 (internal citations omitted) (emphasis added). The court continued:

> [C]ourt authorization or opposing counsel's consent to ex parte contact should be required if the former employee was highly-placed in the company (such as a former officer or director) or *if the former employee's actions are precisely those sought to be imputed to the corporation.*

Id. at 657–58 (quoting Samuel R. Miller, *Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical ?,* 42 BUS. LAW. 1053, 1072–73 (1987) (emphasis added)).

Plaintiff agrees that "an organizational party is one whose acts or omissions may be imputed to the company for purposes of liability." (Resp. 5 (citing *Browning v. AT & T Paradyne,* 838 F.Supp. 1564, 1567 (M.D.Fla.1993)); MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. (2010)). Plaintiff argues, however, that nothing in the Goetz Affidavit could impute liability to Defendants. (*See id.*). Rather, the affidavit provided factual information on Defendants' training, policies, and procedures, which information was confirmed by other employees of Defendants and is not confidential. (*See id.*). Thus, Plaintiff states he employed Goetz as a fact witness, not a managerial employee of Defendants. (*See id.* (citing *Browning,* 838 F.Supp. at 1567)).

The argument that nothing in the Goetz Affidavit could impute liability to Defendants is scarcely coherent, given that Plaintiff cited the same affidavit to the Court as proof of Defendants' "misclassification of its drivers," which issue is central to this suit. (Mot. for Conditional Cert. 10 [ECF No. 39]). Goetz's actions in allegedly training and imposing Defendants' policies and procedures on Plaintiff "are precisely those sought to be imputed to" Aventura. *Rentclub,* 811 F.Supp. at 657–58. In fact, when asked whether the Goetz Affidavit "provides relevant facts to the factors that make up the economic realities test" used to determine whether an individual is an employee or independent contractor, Schulman replied in the affirmative, "but those are the facts that he provided to us." (Mar. 20, 2012 Hearing Tr. 8:18–9:2). There is moreover every indication that the information Goetz provided Plaintiff's counsel *was* confidential, and no evidence the information was public apart from Plaintiff's counsel's self-serving assertions.

Given the lack of dispute between the parties regarding the applicable rule, the content of the Goetz Affidavit, and the conditions under which it was obtained, the Court cannot but find Celler and Schulman's contact with Goetz violated Florida Bar Rule 4–4.2.

***1362 B. Florida Bar Rule 4–7.4(a)**

Florida Bar Rule 4–7.4(a) provides:

> [A] lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient ....

FLA. BAR R. PROF'L CONDUCT 4–7.4(a).

Defendants assert that Robson Coelho ("Coelho"), the plaintiff in another case, *Coelho v. Aventura Limousine & Transp. Serv., Inc.,* No. 10–23228–CIV–COOKE ("*Coelho* Action"), testified at a recent deposition that he was solicited by Schatt to call Celler to sue Aventura for overtime pay. (*See* Mot. to Disqualify Morgan & Morgan 8 (citing Deposition of Robson Coelho, Feb. 29, 2012, Mot. to Disqualify Morgan & Morgan Ex. 14 [ECF No. 82–14] ("Coelho Dep.") 88–90)). The deposition testimony described reads as follows:

> Q: How did you come to hire your attorney? Were you recommended by somebody else?
>
> A: Yes.

Q: Who recommended you?

A: Mr. Schatt. Rod Schatt.

* * *

Q: Then later [your action] was as transferred to arbitration. You are telling me before that Mr. Schatt was the one that recommended you?

A: To the attorney?

Q: Yes.

A: Yes.

Q: Do you know if Mr. Schatt was represented by that firm at the time?

A: He was.

* * *

Q: Did—how did you become aware—how did Mr. Schatt make you aware of the firm?

A: It was in a conversation with him, and said, well, give these people a call. And I called him and asked him to schedule the appointment and come by and talk to them.

(Coelho Dep. 88:23–90:3).

According to Defendants, Celler and Morgan & Morgan have solicited other Aventura drivers, such as Richard Gillespie ("Gillespie"), to sue for overtime as well. (*See id.* (citing Affidavit of Richard Gillespie, Mot. to Disqualify Morgan & Morgan Ex. 15 [ECF No. 82–15] ("Gillespie Aff.")). Gillespie states that Schatt was approached at Miami International Airport by Schatt, who greeted him and asked Gillespie to sit in Schatt's SUV to talk. (*See* Gillespie Aff. ¶ 3). At one point in the conversation, Schatt said to Gillespie that he was "not getting paid like [he] should." (*Id.* ¶ 5). Schatt informed Gillespie that "a group of drivers had gotten together and hired 'the best lawyer in the business' to sue Aventura, and that [Gillespie] should contact this lawyer which he could arrange." (*Id.*). Schatt pressed Gillespie for the latter's telephone number, which Gillespie ultimately provided Schatt. (*See id.*). Schatt also gave Gillespie ***1363** Schatt's number in case Gillespie "wanted to ask him questions about suing Aventura." (*Id.*). Gillespie stated, "It was my impression that I was being recruited to sue Aventura for some sort of pay issue and that my number was being taken for the purpose of getting me involved in it, so I would inquire further. Mr. Schatt never asked me to be a witness in his suit, or to join his suit." (*Id.* ¶ 6). Defendants state their belief that Schatt was soliciting individuals to join this case. (*See* Reply 3). Defendants aver that Celler's statement that Schatt was "hurt deep down" (Nov. 16, 2011 Email Exchange) demonstrates that Celler's true motive in asking how employee drivers were paid during settlement negotiations in the *Schatt* Action was to bring other lawsuits against Aventura, not settle. (*See* Reply 7).

Defendants assert that Padurjan also was solicited, as is shown by the Padurjan Affidavit. (*See id.* 4). Defendants state that one can infer Schatt contacted Padurjan on Celler's orders. (*See id.*).

Defendants contend "the totality of the circumstances" make it apparent Plaintiff's counsel used Schatt as an agent to solicit drivers. (*Id.* 7). Defendants alternatively raise the possibility that even if Plaintiff's counsel did not actively employ Schatt as an agent, they passively allowed him to solicit on their behalf. (*See id.* 8). Defendants go so far as to say that Celler and Morgan & Morgan should have refused to represent clients referred by Schatt. (*See id.* 8–9).

Plaintiff states that "Defendants have not produced one iota of evidence to indicate that **anyone** at Morgan & Morgan, P.A. has ever reached out to potential clients in any matter relating to Defendants, or that any of the clients in this matter were solicited in any manner." (Resp. 2) (emphasis in original).

Plaintiff is correct that there is no evidence Celler, Schulman, or Morgan & Morgan solicited Coelho, Gillespie, or Padurjan against Aventura. Schatt testified:

> If someone asks me how do I further my interests in what is going on, could I be involved, if they ask me these questions, I guess it is like if I had a good plumber. If I had a good plumber and someone asked me how to fix something, I would

> recommend then. Yeah, I would recommend this law firm.

(Mar. 20, 2012 Hearing Tr. 89:10–14). When Coupal asked Schatt what interest he had in getting other drivers to file suit against Aventura, Schatt stated, "I have no interest. I'm getting nothing out of this." (*Id.* 90:7). Schatt flatly denied that he received any favor from Celler for referring clients. (*See id.* 94:25–95:5). In fact, Schatt testified Morgan & Morgan "told [him] not to go solicit anybody." (*Id.* 96:15). Defendants did not elicit any information during the evidentiary hearing before the Court, or furnish any evidence in the record, that Morgan & Morgan solicited clients to act against Aventura through Schatt. While Defendants ask the Court to infer from "the totality of the circumstances" that Schatt must have been motivated to solicit on Morgan & Morgan's behalf, and therefore must have done so, another explanation is just as, if not more, likely—that Schatt is simply telling the truth. The Court does not find Schatt's contacts with other drivers constitute a violation of the Florida Bar Rules.

Nevertheless, Defendants complain that Morgan & Morgan registered a website with the uniform resource locator http://www.aventuralimodriverovertimelawsuit.com ("Overtime Website"), on April 5, 2012. (Second Supp. 2). Defendants provide a copy of a screen shot of the Overtime ***1364** Website as of April 16, 2012, displaying contact information for Celler, Schulman, and Morgan & Morgan, and advising, "If you have any questions about the Aventura Overtime Lawsuit, or overtime pay issues with any employer or past employer," to contact Morgan & Morgan. (Apr. 16, 2012 Screenshot, Second Supp. Ex. 1 [ECF No. 137–1]). Defendants contend the Overtime Website violates Florida Bar Rules 4–7.4 and 4–7.6 by soliciting clients to join this action; Defendants assert this violation is all the more egregious since the Court denied Plaintiffs motion for conditional collective action certification on April 10, 2012. (*See* Second Supp. 2).

Defendants further advise that the Overtime Website has been revised since the Second Supplement was filed. (*See* Revised Screenshot, Second Supp. Reply Ex. 1 [ECF No. 139–1]). The revised text of the Overtime Website contains the same information as on the original version, but adds, *inter alia:*

> If you or someone you know worked as a chauffer/driver for Aventura Limo, you/they may be entitled to additional overtime pay in the weeks in which you/they worked in excess of 40 hours
>
> Aventura Limo may have illegally miscalculated your overtime payrate. As a current or former chauffer/driver of Aventura Limo, you, or others you know, may be eligible to make a claim for corrective overtime pay.
>
> If you or anyone you know would like more information about the case against Aventura Limo, please contact ...

(*Id.*). The Overtime Website also posts a link to the interim award on liability issued in the *Schatt* arbitration. (*See id.*). According to Defendants, "Plaintiff's counsel are attempting to perform an 'end run' around the Court's Order [denying conditional certification] by soliciting the representation of the same potential plaintiffs who would have been noticed had the Court conditionally certified a collection action." (Second Supp. Reply 2). Defendants assert the "implication" of the Overtime Website is clear that drivers are encouraged to contact Morgan & Morgan under the guise that they will join a unitary case against Aventura; instead, the drivers will be signed on for individual cases. (*Id.* 2–3). Defendants accuse Plaintiff's counsel of "stirring up" litigation through unwarranted solicitation. (*Id.* 3).

[10] With respect to advertisements on lawyer websites, Florida Bar Rule 4–7.6(b) provides:

> All World Wide Web sites and home pages accessed via the Internet that are controlled or sponsored by a lawyer or law firm and that contain information concerning the lawyer's or law firm's services: (1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law; (2) shall disclose 1 or more bona fide office locations of the lawyer or law firm, in accordance with subdivision (a)(2) of rule 4–7.2; and (3) *are considered to be information provided upon request.*

FLA. BAR R. PROF'L CONDUCT 4–7.6(b) (emphasis added). "[A] lawyer's Internet web site is accessed by the viewer upon the viewer's initiative and, accordingly, the standards governing such communications correspond

to the rules applicable to information provided to a prospective client at the prospective client's request." *Id.* cmt. Thus, such a website does not constitute solicitation as a general rule.

[11] This language appears squarely to cover the Overtime Website, and Defendants ***1365** offer no reason why this would not be the case. Their argument with respect to the Order denying conditional certification is unconvincing. Plaintiff did not need to succeed on the motion for conditional certification in order to create a website in compliance with Florida Bar Rule 4–7.6. What success on the motion would have permitted Plaintiff to do would have been to actively provide notice to potential members of the class of the pending suit and an opportunity to opt-in, for example by conducting specific discovery of the names and addresses of employees to send notice. *See Hoffmann–La Roche Inc. v. Sperling,* 493 U.S. 165, 169–70, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). This is precisely why the first stage of conditional certification is referred to as the "notice stage." *Hipp v. Liberty Nat. Life Ins. Co.,* 252 F.3d 1208, 1218 (11th Cir.2001) (quoting *Mooney v. Aramco Servs. Co.,* 54 F.3d 1207, 1213–14 (5th Cir.1995)). Defendants do not contend Plaintiff specifically sent the Overtime Website link to potential plaintiffs or otherwise sought to give notice of this action to any individual—the only contention is that the Overtime Website is live and searchable by the public as permitted by Florida Bar Rule 4–7.6. The fact that the website refers to "the case" against Aventura Limo does not convert the website into active solicitation. The Court does not find the Overtime Website constitutes an "end run" around the Court's Order and declines to grant the Motions on this basis.

Defendants also accuse Plaintiff of disseminating a web-based "press release" discussing the *Schatt* Action arbitration, which according to Defendants violates the confidentiality of the stayed arbitration proceedings in that case. (Second Supp. Reply 2). Plaintiff argues that there is no applicable rule or agreement calling for the arbitration proceedings in *Schatt* to be confidential. (*See* Resp. to Third Supp. 2). Plaintiff cites the Statement of Ethical Principles of the American Arbitration Association ("Statement of Principles") [ECF No. 147–1], for the proposition that details of American Arbitration Association ("AAA") arbitration proceedings may be disclosed unless the parties have a separate confidentiality agreement, which Plaintiff contends does not exist in the *Schatt* Action. (*Id.*). The complete text in question states that AAA proceedings are "a private process," and the AAA "takes no position on whether parties should or should not *agree* to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement." (Statement of Principles 3) (emphasis added).

Defendants agree that AAA rules govern the *Schatt* arbitration. As the parties do not dispute that Defendants never agreed to disclose the interim *Schatt* arbitration award, the Court finds Defendants' arguments regarding the press release may have merit. However, this is not the proper forum for raising a violation of AAA rules in the *Schatt* arbitration. Moreover, the Court does not find a resulting violation of Florida Bar Rule 4–7.4 with respect to this case, as Defendants still have not demonstrated how Plaintiff's counsel is actively contacting and soliciting clients with the press release—Defendants have only raised objections to the content of the press release itself. The Court does not grant the Motions to Disqualify on this basis.

C. Florida Bar Rules 4–1.6 and 4–4.4(a)

Florida Bar Rule 4–1.6 provides that "[a] lawyer shall not reveal information ***1366** relating to representation of a client ... unless the client gives informed consent." FLA. BAR R. PROF'L CONDUCT 4–1.6. The purpose of this Rule concerning confidentiality is to engender "trust that is the hallmark of the client-lawyer relationship." *Id.* cmt. The Rule "affirmatively restrict[s] attorneys with 'inside' knowledge from using it for the gain of other clients." *Garfinkel v. Mager,* 57 So.3d 221, 224 (Fla. 5th DCA 2010) (citing FLA. BAR R. PROF'L CONDUCT 4–1.6) (other citations omitted).

Defendants contend that during a deposition occurring in the context of the *Schatt* Action, Celler and Aventura agreed to engage in confidential settlement negotiations. (*See* Mot. to Disqualify Celler 12). As part of those negotiations, Celler induced Aventura to disclose how employee drivers were paid. (*See id.*). Defendants state, "[t]he settlement discussions went nowhere, but it is clear that Celler used those discussions as a ruse to find out whether he believed that he could sue Aventura for how it compensated its employee drivers." (*Id.*). Soon after, Celler brought the lawsuit *Ceant v. Aventura Limousine & Transp. Serv., Inc.,* No. 12–20159–CIV–SCOLA ("*Ceant*

Action"), in which the plaintiff alleges he was not properly paid as an employee driver under the FLSA. (*See id.*). Furthermore, according to Defendants, "[t]he foregoing should also give the Court serious concern that in fact Celler improperly solicited Plaintiff [**Bedoya**] to file this suit, because of the short timeframe in which it was filed after the information was conveyed in the settlement conference." (Mot. to Disqualify Morgan & Morgan 16).

Plaintiff argues that these accusations regarding confidential information purportedly disclosed in the *Schatt* Action are irrelevant to the Motion to Disqualify Celler and Motion to Disqualify Morgan & Morgan. (*See* Pl.'s Post–Hearing Br. 3, 6). Indeed, the Court finds that Plaintiff's counsel's purported misuse of confidential information obtained in the *Schatt* Action, to bring the *Ceant* Action, is beyond the scope of the issue before the Court in the present action. However, to the extent Defendants contend that the confidential information affected Plaintiff **Bedoya's** case, the Court examines the parties' arguments and evidence in support.

In the first place, the Court observes that while Defendants invoke Florida Bar Rule 4–1.6, this is not the rule at issue if indeed Plaintiff's counsel divulged Defendants' confidences, for the simple reason that there is no client-lawyer relationship between Plaintiff's counsel and Defendants. Rather, at issue is Florida Bar Rule 4–4.4, which states, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person." FLA. BAR R. PROF'L CONDUCT 4–4.4(a). Thus, lawyers are subject to "legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." *Id.* cmt. The Court examines whether Plaintiff's counsel violated this Rule.

The parties do not dispute the fact of the settlement negotiations. Tinkler gave the following testimony:

> Q: What was your basis for understanding that those discussions were to be kept confidential?
>
> A: It was for the purpose of trying to settle a case. That was the only reason. I mean, it was—I told Jason ***1367** after it happened, Mr. Coupal, I said I was distressed by the entire situation. I don't understand how you could stop, terminate my deposition, find out how employee chauffeurs are paid, have Mr. Schatt state that he doesn't want to come back as, quote, our employee, and then sue us and then continue the proceedings ten days later. I was beside myself.... I don't understand how that can be possible. I don't get it. It made me lose faith in the system.

(Apr. 2, 2012 Hearing Tr. 15:20–16:8). Tinkler expressed his understanding that during the confidential settlement discussions, he was still under oath on a break from his deposition. (*See id.* 48:2–10). Tinkler declared that Schulman "clearly stated it was for confidential settlement purposes only." (*Id.* 48:2–3). Coupal's testimony confirmed Tinkler's testimony regarding what was divulged, and Schulman's statement that the discussions were confidential. (*See* Mar. 20, 2012 Hearing Tr. 182–83).

Plaintiff, however, states that the specific information Defendants divulged—about how they pay their employee drivers—is not confidential, but "entirely within the public purview," to be found on any of the drivers' pay stubs. (Resp. 3). The Court fails to see how information is rendered "public" by being printed on an employee's pay stub, which presumably may contain various personal data that are decidedly *not* public. Moreover, Plaintiff misses the point. It is not for the Court to pick through pieces of information divulged during settlement to sort into "confidential" and "not confidential" piles. Such a task is not only utterly impracticable but is not sanctioned by the law, which evinces a strong policy in favor of the confidentiality of the medium of the settlement negotiation itself. [13] Thus,

> [I]t is well established that public policy favors the settlement of disputes and avoidance of court litigation whenever possible. In fact, in both the state and federal systems, rules have been codified in order to protect and promote this policy. *See* FED.R.EVID. 408; Fla. Stat. § 90.408; *see, e.g., Central Soya Co. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir.1982) (recognizing a fear that settlement negotiations will be inhibited if parties know that their statements may be used as admissions of liability); *Benoit, Inc. v. Dist. Bd. of Trustees of St. Johns River Cmty. College of Fla.*, 463 So.2d 1260, 1261 (Fla. 5th DCA 1984) (noting that protecting the offeror furthers the state's public policy favoring settlement).

Agan v. Katzman & Korr, P.A., 328 F.Supp.2d 1363, 1369 (S.D.Fla.2004); *see also DR Lakes Inc. v. Brandsmart U.S.A. of W. Palm Beach,* 819 So.2d 971, 973–74 (Fla. 4th DCA 2002) ("The reason for confidentiality as to statements made during mediation where a settlement agreement is not reached is obvious. Mediation could not take place if litigants had to worry about admissions ... being offered into evidence at trial, if a settlement was not reached."). The negotiations in question took place during court-ordered arbitration. Plaintiff does not contest this policy in favor of confidentiality during settlement or contend that the policy would not ***1368** apply during court-ordered arbitration; nor does he deny that Schulman told Tinkler his statements would remain confidential.

Thus, the Court finds that confidential settlement discussions occurred between Defendants and Plaintiff's counsel in the *Schatt* Action, and information divulged during those discussions should be treated as confidential. The question is whether a Florida Bar rule violation occurred in connection with that information in this case. According to Defendants, "[t]he foregoing should ... give the Court serious concern that in fact Celler improperly solicited Plaintiff [**Bedoya**] to file this suit, because of the short timeframe in which it was filed after the information was conveyed in the settlement conference." (Mot. to Disqualify Morgan & Morgan 16). However, no evidence was provided of this, and **Bedoya's** uncontroverted testimony gives no reason to believe he was solicited as a client. (*See* Mar. 20, 2012 Hearing Tr. 84–87). The Court does recognize that the content of the settlement discussions may have a direct bearing on the present case, since the question of how employee drivers are paid may have relevance to a showing of whether or not **Bedoya** was an independent contractor. Thus, Plaintiff's counsel have helped create a situation potentially ripe for a Bar rule violation, should they seek to introduce evidence from the confidential exchanges. Nevertheless, Defendants have not pointed the Court to any improper use of the confidential information that has already occurred, and as such the Court does not disqualify Celler or anyone else on this basis. [14]

D. Florida Bar Rule 4–4.4(b)

Under Florida Bar Rule 4–4.4, "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." FLA. BAR R. PROF'L CONDUCT 4–4.4(b). "If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures." *Id.* cmt.

Defendants assert that Celler intercepted an inadvertently disclosed email sent by Kleppin to Coupal in the context of the *Coelho* Action. (*See* Feb. 7, 2012 Email Exchange, Mot. to Disqualify Celler Ex. 4 [ECF No. 47–4]). Defendants contend that Celler refused to return, sequester, or destroy the email in question, but rather attached it as an exhibit to a motion to disqualify Kleppin in the arbitration in connection with the *Coelho* Action. (*See* Coelho Mot. to Disqualify, Mot. to Disqualify Celler Ex. 3 [ECF No. 47–3]).

Defendants have not given any explanation as to how this inadvertent disclosure ***1369** in the *Coelho* Action has any bearing on the present case. In fact, Defendants advise the Court that the arbitrator denied the motion to disqualify in the *Coelho* arbitration, for Celler to refile it with the court in the *Coelho* Action. (*See* Mot. to Disqualify Celler 5). As Defendants have not identified conduct before the Court which the Court has jurisdiction to sanction, the Court declines to rule on this alleged violation.

E. Florida Bar Rule 4–8.4

Florida Bar Rule 4–8.4 provides:

> A lawyer shall not:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> * * *
>
> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, ...;
>
> (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation,

age, socioeconomic status, employment, or physical characteristic; ...

FLA. BAR R. PROF'L CONDUCT 4–8.4.

The Court finds multiple instances in which Plaintiff's counsel have violated this Rule. For example, the email exchange regarding the Tinkler communication contained such choice statements from Celler to Coupal as "you are not a trial lawyer;" "We are not interested, nor are our clients, in settlement discussions with you as long as you are the lawyer on the other side. You are causing your client a great disservice;" and "Nobody on this side of the internet cares." (Jan. 30, 2012 Email Exchange). Celler himself acknowledges the utter lack of professionalism and impropriety of his emails to Coupal, expressing "remorse and disappointment" (Pl.'s Post–Hearing Br. 2 n. 2), but chalks his behavior up to "zealousness on his client's behalf" and "vigorous[ ]" advocacy. (Resp. 8–9). Needless to say, Celler's emails are far beyond (and at the same time, far short of) what zealous advocacy would require.

Defendants also contend Plaintiff included an injurious false statement in the Padurjan Affidavit that Padurjan only settled his earlier action because of threats from Kleppin that Padurjan would be responsible for paying Kleppin's fees if Padurjan failed to settle. (*See* Mot. to Disqualify Celler 6 n. 6 (citing Padurjan Aff. ¶ 6)). Defendants assert that "[t]his is entirely untrue, and was fabricated by Celler," perhaps on the basis of other firms' retainer agreements which contain a similar clause. (*Id.*). Plaintiff never rebuts this, and if Defendants are correct, the Court agrees such an accusatory statement should not have been made to the Court without any basis and likely runs afoul of Florida Bar Rule 4–8.4. Padurjan's testimony established that there were at least a few additional statements in his own affidavit he could not endorse as true, including the statements regarding his wish to participate in this action. As Plaintiff insists Celler did not personally participate in the Padurjan Affidavit (*see* Resp. 4 n. 5), Schulman and/or Morgan & Morgan are likely responsible for this conduct.

***1370** In addition to the above, Defendants describe deplorable behavior on Celler's part that occurred in connection with the *Schatt* Action. Tinkler testified that during depositions he witnessed "Mr. Celler ... drawing photos of—pictures of male genitalia and showing them to Ms. Schulman, describing Mr. Coupal. I told Mr. Coupal after that was occurring and he made mention about it." (Apr. 2, 2012 Hearing Tr. 17:2–5). Sorci testified that he observed Schulman "laugh[ing] quite a few times" at Celler's drawings, and that on break Schulman made a comment that "this is typical Richard [Celler], this is what he does at these sort of things." (*Id.* 85:5–10). Tinkler further stated that "during Mr. Schatt's deposition Mr. Celler was playing the game Angry Birds. He admitted it aloud and was bragging that he had just beaten somebody in Minnesota at the game during the deposition." (*Id.* 17:6–9). Moreover, Celler would wear a t-shirt and shorts to proceedings to gain "a psychological advantage." (*Id.* 17:11–15). Celler chose Dunkin' Donuts as the site of depositions against Coupal's wishes. According to Tinkler, the Dunkin' Donuts had:

> open glass, an open wall. You could hear the people. There was [sic] two video games right by where this gentleman is sitting. You could hear people the free Wifi video games. It's right near Nova's campus. There were people coming and going constantly through that area, high traffic area. They were yelling and screaming in the reception area where people were ordering their lunch and there was one bathroom that was flooded out and the door was locked constantly.

(*Id.* 55:12–19).

[12] As this conduct occurred in another forum, it is not directly actionable here. Nonetheless, this conduct is relevant to the extent it speaks to Celler's violation of Florida Bar Rule 4–4.4 in embarrassing or burdening Defendants and interfering with their privileged relationship with Coupal in this action, of which the *ex parte* communication with Tinkler was a part. For example, Tinkler witnessed Celler, at the Dunkin' Donuts, "taunting" Coupal about Celler's "27 and 0 record," and about how Coupal will lose this case and "hides behind ... his general counsel title." (*Id.* 17:18–21). Tinkler stated,

> I had to leave the room and I went into the reception area and then Mr. Coupal came and asked me what was the matter and I said, I could not listen to the way Mr. Celler

> was speaking to you. It bothered me significantly.

(*Id.* 17:23–18:1). This behavior, which Celler makes no attempt to deny, is relevant insofar as Celler's course of conduct in disparaging Coupal, to Coupal's clients, has severely impacted these proceedings. Plaintiff glibly tries to downplay Celler's attire, the use of a Dunkin' Donuts to host depositions, and "jokes he may have made," offering excuses that Morgan & Morgan's conference room was undergoing construction. (Pl.'s Post–Hearing Br. 16 & n. 17). Plaintiff urges the Court to "consider the context of Mr. Celler's emails," as the antagonism between the attorneys here "was not totally one-sided." (*Id.* 16). These juvenile arguments hardly excuse Plaintiff's counsel's behavior, and the Court accords them no weight.

F. Disqualification

The question then is whether the various Florida Bar Rule violations—of Rule 4–4.2 with respect to Tinkler and Goetz, and Rule 4–8.4 as discussed above—constitute grounds for disqualification.

*1371 **[13]** **[14]** "[A]s a general rule ... disqualification of counsel under [Florida Bar Rule] 4–4.2 is not presumptively required, and violations thereof should ordinarily be remedied in some other way." *Allstate Ins. Co. v. Bowne,* 817 So.2d 994, 999 (Fla. 4th DCA 2002) (stating that the "usual remedy" is to bar the *ex parte* acquisition of information during discovery or bar the use of any improper communications already had). The Court is conscious of the fact that disqualification on the basis of *ex parte* contact is not an ordinary remedy. However, this is not an ordinary case. The reasoning of the court in *Allstate* demonstrates that a common concern with respect to *ex parte* contact is the improper acquisition of confidential information. Here, there is no allegation Celler acquired confidential information from Tinkler (although this was an issue with other individuals as addressed below). However, as stated, Celler's *ex parte* contact cut to the core of the opposing party's attorney-client relationship. The Court finds that in the instant case, the relationship between Celler, Defendants, and Defendants' counsel has been so impaired that the only proper remedy is Celler's disqualification. The various Florida Bar Rule 4–8.4 violations whereby Celler disparaged Coupal in front of Coupal's clients and generally acted with flagrant disrespect exacerbate the situation and show that the *ex parte* contact with Tinkler was merely one element of a consistent course of disrespectful, unprofessional conduct exhibited by Celler.

The violation of Florida Bar Rule 4–4.2 with respect to Goetz further supports Celler's disqualification, as well as that of Schulman. The substance of the contact with Goetz, which stretched over multiple days and actually resulted in an affidavit submitted against Defendants, goes to an issue central to the present action. The undisputed evidence shows both Celler and Schulman were notified of Coupal's objections to the contact, and both were fully involved in interviewing Goetz, preparing him, and obtaining his signed affidavit. The Court finds sufficient basis to disqualify Schulman from further participation in this action. Plaintiff should not be permitted to profit from the confidential information improperly obtained *ex parte* from Goetz.

Defendants have also moved to disqualify Morgan & Morgan. Plaintiff suggests that should Celler be disqualified, Schulman or other Morgan & Morgan attorneys would simply take primary responsibility for Plaintiff's case. Celler states, "While I intend to assist Ms. Schulman in *Ceant* and ***Bedoya*** if she asks for my assistance, she will remain in her role as primary counsel, and is more than capable of handling these matters alone and without my participation." (Celler Aff. ¶ 4). Murthy, from Morgan & Morgan, has also appeared in this matter. Schulman testified there are seven attorneys practicing labor and employment law in the Morgan & Morgan office where she works with Celler. (*See* Mar. 20, 2012 Hearing Tr. 6:17–24 [ECF No. 109]). An additional three attorneys practice labor and employment law in the firm's Orlando office. (*See id.* 6:25–7:1). Celler is the managing partner of the labor and employment division at Morgan & Morgan, and all of the attorneys in the practice report directly to him. (*See id.* 7:6–9).

Defendants cite *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F.Supp. 1080 (S.D.N.Y.1989), for the proposition that improper *ex parte* communication is a basis for disqualification of an entire firm. (*See* Mot. to Disqualify Morgan & Morgan). In *1372 fact, *Papanicolaou* is an instructive case in which a plaintiff sought to disqualify not only an individual attorney for defendant, but that attorney's entire law firm. The plaintiff in that matter had an *ex parte* communication lasting an hour and a half with a partner of the opposing party's firm,

Milbank, when the plaintiff arrived at Milbank's office for a deposition. *See* 720 F.Supp. at 1081–82. During the conversation, the plaintiff discussed the merits of the case and showed the Milbank partner a key document, and the partner disparaged the competence of the plaintiff's attorneys, Kreindler and Kreindler. *See id.* at 1082.

The court held that the "real litmus test" for disqualification was the probability of "taint of trial." *Id.* at 1083. The court found the substantive, privileged information discussed *ex parte* required disqualification, *see id.* at 1085, and the court questioned the effectiveness of the "Chinese wall" erected to protect the flow of privileged information at Milbank, *id.* at 1087. The court moreover held:

> A Chinese wall seems an inappropriate prophylactic here for another reason. Chinese walls are meant to isolate a client's confidences. *Chinese walls are not designed to, and are not able to, contain the effects of deprecation.* Model Rule 4.2[15] protects parties from the potential consequences of the possession of confidential information; but it also sustains the integrity of the relationships between both an attorney and his client and an attorney and his opponent. The responsible Milbank partner disparaged Kreindler's competence. *His comments are alleged to have upset the equilibrium of the relationship between Kreindler and its client, the plaintiff.* In the conduct of litigation it is essential that the attorney have the full confidence of his client. Attorney-client relationships are delicate and may never fully recover from such attacks. According to Kreindler, the partner has also made it difficult for the firm to maintain a normal, professional adversarial relationship with Milbank. If the relationship between the attorneys in this case has deteriorated to the extent that plaintiff's counsel cannot feel secure, the course of the trial may well be affected, with resulting adverse consequences for the plaintiff.

Id. at 1087 (footnote call number omitted) (emphasis added). The court therefore disqualified the entire Milbank firm as well as the partner who had disparaged the plaintiff's attorney. *See id.*

This language aptly describes what has occurred in this case. It is evident that Celler's actions with respect to Defendants, and throughout this case, have so damaged the adversarial process that any trial may well be tainted. Furthermore, given the small size of the Morgan & Morgan labor practice, the Court is not convinced that a Chinese wall—and removing solely Celler and Schulman from this case—would have any effectiveness. If there are seven attorneys practicing labor and employment law in Celler's office as Schulman testified, three of them have already appeared in this case. Up to this point, Celler and Schulman have hardly demonstrated the scrupulousness that would be required to enforce a Chinese wall, and in the words of the *Papanicolaou* ***1373** court, the "Court doubts whether any Chinese walls, which are meant to be preemptive, can ever function effectively when erected in response to a motion, and not prior to the arising of the conflict." *Id.* at 1087.

The Court finds that the appropriate remedy in this matter is to disqualify the Morgan & Morgan law firm from representation of Plaintiff in this action. In so finding, the Court is influenced by the egregiousness of the Florida Bar Rule violations, and the grave impact Celler's disparaging acts have had on the attorney-client relationship between Coupal and Defendants. The severity of the remedy matches that of the violations.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED as follows:

1. The Motion to Disqualify Celler **[ECF No. 47]** is **GRANTED.** Celler is disqualified from representing Plaintiff as counsel in this matter and relieved of all

further responsibilities related to Plaintiff in these proceedings.

2. The Motion to Disqualify Morgan & Morgan **[ECF No. 82]** is **GRANTED.**

All Citations

861 F.Supp.2d 1346

Footnotes

1 Schulman filed a Notice of Appearance [ECF No. 24] on January 26, 2012. Angeli Murthy ("Murthy") filed a Notice of Appearance [ECF No. 76] as counsel for Plaintiff on March 9, 2012. Celler, Schulman, and Murthy are all attorneys at Morgan & Morgan.

2 Defendants filed a Supplement ("First Supplement") [ECF No. 83] to the Motion to Disqualify Celler on March 9, 2012. Plaintiff filed an Omnibus Response to Defendants' Motions to Disqualify ("Response") [ECF No. 99] on March 16, 2012, to which Defendants replied ("Reply") [ECF No. 123] on April 3, 2012. The Court held an evidentiary hearing on the Motions, and on Plaintiff's own motion to disqualify Defendants' counsel [ECF No. 35], on March 13, 20, and 26, and April 2, 2012. (*See* [ECF Nos. 94, 102, 111, 117]). After the hearing, on April 3, 2012, Plaintiff filed a Post–Hearing Brief on Defendants' Motions to Disqualify ("Plaintiff's Post–Hearing Brief") [ECF No. 127]. Defendants filed a Memorandum in Support ... ("Defendants' Post–Hearing Brief") [ECF No. 128] on April 4, 2012. Defendants further filed a Second Supplement ("Second Supplement") [ECF No. 137] to the Motions on April 16, 2012. Plaintiff filed a Response to Defendants' Second Supplement ... ("Response to Second Supplement") [ECF No. 138] on April 16, 2012, to which Defendants filed a Reply ("Second Supplement Reply") [ECF No. 139] on April 18, 2012. Defendants filed, under seal, a Third Supplement ("Third Supplement") [ECF No. 142] to the Motions on April 23, 2012. Plaintiff filed a Response to Defendants' Third Supplement ... ("Response to Third Supplement") [ECF No. 147] on April 27, 2012, also under seal. Defendants filed a Reply to Plaintiff's Response to Defendant's [sic] Third Supplement ... ("Third Supplement Reply") [ECF No. 169], on May 14, 2012.

Defendants filed the Third Supplement under seal in order to protect the confidentiality of documents generated in ongoing arbitration proceedings. (*See* [ECF No. 141]). The Court will discuss the Third Supplement, Response, and Reply thereto where necessary, without discussing the content of the arbitration documents in question.

3 These are case numbers 1:07–cv–21650 and 1:08–cv–20128 ("*Padurjan* Actions").

4 The Court granted Plaintiff's motion to disqualify Kleppin and his firm, Glasser, Boreth & Kleppin, PA., on April 30, 2012. (*See* Apr. 30, 2012 Order, 2012 WL 1534488 [ECF No. 150]).

5 With respect to Padurjan, Defendants appear largely to take issue with supposed machinations on the part of Plaintiff's counsel to manufacture a conflict of interest to disqualify Kleppin. The Court thoroughly addressed these issues in the April 30, 2012 Order, and found certain of Plaintiff s counsel's complaints regarding the conflict of interest to be legitimate. The Court does not consider the arguments successfully raised by Plaintiff's counsel and addressed in the April 30, 2012 Order as grounds for Plaintiff's counsel's disqualification.

6 In any event, the cited opinion merely states that a party's attorney may not communicate directly with the opposing party on the subject of the litigation, in view of settlement of the judgment, until that attorney has determined the opposing party is no longer represented by counsel. Here, there is no dispute Padurjan was no longer represented by counsel.

7 Defendants also argue that Celler improperly "induced" Padurjan to sign the affidavit by suggesting that Padurjan could join this action. (Mot. to Disqualify Celler 11). Padurjan, however, flatly denied any such inducement at the evidentiary hearing; he testified he did not even remember reading the portion of his affidavit stating that he wished to participate in this action. As there is no evidence that any inducement occurred, the Court does not accord this argument much weight.

8 Celler is referring to a separate email exchange he had with Goodman, discussed below.

9 Plaintiff attempts to argue that Celler could not have refused to settle with Coupal, since after the *ex parte* communication Celler made a "good faith settlement offer" to Coupal of $7.5 million, as a common fund for the various claims against Defendants. (Pl.'s Post–Hearing Br. 12). As an initial matter, the Court notes that the fact Celler offered a single figure to settle various plaintiffs' claims further demonstrates that Celler's statement applied to several cases, not just the *Schatt* Action. With respect to whether this was a good faith offer, Defendants have made clear such an offer seemed excessive in the extreme, and "[i]t made [Tinkler] feel sick to [his] stomach." (Apr. 2, 2012 Hearing Tr. 20:8). Plaintiff's justification for the number, that "each plaintiff's claimed unpaid wages need only be $35,000.00 in order to reach the proposed settlement amount" (Pl.'s Post–Hearing Br. 12 n. 12), strikes the Court as flimsy, particularly as Defendants give several compelling reasons that Plaintiff never rebuts as to why the settlement amount would not have been permitted by law (*see*

Reply 23). Without making a determination as to the plausibility of Plaintiff's settlement offer, the Court finds it does little to prove Celler made no such statement that he would not settle with Coupal, particularly given the clear documentary evidence showing otherwise.

10 These include assertions that the parties actually had a "pleasant" relationship during the *Schatt* Action, Tinkler's wife donated to a charity in which Schulman was participating, the topic of whether Defendants would need outside counsel due to Coupal's health (not his competence) was mentioned in front of the arbitrator, and Defendants had begun talking with Kleppin as early as December 2011. (Pl.'s Post–Hearing Br. 11). None of these address whether an *ex parte* communication within the meaning of Florida Bar Rule 4–4.2 occurred.

11 Testimony during the evidentiary hearing before the Court revealed that Celler was in the habit of wearing shorts and sneakers to proceedings during the *Schatt* Action, including depositions. (*See* Apr. 2, 2012 Hearing 17:11–15). This misconduct is discussed below in reference to Florida Bar Rule 4–8.4.

12 This is especially true since Defendants have attempted to seize on Celler's statement that Schatt was "hurt deep down" as proof of Schatt's motive in allegedly soliciting clients for Morgan & Morgan, as discussed below. (*See* Reply).

13 Plaintiff makes much of the fact that Defendants purportedly lobbied in Washington, D.C., on the same general issue of how they paid employee drivers, demonstrating that this was public information. This argument is equally unavailing, as presumably Plaintiff asks the Court to compare individual statements made in Washington, D.C., with statements made during settlement, an unworkable position not supported by the law.

14 Defendants do argue that Celler learned Kleppin would be co-counsel in this matter through Defendants' inadvertent production of documents in the *Schatt* Action. (*See* Mot. to Disqualify Celler 3). Schulman alerted Coupal to the disclosure, stating that Plaintiff would mail the original document back to Defendants. (*See* Jan. 11, 2011 Email Exchange, Mot. to Disqualify Celler Ex. 2 [ECF No. 47–2]). Defendants' primary complaint appears to be that Plaintiff subsequently tried to name Padurjan as a witness and moved to disqualify Kleppin after the latter had filed a Notice of Appearance. Defendants do not explain why either of these two actions would constitute actionable conduct, however, and the Court does not find that they do, particularly since Schulman did appear to return the documents in question immediately, and as the Court has stated, Plaintiff's counsel's act in bringing Plaintiff's motion to disqualify Kleppin is not at issue here.

15 Model Rule 4.2, examined by the *Papanicolaou* court, is virtually identical to Florida Bar Rule 4–4.2.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Taylor v. Hydraflex, Fla.Cir.Ct., August 24, 2006

593 So.2d 1219
District Court of Appeal of Florida,
First District.

KENN AIR CORP., a Florida Corporation, Petitioner,
v.
GAINESVILLE–ALACHUA COUNTY REGIONAL AIRPORT AUTHORITY, Respondent.

No. 91–1664.
|
Feb. 25, 1992.

Corporation sought review of order entered by Circuit Court denying corporation's motion to disqualify opposing party's attorney. The District Court of Appeal, Ervin, J., held that, whether or not actual ethical violation occurred, representation of opposing party by attorney which formerly represented corporation's predecessor in interest created appearance of switching sides which required disqualification.

Petition for writ of certiorari granted; case remanded with directions.

West Headnotes (6)

[1] **Certiorari**
⇨ Nature and scope of remedy in general

Requirements for issuance of writ of certiorari are that petitioner show that lower court exceeded its jurisdiction in rendering order or that order does not conform to essential requirements of law and may cause material injuries in subsequent proceedings for which remedy by appeal will be inadequate.

1 Cases that cite this headnote

[2] **Certiorari**
⇨ Particular proceedings in civil actions

Orders granting or denying motions to disqualify party's attorney may be appropriately reviewed by certiorari.

6 Cases that cite this headnote

[3] **Attorney and Client**
⇨ Interests of former clients

Before party's former attorney can be disqualified from representing party whose interests are adverse to those of former client, former client must show that matters embraced in pending suit are substantially related to matters in which attorney previously represented the former client. West's F.S.A. Bar Rule 4–1.6.

9 Cases that cite this headnote

[4] **Attorney and Client**
⇨ Organizations and corporations, employment by or representation of

Rule that lawyer who was formerly representing client in matter may not represent another person in same or substantially related matter in which that person's interests were materially adverse to interest of former client applied to corporation which acquired rights in interests of former client by virtue of its purchase of tangible and intangible assets. West's F.S.A. Bar Rules 4–1.6, 4–1.7, 4–1.9; U.S.C.A. Const.Amend. 6.

8 Cases that cite this headnote

[5] **Attorney and Client**
⇨ Disqualification proceedings;standing

Where attorney had long-standing relationship with client regarding its leases at airport, an irrebuttable presumption arose that client disclosed confidences to attorney during that representation, and, thus, attorney would not be allowed to represent successor of former client's adversary in matter substantially related to that in which attorney represented former

client. West's F.S.A. Bar Rules 4–1.6, 4–1.7, 4–1.9; U.S.C.A. Const.Amend. 6.

9 Cases that cite this headnote

[6] **Attorney and Client**
⌲ Disqualification in general

Actual violation of ethics rules is not prerequisite to granting motion for disqualification to avoid appearance of impropriety. West's F.S.A. Bar Rule 4–1.9.

3 Cases that cite this headnote

Attorneys and Law Firms

*1220 Dana G. Bradford, II, Steven E. Brust, of Baumer, Bradford, Walters & Liles, P.A., Jacksonville and Ronald A. Carpenter, Lucy Goddard, of Carpenter & Goddard, P.A., Gainesville, for petitioner.

Leonard E. Ireland, Jr., of Clayton, Johnston, Quincy, Ireland, Felder, Gadd, Smith & Roundtree, Gainesville and Stephen J. DeMontmollin, Gainesville, for respondent.

Opinion

ERVIN, Judge.

Petitioner, Kenn Air Corp., filed its petition for writ of certiorari seeking review of an order entered by the circuit court in Kenn Air's pending action against respondent, Gainesville–Alachua County Regional Airport Authority (GACRAA),[1] which denied Kenn Air's motion to disqualify GACRAA's attorney, Leonard E. Ireland, Jr., and his law firm, Clayton, Johnston, Quincy, Ireland, Felder, Gadd, Smith & Roundtree, from the action. We agree with petitioner that the lower court's order constitutes a departure from the essential requirements of law for which no adequate remedy on appeal exists. We therefore grant the petition and issue the writ.

In 1986 the City of Gainesville (City) sued Kenn Air's predecessor-in-interest, Charter Leasing Corp. (Charter), in connection with a dispute over a lease under which Charter was a tenant of the City at the Gainesville–Alachua County Regional Airport. Charter operated a fixed-base operation (FBO), providing fuel and general aviation services to private aircraft. The suit involved an area called "the hill" and surrounding property located on Charter's leasehold which the City claimed it was entitled to improve under its lease with Charter. Charter protested the improvement, and engaged Leonard E. Ireland, Jr. (Ireland), to defend it in the action. Ireland, on behalf of Charter, reached an agreement with the City to permit its agents to enter the premises and remove the hill. The parties' agreement expressly reserved Charter's right to seek damages in connection with the City's construction efforts.

After the City made the improvements, Ireland filed a counterclaim on behalf of Charter against the City for damages associated with the City's redevelopment of the leasehold. It was alleged that Charter was entitled to damages because the City's improvements (1) hindered Charter's ability to locate properly sized T-hangars for servicing its customers, (2) diverted the flow of water from a nearby creek onto Charter's premises, resulting in a retention area which limited its ability to place the T-hangars on its premises, (3) took property without just compensation, and (4) destroyed two buildings during removal of the hill. The case was eventually voluntarily dismissed without prejudice, pursuant to joint stipulation of the parties.

On March 4, 1988, Kenn Air acquired the rights and interests of Charter by virtue of its purchase from the United States Bankruptcy Court, Northern District of Florida, of all of Charter's tangible and intangible assets. Pursuant to the bill of sale, Kenn Air acquired Charter's leasehold interest in, leasehold improvements on, and contract rights to Charter's leases at the airport, as well as all causes of action attendant thereto.

Kenn Air filed suit in September 1989 against GACRAA seeking declaratory relief and damages associated with GACRAA's revision of the rules and regulations governing FBOs.[2] Specifically, Kenn Air alleged that the revisions were carried *1221 out in bad faith and in complete derogation of Kenn Air's rights under the lease which it had obtained from the Charter purchase. Moreover, Kenn Air claimed that GACRAA's revisions, to the detriment of Kenn Air, were consistent with GACRAA's and the City's long-standing pattern of bad faith and preferential treatment of various FBOs at the airport. In November 1989, after determining that the

damages associated with the City's redevelopment of the then Charter-leased property were severe, Kenn Air filed an amended complaint adding two counts, wherein it sought damages and inverse condemnation associated with the City's actions regarding the hill property in 1986.

GACRAA engaged Mr. Ireland and his firm to represent it in the action. When Ireland first made an appearance on behalf of GACRAA, Kenn Air was unaware of his involvement in the 1986 hill litigation and thus did not initially object to his representation. During the course of reviewing Charter's business records, Kenn Air's president, Kenneth Brown, discovered Ireland's participation in the earlier litigation. Brown also discovered other documents and business records disclosing that Ireland, as attorney for Charter, was also involved in other lawsuits against the City, each involving disputes over various lease agreements.

After fully reviewing all of Charter's litigation and correspondence files in the above matters, Kenn Air's counsel wrote to Ireland and requested that he disqualify himself and his firm from the present litigation. When Ireland refused, Kenn Air filed its motion to disqualify pursuant to Rules 4–1.6, 4–1.7, 4–1.9, and 4–3.7 of the Rules Regulating The Florida Bar. Kenn Air alleged that it was the successor-in-interest to Charter and that one of the substantial matters to be litigated in the action was whether Kenn Air was entitled to damages for "reconfiguration" of the leasehold premises known as the hill, an issue which was similar to that involved in the action Ireland brought on behalf of Charter in 1986. Consequently, Kenn Air alleged that an irrebuttable presumption existed that client confidences were disclosed to Ireland during the course of his representation of Charter, Kenn Air's predecessor-in-interest, and that such confidences could be used to the detriment of Kenn Air if Ireland continued as counsel for GACRAA, which would be an impermissible unfair advantage. Additionally, Kenn Air contended that Ireland acquired knowledge of material facts and circumstances in his prior representation of Charter in numerous other disputes against the City regarding FBO leaseholds, and that the prior Charter actions were substantially similar to the claims set out in Kenn Air's complaint.

The matter came on for hearing, and following the submission of evidence, including Charter's litigation files, the trial court entered the order denying Kenn Air's motion to disqualify Ireland and his firm. In so doing the court found that no ethical violation had occurred and no relationship existed between Ireland and Kenn Air which would require granting the motion to disqualify. Kenn Air now seeks certiorari review of that order.

[1] [2] The requisites to the issuance of a writ of certiorari are that the petitioner demonstrate that the lower court exceeded its jurisdiction in rendering the order or that the order does not conform to the essential requirements of law and may cause material injuries in subsequent proceedings for which remedy by appeal will be inadequate. *Ford Motor Co. v. Edwards*, 363 So.2d 867, 869 (Fla. 1st DCA 1978). Orders granting or denying motions to disqualify a party's attorney may be appropriately reviewed by certiorari. *See, e.g., Jenkins v. Harris Ins., Inc.*, 572 So.2d 1011 (Fla. 1st DCA 1991); *Campbell v. American Pioneer Sav. Bank*, 565 So.2d 417 (Fla. 4th DCA 1990); ***1222** *Ford v. Piper Aircraft Corp.*, 436 So.2d 305 (Fla. 5th DCA 1983), *review denied*, 444 So.2d 417 (Fla.1984); *Sears, Roebuck & Co. v. Stansbury*, 374 So.2d 1051 (Fla. 5th DCA 1979).

[3] Rule 4–1.6 of the Rules Regulating The Florida Bar provides that, except in limited circumstances not applicable here, "[a] lawyer shall not reveal information relating to representation of a client ... unless the client consents after disclosure to the client." The comment to this rule states that the rule of confidentiality applies not only to matters communicated in confidence by the client but to *all* information relating to the representation, whatever its source, and that the duty of confidentiality continues after the client-lawyer relationship is terminated. Requiring the disqualification of an attorney under this rule is, however, a matter of no small consequence. *Ford*, 436 So.2d at 307; *Sears*, 374 So.2d at 1053. Therefore, before a party's former attorney can be disqualified from representing a party whose interests are adverse to those of the former client, the former client must show that the matters embraced in the pending suit are substantially related to the matters in which the attorney previously represented him or her, the former client. *Ford*, 436 So.2d at 307; *Sears*, 374 So.2d at 1053.

The threshold question then is whether an attorney-client relationship existed. It is undisputed that no attorney-client relationship has ever existed between Kenn Air and Ireland. The question next to be answered is whether Kenn

Air may "stand in the shoes" of Charter, Ireland's former client, in order to have standing to make the motion for disqualification. Kenn Air makes several arguments in support of its position that it possessed standing, only one of which we consider has merit.

Kenn Air asserts a violation of rule 4–1.9, which provides that a lawyer who has formerly represented a client in the 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 interest of the former client unless the former client consents after consultation. The rule also prohibits the attorney from using information relating to the representation of a former client to the disadvantage of the former client. This rule is aimed at the problem of attorneys "switching sides," and arises because the duty of confidentiality under rule 4–1.6 protects all confidences and information obtained during representation of a client, and because this duty continues even after the attorney-client relationship is terminated. *See T.C. Theatre Corp. v. Warner Bros. Pictures,* 113 F.Supp. 265, 268 (S.D.N.Y.1953) (lawyer's obligation of absolute loyalty to his or her client's interest does not end with the retainer; the lawyer is enjoined for all time, except when released by law, from disclosing matters revealed by reason of the confidential relationship with the lawyer's client). *And see generally Rosenfeld Constr. Co. v. Superior Court of Fresno County,* 235 Cal.App.3d 566, 286 Cal.Rptr. 609, 612–13 (1991).

[4] As to the question of Kenn Air's standing, the comment to rule 4–1.9 references the comment to rule 4–1.7, which recognizes that someone other than a client or former client may move for disqualification in instances involving conflicts of interest in simultaneous representations. That circumstance exists when the conflict is clear and the question of fair and efficient administration of justice is raised. Because switching sides and conflict of interest in simultaneous representation are two ethical violations that can be clearly seen by persons other than clients, we extend the standing rule set out in *State Farm Mutual Automobile Insurance Co. v. K.A.W.,* 575 So.2d 630 (Fla.1991) (holding that an insurance company could "stand in the shoes" of its insured for the purpose of seeking disqualification of the opposing party's attorney when there existed simultaneous representation of parties with conflicting interests), to the situation at bar and therefore afford Kenn Air standing to raise the motion for disqualification.

[5] ***1223** As to the merits of the motion, it is undisputed that Ireland had a long-standing relationship with Charter regarding its leases at the airport. Thus, an irrebuttable presumption arises that Charter disclosed confidences to Ireland during that representation. To allow Ireland to represent a successor of his former client's adversary in a matter which appears to be substantially related [3] to that in which Ireland previously represented the former client, Charter, creates the appearance that Ireland has switched sides.

[6] Upon consideration of the public's perception of the integrity of the bar, and the appearance of impropriety that arises in situations in which an attorney switches sides, we conclude that the trial court departed from the essential requirements of law by denying Kenn Air's motion for disqualification under the circumstances. [4] *See Campbell v. American Pioneer Sav. Bank,* 565 So.2d 417 (Fla. 4th DCA 1990) (disqualification based on appearance of impropriety was proper in mortgage foreclosure proceeding where petitioner showed that respondent's current attorney had previously represented petitioner in matters concerning the real property at issue and involving a conveyance that was relevant to the foreclosure); *Ford v. Piper Aircraft Corp.,* 436 So.2d 305 (Fla. 5th DCA 1983) (attorney who represented FIT Aviation in one action, and who then filed a suit on behalf of another client, which subsequently resulted in FIT being named as a party defendant, was disqualified from representing the plaintiff in the second suit), *review denied,* 444 So.2d 417 (Fla.1984).

We also conclude that any remedy available to Kenn Air from an appeal of a final adverse order would be inadequate due to the fact that Ireland's informational advantage, obtained through his earlier representation of Charter, could cause material injuries to Kenn Air at any subsequent proceedings.

The petition for writ of certiorari is GRANTED and the case is remanded with directions to grant petitioner's motion to disqualify.

BARFIELD and ALLEN, JJ., concur.

All Citations

593 So.2d 1219, 17 Fla. L. Weekly D558

Footnotes

1 Kenn Air Corp. v. Gainesville–Alachua County Regional Airport Authority, No. 89–2735–CA, (Fla. 8th Cir.Ct. filed Sept.1989).

2 GACRAA is a statutorily-created body which has been authorized by the City to operate, maintain, and control the airport and its facility since 1987. Prior to the creation of GACRAA, the City had negotiated its own commercial leases and was solely responsible for overseeing and enforcing the governing rules and regulations for FBOs.

3 Our review of Charter's 1986 hill counterclaim and petitioner's current complaint convinces us that the two actions are substantially similar. For example, as previously stated, Charter's counterclaim filed by Ireland in the 1986 action alleged that the City had breached its lease agreement with Charter by building a road over its property, which adversely affected Charter's ability to build T-hangars on the property; that the City had diverted the flow of a creek and created a retention pond on the leased premises, which limited Charter's ability to build T-hangars on the premises; and that the City had taken property on the hill and destroyed buildings owned by Charter which were located on the hill without just compensation. Kenn Air's second amended complaint in the present action similarly alleges that the defendant breached the lease in regard to the hill property by causing a drainage retention pond to adversely affect the use and occupancy of the property; by developing a portion of the property in such a way as to make it no longer useful to Kenn Air; and by "reconfiguring" the leasehold, including removal of the hill, so as to constitute an unlawful taking without just compensation.

4 In so saying we specifically do not rule on whether a violation of rule 4–1.9 has occurred. Actual violation of the ethics rules is not a prerequisite to the granting of a motion for disqualification to avoid the appearance of impropriety. *See State Farm,* 575 So.2d at 634. *See also SMI Indus. Canada Ltd. v. Caelter Indus., Inc.,* 586 F.Supp. 808, 817 (N.D.N.Y.1984).

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I.B.

2014 WL 12482616
Only the Westlaw citation is currently available.
United States District Court,
N.D. Florida,
Pensacola Division.

Milton Carpter Center, Inc., Plaintiff,
v.
Cincinnati Insurance Company, Defendant.

Case No. 3:13cv624/MCR/CJK
|
Signed 05/05/2014

Attorneys and Law Firms

David Duff Barnhill, Andrew Philip McDonald, Freeman & Miller PA, Tampa, FL, for Plaintiff.

Guy E. Burnette, Jr., Guy E. Burnette Jr. PA, Tallahassee, FL, Ira Scott Bergman, Jason Michael Chodos, Litchfield Cavo LLP, Ft. Lauderdale, FL, Douglas Frank Miller, Kubicki Draper PA, Pensacola, FL, for Defendant.

ORDER

CHARLES J. KAHN, JR., UNITED STATES MAGISTRATE JUDGE

*1 This matter is before the court on plaintiff's Motion to Compel Defendant to Appoint and Designate Appraiser in Conformity with Insurance Policy (doc. 18), defendant's response thereto (doc. 24), and plaintiff's reply (doc. 26). In it motion, plaintiff requests that the court disqualify defendant's designated appraiser, Guy E. Burnette, Jr., who also serves as defendant's counsel in this matter, on the basis of impartiality and require defendant to appoint a substitute appraiser. [1] In response to plaintiff's motion, defendant offered to reassign the defense of this case to another law firm. The court directed the parties to confer regarding defendant's offer and allowed plaintiff to submit a reply thereafter. In its reply, plaintiff maintained the objection to Mr. Burnette serving as defendant's appraiser. Upon review of the parties' filings, the court finds that Mr. Burnette should be disqualified from serving as defendant's appraiser in this action.

BACKGROUND

Plaintiff suffered a fire loss on November 28, 2012. At the time of the loss, plaintiff was insured under a commercial property policy issued by defendant. There is no dispute that the fire was a covered peril under the policy; there is disagreement, however, as to the amount of plaintiff's loss. After the parties failed to agree on the value of plaintiff's claim, plaintiff filed suit in Santa Rosa County Circuit Court, alleging breach of contract. Shortly thereafter, defendant removed the matter to this court, invoking the court's diversity jurisdiction (doc. 1). Simultaneous with it removal, defendant filed a Motion to Compel Appraisal and Abate Litigation (doc. 3). Approximately six weeks later, the parties entered into a Consent Motion and Memorandum of Appraisal (docs. 12, 13). According to the Memorandum of Appraisal, each party was required to designate its appraiser on or before February 20, 2014. Plaintiff designated Steven Baker as its appraiser; [2] defendant designated Guy E. Burnette, Jr. as its appraiser.

According to the policy, appraisers must be "competent and impartial." [3] *See* doc. 1-1, pg. 16. Plaintiff does not challenge Mr. Burnette's competency; it insists, however, that Mr. Burnette is not impartial. The term "impartial" is not defined in the policy. Accordingly, the court must give the term its plain meaning. Indeed, when interpreting an insurance contract under Florida law, the court is "bound by the plain meaning of the contract's text." *Trinidad v. Florida Peninsula Ins. Co.*, 121 So.3d 433, 441 (Fla. 2013) (internal marks omitted) (holding that "[i]f the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written"); *Citizens Prop. Ins. Corp. v. M.A. & F.H. Props., Ltd.*, 948 So. 2d 1017, 1020 (Fla. 3d DCA 2007) ("In the absence of a contractual definition, we must presume that this word was intended to be used in its plain and ordinary way as can be ascertained by reference to a dictionary"). According to Webster's New College Dictionary (3d ed. 2008), "impartial" means "not partial or biased." *Id.* "Partial" is defined, in pertinent part, as "[f]avoring one person or side over another" and "[h]aving a particular liking for someone or something." *Id.* "Biased" is defined as "[m]arked by bias." *Id.* "Bias" means, among other things, "[a]n inclination or preference, esp. one that interferes with impartial judgment." *Id.*

*2 Throughout the pendency of plaintiff's claim, and predating the actual lawsuit, the defendant has been represented by the law firm of Guy E. Burnette, Jr., P.A. That firm, as well as its members, thus owe a duty of loyalty to defendant. *See* Rules Regulating the Florida Bar § 4-1.10(a); *Chapman v. Klemick*, 3 F.3d 1508, 1512 (11th Cir. 1993) (noting that an attorney owes a duty of loyalty to his client, which is "very nearly sacred"); *see also Reynolds v. Chapman*, 253 F.3d 1337, 1343 (11th Cir. 2001) ("It is also well established in this circuit that a lawyer's confidential knowledge and loyalties can be imputed to his current partners and employees."). Considering that fact, the undersigned finds that Mr. Burnette is not – and, indeed, cannot be – impartial in this matter. *See, e.g., Harris v. Am. Modern Home Ins. Co.*, 571 F. Supp. 2d 1066, 1078 n.6 (E.D. Mo. 2008) (noting that "[c]ases involving interested arbitrators have been cited as persuasive authority for cases concerning interested appraisers" and finding that "[a] substantial and ongoing attorney-client relationship between an arbitrator and the party appointing him renders the arbitrator partial"). As the Eleventh Circuit has explained, "[a]n attorney has an ethical obligation to his or her client that does not admit of competing allegiances." *Chapman v. Klemick*, 3 F.3d 1508, 1511 (11th Cir. 1993). " 'Loyalty to a client is ... impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.' " *Id.* (quoting Rules Regulating the Florida Bar 4-1.7 cmt.). Here, Mr. Burnette is bound by a duty of loyalty that requires him professionally to act in defendant's best interest. Such duty is wholly inconsistent with impartiality, no matter how much an individual lawyer might urge that he or she would be impartial in assigning a value to the claim. *See, e.g., Resolution Trust Corp. v. Holland & Knight*, 832 F. Supp. 1528, 1531 (S.D. Fla. 1993) ("Generally, an attorney breaches the duty of loyalty when the attorney obtains a personal advantage from the client or when there are circumstances that create adversity to the client's interest."). Even if Mr. Burnette could be impartial in the subjective sense, the objective appearance of impropriety warrants disqualification. *See, e.g., Weinger v. State Farm Fire & Cas. Co.*, 620 So. 2d 1298, 1300 (Fla. 4th DCA 1993) ("[T]he appearance of neutrality can be as important as neutrality itself because of the former's impact upon confidence in the proceedings – by the parties and by the public.") (internal marks omitted). The court therefore finds that plaintiff's motion to compel should be granted and that defendant should be required to designate a substitute appraiser consistent with the Memorandum of Appraisal and policy at issue in this case.

Accordingly, it is ORDERED:

1. Plaintiff's Motion to Compel Defendant to Appoint and Designate Appraiser in Conformity with Insurance Policy (doc. 18) is **GRANTED.**

2. Within **fourteen (14) days** of the date of this order, defendant shall designate a substitute appraiser consistent with the Memorandum of Appraisal and policy at issue in this case.

DONE AND ORDERED.

All Citations

Slip Copy, 2014 WL 12482616

Footnotes

1 Guy E. Burnette, Jr. is the principal and sole shareholder of Guy E. Burnette, Jr., P.A., the law firm representing the defendant in this case. The firm employs other lawyers, including Mr. Miller, who has appeared in this case. According to plaintiff, Guy E. Burnette, Jr., P.A. has represented defendant in other matters as well.

2 Plaintiff initially selected Pasquale Cuccaro as its appraiser. On February 27, 2014, plaintiff appointed Steven Baker as its substitute appraiser.

3 As the court recognized in *Rios v. Tri-State Ins. Co.*, 714 So. 2d 547, 549 (Fla. 3d DCA 1998), "parties are free to contract to specify the credentials of party-appointed appraisers."

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I.C.

125 So.3d 309
District Court of Appeal of Florida,
First District.

ANHEUSER–BUSCH COMPANIES, INC. and Anheuser–Busch, Incorporated, Petitioners,
v.
Christopher STAPLES, Respondent.

No. 1D13–1038.
|
Oct. 9, 2013.
|
Rehearing Denied Nov. 26, 2013.

Synopsis

Background: Injured worker, who filed negligence/premises liability action against defendant corporations, seeking damages for the injuries he sustained in the accident occurring on their premises, brought motion to disqualify law firm representing defendants, which also represented worker's employer with respect to employer's workers' compensation lien claim against any judgment awarded to worker as a result of his lawsuit. The trial court granted motion, and disqualified the law firm. Defendants filed petition for writ of certiorari and challenged the order.

[Holding:] The District Court of Appeal, Lewis, C.J., held that defendants waived or abandoned argument that trial court departed from essential requirements of law in determining that conflict of interest existed and in disqualifying law firm.

Petition denied.

Benton, J., concurred with opinion.

Makar, J., filed dissenting opinion.

West Headnotes (5)

[1] **Appeal and Error**
⇦ Insufficient discussion of objections

Alleged tortfeasors waived or abandoned argument that trial court departed from essential requirements of law in determining that conflict of interest existed and in disqualifying law firm representing both alleged tortfeasors in injured workers' negligence suit, and worker's employer, with respect to its workers' compensation lien claim against any judgment awarded a result of workers' tort suit; only issues alleged tortfeasors raised on appeal were whether worker had standing to seek disqualification of the law firm and whether, if worker had requisite standing to do so, the existence of indemnity agreement that was not brought to trial court's attention until filing of alleged tortfeasors' motion for rehearing established that their interests were fundamentally antagonistic to worker's employer's interest. West's F.S.A. Bar Rule 4–1.7.

1 Cases that cite this headnote

[2] **Certiorari**
⇦ Particular proceedings in civil actions

Certiorari is the appropriate remedy to review an order granting a motion to disqualify counsel.

Cases that cite this headnote

[3] **Attorney and Client**
⇦ Disqualification in general

Disqualification of a party's counsel is an extraordinary remedy that should be resorted to sparingly.

Cases that cite this headnote

[4] **Appeal and Error**
⇦ Necessity of presentation in general

An appellate court is not at liberty to address issues that were not raised by the parties.

4 Cases that cite this headnote

[5] **Attorney and Client**
⇦ Particular Cases and Problems

Trial court did not depart from the essential requirements of the law in determining that it was unreasonable for law firm to believe that it could provide competent and diligent representation to both alleged tortfeasors and injured worker's employer, as basis for disqualifying the law firm; alleged tortfeasors' interest lay in minimizing the damages awarded by a verdict or settlement in worker's tort action, while the employer's interest lie in helping worker recover the maximum possible damages against alleged tortfeasors so that it could maximize its recovery on its workers' compensation lien. West's F.S.A. Bar Rule 4–1.7(b).

Cases that cite this headnote

Attorneys and Law Firms

*310 E.T. Fernandez, III and Brian Sebaaly of Fernandez Trial Lawyers, P.A., Jacksonville, for Petitioners.

Philip S. Kinney of Kinney & Sasso, PL, Jacksonville and Brett Hastings of Brett A. Hastings, P.A., Jacksonville, for Respondent.

Opinion

LEWIS, C.J.

Petitioners, Anheuser–Busch Companies, Inc. and Anheuser–Busch, Incorporated, petition for a writ of certiorari and challenge an Order Disqualifying Law Firm. We conclude that the trial court, based upon the record before it, did not depart from the essential requirements of the law in determining that a conflict of interest existed and in disqualifying the law firm representing both Petitioners, the alleged tortfeasors in a negligence suit brought by Respondent, Christopher Staples, and Respondent's employer with respect to its workers' compensation lien claim against any judgment awarded to Respondent as a result of his lawsuit. We, therefore, deny the certiorari petition.

After he was injured while working for his employer, Respondent received workers' compensation benefits. He subsequently filed a negligence/premises liability action against Petitioners, seeking damages for the injuries he sustained in the accident occurring on their premises. The law firm at issue entered an appearance on behalf of Petitioners in the tort action. The firm also filed a Notice of Lien pursuant to section 440.39(3)(a), Florida Statutes, in the tort action on behalf of the employer. Prior to a scheduled mediation, Respondent moved to disqualify the law firm. Both Petitioners and Respondent's employer filed a Consent to Representation with respect to the *311 law firm. The trial court entered an order disqualifying the firm, finding in part that the interests of the firm's clients were directly adverse to one another. After determining that Respondent had standing to raise the conflict of interest, the trial court noted that even if Respondent lacked the requisite standing, it would have raised the issue itself and reached the conclusion that disqualification was necessary. It also determined under Rule 4–1.7 of the Florida Rules of Professional Conduct that the conflict could not be waived because it was unreasonable for the firm to believe that it would be able to provide competent and diligent representation to each affected client and because the representation of Petitioners involved the assertion of a position adverse to Respondent's employer.

Petitioners filed a motion for rehearing and claimed for the first time that an indemnity agreement existed between themselves and the employer and that, as a result, the trial court's conclusion that their interests were fundamentally antagonistic to the employer's interests was erroneous. The indemnity agreement was not attached to the motion or to an accompanying affidavit. The trial court denied the motion for rehearing, and this proceeding followed.

[1] [2] [3] Certiorari is the appropriate remedy to review an order granting a motion to disqualify counsel. *See Transmark, U.S.A., Inc. v. State, Dep't of Ins.*, 631 So.2d 1112, 1116 (Fla. 1st DCA 1994). While it is true, as Petitioners and the dissent point out, that disqualification of a party's counsel is an extraordinary remedy that should be resorted to sparingly, *see Vick v. Bailey*, 777 So.2d 1005, 1007 (Fla. 2d DCA 2000), we find no departure from the essential requirements of the law in this case. The dissent acknowledges that the law firm's representation of Petitioners and Respondent's employer amounted to a conflict of interest under rule 4–1.7(a) of the Florida Rules of Professional Conduct. The dissent then characterizes the issue in this proceeding as being whether the trial court's legal ruling that Petitioners and Respondent's

employer could not waive the conflict departed from the essential requirements of the law. However, the only issues Petitioners have raised before us are whether Respondent had standing to seek disqualification of the law firm and whether, if Respondent had the requisite standing to do so, the existence of the indemnity agreement that was not brought to the trial court's attention until the filing of Petitioners' motion for rehearing established that Petitioners' interests were not fundamentally antagonistic to Respondent's employer's interest. [1]

Contrary to the dissent's characterization of the issue presented in this case, Petitioners have not argued in this proceeding that the trial court's analysis under rule 4–1.7(b) was erroneous, that the trial court departed from the essential requirements of the law in concluding that the law firm could not reasonably believe that it was capable of providing competent and diligent representation to each affected client under rule 4–1.7(b)(1), or that mediation does not constitute a "proceeding before a tribunal" for purposes of rule 4–1.7(b)(3). In fact, Petitioners did not cite to rule 4–1.7(b) in their certiorari petition or in their reply to Respondent's response. Nor was any mention of the rule or the trial court's analysis as to the rule ***312** made at oral argument. Although the dissent correctly notes that Petitioners cited to *State Farm Mutual Automobile Insurance Co. v. K.A.W.,* 575 So.2d 630 (Fla.1991), and *Anderson Trucking Service, Inc. v. Gibson,* 884 So.2d 1046 (Fla. 5th DCA 2004), in their certiorari petition, neither of those cases cited to rule 4–1.7(b). Moreover, Petitioners relied upon those two cases in support of their argument that Respondent lacked standing to seek disqualification of the law firm, not in support of any of the issues raised by the dissent. Furthermore, while Respondent's response to the certiorari petition contains one citation to rule 4–1.7(b), Petitioners made no mention of the rule or the issue of waiver or consent in their reply to the response.

[4] **[5]** The dissent obviously finds certain aspects of this case concerning. However, we are not at liberty to address issues that were not raised by the parties. *See* Philip J. Padovano, *Florida Appellate Practice* § 18.5, at 340–41 (2011 ed.) (noting that an issue on appeal must be one that was raised by a party to the proceeding and citing *Lightsee v. First National Bank of Melbourne,* 132 So.2d 776 (Fla. 2d DCA 1961), for the proposition that an appellate court is "not authorized to pass upon issues other than those properly presented on appeal"); *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.,* 972 So.2d 275, 281 (Fla. 2d DCA 2008) (deeming any potential issue pertaining to the final judgment for attorney's fees and costs waived or abandoned as no argument regarding the issue was made on appeal). [2]

Accordingly, because Petitioners have failed to establish that the trial court departed from the essential requirements of the law with respect to the specific issues actually raised in this proceeding, we DENY their certiorari petition on the merits.

BENTON, J., concurs with opinion; MAKAR, J., Dissenting.

BENTON, J., concurring.

By petition for writ of certiorari, the defendants in a premises liability case ask us to quash the order disqualifying their trial counsel on conflict-of-interest grounds. They argue here, as they did below, that they have given informed consent in writing to the representation, well aware that the same law firm represents the plaintiff's employer, and that the same law firm has filed a lien asserting the plaintiff's employer is entitled to reimbursement, from any recovery the plaintiff may receive from petitioners, for workers' compensation benefits that the employer paid the plaintiff.

After reciting the facts in its order disqualifying law firm, [3] the trial court ruled ***313** that a conflict existed (and that whether or not plaintiff had standing to raise the conflict was "likely moot," [4]) and then went on:

> The next question to be answered is therefore: Can this conflict be waived by the clients?
>
> An untitled subsection (b) of Rule 4–1.7 ("Conflict of Interest; Current Clients"), Florida Rules of Professional Conduct, states:
>
> (b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

Each of these four criteria must be met for a lawyer to proceed with dual representation in the face of a conflict of interest. In the present case, neither criterion (1) nor criterion (3) is met. It is not reasonable for the challenged law ***314** firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.

Because fewer than all the requirements of the rule are met, client consent to continued dual representation by the law firm is insufficient to permit the firm to continue its representations in the face of a conflict. The conflict is thus not one capable of being waived by client consent.

As is clear from the trial court's order, the trial court had not been told of any indemnity agreement between the owner of the premises and the plaintiff's employer when its order was entered. Petitioners did advert to such an agreement in an affidavit attached to their motion for rehearing in the trial court. But they never favored the trial judge with a copy of the indemnity agreement. That did not surface until it appeared in the appendix to the amended petition for writ of certiorari.

Yet in this proceeding petitioners rely heavily on the indemnity agreement for the proposition that any conflict of interest was waived. (Disputing this contention at oral argument, respondent took the position that the agreement did not apply in any event because petitioners alone were alleged to have been negligent.) The belatedly disclosed indemnity agreement is plainly not something we should address now for the first time, or a proper basis for issuance of the writ. For this reason alone, the petition should be denied.

If the respondent had never filed suit, or if the employer had never filed the lien aligning itself against the defendant in the main action, the conflict might have been waivable. But by the time the trial court entered the order under challenge here, these parties were "adversaries in litigation." As a comment to the Third Restatement of the Law Governing Lawyers explains:

> *Conflicts between adversaries in litigation.* When clients are aligned directly against each other in the same litigation, the institutional interest in vigorous development of each client's position renders the conflict nonconsentable (see § 128, Comment *c,* & § 129). The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them. While the parties might give informed consent to joint representation for purposes of negotiating their differences (see § 130, Comment *d*), the joint representation may not continue if the parties become opposed to each other in litigation.

Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iii) (2013). The employer's lien was filed, not with the mediator, but with the court. Thereafter, the conflict between the employer and the petitioners became, in the terminology of the restatement, "nonconsentable."

The filing of the lien in this case was "the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal." R. Regulating Fla. Bar 4–1.7(b)(3). The premises liability claim remained unresolved. *Cf. City of Hollywood v. Lombardi,* 770 So.2d 1196, 1198–1202 (Fla.2000). Counsel filed the employer's lien in the judicial proceeding, not in the mediation, which was, after all, court-ordered. The employer-by seeking to participate in any recovery with its employee, the plaintiff (respondent)-asserted a position (as a statutory indemnitee) adverse to ***315** petitioners, the defending owners of the premises "in the same proceeding before a tribunal," the Circuit Court for the Fourth Judicial Court. *Id.* See generally *The Club at Hokuli'a, Inc. v. Am. Motorists Ins. Co.,* No. 10–00241 JMS–LEK, 2010 WL 3465278, at *5 (D.Haw. Sept.3, 2010) *report and recommendation adopted sub nom,* 2010 WL 4386741 (D.Haw.2010) ("Oceanside notes that, as a general rule, indemnitors are aligned with their indemnitees in cases where the principal obligation is in dispute.").

MAKAR, J., dissenting.

I.

While at an Anheuser–Busch (A–B) brewing and shipping facility in Jacksonville, Florida, Christopher Staples was involved in an accident connected to his employment with Container Carrier Corporation (Container). Mr. Staples received workers' compensation benefits from Container, which is self-insured. Mr. Staples then filed suit against A–B, seeking to recover on negligence and premises liability theories.

Fernandez Trial Attorneys, P.A. (Fernandez), which had been A–B's legal counsel in the past, appeared on behalf of A–B in the lawsuit. Pertinent to this proceeding, Fernandez also filed a notice of lien on behalf of Staples's employer, Container, against any future judgment in Mr. Staples's favor to recoup its expenditures in the workers' compensation proceeding.

Mediation in the matter was scheduled, but cancelled after Mr. Staples's counsel made an issue of Fernandez representing both A–B and Container at the mediation. Fernandez indicated that it would attend on behalf of A–B and that a non-lawyer claims manager employed by Container would attend on behalf of that company. Upon cancellation of the mediation, Mr. Staples promptly filed a motion alleging that a conflict of interests existed between A–B and Container and that Fernandez should be disqualified from further representing A–B and Container in the case.

Fernandez responded with client waivers demonstrating that both A–B and Container understood and consented to Fernandez representing their interests jointly. Both companies waived "any conflict which may currently or in the future exist because of the law firm's representation" of them in the litigation. The trial court, after considering legal memoranda and argument of counsel, issued a lengthy order that, distilled to its core, found as a matter of law that a non-waivable conflict existed as to Fernandez's concurrent representation of A–B and Container. The trial court prohibited Fernandez from representing either A–B or Container, allowing both companies thirty days to get new lawyers to represent them individually. Fernandez seeks certiorari review, asserting the trial court departed from the essential requirements of law in denying A–B and Container their right to be represented by counsel of their choice. *See Yang Enterprises, Inc. v. Georgalis,* 988 So.2d 1180, 1183 (Fla. 1st DCA 2008) ("Certiorari is the appropriate remedy to review orders denying a motion to disqualify counsel."). As this Court recently noted, "because disqualification of counsel denies a party its counsel of choice, such disqualification constitutes a material injury not remediable on plenary appeal." *Walker v. River City Logistics Inc.,* 14 So.3d 1122, 1123 (Fla. 1st DCA 2009). Thus, the only question is whether the order below departed from the essential requirements of law. *Id.*

II.

Disqualification of a lawyer is a serious matter, so serious that it is highly disfavored ***316** because it operates to deprive a litigant of its chosen attorney, interfering with a relationship having constitutional implications. *In re BellSouth Corp.,* 334 F.3d 941, 955–56 (11th Cir.2003). It follows that disqualification of counsel is an extraordinary step, resorted to only sparingly. *Melton v. State,* 56 So.3d 868, 872–73 (Fla. 1st DCA 2011) (citing *Minakan v. Husted,* 27 So.3d 695 (Fla. 4th DCA 2010); *Walker,* 14 So.3d 1122 (Fla. 1st DCA 2009)). Motions for disqualification are "generally viewed with skepticism because ... [they] are often interposed for tactical purposes." *Yang Enterprises,* 988 So.2d at 1183 (citations omitted).

No dispute exists that Fernandez's representation of A–B and Container in this litigation amounts to a conflict as defined under the Rules of Professional Responsibility. *See* R. Regulating Fla. Bar 4–1.7(a). But that does not end the analysis. Both A–B and Container recognized this conflict, voluntarily agreed they both wanted Fernandez to represent them, and explicitly waived the conflict in writing. That was their informed choice to make. What constitutes a conflict under subsection (a) of Rule 4–1.7 is not necessarily a non-waivable conflict under subsection (b); if that were the case no conflicts could ever be waived. The question raised here is whether the trial court's legal ruling, that the conflict between A–B and Container was non-waivable under the circumstances presented, departs from the essential requirements of law.[5] It does for two reasons.

A.

First, the interests of A–B and Container in this routine tort case are not so fundamentally antagonistic that disqualification is compelled. It is not uncommon that clients choose to have one lawyer represent their interests jointly, even if a conflict exists. If clients are fully informed and make voluntary decisions to allow for joint representation (here through written waivers), the basic concerns of the Rules are ameliorated.

To demonstrate that a conflict is one to which a client may consent, four criteria must be met:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

R. Regulating Fla. Bar 4–1.7(b). The trial court set out these criteria in its order, holding that criteria (1) and (3) were not shown. Though the trial court's order is lengthy, the totality of its reasoning as to ***317** these two criteria is contained in these two sentences:

> It is not reasonable for the challenged law firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.

Addressing the first sentence, it is clear legal error to conclude that a lawyer cannot reasonably represent two sophisticated corporate businesses that have voluntarily and specifically averred that they desire the lawyer to jointly represent them and waive in writing "any conflict which may currently or in the future exist because of the law firm's representation" in the matter. To the contrary, it is presumptively reasonable for a lawyer representing A–B and Container under the circumstances of this case at the mediation stage to believe he will be able to "provide competent and diligent representation to each affected client." *Id.* Multi-party representation may not be the norm, but it has become commonplace due to its significant benefits (and risks)[6] that the parties may choose to bear. *See* William E. Wright, Jr., *Ethical Considerations In Representing Multiple Parties In Litigation,* 79 Tul. L.Rev. 1523, 1526 (2005) (discussing ethical considerations and practical issues arising in multiple-party representation) (noting that "applying economic realities and recognizing strategic alliances, it is often advantageous to limit the number of attorneys involved in litigation").

Nothing in the record establishes that joint representation was other than reasonable. Fernandez believed it could provide competent and diligent representation to A–B and Container, an assessment in which both companies concurred. Mr. Staples's counsel could identify no prejudice arising from the joint representation. As such, the trial court's ruling to the contrary simply disregards the voluntary, fully-informed decisions of A–B and Container, thereby depriving *two* clients of their chosen lawyer's services. Harm of this type and magnitude is irremediable once judgment is entered making certiorari appropriate. While trial courts should be wary, as the trial court here was, to potential conflicts that run afoul of the Rules, the joint representation of A–B and Container, supported by written waivers, with no countervailing harm to Mr. Staples, provides no legal basis to conclude that criterion (1) was unmet.

B.

Next, the second sentence—which is an almost verbatim statement of the language of criterion (3)—misapprehends the procedural context of the case. The third criterion only applies where "the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same *proceeding before a tribunal.*" (Emphasis added). This criterion does

not apply in this case at this juncture because mediation is not a "proceeding before a tribunal." The Florida Bar Rules define "Tribunal" as

> a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body ***318** acting in an adjudicative capacity. A ... body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

R. Regulating Fla. Bar 4 (preamble). Mediations do not meet this definition; no neutral official renders a binding legal judgment. Instead, in mediation the "decisionmaking authority rests with the parties." § 44.1011, Fla. Stat. The mediator lacks authority to adjudicate any aspect of a dispute. Fla. R. Med. 10.420(a)(2). Because mediation does not meet the definition of "tribunal," a mediation cannot be a "proceeding before a tribunal" as specified in Rule 4–1.7(b)(3).

Florida Rule 4–1.7 is an analogue of Model Rule of Professional Conduct 1.7, which likewise prohibits representation involving "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Model Rules of Prof'l Conduct R. 1.7. The definition of tribunal is also similar. *Id.* R. 1.0. Notably, the commentary to Model Rule 1.7, discussing paragraph (b)(3), states that "this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under [the terminology rule])." *Id.* R. 1.7 cmt. 17. Because mediation is not a proceeding before a tribunal, criterion (3) of Rule 4–1.7(b) is met, and the conflict presented in this case was one to which A–B and Container may consent at the mediation stage. [7]

That mediation is outside of the Rule's application is consistent with the goal that mediation be a cost-efficient way to resolve disputes. Here, the disqualification order did the opposite; it created a domino effect that multiplied the costs on two companies that did no more than try to reduce their legal expense by using one law firm. Such a result makes little sense in the mediation context.

Beyond that, counsel for Mr. Staples at oral argument was unable to identify any harm to Mr. Staples's interests that would result from the Fernandez firm's joint representation; none. Even if A–B and Container were to hire separate counsel, nothing would prevent the new attorneys from collaborating on behalf of their clients. Given the irremediable harm to A–B and Container it causes, and the absence of any harm to Mr. Staples from the joint representation by Fernandez, the disqualification of Fernandez has no utility other than as an impediment to mediation. If allowed to stand, the order may embolden the tactical use of threats of disqualification as a strategy to gain settlement leverage at the mediation stage by potentially raising litigation costs to opponents. [8]

***319** A side issue that has no bearing on the legal issue presented is the trial court's denial of A–B and Container's motion for rehearing. Perhaps because they believed their written waivers were sufficient to resolve the conflict issue, or even for their own strategic reasons, A–B and Container did not initially disclose a previously signed indemnity agreement between themselves. The agreement —identified in an affidavit submitted with their motion for rehearing-reflects that Container agreed to indemnify A–B for any liability in this case. The effect of the agreement aligned the interests of A–B and Container because any judgment against A–B would be a liability of Container. The trial court was not made aware of this agreement prior to its initial decision; had it been brought to the trial court's attention, it would have been helpful in solidifying that the joint representation met applicable legal standards. Even without the indemnity agreement, the record sufficiently shows that disqualification of Fernandez was unwarranted.

III.

Because the trial court's ruling departs from the essential requirements of law, depriving two clients of the services of their chosen counsel, the disqualification order should be reversed with instructions to allow Fernandez to represent both A–B and Container.

All Citations

125 So.3d 309, 38 Fla. L. Weekly D125

Footnotes

1 Petitioners do not argue that the trial court erred in denying their motion for rehearing. *See Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.,* 88 So.3d 269, 278 (Fla. 1st DCA 2012) (noting that trial courts are not required to consider new issues presented for the first time on rehearing).

2 We note that even if Petitioners had raised the issues addressed by the dissent, we would still deny the certiorari petition. We disagree with the dissent's assertion that the trial court departed from the essential requirements of the law in determining, pursuant to rule 4–1.7(b)(1), that it was unreasonable for the law firm to believe that it could provide competent and diligent representation to both Petitioners and Respondent's employer. As the trial court reasoned based upon the facts before it, Petitioners' interest would lie in minimizing the damages awarded by a verdict or settlement while the employer's interest would lie in helping Respondent recover the maximum possible damages against Petitioners so that it could maximize its recovery on its workers' compensation lien. With respect to rule 4–1.7(b)(3), while the dissent focuses on whether mediation constitutes a "proceeding before a tribunal," the employer's Notice of Lien was filed in the underlying tort case. There is no question that the underlying case constitutes a "proceeding before a tribunal." As such, the dissent's focus on mediation is much too narrow.

3 The trial court set out its fact findings in numbered paragraphs as follows:

> This case arises from the following circumstances:
>
> 1. The Plaintiff, Christopher Staples ("Plaintiff"), was an employee of Container Carrier Corporation ("Employer").
>
> 2. On January 27, 2003, while working for the Employer, the Plaintiff was injured at the Jacksonville brewing and shipping facility of Anheuser–Busch, Inc. Plaintiff alleges that the accident occurred because of the negligence of two related Anheuser–Busch entities, Anheuser–Busch Companies, Inc., and Anheuser–Busch, Inc. ("Defendants").
>
> 3. The Employer is a corporation separate and distinct from the Defendant corporations.
>
> 4. The Plaintiff received worker's compensation benefits from the Employer as a result of this accident. Because the Employer is self-insured against worker's compensation claims, there is no Carrier in the worker's compensation case.
>
> 5. The Plaintiff filed a negligence/premises liability action against the Defendants, seeking damages for the injuries he sustained in the January 27, 2003, accident at the Defendants' brewery.
>
> 6. The law firm of Fernandez Trial Lawyers, P.A. ("the firm"), which has represented the Defendants in past actions, entered an appearance on behalf of both Defendants in this tort action.
>
> 7. The firm also filed a Notice of Lien in this tort action on behalf of the Employer. The lien was filed pursuant to section 440.39(3)(a), Fla. Stat.
>
> 8. When mediation was scheduled for November 1, 2012, in this case, Plaintiff's counsel discussed with the firm his concern about the fact that the firm was representing both the Defendants in the tort action and the Employer in the same action. On behalf of the firm, attorney E.T. Fernandez, III, responded in writing, indicating that the interest of the Employer with regard to the worker's compensation lien would be addressed at mediation by, and negotiated by, Mr. James Gourley, a non-lawyer claims manager employed by the Employer. Because Plaintiff's counsel still had continuing concerns, the mediation was cancelled.
>
> 9. After learning of the dual representation, Plaintiff's counsel moved promptly to file the pending disqualification motion.
>
> 10. Both the Defendants in the tort case and the Employer have filed waivers of any conflict which may currently or in the future exist because of the law firm's representation of all three in the tort case.
>
> (Footnotes omitted.)

4 The trial court ruled:

> [E]ven if Plaintiff here had no standing, the Court would "raise the question" of disqualification itself and reach the same result required by this order. Consequently, the issue of Plaintiff's standing to pursue disqualification is likely moot.

5 Fernandez's petition, though not citing Rule 4–1.7, asserts that its disqualification was improper because the trial court misapplied the legal standard, tracking language from the caselaw interpreting the rule. *See, e.g., State Farm Mut. Auto. Ins. Co. v. K.A.W.,* 575 So.2d 630 (Fla.1991) (citing Rule 4–1.7); *Anderson Trucking Serv., Inc. v. Gibson,* 884 So.2d 1046 (Fla. 5th DCA 2004) (citing *K.A.W.*). Mr. Staples's response, understanding the nature of Fernandez's legal challenge, contains citations to the caselaw applying Rule 4–1.7 as well as to both subsections of Rule 4–1.7. Identification of

the specific judicial act to be reviewed (the disqualification order) and the legal reasoning for its reversal (it applied the incorrect legal standard under the caselaw applying Rule 4–1.7) enables appellate review. *See* Philip J. Padovano, *Florida Appellate Practice* § 16:9 (2012 ed.) (citing cases).

6 That A–B and Container have agreed to joint representation by Fernandez does not end Fernandez's ethical responsibilities, which include continual reevaluation of the joint representation under ethical rules and full, ongoing communications with A–B and Container as circumstances evolve or change.

7 If the case goes beyond meditation and a "proceeding before a tribunal"—such as a trial—is scheduled, the question of whether a conflict then exists can be raised. At that point, the trial court can assess whether joint representation, if it still exists, will involve the "assertion of a position adverse to another client" that fails to meet 4–1.7(b)—along with the other criteria of the Rule. Whether a lienor would appear at trial in this type of case is doubtful, but it might occur.

8 Tempering this tactic is that litigants, absent a special relationship to the lawyers sought to be disqualified, ordinarily will lack standing to make formal motions to disqualify. *See Zarco Supply Co. v. Bonnell,* 658 So.2d 151, 154 (Fla. 1st DCA 1995) (finding standing only where movant could demonstrate prejudice). Here, the trial court erred in concluding that Mr. Staples had standing to seek to disqualify Fernandez because, as admitted at oral argument, Mr. Staples can point to no prejudice arising from the joint representation by Fernandez. The trial court, however, can sua sponte raise conflict issues, making Mr. Staples's standing a non-issue.

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II.A.

125 So.3d 309
District Court of Appeal of Florida,
First District.

ANHEUSER–BUSCH COMPANIES, INC. and Anheuser–Busch, Incorporated, Petitioners,
v.
Christopher STAPLES, Respondent.

No. 1D13–1038.
|
Oct. 9, 2013.
|
Rehearing Denied Nov. 26, 2013.

Synopsis

Background: Injured worker, who filed negligence/premises liability action against defendant corporations, seeking damages for the injuries he sustained in the accident occurring on their premises, brought motion to disqualify law firm representing defendants, which also represented worker's employer with respect to employer's workers' compensation lien claim against any judgment awarded to worker as a result of his lawsuit. The trial court granted motion, and disqualified the law firm. Defendants filed petition for writ of certiorari and challenged the order.

[Holding:] The District Court of Appeal, Lewis, C.J., held that defendants waived or abandoned argument that trial court departed from essential requirements of law in determining that conflict of interest existed and in disqualifying law firm.

Petition denied.

Benton, J., concurred with opinion.

Makar, J., filed dissenting opinion.

West Headnotes (5)

[1] **Appeal and Error**
⇦ Insufficient discussion of objections

Alleged tortfeasors waived or abandoned argument that trial court departed from essential requirements of law in determining that conflict of interest existed and in disqualifying law firm representing both alleged tortfeasors in injured workers' negligence suit, and worker's employer, with respect to its workers' compensation lien claim against any judgment awarded a result of workers' tort suit; only issues alleged tortfeasors raised on appeal were whether worker had standing to seek disqualification of the law firm and whether, if worker had requisite standing to do so, the existence of indemnity agreement that was not brought to trial court's attention until filing of alleged tortfeasors' motion for rehearing established that their interests were fundamentally antagonistic to worker's employer's interest. West's F.S.A. Bar Rule 4–1.7.

1 Cases that cite this headnote

[2] **Certiorari**
⇦ Particular proceedings in civil actions

Certiorari is the appropriate remedy to review an order granting a motion to disqualify counsel.

Cases that cite this headnote

[3] **Attorney and Client**
⇦ Disqualification in general

Disqualification of a party's counsel is an extraordinary remedy that should be resorted to sparingly.

Cases that cite this headnote

[4] **Appeal and Error**
⇦ Necessity of presentation in general

An appellate court is not at liberty to address issues that were not raised by the parties.

4 Cases that cite this headnote

[5] **Attorney and Client**
⇦ Particular Cases and Problems

Trial court did not depart from the essential requirements of the law in determining that it was unreasonable for law firm to believe that it could provide competent and diligent representation to both alleged tortfeasors and injured worker's employer, as basis for disqualifying the law firm; alleged tortfeasors' interest lay in minimizing the damages awarded by a verdict or settlement in worker's tort action, while the employer's interest lie in helping worker recover the maximum possible damages against alleged tortfeasors so that it could maximize its recovery on its workers' compensation lien. West's F.S.A. Bar Rule 4–1.7(b).

Cases that cite this headnote

Attorneys and Law Firms

***310** E.T. Fernandez, III and Brian Sebaaly of Fernandez Trial Lawyers, P.A., Jacksonville, for Petitioners.

Philip S. Kinney of Kinney & Sasso, PL, Jacksonville and Brett Hastings of Brett A. Hastings, P.A., Jacksonville, for Respondent.

Opinion

LEWIS, C.J.

Petitioners, Anheuser–Busch Companies, Inc. and Anheuser–Busch, Incorporated, petition for a writ of certiorari and challenge an Order Disqualifying Law Firm. We conclude that the trial court, based upon the record before it, did not depart from the essential requirements of the law in determining that a conflict of interest existed and in disqualifying the law firm representing both Petitioners, the alleged tortfeasors in a negligence suit brought by Respondent, Christopher Staples, and Respondent's employer with respect to its workers' compensation lien claim against any judgment awarded to Respondent as a result of his lawsuit. We, therefore, deny the certiorari petition.

After he was injured while working for his employer, Respondent received workers' compensation benefits. He subsequently filed a negligence/premises liability action against Petitioners, seeking damages for the injuries he sustained in the accident occurring on their premises. The law firm at issue entered an appearance on behalf of Petitioners in the tort action. The firm also filed a Notice of Lien pursuant to section 440.39(3)(a), Florida Statutes, in the tort action on behalf of the employer. Prior to a scheduled mediation, Respondent moved to disqualify the law firm. Both Petitioners and Respondent's employer filed a Consent to Representation with respect to the ***311** law firm. The trial court entered an order disqualifying the firm, finding in part that the interests of the firm's clients were directly adverse to one another. After determining that Respondent had standing to raise the conflict of interest, the trial court noted that even if Respondent lacked the requisite standing, it would have raised the issue itself and reached the conclusion that disqualification was necessary. It also determined under Rule 4–1.7 of the Florida Rules of Professional Conduct that the conflict could not be waived because it was unreasonable for the firm to believe that it would be able to provide competent and diligent representation to each affected client and because the representation of Petitioners involved the assertion of a position adverse to Respondent's employer.

Petitioners filed a motion for rehearing and claimed for the first time that an indemnity agreement existed between themselves and the employer and that, as a result, the trial court's conclusion that their interests were fundamentally antagonistic to the employer's interests was erroneous. The indemnity agreement was not attached to the motion or to an accompanying affidavit. The trial court denied the motion for rehearing, and this proceeding followed.

[1] [2] [3] Certiorari is the appropriate remedy to review an order granting a motion to disqualify counsel. *See Transmark, U.S.A., Inc. v. State, Dep't of Ins.*, 631 So.2d 1112, 1116 (Fla. 1st DCA 1994). While it is true, as Petitioners and the dissent point out, that disqualification of a party's counsel is an extraordinary remedy that should be resorted to sparingly, *see Vick v. Bailey*, 777 So.2d 1005, 1007 (Fla. 2d DCA 2000), we find no departure from the essential requirements of the law in this case. The dissent acknowledges that the law firm's representation of Petitioners and Respondent's employer amounted to a conflict of interest under rule 4–1.7(a) of the Florida Rules of Professional Conduct. The dissent then characterizes the issue in this proceeding as being whether the trial court's legal ruling that Petitioners and Respondent's

employer could not waive the conflict departed from the essential requirements of the law. However, the only issues Petitioners have raised before us are whether Respondent had standing to seek disqualification of the law firm and whether, if Respondent had the requisite standing to do so, the existence of the indemnity agreement that was not brought to the trial court's attention until the filing of Petitioners' motion for rehearing established that Petitioners' interests were not fundamentally antagonistic to Respondent's employer's interest. [1]

Contrary to the dissent's characterization of the issue presented in this case, Petitioners have not argued in this proceeding that the trial court's analysis under rule 4–1.7(b) was erroneous, that the trial court departed from the essential requirements of the law in concluding that the law firm could not reasonably believe that it was capable of providing competent and diligent representation to each affected client under rule 4–1.7(b)(1), or that mediation does not constitute a "proceeding before a tribunal" for purposes of rule 4–1.7(b)(3). In fact, Petitioners did not cite to rule 4–1.7(b) in their certiorari petition or in their reply to Respondent's response. Nor was any mention of the rule or the trial court's analysis as to the rule ***312** made at oral argument. Although the dissent correctly notes that Petitioners cited to *State Farm Mutual Automobile Insurance Co. v. K.A.W.*, 575 So.2d 630 (Fla.1991), and *Anderson Trucking Service, Inc. v. Gibson*, 884 So.2d 1046 (Fla. 5th DCA 2004), in their certiorari petition, neither of those cases cited to rule 4–1.7(b). Moreover, Petitioners relied upon those two cases in support of their argument that Respondent lacked standing to seek disqualification of the law firm, not in support of any of the issues raised by the dissent. Furthermore, while Respondent's response to the certiorari petition contains one citation to rule 4–1.7(b), Petitioners made no mention of the rule or the issue of waiver or consent in their reply to the response.

[4] **[5]** The dissent obviously finds certain aspects of this case concerning. However, we are not at liberty to address issues that were not raised by the parties. *See* Philip J. Padovano, *Florida Appellate Practice* § 18.5, at 340–41 (2011 ed.) (noting that an issue on appeal must be one that was raised by a party to the proceeding and citing *Lightsee v. First National Bank of Melbourne*, 132 So.2d 776 (Fla. 2d DCA 1961), for the proposition that an appellate court is "not authorized to pass upon issues other than those properly presented on appeal"); *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.*, 972 So.2d 275, 281 (Fla. 2d DCA 2008) (deeming any potential issue pertaining to the final judgment for attorney's fees and costs waived or abandoned as no argument regarding the issue was made on appeal). [2]

Accordingly, because Petitioners have failed to establish that the trial court departed from the essential requirements of the law with respect to the specific issues actually raised in this proceeding, we DENY their certiorari petition on the merits.

BENTON, J., concurs with opinion; MAKAR, J., Dissenting.

BENTON, J., concurring.

By petition for writ of certiorari, the defendants in a premises liability case ask us to quash the order disqualifying their trial counsel on conflict-of-interest grounds. They argue here, as they did below, that they have given informed consent in writing to the representation, well aware that the same law firm represents the plaintiff's employer, and that the same law firm has filed a lien asserting the plaintiff's employer is entitled to reimbursement, from any recovery the plaintiff may receive from petitioners, for workers' compensation benefits that the employer paid the plaintiff.

After reciting the facts in its order disqualifying law firm, [3] the trial court ruled ***313** that a conflict existed (and that whether or not plaintiff had standing to raise the conflict was "likely moot," [4]) and then went on:

> The next question to be answered is therefore: Can this conflict be waived by the clients?
>
> An untitled subsection (b) of Rule 4–1.7 ("Conflict of Interest; Current Clients"), Florida Rules of Professional Conduct, states:
>
> (b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

Each of these four criteria must be met for a lawyer to proceed with dual representation in the face of a conflict of interest. In the present case, neither criterion (1) nor criterion (3) is met. It is not reasonable for the challenged law ***314** firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.

Because fewer than all the requirements of the rule are met, client consent to continued dual representation by the law firm is insufficient to permit the firm to continue its representations in the face of a conflict. The conflict is thus not one capable of being waived by client consent.

As is clear from the trial court's order, the trial court had not been told of any indemnity agreement between the owner of the premises and the plaintiff's employer when its order was entered. Petitioners did advert to such an agreement in an affidavit attached to their motion for rehearing in the trial court. But they never favored the trial judge with a copy of the indemnity agreement. That did not surface until it appeared in the appendix to the amended petition for writ of certiorari.

Yet in this proceeding petitioners rely heavily on the indemnity agreement for the proposition that any conflict of interest was waived. (Disputing this contention at oral argument, respondent took the position that the agreement did not apply in any event because petitioners alone were alleged to have been negligent.) The belatedly disclosed indemnity agreement is plainly not something we should address now for the first time, or a proper basis for issuance of the writ. For this reason alone, the petition should be denied.

If the respondent had never filed suit, or if the employer had never filed the lien aligning itself against the defendant in the main action, the conflict might have been waivable. But by the time the trial court entered the order under challenge here, these parties were "adversaries in litigation." As a comment to the Third Restatement of the Law Governing Lawyers explains:

> *Conflicts between adversaries in litigation.* When clients are aligned directly against each other in the same litigation, the institutional interest in vigorous development of each client's position renders the conflict nonconsentable (see § 128, Comment *c,* & § 129). The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them. While the parties might give informed consent to joint representation for purposes of negotiating their differences (see § 130, Comment *d*), the joint representation may not continue if the parties become opposed to each other in litigation.

Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iii) (2013). The employer's lien was filed, not with the mediator, but with the court. Thereafter, the conflict between the employer and the petitioners became, in the terminology of the restatement, "nonconsentable."

The filing of the lien in this case was "the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal." R. Regulating Fla. Bar 4–1.7(b)(3). The premises liability claim remained unresolved. *Cf. City of Hollywood v. Lombardi,* 770 So.2d 1196, 1198–1202 (Fla.2000). Counsel filed the employer's lien in the judicial proceeding, not in the mediation, which was, after all, court-ordered. The employer-by seeking to participate in any recovery with its employee, the plaintiff (respondent)-asserted a position (as a statutory indemnitee) adverse to ***315** petitioners, the defending owners of the premises "in the same proceeding before a tribunal," the Circuit Court for the Fourth Judicial Court. *Id.* See generally *The Club at Hokuli'a, Inc. v. Am. Motorists Ins. Co.,* No. 10–00241 JMS–LEK, 2010 WL 3465278, at *5 (D.Haw. Sept.3, 2010) *report and recommendation adopted sub nom,* 2010 WL 4386741 (D.Haw.2010) ("Oceanside notes that, as a general rule, indemnitors are aligned with their indemnitees in cases where the principal obligation is in dispute.").

MAKAR, J., dissenting.

I.

While at an Anheuser–Busch (A–B) brewing and shipping facility in Jacksonville, Florida, Christopher Staples was involved in an accident connected to his employment with Container Carrier Corporation (Container). Mr. Staples received workers' compensation benefits from Container, which is self-insured. Mr. Staples then filed suit against A–B, seeking to recover on negligence and premises liability theories.

Fernandez Trial Attorneys, P.A. (Fernandez), which had been A–B's legal counsel in the past, appeared on behalf of A–B in the lawsuit. Pertinent to this proceeding, Fernandez also filed a notice of lien on behalf of Staples's employer, Container, against any future judgment in Mr. Staples's favor to recoup its expenditures in the workers' compensation proceeding.

Mediation in the matter was scheduled, but cancelled after Mr. Staples's counsel made an issue of Fernandez representing both A–B and Container at the mediation. Fernandez indicated that it would attend on behalf of A–B and that a non-lawyer claims manager employed by Container would attend on behalf of that company. Upon cancellation of the mediation, Mr. Staples promptly filed a motion alleging that a conflict of interests existed between A–B and Container and that Fernandez should be disqualified from further representing A–B and Container in the case.

Fernandez responded with client waivers demonstrating that both A–B and Container understood and consented to Fernandez representing their interests jointly. Both companies waived "any conflict which may currently or in the future exist because of the law firm's representation" of them in the litigation. The trial court, after considering legal memoranda and argument of counsel, issued a lengthy order that, distilled to its core, found as a matter of law that a non-waivable conflict existed as to Fernandez's concurrent representation of A–B and Container. The trial court prohibited Fernandez from representing either A–B or Container, allowing both companies thirty days to get new lawyers to represent them individually. Fernandez seeks certiorari review, asserting the trial court departed from the essential requirements of law in denying A–B and Container their right to be represented by counsel of their choice. *See Yang Enterprises, Inc. v. Georgalis,* 988 So.2d 1180, 1183 (Fla. 1st DCA 2008) ("Certiorari is the appropriate remedy to review orders denying a motion to disqualify counsel."). As this Court recently noted, "because disqualification of counsel denies a party its counsel of choice, such disqualification constitutes a material injury not remediable on plenary appeal." *Walker v. River City Logistics Inc.,* 14 So.3d 1122, 1123 (Fla. 1st DCA 2009). Thus, the only question is whether the order below departed from the essential requirements of law. *Id.*

II.

Disqualification of a lawyer is a serious matter, so serious that it is highly disfavored ***316** because it operates to deprive a litigant of its chosen attorney, interfering with a relationship having constitutional implications. *In re BellSouth Corp.,* 334 F.3d 941, 955–56 (11th Cir.2003). It follows that disqualification of counsel is an extraordinary step, resorted to only sparingly. *Melton v. State,* 56 So.3d 868, 872–73 (Fla. 1st DCA 2011) (citing *Minakan v. Husted,* 27 So.3d 695 (Fla. 4th DCA 2010); *Walker,* 14 So.3d 1122 (Fla. 1st DCA 2009)). Motions for disqualification are "generally viewed with skepticism because ... [they] are often interposed for tactical purposes." *Yang Enterprises,* 988 So.2d at 1183 (citations omitted).

No dispute exists that Fernandez's representation of A–B and Container in this litigation amounts to a conflict as defined under the Rules of Professional Responsibility. *See* R. Regulating Fla. Bar 4–1.7(a). But that does not end the analysis. Both A–B and Container recognized this conflict, voluntarily agreed they both wanted Fernandez to represent them, and explicitly waived the conflict in writing. That was their informed choice to make. What constitutes a conflict under subsection (a) of Rule 4–1.7 is not necessarily a non-waivable conflict under subsection (b); if that were the case no conflicts could ever be waived. The question raised here is whether the trial court's legal ruling, that the conflict between A–B and Container was non-waivable under the circumstances presented, departs from the essential requirements of law.[5] It does for two reasons.

A.

First, the interests of A–B and Container in this routine tort case are not so fundamentally antagonistic that disqualification is compelled. It is not uncommon that clients choose to have one lawyer represent their interests jointly, even if a conflict exists. If clients are fully informed and make voluntary decisions to allow for joint representation (here through written waivers), the basic concerns of the Rules are ameliorated.

To demonstrate that a conflict is one to which a client may consent, four criteria must be met:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

R. Regulating Fla. Bar 4–1.7(b). The trial court set out these criteria in its order, holding that criteria (1) and (3) were not shown. Though the trial court's order is lengthy, the totality of its reasoning as to ***317** these two criteria is contained in these two sentences:

> It is not reasonable for the challenged law firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.

Addressing the first sentence, it is clear legal error to conclude that a lawyer cannot reasonably represent two sophisticated corporate businesses that have voluntarily and specifically averred that they desire the lawyer to jointly represent them and waive in writing "any conflict which may currently or in the future exist because of the law firm's representation" in the matter. To the contrary, it is presumptively reasonable for a lawyer representing A–B and Container under the circumstances of this case at the mediation stage to believe he will be able to "provide competent and diligent representation to each affected client." *Id.* Multi-party representation may not be the norm, but it has become commonplace due to its significant benefits (and risks)[6] that the parties may choose to bear. *See* William E. Wright, Jr., *Ethical Considerations In Representing Multiple Parties In Litigation,* 79 Tul. L.Rev. 1523, 1526 (2005) (discussing ethical considerations and practical issues arising in multiple-party representation) (noting that "applying economic realities and recognizing strategic alliances, it is often advantageous to limit the number of attorneys involved in litigation").

Nothing in the record establishes that joint representation was other than reasonable. Fernandez believed it could provide competent and diligent representation to A–B and Container, an assessment in which both companies concurred. Mr. Staples's counsel could identify no prejudice arising from the joint representation. As such, the trial court's ruling to the contrary simply disregards the voluntary, fully-informed decisions of A–B and Container, thereby depriving *two* clients of their chosen lawyer's services. Harm of this type and magnitude is irremediable once judgment is entered making certiorari appropriate. While trial courts should be wary, as the trial court here was, to potential conflicts that run afoul of the Rules, the joint representation of A–B and Container, supported by written waivers, with no countervailing harm to Mr. Staples, provides no legal basis to conclude that criterion (1) was unmet.

B.

Next, the second sentence—which is an almost verbatim statement of the language of criterion (3)—misapprehends the procedural context of the case. The third criterion only applies where "the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same *proceeding before a tribunal.*" (Emphasis added). This criterion does

not apply in this case at this juncture because mediation is not a "proceeding before a tribunal." The Florida Bar Rules define "Tribunal" as

> a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body *318 acting in an adjudicative capacity. A ... body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

R. Regulating Fla. Bar 4 (preamble). Mediations do not meet this definition; no neutral official renders a binding legal judgment. Instead, in mediation the "decisionmaking authority rests with the parties." § 44.1011, Fla. Stat. The mediator lacks authority to adjudicate any aspect of a dispute. Fla. R. Med. 10.420(a)(2). Because mediation does not meet the definition of "tribunal," a mediation cannot be a "proceeding before a tribunal" as specified in Rule 4–1.7(b)(3).

Florida Rule 4–1.7 is an analogue of Model Rule of Professional Conduct 1.7, which likewise prohibits representation involving "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Model Rules of Prof'l Conduct R. 1.7. The definition of tribunal is also similar. *Id.* R. 1.0. Notably, the commentary to Model Rule 1.7, discussing paragraph (b)(3), states that "this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under [the terminology rule])." *Id.* R. 1.7 cmt. 17. Because mediation is not a proceeding before a tribunal, criterion (3) of Rule 4–1.7(b) is met, and the conflict presented in this case was one to which A–B and Container may consent at the mediation stage. [7]

That mediation is outside of the Rule's application is consistent with the goal that mediation be a cost-efficient way to resolve disputes. Here, the disqualification order did the opposite; it created a domino effect that multiplied the costs on two companies that did no more than try to reduce their legal expense by using one law firm. Such a result makes little sense in the mediation context.

Beyond that, counsel for Mr. Staples at oral argument was unable to identify any harm to Mr. Staples's interests that would result from the Fernandez firm's joint representation; none. Even if A–B and Container were to hire separate counsel, nothing would prevent the new attorneys from collaborating on behalf of their clients. Given the irremediable harm to A–B and Container it causes, and the absence of any harm to Mr. Staples from the joint representation by Fernandez, the disqualification of Fernandez has no utility other than as an impediment to mediation. If allowed to stand, the order may embolden the tactical use of threats of disqualification as a strategy to gain settlement leverage at the mediation stage by potentially raising litigation costs to opponents. [8]

*319 A side issue that has no bearing on the legal issue presented is the trial court's denial of A–B and Container's motion for rehearing. Perhaps because they believed their written waivers were sufficient to resolve the conflict issue, or even for their own strategic reasons, A–B and Container did not initially disclose a previously signed indemnity agreement between themselves. The agreement —identified in an affidavit submitted with their motion for rehearing-reflects that Container agreed to indemnify A–B for any liability in this case. The effect of the agreement aligned the interests of A–B and Container because any judgment against A–B would be a liability of Container. The trial court was not made aware of this agreement prior to its initial decision; had it been brought to the trial court's attention, it would have been helpful in solidifying that the joint representation met applicable legal standards. Even without the indemnity agreement, the record sufficiently shows that disqualification of Fernandez was unwarranted.

III.

Because the trial court's ruling departs from the essential requirements of law, depriving two clients of the services of their chosen counsel, the disqualification order should be reversed with instructions to allow Fernandez to represent both A–B and Container.

All Citations

125 So.3d 309, 38 Fla. L. Weekly D125

Footnotes

1 Petitioners do not argue that the trial court erred in denying their motion for rehearing. *See Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.,* 88 So.3d 269, 278 (Fla. 1st DCA 2012) (noting that trial courts are not required to consider new issues presented for the first time on rehearing).

2 We note that even if Petitioners had raised the issues addressed by the dissent, we would still deny the certiorari petition. We disagree with the dissent's assertion that the trial court departed from the essential requirements of the law in determining, pursuant to rule 4–1.7(b)(1), that it was unreasonable for the law firm to believe that it could provide competent and diligent representation to both Petitioners and Respondent's employer. As the trial court reasoned based upon the facts before it, Petitioners' interest would lie in minimizing the damages awarded by a verdict or settlement while the employer's interest would lie in helping Respondent recover the maximum possible damages against Petitioners so that it could maximize its recovery on its workers' compensation lien. With respect to rule 4–1.7(b)(3), while the dissent focuses on whether mediation constitutes a "proceeding before a tribunal," the employer's Notice of Lien was filed in the underlying tort case. There is no question that the underlying case constitutes a "proceeding before a tribunal." As such, the dissent's focus on mediation is much too narrow.

3 The trial court set out its fact findings in numbered paragraphs as follows:

> This case arises from the following circumstances:
>
> 1. The Plaintiff, Christopher Staples ("Plaintiff"), was an employee of Container Carrier Corporation ("Employer").
>
> 2. On January 27, 2003, while working for the Employer, the Plaintiff was injured at the Jacksonville brewing and shipping facility of Anheuser–Busch, Inc. Plaintiff alleges that the accident occurred because of the negligence of two related Anheuser–Busch entities, Anheuser–Busch Companies, Inc., and Anheuser–Busch, Inc. ("Defendants").
>
> 3. The Employer is a corporation separate and distinct from the Defendant corporations.
>
> 4. The Plaintiff received worker's compensation benefits from the Employer as a result of this accident. Because the Employer is self-insured against worker's compensation claims, there is no Carrier in the worker's compensation case.
>
> 5. The Plaintiff filed a negligence/premises liability action against the Defendants, seeking damages for the injuries he sustained in the January 27, 2003, accident at the Defendants' brewery.
>
> 6. The law firm of Fernandez Trial Lawyers, P.A. ("the firm"), which has represented the Defendants in past actions, entered an appearance on behalf of both Defendants in this tort action.
>
> 7. The firm also filed a Notice of Lien in this tort action on behalf of the Employer. The lien was filed pursuant to section 440.39(3)(a), Fla. Stat.
>
> 8. When mediation was scheduled for November 1, 2012, in this case, Plaintiff's counsel discussed with the firm his concern about the fact that the firm was representing both the Defendants in the tort action and the Employer in the same action. On behalf of the firm, attorney E.T. Fernandez, III, responded in writing, indicating that the interest of the Employer with regard to the worker's compensation lien would be addressed at mediation by, and negotiated by, Mr. James Gourley, a non-lawyer claims manager employed by the Employer. Because Plaintiff's counsel still had continuing concerns, the mediation was cancelled.
>
> 9. After learning of the dual representation, Plaintiff's counsel moved promptly to file the pending disqualification motion.
>
> 10. Both the Defendants in the tort case and the Employer have filed waivers of any conflict which may currently or in the future exist because of the law firm's representation of all three in the tort case.
>
> (Footnotes omitted.)

4 The trial court ruled:

> [E]ven if Plaintiff here had no standing, the Court would "raise the question" of disqualification itself and reach the same result required by this order. Consequently, the issue of Plaintiff's standing to pursue disqualification is likely moot.

5 Fernandez's petition, though not citing Rule 4–1.7, asserts that its disqualification was improper because the trial court misapplied the legal standard, tracking language from the caselaw interpreting the rule. *See, e.g., State Farm Mut. Auto. Ins. Co. v. K.A.W.,* 575 So.2d 630 (Fla.1991) (citing Rule 4–1.7); *Anderson Trucking Serv., Inc. v. Gibson,* 884 So.2d 1046 (Fla. 5th DCA 2004) (citing *K.A.W.*). Mr. Staples's response, understanding the nature of Fernandez's legal challenge, contains citations to the caselaw applying Rule 4–1.7 as well as to both subsections of Rule 4–1.7. Identification of

the specific judicial act to be reviewed (the disqualification order) and the legal reasoning for its reversal (it applied the incorrect legal standard under the caselaw applying Rule 4–1.7) enables appellate review. *See* Philip J. Padovano, *Florida Appellate Practice* § 16:9 (2012 ed.) (citing cases).

6 That A–B and Container have agreed to joint representation by Fernandez does not end Fernandez's ethical responsibilities, which include continual reevaluation of the joint representation under ethical rules and full, ongoing communications with A–B and Container as circumstances evolve or change.

7 If the case goes beyond meditation and a "proceeding before a tribunal"—such as a trial—is scheduled, the question of whether a conflict then exists can be raised. At that point, the trial court can assess whether joint representation, if it still exists, will involve the "assertion of a position adverse to another client" that fails to meet 4–1.7(b)—along with the other criteria of the Rule. Whether a lienor would appear at trial in this type of case is doubtful, but it might occur.

8 Tempering this tactic is that litigants, absent a special relationship to the lawyers sought to be disqualified, ordinarily will lack standing to make formal motions to disqualify. *See Zarco Supply Co. v. Bonnell,* 658 So.2d 151, 154 (Fla. 1st DCA 1995) (finding standing only where movant could demonstrate prejudice). Here, the trial court erred in concluding that Mr. Staples had standing to seek to disqualify Fernandez because, as admitted at oral argument, Mr. Staples can point to no prejudice arising from the joint representation by Fernandez. The trial court, however, can sua sponte raise conflict issues, making Mr. Staples's standing a non-issue.

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II.B.

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-1. Client-Lawyer Relationship

West's F.S.A. Bar Rule 4-1.7

Rule 4-1.7. Conflict of Interest; Current Clients

Currentness

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood, Adoption, or Marriage. A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.

(e) Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Credits

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Jan. 23, 2003, effective July 1, 2003 (838 So.2d 1140); March 23, 2006, effective May 22, 2006 (933 So.2d 417); May 29, 2014, effective June 1, 2014 (140 So.3d 541).

Editors' Notes

COMMENT

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses

alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (a), (b), and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivisions (b) and (c) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory

judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

The purpose of Rule 4-1.7(d) is to prohibit representation of adverse interests, unless informed consent is given by the client, by a lawyer related to another lawyer by blood, adoption, or marriage as a parent, child, sibling, or spouse so as to include those with biological or adopted children and within relations by marriage those who would be considered in-laws and stepchildren and stepparents.

Representation of insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time afterwards. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Notes of Decisions (190)

West's F. S. A. Bar Rule 4-1.7, FL ST BAR Rule 4-1.7
Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 08/15/16. All other State Court Rules are current with amendments received through 08/15/16.

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II.C.

39 So.3d 309
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
William Sumner SCOTT, Respondent.

No. SC05-1145.
|
June 10, 2010.
|
Rehearing Denied July 6, 2010.

Synopsis

Background: Disciplinary action was brought against attorney. The referee recommended attorney be found guilty of professional misconduct and suspended from the practice of law for 18 months.

Holdings: The Supreme Court held that:

[1] attorney represented client's business partner in attempt to have frozen funds released;

[2] attorney violated rules of professional conduct regarding conflicts of interest by representing multiple clients who all had claims to the same limited funds;

[3] attorney violated rules of professional conduct prohibiting lawyer from making false statements or engaging in dishonesty by making misrepresentations to business partner of client; and

[4] three-year suspension was warranted.

Suspension ordered.

West Headnotes (11)

[1] **Attorney and Client**
⇐ Review

In an attorney discipline matter, if a referee's findings of fact are supported by competent, substantial evidence in the record, the Supreme Court will not reweigh the evidence and substitute its judgment for that of the referee.

1 Cases that cite this headnote

[2] **Attorney and Client**
⇐ Grounds for Discipline

Attorney's action in telling individual who was entering into business transaction with client that client was an "honest man" triggered a duty on attorney's part to also reveal to individual the negative information he had concerning client that could have impacted individual's decision to go into business with client.

Cases that cite this headnote

[3] **Attorney and Client**
⇐ What constitutes a retainer

Attorney represented client's business partner in attempt to have frozen funds released; attorney sent partner a retainer agreement outlining representation and sent an addendum to the agreement stating that partner consented to the employment of attorney's law firm.

Cases that cite this headnote

[4] **Attorney and Client**
⇐ Disclosure, waiver, or consent

Attorney violated rules of professional conduct regarding conflicts of interest by representing multiple clients who all had claims to the same limited funds in frozen account regardless of whether client signed conflict waiver; the conflicts were directly adverse to clients' interests and could not be waived. West's F.S.A. Bar Rules 4-1.7(a), 4-1.9(a), 4-1.16(a)(1).

3 Cases that cite this headnote

[5] **Attorney and Client**
⇐ Representing Adverse Interests

An attorney engages in unethical conduct when he undertakes a representation when he either knows or should know of a conflict of interest prohibiting the representation. West's F.S.A. Bar Rules 4-1.7(a), 4-1.9(a), 4-1.16(a)(1).

1 Cases that cite this headnote

[6] **Attorney and Client**
Disclosure, waiver, or consent

Some kinds of conflicts of interest cannot be waived by a client.

1 Cases that cite this headnote

[7] **Attorney and Client**
Disclosure, waiver, or consent

Assuming that the conflicts of interest attorney had with various clients who had claims to frozen account funds had been waivable, client's waiver was at best void or voidable; at the time client signed the retainer agreements, he was unaware of the severity of the conflict, and he believed that his and everyone else's money was intact, just frozen, when he retained attorney, and did not discover that most of the money was gone until much later.

Cases that cite this headnote

[8] **Attorney and Client**
Character and conduct

Attorney violated rules of professional conduct prohibiting lawyer from making false statements or engaging in dishonesty by making misrepresentations to business partner of client about client's honesty and failing to tell partner about lawsuit against client, the court order prohibiting client from entering into certain business transactions, or client's criminal history, even though this information was public and nonconfidential. West's F.S.A. Bar Rules 4-4.1(a), 4-8.4(c).

Cases that cite this headnote

[9] **Attorney and Client**
Review

In reviewing a referee's recommended attorney discipline, Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because ultimately it is the Court's responsibility to order the appropriate sanction.

1 Cases that cite this headnote

[10] **Attorney and Client**
Review

Generally speaking, the Supreme Court will not second-guess the referee's recommended attorney discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

Cases that cite this headnote

[11] **Attorney and Client**
Definite Suspension

Three year suspension was warranted for attorney who engaged in misconduct by representing clients with unwaivable conflicts of interest and making misrepresentations to client. West's F.S.A. Bar Rules 4-1.7(a), 4-1.9(a), 4-1.16(a)(1), 4-4.1(a), 4-8.4(c).

1 Cases that cite this headnote

Attorneys and Law Firms

*310 John F. Harkness, Jr., Executive Director, and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, Tallahassee, FL, and Arlene Kalish Sankel, Bar Counsel, The Florida Bar, Miami, FL, for Complainant.

William Sumner Scott, pro se, Miami, FL, for Respondent.

Opinion

PER CURIAM.

We have for review a referee's report recommending that William Sumner Scott be found guilty of professional misconduct and suspended from the practice of law for eighteen months. We have jurisdiction. *See* art. V, § 15, Fla. Const. We approve the referee's findings of fact and recommendations regarding guilt. But we disapprove the sanction recommendation and instead impose a three-year suspension.

FACTS

The referee found that The Florida Bar proved the following facts by clear and convincing evidence.

***311** In 1995, Scott represented Richard Maseri's company, Private Research, Inc., in a suit for an injunction filed by the Commodity Futures Trading Commission (CFTC) in the United States District Court for the Southern District of Florida-*Commodity Futures Trading Commission v. Maseri,* No. 95-6970-CIV-DAVIS, 1995 WL 17144922 (S.D. Fla. complaint filed Oct. 16, 1995). The CFTC complaint alleged that Maseri and Private Research defrauded customers, converted customer funds, and violated the registration provisions of the Commodity Exchange Act (the Act), 7 U.S.C. §§ 1-27f (1994), and CFTC Regulations, 17 C.F.R. §§ 1-199 (1995). The court issued preliminary injunctive orders and, in 1997, made them permanent. The orders prohibited Maseri and Private Research from contracting for the sale of any commodity; acting directly or indirectly as a commodities trading advisor (CTA) or commodities pooling operator (CPO) without being registered as such; and engaging in any fraudulent activities while acting as a CTA or CPO.

In the summer of 1998, Maseri advertised for investors for a commodities brokerage venture. Steven Frankel, who was unaware of Maseri's previous history, responded to the advertisement. In July 1998, Maseri hired Scott to represent him in negotiations with Frankel aimed at establishing a forex brokerage company.[1] In August 1998, Maseri and Frankel created International Currency Exchange Corporation, a Nevada corporation, later renamed Intercontinental Currency Exchange Corporation (ICEC). They each owned a fifty-percent share of the company. They met, along with Scott, on August 4, 1998, to sign the stockholders' agreement. Before Maseri arrived for the meeting, Frankel questioned Scott about Maseri. Scott failed to tell Frankel about CFTC's suit against Maseri, the court order prohibiting Maseri from entering into certain business transactions, or Maseri's criminal history, even though this information was public and nonconfidential. During the course of their conversation, Scott made statements to the effect that Maseri was "an honest man."

During the August 4 meeting, Scott agreed to represent ICEC. At a minimum, Scott agreed to prepare new account form documents for ICEC. Frankel put up $5000 in equity for the venture and loaned ICEC $180,000.

In November 1998, the federal court entered a final order of judgment against Maseri in the *Maseri* case. Prudential Securities, Inc. (Prudential), as a holder of ICEC assets, filed an interpleader action against CFTC in the United States District Court for the Southern District of Florida and notified ICEC that its assets would be frozen until released by the court. *Prudential Securities, Inc. v. Commodity Futures Trading Commission,* No. 98-8891-CIV-MIDDLEBROOKS (S.D.Fla.). Maseri, as ICEC's president and chief operating officer, hired Scott to attempt to unfreeze ICEC's assets.

Frankel was unaware of these events until December 15, 1998. On that date, because he was unable to contact Maseri by telephone, he drove to the office and discovered that law enforcement officers had raided ICEC. At that point, Maseri told Frankel about his problems with the CFTC and referred him to Scott.

Frankel contacted Scott, who told him that he had been retained to represent ICEC and, since Frankel had loaned ***312** ICEC money, he would be representing Frankel in getting his funds released to him. On December 18, 1998, Frankel entered into a retainer agreement with Scott in which Scott agreed "to attempt to have the accounts which hold your funds at Prudential released."[2] Three days later, Frankel signed an addendum to his retainer agreement with Scott in which "Frankel, not as a Director, but as a lender to ICEC," ratified, adopted, and approved his earlier hiring of Scott.

ICEC also maintained accounts at Donaldson, Luftkin & Jenrette (DLJ). These accounts were controlled by Dreyfus Service Corporation (Dreyfus). In 1999, Dreyfus, like Prudential, filed an interpleader action in the United States District Court for the Southern District of Florida.

Dreyfus Service Corp. v. Intercont'l Currency Exch. Corp., No. 99-6151-CIV-DAVIS (S.D.Fla.). Scott, on behalf of ICEC investor Moresea, Ltd., filed a counterclaim against Dreyfus and a third-party complaint against DLJ, alleging that ICEC had conducted business in an illegal manner.

On January 6, 1999, Scott filed a petition for emergency relief on behalf of ICEC in the *Prudential* interpleader action. The petition included a cross-claim against Prudential on behalf of ICEC investors.

On January 15, 1999, the federal district court supplemented the final judgment in the *Commodity Futures Trading Commission v. Maseri* case to make ICEC subject to receivership. As a result, ICEC's assets went into receivership. The receiver notified Prudential that ICEC's assets were to be turned over to satisfy the judgment.

On February 9, 1999, on behalf of ICEC investor Investcan, Ltd., Scott filed an answer and a counterclaim against Prudential, alleging that Maseri and ICEC had operated in violation of Florida law. Prudential wrote to Scott on February 12 and 19, 1999, to object to his dual representation of ICEC and its investors on the basis of conflicts of interest. Despite Prudential's objection, Scott filed a counterclaim on February 24, 1999, on behalf of ICEC investors Roger Lennon and The Lennon Trust.

The court in *Prudential* dismissed the ICEC investors' cross-claim on March 17, the Investcan cross-claim on April 13, and the Lennon counterclaim on April 19. Scott filed a first amended counterclaim against Prudential on behalf of ICEC investors on April 23; that counterclaim also asserted unlawful conduct by ICEC.

The court dismissed the *Dreyfus* case on June 14, 2000, and the *Prudential* case on January 4, 2001. Prudential released the ICEC funds to the receiver. Scott tried to reopen the *Prudential* case over a year later, on January 18, 2002, and to file a cross-claim against his former client Frankel on behalf of ICEC and its investors/depositors for breach of contract, legal malpractice, and fraud. The court denied his motion on February 4, 2002. That same day, Scott filed a motion on behalf of Investcan, seeking joinder to the cross-claim against Frankel. On February 13, Scott filed a motion to reconsider reopening the *Prudential* case on behalf of ICEC and all persons who opened an account with ICEC.

Meanwhile, on January 29, 2002, the federal district court in *Commodity Futures Trading Commission v. Maseri* issued an order discharging the receiver and granting *313 the receiver's final report of distribution. On February 5, 2002, Scott filed a motion for reconsideration in that case on behalf of ICEC to contest the order of distribution. On February 19, Scott wrote to Frankel and Maseri, urging them to appeal the court's order of discharge and demanding a retainer for legal fees to represent ICEC in an appeal.

On February 20, 2002, Frankel demanded that Scott cease representing ICEC. Five days later, on February 25, 2002, Scott wrote to Frankel and Maseri, claiming that "no impasse of ICEC Nev[ada] management exists in regard to this case because both of you agreed for our firm to obtain recovery of the ICEC Nev [ada] deposits without regard to where they were located. We will keep you advised of developments."

On February 26, 2002, Frankel filed a motion to disqualify Scott on the basis of a conflict of interest. Scott wrote to Frankel on March 7, 2002, through Frankel's attorney, stating, "ICEC Nev[ada] depositors have a superior right to the proceeds taken from ICEC Nev[ada] to pay the fees and costs of the Receiver than does Mr. Frankel either as shareholder or lender to ICEC Nev[ada]," and affording Frankel the "opportunity to respond to the proposed appeal by ICEC Nev[ada] of the order that discharged the receiver."

On April 22, 2002, Scott filed suit against Frankel and Maseri, on behalf of ICEC investor Investcan, in the United States District Court for the Southern District of Florida, asserting Investcan's right to a return of its funds. *Investcan Int'l, Ltd. v. Frankel,* No. 02-60565-CIV-MIDDLEBROOKS (S.D. Fla. complaint filed Apr. 22, 2002).

The court denied Scott's motion for reconsideration in *Prudential* on May 24, 2002, noting

> a serious question as to ICEC's putative counsel's ability to represent ICEC in this matter.... This raises conflict issues.... The fact appears to be that *at this date,* Mr. Scott *has* represented Mr. Frankel in his individual capacity, in an attempt to get back monies

> Mr. Scott apparently now seeks on behalf of another client.

Scott appealed the order. The Eleventh Circuit Court of Appeals affirmed. *Moresea, Ltd. v. Prudential,* No. 02-13523-JJ (11th Cir.).

On July 3, 2002, Scott amended the Investcan complaint to allege that Frankel and Maseri failed to ensure that ICEC operated legally and thus defrauded plaintiffs of their money. The court disqualified Scott on October 4, 2002, on the basis of a conflict of interest in violation of Rule Regulating the Florida Bar 4-1.9. That decision was affirmed by the Eleventh Circuit Court of Appeals on March 28, 2003. *Investcan Int'l, Ltd. v. Frankel,* 65 Fed.Appx. 715 (11th Cir. 2003).

Based on the factual findings, the referee recommends that Scott be found guilty of violating Rules Regulating the Florida Bar 4-4.1(a) (prohibiting lawyer from making false statement of material fact or law to third party in course of representing client)-one count; 4-1.7(a) (1993) (prohibiting lawyer from representing client if representation will be directly adverse to interests of another client unless lawyer reasonably believes representation will not adversely affect lawyer's responsibilities to and relationship with other client and each client consents after consultation)-five counts; 4-1.9(a) (1993) (prohibiting lawyer who formerly represented client from representing another person in same or substantially related matter in which that person's interests are materially adverse to interests of former client unless former client consents after consultation)-six ***314** counts; 4-1.16(a)(1) (1993) (prohibiting lawyer from representing client or requiring lawyer to withdraw where representation will result in violation of Rules of Professional Conduct or law)-seven counts; and 4-8.4(c) (prohibiting lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation)-one count.

The referee recommends that Scott be suspended for eighteen months and taxed with the Bar's costs. In recommending the eighteen-month suspension, the referee considered two mitigating factors-the absence of a prior disciplinary record and Scott's age (seventy). The referee found no aggravating factors. In recommending an eighteen-month suspension, the referee did not identify the particular Florida Standards for Imposing Lawyer Sanctions on which he relied. Neither did he cite to any previous cases involving similar fact patterns in which this Court imposed eighteen-month suspensions.

Scott petitioned for review of the referee's report. He argues that the Bar's complaint should have been dismissed as barred by the statute of limitations for Bar disciplinary proceedings; Scott was not obligated to tell Frankel about Maseri's criminal history or legal problems with the CFTC; the referee's finding that he misled Frankel was unsupported; the referee's finding that he represented Frankel was unsupported and Frankel had waived any real or potential conflict of interest; and Scott's duty to protect the public took precedence over his duty to maintain client confidentiality or to decline the representation of a client where a conflict of interest exists or is likely to arise. The Bar filed a cross-petition, seeking review of the sanction recommendation. The Bar argues that a three-year suspension is the appropriate sanction for the proven misconduct.

ANALYSIS

Scott previously raised the statute-of-limitations issue in a motion to dismiss filed in this Court. The Court rejected Scott's statute-of-limitations argument and denied the motion to dismiss. We will not now revisit this issue, which we have previously determined adversely to Scott.

[1] Scott takes issue with the referee's finding that Scott misled Frankel by representing that Maseri was an honest man. Scott argues that he had no duty to advise Frankel of public, nonconfidential information about Maseri. The referee's finding in this regard is supported by competent, substantial evidence. Critically, if a referee's findings of fact are supported by competent, substantial evidence in the record, the Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick,* 756 So.2d 79, 86 (Fla.2000); *see also Fla. Bar v. Jordan,* 705 So.2d 1387, 1390 (Fla.1998).

[2] In this instance, the referee found that Scott's action in telling Frankel that Maseri was an "honest man" triggered a duty on his part to also reveal to Frankel the negative information he had concerning Maseri that could have impacted Frankel's decision to go into business with Maseri. This finding is also supported by the record. Frankel, testifying about his conversation with Scott at the August 4, 1998, meeting, stated: "I asked him

what he knew of him, and he indicated to me that Mr. Maseri had never lied to him, that he was an honest man, that he had never lost any money with him, and generally he left me feeling very good about him." He further testified that Scott did not tell him anything negative about Maseri during their conversation and that if Scott had told him anything negative, specifically about the public nonconfidential information ***315** Scott had about Maseri, Frankel would have gotten up and left.

More importantly, Scott admitted that his intent was to convince Frankel that Maseri was an honest man so as to ensure that Frankel proceeded with the proposed business deal. Concerning his motivation in telling Frankel that Maseri had never lied to him, Scott testified:

> Q Isn't it true that in response to Mr. Frankel's questions, you told him that Maseri had never lied or cheated you because you wanted Frankel to infer that Maseri was an honest man?
>
> A I gave a deposition and acknowledged that. When he started asking his questions, my goal was to preserve the deal. I already knew that in the agreement there was no representation of past litigation or regulation history. I already knew and had discussions with Maseri about what had he disclosed to Frankel and what he had not.
>
> I felt that at a closing that had been going on and negotiations back and forth for seven or eight days, for those questions to come up, I felt blindsided and as though the guy was trying to make me personally responsible for his problems instead of serving as his own lawyer, which I told him at the outset he had to do, and I told him-I thought I gave him plenty of notice that there was something there for him to worry about when I told him he ought to go get his own lawyer. You know, you can only take a cripple so far.
>
> Q Do I understand you correctly to have just said that yes, you wanted him to infer that Maseri was an honest man because you didn't want the deal to get blown?
>
> A That is true.

Scott also admitted that if the deal had been "blown," he would not have been able to look forward to earning any fees from the ICEC venture.

[3] The referee's finding that Scott represented Frankel is also supported by competent, substantial evidence in the record. The Bar introduced two retainer agreements, dated December 18 and 21, 1998, into evidence. The December 18 agreement states: "After my explanation to you of the existence of potential conflicts of interests among the depositors, you have requested *that our firm represent you* in the limited capacity to attempt to have the accounts which hold your funds at Prudential released." (Emphasis added.) In the December 21 "Addendum to Retainer Agreement," Frankel "consents, ratifies, and approves the employment of The Scott Law Firm, P.A. (the 'Firm') upon the terms outlined above."

In addition, both Scott and Frankel testified concerning Scott's representation. When discussing the December 18 and 21 retainer agreements, Scott stated: "I also believed that I needed to get [a] retainer from him, which I *now* prefer to characterize as a waiver." (Emphasis added.) The clear implication of this statement is that Scott himself viewed the documents as retainers at the time he sent them to Frankel.

We reject Scott's argument that it was permissible for him to represent the ICEC investors despite the conflicts presented by his representation under some kind of duty-to-the-public exception. No such exception exists. To the extent that ICEC investors wanted to pursue claims against Scott's past or present clients with interests adverse to theirs, Scott should have referred them to other counsel, someone without a disqualifying conflict.

[4] We next address the referee's guilt recommendations. The Court has repeatedly stated that the referee's factual findings must be sufficient under the applicable ***316** rules to support the recommendations as to guilt. *See Fla. Bar v. Shoureas,* 913 So.2d 554, 557-58 (Fla.2005). Scott argues that the referee's guilt recommendations on the conflict-of-interest issue are unsupported by the factual findings. His argument fails.

[5] An attorney engages in unethical conduct when he undertakes a representation when he either knows or should know of a conflict of interest prohibiting the representation. *Fla. Bar v. Cosnow,* 797 So.2d 1255, 1257 (Fla.2001). The referee recommends that Scott be found guilty of violating Rules Regulating the Florida Bar 4-1.7(a), 4-1.9(a), and 4-1.16(a)(1) for his conflict-of-interest conduct in this case.

Rule 4-1.7(a) provides that an attorney "shall not represent a client if the representation of that client will be directly adverse to the interests of another client" unless: (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and (2) each client consents after consultation.

Rule 4-1.9(a) provides that a lawyer who formerly represented a client shall not "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 consents after consultation."

Rule 4-1.16(a)(1) provides that a lawyer shall not represent a client or shall withdraw where "the representation will result in violation of the Rules of Professional Conduct or law."

Scott represented, either seriatim or in conjunction: Maseri's company, Private Research, in the *Maseri* case; Maseri in business negotiations with Frankel; ICEC (owned in equal parts by Maseri and Frankel) in the preparation of certain forms and in attempts to have ICEC's assets unfrozen; Frankel, individually, as the maker of a loan to ICEC, for the recovery of the money Frankel loaned to ICEC; and individual ICEC investors, for recovery of the money they invested with ICEC and in a lawsuit for fraud against Maseri and Frankel. All of the representations undertaken by Scott after the creation of ICEC involved claims for ICEC's assets in one way or another. The interests of ICEC, Maseri, Frankel, and the individual ICEC investors were all directly adverse to one another because all had claims to the same pool of money.

[6] Furthermore, even if the documents Frankel signed on December 18 and 21, 1998, were waivers of conflict rather than retainer agreements, as Scott argues, Frankel's waiver would have been ineffective. Some kinds of conflicts of interest cannot be waived by a client. For example, in *Florida Bar v. Feige,* 596 So.2d 433, 434 (Fla.1992), Feige represented himself and his client in a suit by his client's ex-husband for the return of alimony payments made after Feige's client had remarried. Feige had not represented the client in the divorce proceedings, but was aware of the provision in the couple's marital settlement agreement requiring the ex-husband to pay alimony until the ex-wife, Feige's client, died or remarried. His client was aware of the conflict in Feige's representing himself and her and agreed to waive the conflict. This Court held that the conflict was the type that could not be waived and suspended him for two years.

[7] The conflicts of interest in this case were as directly adverse as those in *Feige* and equally unwaivable. Even if the conflicts had been waivable, Frankel's waiver would have been, at best, void or voidable. At the time Frankel signed the retainer agreements, he was unaware of the severity of the conflict. Frankel testified that he *317 believed that his and everyone else's money was intact, just frozen, when he retained Scott. He did not discover that most of the money was gone until much later.

Thus, the referee's findings more than amply support the referee's recommendations of guilt as to the conflict-of-interest claims, and accordingly, we approve these guilt recommendations.

[8] Scott also argues that the recommendation that he be found guilty of a misrepresentation is unsupported by the factual findings. We reject this argument as well. The referee's findings adequately support his recommendation that Scott be found guilty of violating rules 4-4.1(a) (prohibiting lawyer from making false statement of material fact or law to third person in course of representing a client) and 4-8.4(c) (prohibiting lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The referee found that Scott made a misrepresentation to Frankel when he told Frankel that Maseri had never lied to him, indicating that Maseri was an honest man. The referee also found that Scott failed to tell Frankel about CFTC's suit against Maseri, the court order prohibiting Maseri from entering into certain business transactions, or Maseri's criminal history, even though this information was public and nonconfidential. The combination of the two circumstances constituted a misrepresentation. These factual findings are sufficient to support the referee's recommendations that Scott be found guilty of violating rules 4-4.1(a) and 4-8.4(c).

[9] [10] We next consider the appropriate sanction for Scott's misconduct. In reviewing a referee's recommended discipline, the Court's scope of review is broader than that afforded to the referee's findings of fact because ultimately it is the Court's responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson,* 538 So.2d

852, 854 (Fla.1989); *see also* art. V, 15, Fla. Const. However, generally speaking, the Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer,* 753 So.2d 555, 558 (Fla.1999). The referee in this case did not cite to any cases or standards in support of the sanction recommendations.

[11] The Bar argues in its cross-petition that the referee's recommendation of an eighteen-month suspension is unsupported by the Florida Standards for Imposing Lawyer Sanctions and our caselaw and that the suspension should be for three years. We agree and instead impose a three-year suspension.

In support of its argument that a three-year suspension is the appropriate discipline, the Bar cites to standards 4.32 and 7.2, as well as *Florida Bar v. Dunagan,* 731 So.2d 1237 (Fla.1999) (suspending attorney for ninety-one days for representing husband in dissolution proceeding after he had represented both husband and wife in connection with various business matters and business was marital asset); *Florida Bar v. Wilson,* 714 So.2d 381 (Fla.1998) (suspending attorney for one year for agreeing to represent wife in dissolution proceeding after previously representing couple in unrelated declaratory judgment action and for other misconduct); *Florida Bar v. Hmielewski,* 702 So.2d 218 (Fla.1997) (suspending attorney for three years for making deliberate misrepresentations in medical malpractice action despite significant mitigating factors); *Florida Bar v. Calvo,* 630 So.2d 548, 549 (Fla.1993) (disbarring attorney for his reckless misconduct with regard to securities offering, including failing to disclose to potential ***318** investors that one of principals involved had been indicted for mail fraud); *Florida Bar v. Mastrilli,* 614 So.2d 1081 (Fla.1993) (suspending attorney for six months for filing suit against one client on behalf of another client in matter for which attorney had been retained by both of them); and *Feige,* 596 So.2d 433 (suspending attorney for two years for representing himself and client when their interests were adverse, despite client's consent to dual representation).

Standard 4.32 provides that suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. Standard 7.2 provides that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Of course, the standards do not distinguish between suspensions of different lengths. These standards support the referee's recommendation to the same extent that they support the Bar's position.

However, if the egregiousness of the conduct is viewed as falling along a continuum, the closer the conduct falls on the continuum to the dividing line between suspension and disbarment, the longer the suspension that such conduct would warrant. In looking at the corresponding standards for disbarment in these same categories, it appears that Scott's conduct comes close to that dividing line in both cases. Standard 4.31 provides, in pertinent part, that disbarment is appropriate when a lawyer, without the informed consent of the client, simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client, or represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

Standard 7.1 provides that disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

In the case of both standards, it appears that Scott's conduct falls close to the dividing line on the continuum between disbarment and suspension. This supports the imposition of a suspension close to the dividing line between suspension and disbarment. The maximum length of a definite-term suspension under the Rules Regulating the Florida Bar is three years. R. Regulating Fla. Bar 3-5.1(e).

Feige is particularly helpful in gauging an appropriate sanction in this case. *Feige* involved a lawyer who engaged in an unwaivable conflict of interest and who failed to inform a third party of nonconfidential information

under circumstances that allowed his client to perpetrate a fraud on her ex-husband, the third party. Scott engaged in precisely the same kinds of misconduct in this case but to a more egregious extent. This Court suspended Feige for two years. Because Scott's misconduct was more egregious, it warrants a longer suspension than that imposed in *Feige*.

The more recent cases of *Florida Bar v. Head,* 27 So.3d 1 (Fla.2010), and *Florida Bar v. Herman,* 8 So.3d 1100 (Fla.2009), also involved similar but less egregious misconduct. In *Head* we suspended a lawyer ***319** for one year after he created a conflict of interest between himself and his clients by convincing them to pay him $10,000 from the proceeds of a mortgage refinancing when his clients' primary objective in arranging the mortgage refinancing had been to pay off their biggest creditor and paying the lawyer $10,000 frustrated that objective. *Head,* 27 So.3d at 9. In addition, the lawyer was not forthcoming in advising the bankruptcy court in his clients' case that he had received $10,000 in fees. He also filed a "Suggestion of Bankruptcy" for his firm in his clients' bankruptcy case when he had not filed a petition for bankruptcy for the firm. *Id.* at 5.

In *Herman* we suspended a lawyer for eighteen months for going into direct business competition with a client of his firm and representing both companies without advising the first client of the conflict or obtaining a waiver. *Herman,* 8 So.3d at 1103. We found his failure to inform his first client about his own company was "dishonest and deceitful" and motivated by "monetary concerns." *Id.*

CONCLUSION

Accordingly, William Sumner Scott is hereby suspended from the practice of law for three years and ordered to reimburse the Bar for its costs. The suspension will be effective thirty days from the filing of this opinion so that Scott can close out his practice and protect the interests of existing clients. If Scott notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Scott shall accept no new business from the date this opinion is filed until he is reinstated by this Court.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from William Sumner Scott in the amount of $5,637.71, for which sum let execution issue.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

All Citations

39 So.3d 309, 35 Fla. L. Weekly S333

Footnotes

1 Frankel testified before the referee that a forex brokerage company is a currency exchange brokerage company.

2 The agreement reflects that Scott was retained by ICEC on November 30, 1998, but was terminated on December 12, 1998.

End of Document

II.D.

104 So.2d 874
District Court of Appeal of Florida, Third District.

Joyce B. KOLB, Appellant,
v.
Jeanette V. LEVY, Individually, and as Executrix under the Last Will and Testament of Regina Rosenthal, Deceased, Appellee.

No. 57-179.
|
July 15, 1958.
|
Rehearing Denied Sept. 29, 1958.

Proceeding on petition for removal of coexecutrix who had filed claim against estate, on ground of conflicting or adverse interest. From an order of the County Judges' Court of Dade County, Frank B. Dowling J., removing the coexecutrix, she appealed. The District Court of Appeal Pearson, J., held that when conflict in interest becomes apparent, the county judge need not wait until merits of conflict are determined before he can act to avoid embarrassment and delay which may follow from a situation where personal representative is litigating against himself and that the county judge acted within his authority when he determined that it would be for best interest of estate that coexecutrix be removed.

Affirmed.

West Headnotes (5)

[1] **Executors and Administrators**
⇐Hostility or Adverse Interest

Statute providing that any personal representative may be removed for conflicting or adverse interest held by the personal representative against estate and that proceedings for removal may be instituted by county judge of his own motion, repose in the county judge a degree of discretion in determining whether interest of personal representative is conflicting or adverse and when conflict in interest becomes apparent the county judge need not wait until merits of conflict have been determined before he can act to avoid embarrassment and delay which may follow from a situation where personal representative is litigating against himself. F.S.A. §§ 734.11 and subd. (10), 734.13.

3 Cases that cite this headnote

[2] **Courts**
⇐Jurisdiction

The County Judges' Court is a court of equity insofar as the subjects committed by Constitution and laws of Florida to its exclusive jurisdiction are concerned.

Cases that cite this headnote

[3] **Executors and Administrators**
⇐Hostility or Adverse Interest

While every claim in an estate filed by a personal representative of that estate does not necessarily require his removal, the fact that claim has not been judicially determined to be a valid claim does not preclude removal. F.S.A. §§ 734.11 and subd. (10), 734.13.

2 Cases that cite this headnote

[4] **Executors and Administrators**
⇐Pleading

Petition for removal of coexecutrix on ground of conflicting or adverse interest held by the coexecutrix against the estate although conflicting or adverse interest consisted only of filing of a claim which had not been judicially determined to be a valid claim sufficiently stated ground for removal. F.S.A. §§ 734.11 and subd. (10), 734.13.

1 Cases that cite this headnote

[5] **Executors and Administrators**
⊶Hostility or Adverse Interest

Statutes authorizing County Judges' Court to remove personal representative for conflicting or adverse interest does not oblige court to remove a personal representative unless there is some tangible and substantial reason to believe that damage will otherwise accrue to the estate and such statutes do not conflict with statutes authorizing appointment of creditor as a personal representative and authorizing appointment of an administrator ad litem to represent estate when personal representative is enforcing a claim against the estate. F.S.A. §§ 732.51, 732.55, 734.11, 734.13.

6 Cases that cite this headnote

Attorneys and Law Firms

*875 J. M. Flowers, Miami, for appellant.

Redfearn & Ferrell and Marion Brooks, Miami, for appellee.

Opinion

PEARSON, Judge.

This is an appeal from an order of the County Judges' Court of Dade County removing the appellant, Joyce B. Kolb, as co-executrix under the last will and testament of Regina Rosenthal, deceased, upon the ground of conflicting or adverse interest held by the said personal representative against the estate.

The appellant urges that the petition did not set forth a sufficient ground for removal under the Florida Statutes, inasmuch as the alleged 'conflicting or adverse interest'[1] consisted only of filing a claim, which has not been judicially determined to be a valid claim. The record on appeal contains no report of the proceedings upon the petition. We find that the petition for removal contained grounds which are sufficient under the statute.

The petition for removal of co-executrix set forth the following:
'That on the 22nd day of September 1956, Joyce B. Kolb, and petitioner, Jeanette V. Levy, qualified as joint executrixes of the estate or Regina Rosenthal, deceased.

'Joyce B. Kolb has been derelict in her duties as an executrix of the estate of Regina Rosenthal, deceased, for the reasons set forth in this petition. Instead of carrying out the provisions of the will made by Regina Rosenthal, which she was legally bound to do, she has attempted to destroy its legal effect. Adverse and conflicting interest to the estate is manifested by the number of claims which she has filed in this court, which in the aggregate greatly exceeds the entire corpus of the estate.

'In the allegations made in her claims, she has charged the testatrix, Regina Rosenthal, with not only a breach of contract in her repudiation of a prior will whereby she alleges testatrix agreed to leave her the entire estate, but also with the embezzlement of $10,000.00, which she, the said Joyce B. Kolb, claims to have given to the testatrix to buy government bonds.

'On January 4, 1957, the said Joyce B. Kolb, filed her petition in this court for the return of $10,000.00 in government bonds, she claiming absolute ownership to them. The bonds, hereinabove referred to, were listed in the inventory of said estate by the said Joyce B. Kolb, as co-executrix, as belonging to said estate, and this inventory of the bonds was sworn to by the said Joyce B. Kolb.

*876 'The said Joyce B. Kolb alleged in her said petition that she gave $10,000.00 in cash to the testatrix for the express purpose of purchasing government bonds and holding them for her father, who died several years ago.

'She further alleged that the testatrix told her that she had a 'note inside of the $10,000.00 folder bonds, which note definitely stated these bonds are the property of my niece, JOYCE B. KOLB.' The bonds were in the personal safety box of testatrix in the Florida National Bank and Trust Company at Miami, Florida. Later the testatrix surrendered her personal box and removed the bonds therefrom into a joint box, to which she, the said Joyce B. Kolb, and the testatrix had access. The said Joyce B. Kolb further alleged in her claim that the $10,000.00 bonds and also the 'note' hereinabove referred to was seen by her.

'The said Joyce B. Kolb returned to Miami on September 25, 1956, with the body of the testatrix. While in Miami she learned, so she claims, that the testatrix had opened another safety deposit box in her own name after having

surrendered the box to which she and the testatrix had access; she also claims that at that time she discovered that the bonds had been revoved to the later acquired box, she discovered the 'note' or memorandum indicating her ownership of the bonds was missing.

'The said Joyce B. Kolb alleges in her claim that she was the attorney for the testatrix and had handled all of her financial matters exclusively, and that the testatrix had never invested in the bonds and had never paid any federal tax on the dividends derived from them; that although the said Joyce B. Kolb had been a practicing attorney for thirty odd years in New York and had resided in New York, and the testatrix was a resident of Miami, Florida, for many years before her demise, she Joyce B. Kolb, entrusted the testatrix with $10,000.00 to buy bonds and keep them in the safe deposit box in Miami. Petitioner alleges that most of the time during the administration of this estate, the said Joyce B. Kolb has been in New York consulting attorneys and preparing claims against this estate.

'The allegations of the said Joyce B. Kolb, that she entrusted testatrix with $10,000.00 to buy government bonds; that testatrix bought them for her and put them in the box to which both had access with a 'note' saying they belonged to the said Joyce B. Kolb; that the testatrix, without Joyce B. Kolb's knowledge, cancelled the box jointly used by both parties and opened another box and destroying said note, are charges of conversion against testatrix.

'After the aforesaid petition was filed in this court for the recovery of the bonds, the said Joyce B. Kolb filed an 'Amended Petition to Return Bonds' in the County Judges' Court in which she attempted to explain why she had signed nad verified the inventory as co-executrix by stating that the bonds were listed for tax purposes. Her petition was denied by the Honorable Frank B. Dowling on the ground that the County Judges' Court had no jurisdiction to determine title.

'Thereafter, on the 27th day of March, 1957, the said Joyce B. Kolb, filed in the Circuit Court in Dade County, Florida, a complaint in equity No. 199, 817, entitled Joyce B. Kolb, plaintiff, v. Jeanette v. Levy, as co-executrix of the estate of Regina Rosenthal, deceased, the purpose of this suit being to establish ownership to the bonds hereinabove referred to. The complaint was only for the recovery of the bonds. On May 27th, 1957, the complaint was dismissed in *877 the Circuit Court of Dade County, Florida; more than sixty days have expired, and no appeal has been taken from said order of dismissal.

'After dismissal of the suit, as aforesaid, on June 4, 1957, the said Joyce B. Kolb, filed two claims in the County Judges' Court, one being for $10,000.00, in money she claimed that she advanced to Regina Rosenthal on or about April 15, 1945, and the other for money advanced for express purpose of purchasing $10,000.00 worth of Treasury bonds, negotiable; this is the same claim above mentioned on which she lost her suit in the chancery suit.

'In the last claim there is a direct charge of conversion or misappropriation of funds entrusted to the testatrix.

'Subsequently to the claims and suits hereinabove described, the said Joyce destroying the will of the testatrix. against the estate in the amount of $125,000.00, purporting to be for legal services she rendered to the testatrix for several years prior to her death.

'On the 28th day of June, 1957, the said Joyce B. Kolb filed another claim against said estate in the amount of $350,000.00. This claim, if allowed, would have the effect of completely destroying the will of the tesatrix. This claim shows more than merely an adverse interest against the estate. It is an attempt to destroy the effect of the will and it is the equivalent of a contest of the will itself. It is stated in this claim that an agreement was entered into between the testatrix and herself whereby the testatrix in consideration of services rendered to her by the said Joyce B. Kolb, she, the said testatrix, would make the said Kolb the sole beneficiary of her estate except for certain legacies.

'In said claim it is alleged that the testatrix agreed not to make another will without the said Joyce B. Kolb's express consent, that the testatrix subsequently to this purported agreement, made a will without the knowledge of the said Joyce B. Kolb which deprived the said Joyce B. Kolb of her legacy under the first will; that by reason of this alleged breach, Joyce B. Kolb claims the sum of $350,000.00. Thus she seeks not only to destroy the last will now under probate in this court and under which she is co-executrix, but she also seeks to take the entire estate on the adverse claims filed by her.

'Petitioner alleges that the above mentioned claims are totally without merit, and yet the said Joyce B. Kolb is attempting to nullify the will of the deceased by such fake claims and claim the entire estate. The petitioner alleges that the said Joyce B. Kolb should be removed as co-executrix and that she should be required to surrender all papers, documents, and other assets relating to or belonging to said estate, now in the possession, custody or control of the said Joyce B. Kolb.'

The appellant presents two assignments of error, as follows: '(1) The court was without jurisdiction to determine the legal effect of the claims filed by the appellant. (2) The court erred in determining that claims filed by the appellant constituted grounds for removing her as an executrix.' The gist of the argument is that the court was without jurisdiction to remove the appellant as co-executrix on the ground that she had filed claims in the estate, as such ground necessarily involves a decision by the County Judges' Court as to the merits of such claims. And that even if the County Judges' Court had jurisdiction to decide the legal effect of such claims, as distinguished from the merits thereof, nevertheless, a personal representative cannot be construed to hold a 'conflicting or adverse interest' so long as he does not hold any property right of the estate in his hands as an individual.

*878 [1] Section 734.13[2] of the Florida Statutes, F.S.A. provides proceedings whereby the county judge may remove an executor or administrator, even on his own motion. In addition it is important, we think, to note that section 734.11, supra, reads 'may' instead of 'must'. Both sections use the word 'may', which can only have the purpose of reposing in the county judge a degree of discretion in determining whether the interest of the personal representative is conflicting or adverse. It is not reasonable to hold that when the conflict in interest becomes apparent that the county judge must wait until the merits of the conflict are determined before he can act to avoid the embarrassment and delay which may follow from a situation where the personal representative is litigating against himself. In this connection see In re Stauffer's Estate, Ohio App.1943, 57 N.E.2d 145.

[2] The tenth ground of section 734.11, supra, pertaining to conflicting or adverse interest held by the personal representative against the estate must be construed in the same manner as any of the other grounds would be construed. For example, it would not be tenable to argue that the county judge would have no authority to remove a personal representative for 'The wasting, embezzlement or other maladministration of the estate',[3] until the merits of the controversy had been settled by a conviction of any of these. The County Judges' Court is a court of equity insofar as the subjects committed by the Constitution and the Laws of Florida to its exclusive jurisdiction are concerned. See Crosby v. Burleson, 142 Fla. 443, 195 So. 202; White v. Bourne, 151 Fla. 12, 9 So.2d 170.

[3] [4] While it does not follow that every claim in an estate filed by a personal representative of that estate would require his removal, we are unable to say that the allegations of the petition, in this instance, did not set forth a factual situation of conflicting or adverse interest on the part of the personal representative.

[5] We turn now to the question raised by the appellant under her second assignment of error. It is urged inasmuch as section 732.51 Fla.Stat., F.S.A., expressly provides that the appointment of a creditor as personal representative of the estate of a deceased shall not release the debt due by the decedent, and inasmuch as section 732.55, Fla.Stat., F.S.A., expressly provides that when the personal representative is interested adversely to the estate of a decedent or is enforcing a claim against such estate, the County Judges' Court shall appoint an administrator ad litem to represent the estate, then to hold that an executor can be removed because of a claim filed against the estate, would be to destroy the force of the last mentioned sections of the statute.

To state the argument is to demonstrate its weakness. The alleged conflict does not exist. Each of the cited sections are capable of proper and independent operation. The authority for removal of a personal representative is vested in the County Judges' Court by virtue of sections 734.11 and 734.13, supra. The court has a wide discretion in proceedings under these sections and is not obliged to removed a personal representative unless there is some tangible and substantial reason to believe that damage will otherwise accrue to the estate. See In re Arduser's Estate, 226 Iowa 103, 283 N.W. 879.

Sections 732.51 and 732.55, supra provide the judicial machinery for those cases *879 where the interest of the personal representative is not found to require his removal.

We find therefore that the county judge acted within his authority when he determined that it would be for the best interest of said estate that the co-executrix be removed. See Henderson v. Ewell, 111 Fla. 324, 149 So. 372; State ex rel. North v. Whitehurst, 145 Fla. 559, 1 So.2d 175; In re Weltner's Estate, 154 Fla. 292, 17 So.2d 396, 398.

Affirmed.

CARROLL, CHAS., C. J., and HORTON, J., concur.

All Citations

104 So.2d 874

Footnotes

1 Section 734.11, Fla.Stat., F.S.A. 'Any personal representative may be removed and his letters revoked for any of the following causes, and such removal shall be in addition to, and not in lieu, of any other penalties prescribed by law:
'(10) Conflicting or adverse interest held by the personal representative against the estate, but this shall not apply to the widow because of electing to take dower or claiming family allowance or exemptions.'

2 Section 734.13, Fla.Stat., F.S.A. 'Proceedings for removal may be instituted by the county judge of his own motion or by any creditor, legatee, devisee, heir, distributee, coexecutor, coadministrator or by any surety upon the bond of the personal representative. Such notice shall be given to the personal representative as the county judge may direct.'

3 Section 734.11(5), Fla.Stat., F.S.A.

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III.A.

39 So.3d 309
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
William Sumner SCOTT, Respondent.

No. SC05-1145.
|
June 10, 2010.
|
Rehearing Denied July 6, 2010.

Synopsis

Background: Disciplinary action was brought against attorney. The referee recommended attorney be found guilty of professional misconduct and suspended from the practice of law for 18 months.

Holdings: The Supreme Court held that:

[1] attorney represented client's business partner in attempt to have frozen funds released;

[2] attorney violated rules of professional conduct regarding conflicts of interest by representing multiple clients who all had claims to the same limited funds;

[3] attorney violated rules of professional conduct prohibiting lawyer from making false statements or engaging in dishonesty by making misrepresentations to business partner of client; and

[4] three-year suspension was warranted.

Suspension ordered.

West Headnotes (11)

[1] **Attorney and Client**
Review

In an attorney discipline matter, if a referee's findings of fact are supported by competent, substantial evidence in the record, the Supreme Court will not reweigh the evidence and substitute its judgment for that of the referee.

1 Cases that cite this headnote

[2] **Attorney and Client**
Grounds for Discipline

Attorney's action in telling individual who was entering into business transaction with client that client was an "honest man" triggered a duty on attorney's part to also reveal to individual the negative information he had concerning client that could have impacted individual's decision to go into business with client.

Cases that cite this headnote

[3] **Attorney and Client**
What constitutes a retainer

Attorney represented client's business partner in attempt to have frozen funds released; attorney sent partner a retainer agreement outlining representation and sent an addendum to the agreement stating that partner consented to the employment of attorney's law firm.

Cases that cite this headnote

[4] **Attorney and Client**
Disclosure, waiver, or consent

Attorney violated rules of professional conduct regarding conflicts of interest by representing multiple clients who all had claims to the same limited funds in frozen account regardless of whether client signed conflict waiver; the conflicts were directly adverse to clients' interests and could not be waived. West's F.S.A. Bar Rules 4-1.7(a), 4-1.9(a), 4-1.16(a)(1).

3 Cases that cite this headnote

[5] **Attorney and Client**
Representing Adverse Interests

An attorney engages in unethical conduct when he undertakes a representation when he either knows or should know of a conflict of interest prohibiting the representation. West's F.S.A. Bar Rules 4-1.7(a), 4-1.9(a), 4-1.16(a)(1).

1 Cases that cite this headnote

[6] **Attorney and Client**
⇦ Disclosure, waiver, or consent

Some kinds of conflicts of interest cannot be waived by a client.

1 Cases that cite this headnote

[7] **Attorney and Client**
⇦ Disclosure, waiver, or consent

Assuming that the conflicts of interest attorney had with various clients who had claims to frozen account funds had been waivable, client's waiver was at best void or voidable; at the time client signed the retainer agreements, he was unaware of the severity of the conflict, and he believed that his and everyone else's money was intact, just frozen, when he retained attorney, and did not discover that most of the money was gone until much later.

Cases that cite this headnote

[8] **Attorney and Client**
⇦ Character and conduct

Attorney violated rules of professional conduct prohibiting lawyer from making false statements or engaging in dishonesty by making misrepresentations to business partner of client about client's honesty and failing to tell partner about lawsuit against client, the court order prohibiting client from entering into certain business transactions, or client's criminal history, even though this information was public and nonconfidential. West's F.S.A. Bar Rules 4-4.1(a), 4-8.4(c).

Cases that cite this headnote

[9] **Attorney and Client**
⇦ Review

In reviewing a referee's recommended attorney discipline, Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because ultimately it is the Court's responsibility to order the appropriate sanction.

1 Cases that cite this headnote

[10] **Attorney and Client**
⇦ Review

Generally speaking, the Supreme Court will not second-guess the referee's recommended attorney discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

Cases that cite this headnote

[11] **Attorney and Client**
⇦ Definite Suspension

Three year suspension was warranted for attorney who engaged in misconduct by representing clients with unwaivable conflicts of interest and making misrepresentations to client. West's F.S.A. Bar Rules 4-1.7(a), 4-1.9(a), 4-1.16(a)(1), 4-4.1(a), 4-8.4(c).

1 Cases that cite this headnote

Attorneys and Law Firms

***310** John F. Harkness, Jr., Executive Director, and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, Tallahassee, FL, and Arlene Kalish Sankel, Bar Counsel, The Florida Bar, Miami, FL, for Complainant.

William Sumner Scott, pro se, Miami, FL, for Respondent.

Opinion

PER CURIAM.

We have for review a referee's report recommending that William Sumner Scott be found guilty of professional misconduct and suspended from the practice of law for eighteen months. We have jurisdiction. *See* art. V, § 15, Fla. Const. We approve the referee's findings of fact and recommendations regarding guilt. But we disapprove the sanction recommendation and instead impose a three-year suspension.

FACTS

The referee found that The Florida Bar proved the following facts by clear and convincing evidence.

***311** In 1995, Scott represented Richard Maseri's company, Private Research, Inc., in a suit for an injunction filed by the Commodity Futures Trading Commission (CFTC) in the United States District Court for the Southern District of Florida-*Commodity Futures Trading Commission v. Maseri,* No. 95-6970-CIV-DAVIS, 1995 WL 17144922 (S.D. Fla. complaint filed Oct. 16, 1995). The CFTC complaint alleged that Maseri and Private Research defrauded customers, converted customer funds, and violated the registration provisions of the Commodity Exchange Act (the Act), 7 U.S.C. §§ 1-27f (1994), and CFTC Regulations, 17 C.F.R. §§ 1-199 (1995). The court issued preliminary injunctive orders and, in 1997, made them permanent. The orders prohibited Maseri and Private Research from contracting for the sale of any commodity; acting directly or indirectly as a commodities trading advisor (CTA) or commodities pooling operator (CPO) without being registered as such; and engaging in any fraudulent activities while acting as a CTA or CPO.

In the summer of 1998, Maseri advertised for investors for a commodities brokerage venture. Steven Frankel, who was unaware of Maseri's previous history, responded to the advertisement. In July 1998, Maseri hired Scott to represent him in negotiations with Frankel aimed at establishing a forex brokerage company.[1] In August 1998, Maseri and Frankel created International Currency Exchange Corporation, a Nevada corporation, later renamed Intercontinental Currency Exchange Corporation (ICEC). They each owned a fifty-percent share of the company. They met, along with Scott, on August 4, 1998, to sign the stockholders' agreement. Before Maseri arrived for the meeting, Frankel questioned Scott about Maseri. Scott failed to tell Frankel about CFTC's suit against Maseri, the court order prohibiting Maseri from entering into certain business transactions, or Maseri's criminal history, even though this information was public and nonconfidential. During the course of their conversation, Scott made statements to the effect that Maseri was "an honest man."

During the August 4 meeting, Scott agreed to represent ICEC. At a minimum, Scott agreed to prepare new account form documents for ICEC. Frankel put up $5000 in equity for the venture and loaned ICEC $180,000.

In November 1998, the federal court entered a final order of judgment against Maseri in the *Maseri* case. Prudential Securities, Inc. (Prudential), as a holder of ICEC assets, filed an interpleader action against CFTC in the United States District Court for the Southern District of Florida and notified ICEC that its assets would be frozen until released by the court. *Prudential Securities, Inc. v. Commodity Futures Trading Commission,* No. 98-8891-CIV-MIDDLEBROOKS (S.D.Fla.). Maseri, as ICEC's president and chief operating officer, hired Scott to attempt to unfreeze ICEC's assets.

Frankel was unaware of these events until December 15, 1998. On that date, because he was unable to contact Maseri by telephone, he drove to the office and discovered that law enforcement officers had raided ICEC. At that point, Maseri told Frankel about his problems with the CFTC and referred him to Scott.

Frankel contacted Scott, who told him that he had been retained to represent ICEC and, since Frankel had loaned ***312** ICEC money, he would be representing Frankel in getting his funds released to him. On December 18, 1998, Frankel entered into a retainer agreement with Scott in which Scott agreed "to attempt to have the accounts which hold your funds at Prudential released."[2] Three days later, Frankel signed an addendum to his retainer agreement with Scott in which "Frankel, not as a Director, but as a lender to ICEC," ratified, adopted, and approved his earlier hiring of Scott.

ICEC also maintained accounts at Donaldson, Luftkin & Jenrette (DLJ). These accounts were controlled by Dreyfus Service Corporation (Dreyfus). In 1999, Dreyfus, like Prudential, filed an interpleader action in the United States District Court for the Southern District of Florida.

Dreyfus Service Corp. v. Intercont'l Currency Exch. Corp., No. 99-6151-CIV-DAVIS (S.D.Fla.). Scott, on behalf of ICEC investor Moresea, Ltd., filed a counterclaim against Dreyfus and a third-party complaint against DLJ, alleging that ICEC had conducted business in an illegal manner.

On January 6, 1999, Scott filed a petition for emergency relief on behalf of ICEC in the *Prudential* interpleader action. The petition included a cross-claim against Prudential on behalf of ICEC investors.

On January 15, 1999, the federal district court supplemented the final judgment in the *Commodity Futures Trading Commission v. Maseri* case to make ICEC subject to receivership. As a result, ICEC's assets went into receivership. The receiver notified Prudential that ICEC's assets were to be turned over to satisfy the judgment.

On February 9, 1999, on behalf of ICEC investor Investcan, Ltd., Scott filed an answer and a counterclaim against Prudential, alleging that Maseri and ICEC had operated in violation of Florida law. Prudential wrote to Scott on February 12 and 19, 1999, to object to his dual representation of ICEC and its investors on the basis of conflicts of interest. Despite Prudential's objection, Scott filed a counterclaim on February 24, 1999, on behalf of ICEC investors Roger Lennon and The Lennon Trust.

The court in *Prudential* dismissed the ICEC investors' cross-claim on March 17, the Investcan cross-claim on April 13, and the Lennon counterclaim on April 19. Scott filed a first amended counterclaim against Prudential on behalf of ICEC investors on April 23; that counterclaim also asserted unlawful conduct by ICEC.

The court dismissed the *Dreyfus* case on June 14, 2000, and the *Prudential* case on January 4, 2001. Prudential released the ICEC funds to the receiver. Scott tried to reopen the *Prudential* case over a year later, on January 18, 2002, and to file a cross-claim against his former client Frankel on behalf of ICEC and its investors/depositors for breach of contract, legal malpractice, and fraud. The court denied his motion on February 4, 2002. That same day, Scott filed a motion on behalf of Investcan, seeking joinder to the cross-claim against Frankel. On February 13, Scott filed a motion to reconsider reopening the *Prudential* case on behalf of ICEC and all persons who opened an account with ICEC.

Meanwhile, on January 29, 2002, the federal district court in *Commodity Futures Trading Commission v. Maseri* issued an order discharging the receiver and granting *313 the receiver's final report of distribution. On February 5, 2002, Scott filed a motion for reconsideration in that case on behalf of ICEC to contest the order of distribution. On February 19, Scott wrote to Frankel and Maseri, urging them to appeal the court's order of discharge and demanding a retainer for legal fees to represent ICEC in an appeal.

On February 20, 2002, Frankel demanded that Scott cease representing ICEC. Five days later, on February 25, 2002, Scott wrote to Frankel and Maseri, claiming that "no impasse of ICEC Nev[ada] management exists in regard to this case because both of you agreed for our firm to obtain recovery of the ICEC Nev [ada] deposits without regard to where they were located. We will keep you advised of developments."

On February 26, 2002, Frankel filed a motion to disqualify Scott on the basis of a conflict of interest. Scott wrote to Frankel on March 7, 2002, through Frankel's attorney, stating, "ICEC Nev[ada] depositors have a superior right to the proceeds taken from ICEC Nev[ada] to pay the fees and costs of the Receiver than does Mr. Frankel either as shareholder or lender to ICEC Nev[ada]," and affording Frankel the "opportunity to respond to the proposed appeal by ICEC Nev[ada] of the order that discharged the receiver."

On April 22, 2002, Scott filed suit against Frankel and Maseri, on behalf of ICEC investor Investcan, in the United States District Court for the Southern District of Florida, asserting Investcan's right to a return of its funds. *Investcan Int'l, Ltd. v. Frankel,* No. 02-60565-CIV-MIDDLEBROOKS (S.D. Fla. complaint filed Apr. 22, 2002).

The court denied Scott's motion for reconsideration in *Prudential* on May 24, 2002, noting

> a serious question as to ICEC's putative counsel's ability to represent ICEC in this matter.... This raises conflict issues.... The fact appears to be that *at this date,* Mr. Scott *has* represented Mr. Frankel in his individual capacity, in an attempt to get back monies

> Mr. Scott apparently now seeks on behalf of another client.

Scott appealed the order. The Eleventh Circuit Court of Appeals affirmed. *Moresea, Ltd. v. Prudential,* No. 02-13523-JJ (11th Cir.).

On July 3, 2002, Scott amended the Investcan complaint to allege that Frankel and Maseri failed to ensure that ICEC operated legally and thus defrauded plaintiffs of their money. The court disqualified Scott on October 4, 2002, on the basis of a conflict of interest in violation of Rule Regulating the Florida Bar 4-1.9. That decision was affirmed by the Eleventh Circuit Court of Appeals on March 28, 2003. *Investcan Int'l, Ltd. v. Frankel,* 65 Fed.Appx. 715 (11th Cir. 2003).

Based on the factual findings, the referee recommends that Scott be found guilty of violating Rules Regulating the Florida Bar 4-4.1(a) (prohibiting lawyer from making false statement of material fact or law to third party in course of representing client)-one count; 4-1.7(a) (1993) (prohibiting lawyer from representing client if representation will be directly adverse to interests of another client unless lawyer reasonably believes representation will not adversely affect lawyer's responsibilities to and relationship with other client and each client consents after consultation)-five counts; 4-1.9(a) (1993) (prohibiting lawyer who formerly represented client from representing another person in same or substantially related matter in which that person's interests are materially adverse to interests of former client unless former client consents after consultation)-six ***314** counts; 4-1.16(a)(1) (1993) (prohibiting lawyer from representing client or requiring lawyer to withdraw where representation will result in violation of Rules of Professional Conduct or law)-seven counts; and 4-8.4(c) (prohibiting lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation)-one count.

The referee recommends that Scott be suspended for eighteen months and taxed with the Bar's costs. In recommending the eighteen-month suspension, the referee considered two mitigating factors-the absence of a prior disciplinary record and Scott's age (seventy). The referee found no aggravating factors. In recommending an eighteen-month suspension, the referee did not identify the particular Florida Standards for Imposing Lawyer Sanctions on which he relied. Neither did he cite to any previous cases involving similar fact patterns in which this Court imposed eighteen-month suspensions.

Scott petitioned for review of the referee's report. He argues that the Bar's complaint should have been dismissed as barred by the statute of limitations for Bar disciplinary proceedings; Scott was not obligated to tell Frankel about Maseri's criminal history or legal problems with the CFTC; the referee's finding that he misled Frankel was unsupported; the referee's finding that he represented Frankel was unsupported and Frankel had waived any real or potential conflict of interest; and Scott's duty to protect the public took precedence over his duty to maintain client confidentiality or to decline the representation of a client where a conflict of interest exists or is likely to arise. The Bar filed a cross-petition, seeking review of the sanction recommendation. The Bar argues that a three-year suspension is the appropriate sanction for the proven misconduct.

ANALYSIS

Scott previously raised the statute-of-limitations issue in a motion to dismiss filed in this Court. The Court rejected Scott's statute-of-limitations argument and denied the motion to dismiss. We will not now revisit this issue, which we have previously determined adversely to Scott.

[1] Scott takes issue with the referee's finding that Scott misled Frankel by representing that Maseri was an honest man. Scott argues that he had no duty to advise Frankel of public, nonconfidential information about Maseri. The referee's finding in this regard is supported by competent, substantial evidence. Critically, if a referee's findings of fact are supported by competent, substantial evidence in the record, the Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick,* 756 So.2d 79, 86 (Fla.2000); *see also Fla. Bar v. Jordan,* 705 So.2d 1387, 1390 (Fla.1998).

[2] In this instance, the referee found that Scott's action in telling Frankel that Maseri was an "honest man" triggered a duty on his part to also reveal to Frankel the negative information he had concerning Maseri that could have impacted Frankel's decision to go into business with Maseri. This finding is also supported by the record. Frankel, testifying about his conversation with Scott at the August 4, 1998, meeting, stated: "I asked him

what he knew of him, and he indicated to me that Mr. Maseri had never lied to him, that he was an honest man, that he had never lost any money with him, and generally he left me feeling very good about him." He further testified that Scott did not tell him anything negative about Maseri during their conversation and that if Scott had told him anything negative, specifically about the public nonconfidential information ***315** Scott had about Maseri, Frankel would have gotten up and left.

More importantly, Scott admitted that his intent was to convince Frankel that Maseri was an honest man so as to ensure that Frankel proceeded with the proposed business deal. Concerning his motivation in telling Frankel that Maseri had never lied to him, Scott testified:

> Q Isn't it true that in response to Mr. Frankel's questions, you told him that Maseri had never lied or cheated you because you wanted Frankel to infer that Maseri was an honest man?
>
> A I gave a deposition and acknowledged that. When he started asking his questions, my goal was to preserve the deal. I already knew that in the agreement there was no representation of past litigation or regulation history. I already knew and had discussions with Maseri about what had he disclosed to Frankel and what he had not.
>
> I felt that at a closing that had been going on and negotiations back and forth for seven or eight days, for those questions to come up, I felt blindsided and as though the guy was trying to make me personally responsible for his problems instead of serving as his own lawyer, which I told him at the outset he had to do, and I told him-I thought I gave him plenty of notice that there was something there for him to worry about when I told him he ought to go get his own lawyer. You know, you can only take a cripple so far.
>
> Q Do I understand you correctly to have just said that yes, you wanted him to infer that Maseri was an honest man because you didn't want the deal to get blown?
>
> A That is true.

Scott also admitted that if the deal had been "blown," he would not have been able to look forward to earning any fees from the ICEC venture.

[3] The referee's finding that Scott represented Frankel is also supported by competent, substantial evidence in the record. The Bar introduced two retainer agreements, dated December 18 and 21, 1998, into evidence. The December 18 agreement states: "After my explanation to you of the existence of potential conflicts of interests among the depositors, you have requested *that our firm represent you* in the limited capacity to attempt to have the accounts which hold your funds at Prudential released." (Emphasis added.) In the December 21 "Addendum to Retainer Agreement," Frankel "consents, ratifies, and approves the employment of The Scott Law Firm, P.A. (the 'Firm') upon the terms outlined above."

In addition, both Scott and Frankel testified concerning Scott's representation. When discussing the December 18 and 21 retainer agreements, Scott stated: "I also believed that I needed to get [a] retainer from him, which I *now* prefer to characterize as a waiver." (Emphasis added.) The clear implication of this statement is that Scott himself viewed the documents as retainers at the time he sent them to Frankel.

We reject Scott's argument that it was permissible for him to represent the ICEC investors despite the conflicts presented by his representation under some kind of duty-to-the-public exception. No such exception exists. To the extent that ICEC investors wanted to pursue claims against Scott's past or present clients with interests adverse to theirs, Scott should have referred them to other counsel, someone without a disqualifying conflict.

[4] We next address the referee's guilt recommendations. The Court has repeatedly stated that the referee's factual findings must be sufficient under the applicable ***316** rules to support the recommendations as to guilt. *See Fla. Bar v. Shoureas,* 913 So.2d 554, 557-58 (Fla.2005). Scott argues that the referee's guilt recommendations on the conflict-of-interest issue are unsupported by the factual findings. His argument fails.

[5] An attorney engages in unethical conduct when he undertakes a representation when he either knows or should know of a conflict of interest prohibiting the representation. *Fla. Bar v. Cosnow,* 797 So.2d 1255, 1257 (Fla.2001). The referee recommends that Scott be found guilty of violating Rules Regulating the Florida Bar 4-1.7(a), 4-1.9(a), and 4-1.16(a)(1) for his conflict-of-interest conduct in this case.

Rule 4-1.7(a) provides that an attorney "shall not represent a client if the representation of that client will be directly adverse to the interests of another client" unless: (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and (2) each client consents after consultation.

Rule 4-1.9(a) provides that a lawyer who formerly represented a client shall not "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 consents after consultation."

Rule 4-1.16(a)(1) provides that a lawyer shall not represent a client or shall withdraw where "the representation will result in violation of the Rules of Professional Conduct or law."

Scott represented, either seriatim or in conjunction: Maseri's company, Private Research, in the *Maseri* case; Maseri in business negotiations with Frankel; ICEC (owned in equal parts by Maseri and Frankel) in the preparation of certain forms and in attempts to have ICEC's assets unfrozen; Frankel, individually, as the maker of a loan to ICEC, for the recovery of the money Frankel loaned to ICEC; and individual ICEC investors, for recovery of the money they invested with ICEC and in a lawsuit for fraud against Maseri and Frankel. All of the representations undertaken by Scott after the creation of ICEC involved claims for ICEC's assets in one way or another. The interests of ICEC, Maseri, Frankel, and the individual ICEC investors were all directly adverse to one another because all had claims to the same pool of money.

[6] Furthermore, even if the documents Frankel signed on December 18 and 21, 1998, were waivers of conflict rather than retainer agreements, as Scott argues, Frankel's waiver would have been ineffective. Some kinds of conflicts of interest cannot be waived by a client. For example, in *Florida Bar v. Feige,* 596 So.2d 433, 434 (Fla.1992), Feige represented himself and his client in a suit by his client's ex-husband for the return of alimony payments made after Feige's client had remarried. Feige had not represented the client in the divorce proceedings, but was aware of the provision in the couple's marital settlement agreement requiring the ex-husband to pay alimony until the ex-wife, Feige's client, died or remarried. His client was aware of the conflict in Feige's representing himself and her and agreed to waive the conflict. This Court held that the conflict was the type that could not be waived and suspended him for two years.

[7] The conflicts of interest in this case were as directly adverse as those in *Feige* and equally unwaivable. Even if the conflicts had been waivable, Frankel's waiver would have been, at best, void or voidable. At the time Frankel signed the retainer agreements, he was unaware of the severity of the conflict. Frankel testified that he ***317** believed that his and everyone else's money was intact, just frozen, when he retained Scott. He did not discover that most of the money was gone until much later.

Thus, the referee's findings more than amply support the referee's recommendations of guilt as to the conflict-of-interest claims, and accordingly, we approve these guilt recommendations.

[8] Scott also argues that the recommendation that he be found guilty of a misrepresentation is unsupported by the factual findings. We reject this argument as well. The referee's findings adequately support his recommendation that Scott be found guilty of violating rules 4-4.1(a) (prohibiting lawyer from making false statement of material fact or law to third person in course of representing a client) and 4-8.4(c) (prohibiting lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The referee found that Scott made a misrepresentation to Frankel when he told Frankel that Maseri had never lied to him, indicating that Maseri was an honest man. The referee also found that Scott failed to tell Frankel about CFTC's suit against Maseri, the court order prohibiting Maseri from entering into certain business transactions, or Maseri's criminal history, even though this information was public and nonconfidential. The combination of the two circumstances constituted a misrepresentation. These factual findings are sufficient to support the referee's recommendations that Scott be found guilty of violating rules 4-4.1(a) and 4-8.4(c).

[9] [10] We next consider the appropriate sanction for Scott's misconduct. In reviewing a referee's recommended discipline, the Court's scope of review is broader than that afforded to the referee's findings of fact because ultimately it is the Court's responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson,* 538 So.2d

852, 854 (Fla.1989); *see also* art. V, 15, Fla. Const. However, generally speaking, the Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer,* 753 So.2d 555, 558 (Fla.1999). The referee in this case did not cite to any cases or standards in support of the sanction recommendations.

[11] The Bar argues in its cross-petition that the referee's recommendation of an eighteen-month suspension is unsupported by the Florida Standards for Imposing Lawyer Sanctions and our caselaw and that the suspension should be for three years. We agree and instead impose a three-year suspension.

In support of its argument that a three-year suspension is the appropriate discipline, the Bar cites to standards 4.32 and 7.2, as well as *Florida Bar v. Dunagan,* 731 So.2d 1237 (Fla.1999) (suspending attorney for ninety-one days for representing husband in dissolution proceeding after he had represented both husband and wife in connection with various business matters and business was marital asset); *Florida Bar v. Wilson,* 714 So.2d 381 (Fla.1998) (suspending attorney for one year for agreeing to represent wife in dissolution proceeding after previously representing couple in unrelated declaratory judgment action and for other misconduct); *Florida Bar v. Hmielewski,* 702 So.2d 218 (Fla.1997) (suspending attorney for three years for making deliberate misrepresentations in medical malpractice action despite significant mitigating factors); *Florida Bar v. Calvo,* 630 So.2d 548, 549 (Fla.1993) (disbarring attorney for his reckless misconduct with regard to securities offering, including failing to disclose to potential ***318** investors that one of principals involved had been indicted for mail fraud); *Florida Bar v. Mastrilli,* 614 So.2d 1081 (Fla.1993) (suspending attorney for six months for filing suit against one client on behalf of another client in matter for which attorney had been retained by both of them); and *Feige,* 596 So.2d 433 (suspending attorney for two years for representing himself and client when their interests were adverse, despite client's consent to dual representation).

Standard 4.32 provides that suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. Standard 7.2 provides that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Of course, the standards do not distinguish between suspensions of different lengths. These standards support the referee's recommendation to the same extent that they support the Bar's position.

However, if the egregiousness of the conduct is viewed as falling along a continuum, the closer the conduct falls on the continuum to the dividing line between suspension and disbarment, the longer the suspension that such conduct would warrant. In looking at the corresponding standards for disbarment in these same categories, it appears that Scott's conduct comes close to that dividing line in both cases. Standard 4.31 provides, in pertinent part, that disbarment is appropriate when a lawyer, without the informed consent of the client, simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client, or represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

Standard 7.1 provides that disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

In the case of both standards, it appears that Scott's conduct falls close to the dividing line on the continuum between disbarment and suspension. This supports the imposition of a suspension close to the dividing line between suspension and disbarment. The maximum length of a definite-term suspension under the Rules Regulating the Florida Bar is three years. R. Regulating Fla. Bar 3-5.1(e).

Feige is particularly helpful in gauging an appropriate sanction in this case. *Feige* involved a lawyer who engaged in an unwaivable conflict of interest and who failed to inform a third party of nonconfidential information

under circumstances that allowed his client to perpetrate a fraud on her ex-husband, the third party. Scott engaged in precisely the same kinds of misconduct in this case but to a more egregious extent. This Court suspended Feige for two years. Because Scott's misconduct was more egregious, it warrants a longer suspension than that imposed in *Feige.*

The more recent cases of *Florida Bar v. Head,* 27 So.3d 1 (Fla.2010), and *Florida Bar v. Herman,* 8 So.3d 1100 (Fla.2009), also involved similar but less egregious misconduct. In *Head* we suspended a lawyer ***319** for one year after he created a conflict of interest between himself and his clients by convincing them to pay him $10,000 from the proceeds of a mortgage refinancing when his clients' primary objective in arranging the mortgage refinancing had been to pay off their biggest creditor and paying the lawyer $10,000 frustrated that objective. *Head,* 27 So.3d at 9. In addition, the lawyer was not forthcoming in advising the bankruptcy court in his clients' case that he had received $10,000 in fees. He also filed a "Suggestion of Bankruptcy" for his firm in his clients' bankruptcy case when he had not filed a petition for bankruptcy for the firm. *Id.* at 5.

In *Herman* we suspended a lawyer for eighteen months for going into direct business competition with a client of his firm and representing both companies without advising the first client of the conflict or obtaining a waiver. *Herman,* 8 So.3d at 1103. We found his failure to inform his first client about his own company was "dishonest and deceitful" and motivated by "monetary concerns." *Id.*

CONCLUSION

Accordingly, William Sumner Scott is hereby suspended from the practice of law for three years and ordered to reimburse the Bar for its costs. The suspension will be effective thirty days from the filing of this opinion so that Scott can close out his practice and protect the interests of existing clients. If Scott notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Scott shall accept no new business from the date this opinion is filed until he is reinstated by this Court.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from William Sumner Scott in the amount of $5,637.71, for which sum let execution issue.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

All Citations

39 So.3d 309, 35 Fla. L. Weekly S333

Footnotes

1 Frankel testified before the referee that a forex brokerage company is a currency exchange brokerage company.

2 The agreement reflects that Scott was retained by ICEC on November 30, 1998, but was terminated on December 12, 1998.

End of Document

III.B.

125 So.3d 309
District Court of Appeal of Florida,
First District.

ANHEUSER–BUSCH COMPANIES, INC. and Anheuser–Busch, Incorporated, Petitioners,
v.
Christopher STAPLES, Respondent.

No. 1D13–1038.
|
Oct. 9, 2013.
|
Rehearing Denied Nov. 26, 2013.

Synopsis

Background: Injured worker, who filed negligence/premises liability action against defendant corporations, seeking damages for the injuries he sustained in the accident occurring on their premises, brought motion to disqualify law firm representing defendants, which also represented worker's employer with respect to employer's workers' compensation lien claim against any judgment awarded to worker as a result of his lawsuit. The trial court granted motion, and disqualified the law firm. Defendants filed petition for writ of certiorari and challenged the order.

[Holding:] The District Court of Appeal, Lewis, C.J., held that defendants waived or abandoned argument that trial court departed from essential requirements of law in determining that conflict of interest existed and in disqualifying law firm.

Petition denied.

Benton, J., concurred with opinion.

Makar, J., filed dissenting opinion.

West Headnotes (5)

[1] **Appeal and Error**
⇦ Insufficient discussion of objections

Alleged tortfeasors waived or abandoned argument that trial court departed from essential requirements of law in determining that conflict of interest existed and in disqualifying law firm representing both alleged tortfeasors in injured workers' negligence suit, and worker's employer, with respect to its workers' compensation lien claim against any judgment awarded a result of workers' tort suit; only issues alleged tortfeasors raised on appeal were whether worker had standing to seek disqualification of the law firm and whether, if worker had requisite standing to do so, the existence of indemnity agreement that was not brought to trial court's attention until filing of alleged tortfeasors' motion for rehearing established that their interests were fundamentally antagonistic to worker's employer's interest. West's F.S.A. Bar Rule 4–1.7.

1 Cases that cite this headnote

[2] **Certiorari**
⇦ Particular proceedings in civil actions

Certiorari is the appropriate remedy to review an order granting a motion to disqualify counsel.

Cases that cite this headnote

[3] **Attorney and Client**
⇦ Disqualification in general

Disqualification of a party's counsel is an extraordinary remedy that should be resorted to sparingly.

Cases that cite this headnote

[4] **Appeal and Error**
⇦ Necessity of presentation in general

An appellate court is not at liberty to address issues that were not raised by the parties.

4 Cases that cite this headnote

[5] **Attorney and Client**
⇦ Particular Cases and Problems

Trial court did not depart from the essential requirements of the law in determining that it was unreasonable for law firm to believe that it could provide competent and diligent representation to both alleged tortfeasors and injured worker's employer, as basis for disqualifying the law firm; alleged tortfeasors' interest lay in minimizing the damages awarded by a verdict or settlement in worker's tort action, while the employer's interest lie in helping worker recover the maximum possible damages against alleged tortfeasors so that it could maximize its recovery on its workers' compensation lien. West's F.S.A. Bar Rule 4–1.7(b).

Cases that cite this headnote

Attorneys and Law Firms

***310** E.T. Fernandez, III and Brian Sebaaly of Fernandez Trial Lawyers, P.A., Jacksonville, for Petitioners.

Philip S. Kinney of Kinney & Sasso, PL, Jacksonville and Brett Hastings of Brett A. Hastings, P.A., Jacksonville, for Respondent.

Opinion

LEWIS, C.J.

Petitioners, Anheuser–Busch Companies, Inc. and Anheuser–Busch, Incorporated, petition for a writ of certiorari and challenge an Order Disqualifying Law Firm. We conclude that the trial court, based upon the record before it, did not depart from the essential requirements of the law in determining that a conflict of interest existed and in disqualifying the law firm representing both Petitioners, the alleged tortfeasors in a negligence suit brought by Respondent, Christopher Staples, and Respondent's employer with respect to its workers' compensation lien claim against any judgment awarded to Respondent as a result of his lawsuit. We, therefore, deny the certiorari petition.

After he was injured while working for his employer, Respondent received workers' compensation benefits. He subsequently filed a negligence/premises liability action against Petitioners, seeking damages for the injuries he sustained in the accident occurring on their premises. The law firm at issue entered an appearance on behalf of Petitioners in the tort action. The firm also filed a Notice of Lien pursuant to section 440.39(3)(a), Florida Statutes, in the tort action on behalf of the employer. Prior to a scheduled mediation, Respondent moved to disqualify the law firm. Both Petitioners and Respondent's employer filed a Consent to Representation with respect to the ***311** law firm. The trial court entered an order disqualifying the firm, finding in part that the interests of the firm's clients were directly adverse to one another. After determining that Respondent had standing to raise the conflict of interest, the trial court noted that even if Respondent lacked the requisite standing, it would have raised the issue itself and reached the conclusion that disqualification was necessary. It also determined under Rule 4–1.7 of the Florida Rules of Professional Conduct that the conflict could not be waived because it was unreasonable for the firm to believe that it would be able to provide competent and diligent representation to each affected client and because the representation of Petitioners involved the assertion of a position adverse to Respondent's employer.

Petitioners filed a motion for rehearing and claimed for the first time that an indemnity agreement existed between themselves and the employer and that, as a result, the trial court's conclusion that their interests were fundamentally antagonistic to the employer's interests was erroneous. The indemnity agreement was not attached to the motion or to an accompanying affidavit. The trial court denied the motion for rehearing, and this proceeding followed.

[1] [2] [3] Certiorari is the appropriate remedy to review an order granting a motion to disqualify counsel. *See Transmark, U.S.A., Inc. v. State, Dep't of Ins.*, 631 So.2d 1112, 1116 (Fla. 1st DCA 1994). While it is true, as Petitioners and the dissent point out, that disqualification of a party's counsel is an extraordinary remedy that should be resorted to sparingly, *see Vick v. Bailey*, 777 So.2d 1005, 1007 (Fla. 2d DCA 2000), we find no departure from the essential requirements of the law in this case. The dissent acknowledges that the law firm's representation of Petitioners and Respondent's employer amounted to a conflict of interest under rule 4–1.7(a) of the Florida Rules of Professional Conduct. The dissent then characterizes the issue in this proceeding as being whether the trial court's legal ruling that Petitioners and Respondent's

employer could not waive the conflict departed from the essential requirements of the law. However, the only issues Petitioners have raised before us are whether Respondent had standing to seek disqualification of the law firm and whether, if Respondent had the requisite standing to do so, the existence of the indemnity agreement that was not brought to the trial court's attention until the filing of Petitioners' motion for rehearing established that Petitioners' interests were not fundamentally antagonistic to Respondent's employer's interest. [1]

Contrary to the dissent's characterization of the issue presented in this case, Petitioners have not argued in this proceeding that the trial court's analysis under rule 4–1.7(b) was erroneous, that the trial court departed from the essential requirements of the law in concluding that the law firm could not reasonably believe that it was capable of providing competent and diligent representation to each affected client under rule 4–1.7(b)(1), or that mediation does not constitute a "proceeding before a tribunal" for purposes of rule 4–1.7(b)(3). In fact, Petitioners did not cite to rule 4–1.7(b) in their certiorari petition or in their reply to Respondent's response. Nor was any mention of the rule or the trial court's analysis as to the rule ***312** made at oral argument. Although the dissent correctly notes that Petitioners cited to *State Farm Mutual Automobile Insurance Co. v. K.A.W.*, 575 So.2d 630 (Fla.1991), and *Anderson Trucking Service, Inc. v. Gibson,* 884 So.2d 1046 (Fla. 5th DCA 2004), in their certiorari petition, neither of those cases cited to rule 4–1.7(b). Moreover, Petitioners relied upon those two cases in support of their argument that Respondent lacked standing to seek disqualification of the law firm, not in support of any of the issues raised by the dissent. Furthermore, while Respondent's response to the certiorari petition contains one citation to rule 4–1.7(b), Petitioners made no mention of the rule or the issue of waiver or consent in their reply to the response.

[4] **[5]** The dissent obviously finds certain aspects of this case concerning. However, we are not at liberty to address issues that were not raised by the parties. *See* Philip J. Padovano, *Florida Appellate Practice* § 18.5, at 340–41 (2011 ed.) (noting that an issue on appeal must be one that was raised by a party to the proceeding and citing *Lightsee v. First National Bank of Melbourne,* 132 So.2d 776 (Fla. 2d DCA 1961), for the proposition that an appellate court is "not authorized to pass upon issues other than those properly presented on appeal"); *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.*, 972 So.2d 275, 281 (Fla. 2d DCA 2008) (deeming any potential issue pertaining to the final judgment for attorney's fees and costs waived or abandoned as no argument regarding the issue was made on appeal). [2]

Accordingly, because Petitioners have failed to establish that the trial court departed from the essential requirements of the law with respect to the specific issues actually raised in this proceeding, we DENY their certiorari petition on the merits.

BENTON, J., concurs with opinion; MAKAR, J., Dissenting.

BENTON, J., concurring.

By petition for writ of certiorari, the defendants in a premises liability case ask us to quash the order disqualifying their trial counsel on conflict-of-interest grounds. They argue here, as they did below, that they have given informed consent in writing to the representation, well aware that the same law firm represents the plaintiff's employer, and that the same law firm has filed a lien asserting the plaintiff's employer is entitled to reimbursement, from any recovery the plaintiff may receive from petitioners, for workers' compensation benefits that the employer paid the plaintiff.

After reciting the facts in its order disqualifying law firm, [3] the trial court ruled ***313** that a conflict existed (and that whether or not plaintiff had standing to raise the conflict was "likely moot," [4]) and then went on:

> The next question to be answered is therefore: Can this conflict be waived by the clients?
>
> An untitled subsection (b) of Rule 4–1.7 ("Conflict of Interest; Current Clients"), Florida Rules of Professional Conduct, states:
>
> (b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

Each of these four criteria must be met for a lawyer to proceed with dual representation in the face of a conflict of interest. In the present case, neither criterion (1) nor criterion (3) is met. It is not reasonable for the challenged law ***314** firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.

Because fewer than all the requirements of the rule are met, client consent to continued dual representation by the law firm is insufficient to permit the firm to continue its representations in the face of a conflict. The conflict is thus not one capable of being waived by client consent.

As is clear from the trial court's order, the trial court had not been told of any indemnity agreement between the owner of the premises and the plaintiff's employer when its order was entered. Petitioners did advert to such an agreement in an affidavit attached to their motion for rehearing in the trial court. But they never favored the trial judge with a copy of the indemnity agreement. That did not surface until it appeared in the appendix to the amended petition for writ of certiorari.

Yet in this proceeding petitioners rely heavily on the indemnity agreement for the proposition that any conflict of interest was waived. (Disputing this contention at oral argument, respondent took the position that the agreement did not apply in any event because petitioners alone were alleged to have been negligent.) The belatedly disclosed indemnity agreement is plainly not something we should address now for the first time, or a proper basis for issuance of the writ. For this reason alone, the petition should be denied.

If the respondent had never filed suit, or if the employer had never filed the lien aligning itself against the defendant in the main action, the conflict might have been waivable. But by the time the trial court entered the order under challenge here, these parties were "adversaries in litigation." As a comment to the Third Restatement of the Law Governing Lawyers explains:

Conflicts between adversaries in litigation. When clients are aligned directly against each other in the same litigation, the institutional interest in vigorous development of each client's position renders the conflict nonconsentable (see § 128, Comment *c*, & § 129). The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them. While the parties might give informed consent to joint representation for purposes of negotiating their differences (see § 130, Comment *d*), the joint representation may not continue if the parties become opposed to each other in litigation.

Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iii) (2013). The employer's lien was filed, not with the mediator, but with the court. Thereafter, the conflict between the employer and the petitioners became, in the terminology of the restatement, "nonconsentable."

The filing of the lien in this case was "the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal." R. Regulating Fla. Bar 4–1.7(b)(3). The premises liability claim remained unresolved. *Cf. City of Hollywood v. Lombardi,* 770 So.2d 1196, 1198–1202 (Fla.2000). Counsel filed the employer's lien in the judicial proceeding, not in the mediation, which was, after all, court-ordered. The employer-by seeking to participate in any recovery with its employee, the plaintiff (respondent)-asserted a position (as a statutory indemnitee) adverse to ***315** petitioners, the defending owners of the premises "in the same proceeding before a tribunal," the Circuit Court for the Fourth Judicial Court. *Id.* See generally *The Club at Hokuli'a, Inc. v. Am. Motorists Ins. Co.,* No. 10–00241 JMS–LEK, 2010 WL 3465278, at *5 (D.Haw. Sept.3, 2010) *report and recommendation adopted sub nom,* 2010 WL 4386741 (D.Haw.2010) ("Oceanside notes that, as a general rule, indemnitors are aligned with their indemnitees in cases where the principal obligation is in dispute.").

MAKAR, J., dissenting.

I.

While at an Anheuser–Busch (A–B) brewing and shipping facility in Jacksonville, Florida, Christopher Staples was involved in an accident connected to his employment with Container Carrier Corporation (Container). Mr. Staples received workers' compensation benefits from Container, which is self-insured. Mr. Staples then filed suit against A–B, seeking to recover on negligence and premises liability theories.

Fernandez Trial Attorneys, P.A. (Fernandez), which had been A–B's legal counsel in the past, appeared on behalf of A–B in the lawsuit. Pertinent to this proceeding, Fernandez also filed a notice of lien on behalf of Staples's employer, Container, against any future judgment in Mr. Staples's favor to recoup its expenditures in the workers' compensation proceeding.

Mediation in the matter was scheduled, but cancelled after Mr. Staples's counsel made an issue of Fernandez representing both A–B and Container at the mediation. Fernandez indicated that it would attend on behalf of A–B and that a non-lawyer claims manager employed by Container would attend on behalf of that company. Upon cancellation of the mediation, Mr. Staples promptly filed a motion alleging that a conflict of interests existed between A–B and Container and that Fernandez should be disqualified from further representing A–B and Container in the case.

Fernandez responded with client waivers demonstrating that both A–B and Container understood and consented to Fernandez representing their interests jointly. Both companies waived "any conflict which may currently or in the future exist because of the law firm's representation" of them in the litigation. The trial court, after considering legal memoranda and argument of counsel, issued a lengthy order that, distilled to its core, found as a matter of law that a non-waivable conflict existed as to Fernandez's concurrent representation of A–B and Container. The trial court prohibited Fernandez from representing either A–B or Container, allowing both companies thirty days to get new lawyers to represent them individually. Fernandez seeks certiorari review, asserting the trial court departed from the essential requirements of law in denying A–B and Container their right to be represented by counsel of their choice. *See Yang Enterprises, Inc. v. Georgalis,* 988 So.2d 1180, 1183 (Fla. 1st DCA 2008) ("Certiorari is the appropriate remedy to review orders denying a motion to disqualify counsel."). As this Court recently noted, "because disqualification of counsel denies a party its counsel of choice, such disqualification constitutes a material injury not remediable on plenary appeal." *Walker v. River City Logistics Inc.,* 14 So.3d 1122, 1123 (Fla. 1st DCA 2009). Thus, the only question is whether the order below departed from the essential requirements of law. *Id.*

II.

Disqualification of a lawyer is a serious matter, so serious that it is highly disfavored ***316** because it operates to deprive a litigant of its chosen attorney, interfering with a relationship having constitutional implications. *In re BellSouth Corp.,* 334 F.3d 941, 955–56 (11th Cir.2003). It follows that disqualification of counsel is an extraordinary step, resorted to only sparingly. *Melton v. State,* 56 So.3d 868, 872–73 (Fla. 1st DCA 2011) (citing *Minakan v. Husted,* 27 So.3d 695 (Fla. 4th DCA 2010); *Walker,* 14 So.3d 1122 (Fla. 1st DCA 2009)). Motions for disqualification are "generally viewed with skepticism because ... [they] are often interposed for tactical purposes." *Yang Enterprises,* 988 So.2d at 1183 (citations omitted).

No dispute exists that Fernandez's representation of A–B and Container in this litigation amounts to a conflict as defined under the Rules of Professional Responsibility. *See* R. Regulating Fla. Bar 4–1.7(a). But that does not end the analysis. Both A–B and Container recognized this conflict, voluntarily agreed they both wanted Fernandez to represent them, and explicitly waived the conflict in writing. That was their informed choice to make. What constitutes a conflict under subsection (a) of Rule 4–1.7 is not necessarily a non-waivable conflict under subsection (b); if that were the case no conflicts could ever be waived. The question raised here is whether the trial court's legal ruling, that the conflict between A–B and Container was non-waivable under the circumstances presented, departs from the essential requirements of law.[5] It does for two reasons.

A.

First, the interests of A–B and Container in this routine tort case are not so fundamentally antagonistic that disqualification is compelled. It is not uncommon that clients choose to have one lawyer represent their interests jointly, even if a conflict exists. If clients are fully informed and make voluntary decisions to allow for joint representation (here through written waivers), the basic concerns of the Rules are ameliorated.

To demonstrate that a conflict is one to which a client may consent, four criteria must be met:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

R. Regulating Fla. Bar 4–1.7(b). The trial court set out these criteria in its order, holding that criteria (1) and (3) were not shown. Though the trial court's order is lengthy, the totality of its reasoning as to ***317** these two criteria is contained in these two sentences:

> It is not reasonable for the challenged law firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.

Addressing the first sentence, it is clear legal error to conclude that a lawyer cannot reasonably represent two sophisticated corporate businesses that have voluntarily and specifically averred that they desire the lawyer to jointly represent them and waive in writing "any conflict which may currently or in the future exist because of the law firm's representation" in the matter. To the contrary, it is presumptively reasonable for a lawyer representing A–B and Container under the circumstances of this case at the mediation stage to believe he will be able to "provide competent and diligent representation to each affected client." *Id.* Multi-party representation may not be the norm, but it has become commonplace due to its significant benefits (and risks)[6] that the parties may choose to bear. *See* William E. Wright, Jr., *Ethical Considerations In Representing Multiple Parties In Litigation,* 79 Tul. L.Rev. 1523, 1526 (2005) (discussing ethical considerations and practical issues arising in multiple-party representation) (noting that "applying economic realities and recognizing strategic alliances, it is often advantageous to limit the number of attorneys involved in litigation").

Nothing in the record establishes that joint representation was other than reasonable. Fernandez believed it could provide competent and diligent representation to A–B and Container, an assessment in which both companies concurred. Mr. Staples's counsel could identify no prejudice arising from the joint representation. As such, the trial court's ruling to the contrary simply disregards the voluntary, fully-informed decisions of A–B and Container, thereby depriving *two* clients of their chosen lawyer's services. Harm of this type and magnitude is irremediable once judgment is entered making certiorari appropriate. While trial courts should be wary, as the trial court here was, to potential conflicts that run afoul of the Rules, the joint representation of A–B and Container, supported by written waivers, with no countervailing harm to Mr. Staples, provides no legal basis to conclude that criterion (1) was unmet.

B.

Next, the second sentence—which is an almost verbatim statement of the language of criterion (3)—misapprehends the procedural context of the case. The third criterion only applies where "the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same *proceeding before a tribunal.*" (Emphasis added). This criterion does

not apply in this case at this juncture because mediation is not a "proceeding before a tribunal." The Florida Bar Rules define "Tribunal" as

> a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body ***318** acting in an adjudicative capacity. A ... body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

R. Regulating Fla. Bar 4 (preamble). Mediations do not meet this definition; no neutral official renders a binding legal judgment. Instead, in mediation the "decisionmaking authority rests with the parties." § 44.1011, Fla. Stat. The mediator lacks authority to adjudicate any aspect of a dispute. Fla. R. Med. 10.420(a)(2). Because mediation does not meet the definition of "tribunal," a mediation cannot be a "proceeding before a tribunal" as specified in Rule 4–1.7(b)(3).

Florida Rule 4–1.7 is an analogue of Model Rule of Professional Conduct 1.7, which likewise prohibits representation involving "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Model Rules of Prof'l Conduct R. 1.7. The definition of tribunal is also similar. *Id.* R. 1.0. Notably, the commentary to Model Rule 1.7, discussing paragraph (b)(3), states that "this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under [the terminology rule])." *Id.* R. 1.7 cmt. 17. Because mediation is not a proceeding before a tribunal, criterion (3) of Rule 4–1.7(b) is met, and the conflict presented in this case was one to which A–B and Container may consent at the mediation stage. [7]

That mediation is outside of the Rule's application is consistent with the goal that mediation be a cost-efficient way to resolve disputes. Here, the disqualification order did the opposite; it created a domino effect that multiplied the costs on two companies that did no more than try to reduce their legal expense by using one law firm. Such a result makes little sense in the mediation context.

Beyond that, counsel for Mr. Staples at oral argument was unable to identify any harm to Mr. Staples's interests that would result from the Fernandez firm's joint representation; none. Even if A–B and Container were to hire separate counsel, nothing would prevent the new attorneys from collaborating on behalf of their clients. Given the irremediable harm to A–B and Container it causes, and the absence of any harm to Mr. Staples from the joint representation by Fernandez, the disqualification of Fernandez has no utility other than as an impediment to mediation. If allowed to stand, the order may embolden the tactical use of threats of disqualification as a strategy to gain settlement leverage at the mediation stage by potentially raising litigation costs to opponents. [8]

***319** A side issue that has no bearing on the legal issue presented is the trial court's denial of A–B and Container's motion for rehearing. Perhaps because they believed their written waivers were sufficient to resolve the conflict issue, or even for their own strategic reasons, A–B and Container did not initially disclose a previously signed indemnity agreement between themselves. The agreement —identified in an affidavit submitted with their motion for rehearing-reflects that Container agreed to indemnify A–B for any liability in this case. The effect of the agreement aligned the interests of A–B and Container because any judgment against A–B would be a liability of Container. The trial court was not made aware of this agreement prior to its initial decision; had it been brought to the trial court's attention, it would have been helpful in solidifying that the joint representation met applicable legal standards. Even without the indemnity agreement, the record sufficiently shows that disqualification of Fernandez was unwarranted.

III.

Because the trial court's ruling departs from the essential requirements of law, depriving two clients of the services of their chosen counsel, the disqualification order should be reversed with instructions to allow Fernandez to represent both A–B and Container.

All Citations

125 So.3d 309, 38 Fla. L. Weekly D125

Footnotes

1 Petitioners do not argue that the trial court erred in denying their motion for rehearing. *See Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.,* 88 So.3d 269, 278 (Fla. 1st DCA 2012) (noting that trial courts are not required to consider new issues presented for the first time on rehearing).

2 We note that even if Petitioners had raised the issues addressed by the dissent, we would still deny the certiorari petition. We disagree with the dissent's assertion that the trial court departed from the essential requirements of the law in determining, pursuant to rule 4–1.7(b)(1), that it was unreasonable for the law firm to believe that it could provide competent and diligent representation to both Petitioners and Respondent's employer. As the trial court reasoned based upon the facts before it, Petitioners' interest would lie in minimizing the damages awarded by a verdict or settlement while the employer's interest would lie in helping Respondent recover the maximum possible damages against Petitioners so that it could maximize its recovery on its workers' compensation lien. With respect to rule 4–1.7(b)(3), while the dissent focuses on whether mediation constitutes a "proceeding before a tribunal," the employer's Notice of Lien was filed in the underlying tort case. There is no question that the underlying case constitutes a "proceeding before a tribunal." As such, the dissent's focus on mediation is much too narrow.

3 The trial court set out its fact findings in numbered paragraphs as follows:

> This case arises from the following circumstances:
>
> 1. The Plaintiff, Christopher Staples ("Plaintiff"), was an employee of Container Carrier Corporation ("Employer").
>
> 2. On January 27, 2003, while working for the Employer, the Plaintiff was injured at the Jacksonville brewing and shipping facility of Anheuser–Busch, Inc. Plaintiff alleges that the accident occurred because of the negligence of two related Anheuser–Busch entities, Anheuser–Busch Companies, Inc., and Anheuser–Busch, Inc. ("Defendants").
>
> 3. The Employer is a corporation separate and distinct from the Defendant corporations.
>
> 4. The Plaintiff received worker's compensation benefits from the Employer as a result of this accident. Because the Employer is self-insured against worker's compensation claims, there is no Carrier in the worker's compensation case.
>
> 5. The Plaintiff filed a negligence/premises liability action against the Defendants, seeking damages for the injuries he sustained in the January 27, 2003, accident at the Defendants' brewery.
>
> 6. The law firm of Fernandez Trial Lawyers, P.A. ("the firm"), which has represented the Defendants in past actions, entered an appearance on behalf of both Defendants in this tort action.
>
> 7. The firm also filed a Notice of Lien in this tort action on behalf of the Employer. The lien was filed pursuant to section 440.39(3)(a), Fla. Stat.
>
> 8. When mediation was scheduled for November 1, 2012, in this case, Plaintiff's counsel discussed with the firm his concern about the fact that the firm was representing both the Defendants in the tort action and the Employer in the same action. On behalf of the firm, attorney E.T. Fernandez, III, responded in writing, indicating that the interest of the Employer with regard to the worker's compensation lien would be addressed at mediation by, and negotiated by, Mr. James Gourley, a non-lawyer claims manager employed by the Employer. Because Plaintiff's counsel still had continuing concerns, the mediation was cancelled.
>
> 9. After learning of the dual representation, Plaintiff's counsel moved promptly to file the pending disqualification motion.
>
> 10. Both the Defendants in the tort case and the Employer have filed waivers of any conflict which may currently or in the future exist because of the law firm's representation of all three in the tort case.
>
> (Footnotes omitted.)

4 The trial court ruled:

> [E]ven if Plaintiff here had no standing, the Court would "raise the question" of disqualification itself and reach the same result required by this order. Consequently, the issue of Plaintiff's standing to pursue disqualification is likely moot.

5 Fernandez's petition, though not citing Rule 4–1.7, asserts that its disqualification was improper because the trial court misapplied the legal standard, tracking language from the caselaw interpreting the rule. *See, e.g., State Farm Mut. Auto. Ins. Co. v. K.A.W.,* 575 So.2d 630 (Fla.1991) (citing Rule 4–1.7); *Anderson Trucking Serv., Inc. v. Gibson,* 884 So.2d 1046 (Fla. 5th DCA 2004) (citing *K.A.W.*). Mr. Staples's response, understanding the nature of Fernandez's legal challenge, contains citations to the caselaw applying Rule 4–1.7 as well as to both subsections of Rule 4–1.7. Identification of

the specific judicial act to be reviewed (the disqualification order) and the legal reasoning for its reversal (it applied the incorrect legal standard under the caselaw applying Rule 4–1.7) enables appellate review. *See* Philip J. Padovano, *Florida Appellate Practice* § 16:9 (2012 ed.) (citing cases).

6 That A–B and Container have agreed to joint representation by Fernandez does not end Fernandez's ethical responsibilities, which include continual reevaluation of the joint representation under ethical rules and full, ongoing communications with A–B and Container as circumstances evolve or change.

7 If the case goes beyond meditation and a "proceeding before a tribunal"—such as a trial—is scheduled, the question of whether a conflict then exists can be raised. At that point, the trial court can assess whether joint representation, if it still exists, will involve the "assertion of a position adverse to another client" that fails to meet 4–1.7(b)—along with the other criteria of the Rule. Whether a lienor would appear at trial in this type of case is doubtful, but it might occur.

8 Tempering this tactic is that litigants, absent a special relationship to the lawyers sought to be disqualified, ordinarily will lack standing to make formal motions to disqualify. *See Zarco Supply Co. v. Bonnell,* 658 So.2d 151, 154 (Fla. 1st DCA 1995) (finding standing only where movant could demonstrate prejudice). Here, the trial court erred in concluding that Mr. Staples had standing to seek to disqualify Fernandez because, as admitted at oral argument, Mr. Staples can point to no prejudice arising from the joint representation by Fernandez. The trial court, however, can sua sponte raise conflict issues, making Mr. Staples's standing a non-issue.

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III.C.

934 F.Supp. 394
United States District Court,
M.D. Florida.

UNITED STATES of America
v.
Conan Curtis CULP.

No. 96–9–CR–FTM–23.
|
July 9, 1996.

Conspiracy to distribute cocaine prosecution was brought, and government moved to disqualify defendant's counsel for conflict of interest. The District Court, Gagliardi, Senior District Judge, held that: (1) defense counsel had actual conflict of interest; (2) government did not have to show existence of actual conflict before its motion could be granted; (3) defendant could not waive either rights of attorney's former clients or interest of court in integrity of its procedures and fair and efficient administration of justice; and (4) impending trial date did not preclude granting of motion.

Motion granted.

West Headnotes (15)

[1] **Criminal Law**
Choice of Counsel

Right of criminal defendant to be represented by counsel of his choice, although comprehended by Sixth Amendment, is not absolute. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[2] **Criminal Law**
Choice of Counsel

Essential aim of Sixth Amendment is to guarantee effective advocate for each criminal defendant, rather to ensure that defendant will inexorably be represented by lawyer he prefers. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[3] **Criminal Law**
Objections and Waiver

Actual conflict of interest required disqualification of attorney from representation of defendant in prosecution for conspiracy to distribute cocaine, despite defendant's willingness to waive conflict, as vigorous representation of defendant would require attorney to act in manner adverse to interests of his former clients; attorney represented one former client in matter that led to his cooperation in defendant's prosecution, and attorney represented second former client in state cocaine proceeding for conduct which was "part-and-parcel" of conspiracy charge in defendant's prosecution. U.S.C.A. Const.Amend. 6; ABA Rules of Prof.Conduct, Rules 1.6, 1.6 comment, 1.7, 1.7 comment, 1.8(b), 1.9, 1.9 comment, 3.3.

1 Cases that cite this headnote

[4] **Attorney and Client**
Interests of Former Clients

Successive representation of clients may give rise to actual conflict, although attorney's simultaneous representation of clients with adverse interests is most egregious form of conflict of interest. ABA Rules of Prof.Conduct, Rule 1.6 comment.

3 Cases that cite this headnote

[5] **Attorney and Client**
Client's Confidences, in General

Lawyer's duty to preserve client confidences survives termination of lawyer-client relationship. ABA Rules of Prof.Conduct, Rule 1.6.

2 Cases that cite this headnote

[6] **Criminal Law**
Joint Representation of Codefendants

Simultaneous or successive representation of more than one defendant charged in same criminal conspiracy inevitably presents conundrum for lawyer who is so engaged, because of lawyer's continuing duty of confidentiality. ABA Rules of Prof.Conduct, Rules 1.7 comment, 1.9 comment.

4 Cases that cite this headnote

[7] **Attorney and Client**

Government, Employment by or Representation Of

Attorney's representation when former client will testify against current client as witness for government is presumptively suspect, because conflicting ethical impairments under such circumstances place attorney in untenable position. ABA Rules of Prof.Conduct, Rules 1.7 comment, 1.9 comment.

3 Cases that cite this headnote

[8] **Attorney and Client**

Interests of Former Clients

Prohibition on representation of clients with interests adverse to those of former client without former client's consent applies without regard to whether prior representation entailed disclosure of confidential communications. ABA Rules of Prof.Conduct, Rules 1.6, 1.7, 1.9(a).

1 Cases that cite this headnote

[9] **Attorney and Client**

Interests of Former Clients

Blanket prohibition on representation of clients with interests adverse to those of former client without former client's consent promotes attorney's duty of loyalty to clients while furthering objectives of rules protecting confidential communications between attorney and client by obviating need for intrusive judicial fact finding that would require disclosure of confidential communications. ABA Rules of Prof.Conduct, Rules 1.6, 1.7, 1.9(a).

2 Cases that cite this headnote

[10] **Attorney and Client**

Interests of Former Clients

Proscription against successive representation is triggered when representation of former and present client involve same or substantially related matter. ABA Rules of Prof.Conduct, Rule 1.9(a).

Cases that cite this headnote

[11] **Criminal Law**

Pretrial Proceedings in General

Criminal Law

Presumptions and Burden of Proof

Government need not show existence of actual conflict before motion to disqualify defense counsel before trial in criminal prosecution may be granted.

1 Cases that cite this headnote

[12] **Criminal Law**

Pretrial Proceedings in General

Criminal Law

Presumptions and Burden of Proof

Showing of potential conflict alone will suffice to grant motion to disqualify defense counsel before trial in criminal prosecution.

Cases that cite this headnote

[13] **Criminal Law**

Stage of Proceedings as Affecting Right

Criminal Law

Presumptions and Burden of Proof

Defendant's presumptive right to counsel of his choice may be overcome before trial by showing of potential conflict of interest, although defendant who raises no objection at trial must demonstrate in collateral proceeding that actual conflict of interest existed, and that such conflict adversely affected lawyer's performance at trial. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[14] **Criminal Law**
⇨ Objections and Waiver

Defendant could not waive either rights of attorney's former clients or interest of court in integrity of its procedures and fair and efficient administration of justice for purposes of government's motion to disqualify attorney based on conflict of interest. ABA Rules of Prof.Conduct, Rules 1.7 comment, 1.9 comment.

1 Cases that cite this headnote

[15] **Criminal Law**
⇨ Advice, Inquiry, and Determination

Criminal Law
⇨ Objections and Waiver

Government's motion to disqualify defendant's counsel for conflict of interest did not have to be denied because of claims of prejudice based upon government's failure to bring motion more promptly and impending trial date; any prejudice to defendant would be addressed at such time as it was properly raised by defendant's substitute counsel.

Cases that cite this headnote

Attorneys and Law Firms

***396** Susan Daltuva, Asst. U.S. Atty., United States Attorney's Office, Ft. Myers, FL, for United States of America.

Stuart Pepper, Pepper Law Firm, Cape Coral, FL, for Defendant.

Order and Opinion

GAGLIARDI, Senior District Judge.

I. Facts

In this case the Government has moved the Court to disqualify counsel for Defendant Conan Curtis Culp, Stuart Pepper, based on its allegations that Mr. Pepper's representation of Defendant would be a conflict of interest. Defendant is charged with conspiring to distribute large quantities of cocaine. Two of the Government's prospective witnesses—Carlos Valdes, and his son Douglas Wayne Valdes—who are co-conspirators in the crimes charged against Defendant, have also been represented by Mr. Pepper in the past. [1] On April 23, 1996, this Court held a hearing to determine whether a conflict of interest exists.

The parties do not dispute that Mr. Pepper represented Douglas Valdes at a *Nebbia* hearing in connection with federal narcotics charges which ultimately led to his cooperation in the instant case. *Tr. of Proceedings: Mot. to Determine Conflict of Interest, Apr. 23, 1996,* at 11:6–11. As part of that representation, Mr. Pepper had several conversations with Douglas Valdes. *Aff. of Stuart Pepper, Apr. 24, 1996,* at 2. [2] In addition, the parties do not dispute that Mr. Pepper represented Carlos Valdes in a state cocaine proceeding which is part-and-parcel of the drug conspiracy charged in this action. *Id.* at ¶ 8. Although both of the Government's witnesses have pleaded guilty to federal drug charges, neither has been sentenced at this time.

***397** At the hearing, Defendant testified that he was willing to waive his right to conflict-free counsel. Douglas Valdes and Carlos Valdes each in turn declined to waive their rights.

Mr. Pepper then attempted to make a proffer in order to show (1) that his representation of Douglas and Carlos Valdes had terminated; and (2) that no confidential communications were exchanged during his prior representation of them. The Court sustained objections to Mr. Pepper's attempts to elicit from his former clients information relating to his representation of them. *Tr.* at 22:14–24:11.

The Government introduced a letter dated March 12, 1996 sent to Mr. Pepper by the Assistant United States Attorney ("AUSA") prosecuting the case, advising Mr. Pepper of the Government's position that his representation of Defendant posed a conflict of interest. *Tr.* at 30:24–31:7. The AUSA stated that she believed a conflict existed from the beginning of her involvement

in the matter, and repeatedly exhorted Mr. Pepper to withdraw from the representation. *Tr.* at 9:11–18. After he failed to heed the Government's importunings, the Government filed this motion.

II. Arguments Presented

Mr. Pepper challenges the Government's standing to move for his disqualification. In addition, Mr. Pepper argues that the Government has failed to show that a conflict of interest exists, and that if such a conflict does exist, Defendant has knowingly and voluntarily waived his right to conflict-free counsel. The Government responds that because its cooperating witnesses, who are former clients of Mr. Pepper, have refused to waive their rights to conflict-free representation, Mr. Pepper must be disqualified. The Court agrees.

III. Conclusions of Law

[1] [2] [3] This motion pits the defendant's constitutional interest in counsel of his choice against the competing interests of the defendant, the Court, the Government and two of its potential witnesses in a trial free from conflicts of interest. The right of a criminal defendant to be represented by counsel of his choice, although comprehended by the Sixth Amendment, is not absolute. *Wheat v. United States,* 486 U.S. 153, 154, 108 S.Ct. 1692, 1694, 100 L.Ed.2d 140 (1988). As the Supreme Court has interpreted the Sixth Amendment, its "essential aim ... is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat,* 486 U.S. at 159, 108 S.Ct. at 1697. In *Wheat,* the Court considered the extent to which a defendant's right to be represented by an attorney of his or her choice is qualified by the attorney's past representation of other defendants charged in the same criminal conspiracy. *Id.* After considering the countervailing interests, the Court concluded that when a motion to disqualify based on an alleged conflict is raised prior to trial, a defendant's presumptive entitlement to retain counsel of his or her choice "may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Id.* at 164, 108 S.Ct. at 1700. Because the facts adduced with respect to this motion show at least a potential conflict of interest, the Court declines the Defendant's request to have Mr. Pepper represent him in this case.

[4] [5] The Court finds on the basis of facts proven in the evidentiary hearing that Mr. Pepper labors under an intractable conflict of interest, since the vigorous representation of his present client will require him to act in a manner adverse to the interests of his former clients, Douglas and Carlos Valdes.[3] Although the simultaneous representation of clients with adverse interests is the most egregious form of a lawyer's conflict of interest, this Circuit has repeatedly held that successive representation may also give rise to an actual conflict. *Smith v. White,* 815 F.2d 1401, 1405 (11th Cir.1987); *United States v. Ross,* 33 F.3d 1507, 1523 (11th Cir.1994). Mr. Pepper's vehement protestations that he no longer represents any members ***398** of the Valdes family are therefore unavailing. Moreover, these assertions ignore the fact that a lawyer's duty to preserve client confidences survives the termination of the lawyer-client relationship. *Model Rules of Professional Conduct* (hereinafter "*Model Rules*"), Rule 1.6 cmt. at ¶ 22 ("The duty of confidentiality continues after the client-lawyer relationship has terminated."). To the extent that Mr. Pepper argues that he never represented Douglas Valdes, the Court refers him to Model Rule 1.2, entitled "Scope of the Representation," and Model Rule 3.3, entitled "Candor Towards the Tribunal."

[6] [7] Because of the lawyer's continuing duty of confidentiality, the representation, be it simultaneous or successive, of more than one defendant charged in the same criminal conspiracy inevitably presents a conundrum for the lawyer who is so engaged. *Model Rules,* Rule 1.7 cmt. at ¶ 7 ("The potential for conflict of interest in representing several defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."); *see also* Rule 1.9 cmt. at ¶ 1 (incorporating Rule 1.7 test for "adverse interests" into context of successive representation). This conundrum is posed most starkly where, as here, the lawyer's former client will testify against his current client as a witness for the Government. To vigorously defend his current client, the lawyer must cross-examine his former client in an effort to impeach the former client's credibility. The ethical canons thus present the lawyer with a Hobson's choice: the lawyer must either seek to elicit confidential information from the former client,[4] or refrain from vigorous cross-examination. Because the

conflicting ethical imperatives under such circumstances place the defense lawyer in an untenable position, *Wheat,* 486 U.S. at 164, 108 S.Ct. at 1699–1700; *Ross,* 33 F.3d at 1523; representation under such circumstances is presumptively suspect. *Lightbourne v. Dugger,* 829 F.2d 1012, 1023 (11th Cir.1987) ("An attorney who cross-examines a former client inherently encounters divided loyalties"). The Court will not abandon the legal presumption that Culp will be adversely affected by this conflict merely because of Mr. Pepper's apparent willingness to compromise his ethical obligations to his former clients.

[8] **[9]** Mr. Pepper states in his affidavit, however, that due to the limited nature of his representation of Douglas Valdes, he learned no information during the course of that representation which he could now use against Mr. Valdes. *Aff. of Stuart Pepper,* at 2–3.[5] This argument ignores the fact that under the ethical canons a duty of loyalty exists apart and distinct from the duty to maintain client confidences. *Compare Model Rules,* Rule 1.6 with Rules 1.7 & 1.9. One need only compare Model Rule 1.6, which outlines the lawyer's duty of confidentiality, with Model Rule 1.9(a), which imposes a blanket prohibition on the representation of clients with interests adverse to those of a former client without the former client's consent. The prohibition set forth in Rule 1.9 applies *without regard* to whether the prior representation entailed the disclosure of confidential communications. The rule thereby furthers two purposes simultaneously; it promotes the attorney's duty of loyalty to his clients while furthering the objectives of rules protecting confidential communications between attorney and client by obviating the need for intrusive judicial fact-finding that would require the disclosure of such communications. The policies underlying this rule are equally relevant here, for the Government's intended witnesses in this case, both of whom have not yet been sentenced for their own participation in the charged conspiracy, will be understandably loath to take the stand and refute Mr. Pepper's proffer by describing any of their own illegal activities which they may have disclosed to him.

*399 **[10]** Under Rule 1.9(a), the proscription against successive representation is triggered when the representation of the former and present client involve "the same or a substantially related matter." *Model Rules* Rule 1.9(a); *Ross,* 33 F.3d at 1523 (firm disqualified where former client represented in connection with same narcotics conspiracy); *Smith v. White,* 815 F.2d 1401, 1405 (11th Cir.1987). Here, Mr. Pepper represented Douglas Valdes in the matter that led to his cooperation in the instant case, including appearing on Valdes' behalf at a *Nebbia* hearing. Mr. Pepper represented Carlos Valdes in a state cocaine proceeding for conduct which is "part-and-parcel" of the conspiracy charged in this case. Accordingly, the Court finds that an actual conflict of interest exists on these facts.

[11] **[12]** **[13]** Notwithstanding its finding that an actual conflict exists in the case at bar, the Court unequivocally rejects Mr. Pepper's arguments that the Government must show the existence of an actual conflict before its motion may be granted. As the case law makes abundantly clear, a showing of a potential conflict alone will suffice at this stage. *Wheat,* 486 U.S. at 164, 108 S.Ct. at 1700; *Ross,* 33 F.3d at 1523. Mr. Pepper's reliance on *Smith* and *Lightbourne* for the proposition that the Government must demonstrate an actual conflict of interest ignores the procedural posture in which those challenges were presented, and demonstrates his failure to appreciate the important distinction between post-conviction challenges asserted in *habeas corpus* petitions and motions filed prior to trial. Thus, although a defendant who raises no objection at trial must demonstrate in a collateral proceeding that an *actual* conflict of interest existed and that such conflict adversely affected his lawyer's performance at trial, *Cuyler v. Sullivan,* 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980), a defendant's presumptive right to counsel of his choice may be overcome before trial by a showing of a *potential* conflict. *Wheat,* 486 U.S. at 164, 108 S.Ct. at 1700.

The reasons for this difference are clear enough. As the Supreme Court observed in *Wheat,* a trial judge presented with the specter of a prospective conflict must resolve the issues "in the murk[y] pre-trial context when relationships between parties are seen through a glass, darkly." *Id.* at 162, 108 S.Ct. at 1699. At such time, "[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials." *Id.* Different interests are implicated, however, and a different standard applies, when a defendant uses collateral proceedings to attack the finality of his or her conviction. *Smith,* 815 F.2d at 1406. *See generally McCleskey v. Zant,* 499 U.S.

467, 490–92, 111 S.Ct. 1454, 1468–69, 113 L.Ed.2d 517 (1980) (discussing systemic reasons to protect finality of convictions).

Mr. Pepper's argument that the Government lacks standing to raise the issue of a potential conflict gives short shrift to the respective interests of the Government and the Court in ensuring that judgments remain intact on appeal. *Model Rules,* Rule 1.7 cmt. at ¶ 15 (Government may raise question of conflict). Under such circumstances, a trial court's inquiry is necessarily informed by "the legitimate wish of district courts that their judgments remain intact on appeal." *Wheat,* 486 U.S. at 161, 108 S.Ct. at 1698. *See also id.* at 160, 108 S.Ct. at 1698 ("[N]ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation."). The Eleventh Circuit has explicitly recognized the independent judicial interest at stake in cases involving the representation of multiple defendants. *Ross,* 33 F.3d at 1523–24; *see also Cuyler,* 446 U.S. at 351, 100 S.Ct. at 1719 (Brennan, J., concurring) ("[T]he Constitution also protects defendants whose attorneys fail to consider, or choose to ignore potential conflict problems."). Mr. Pepper's challenges to the Government's standing betray a conception of the interests at stake in this motion which is both unduly narrow and overly simplistic.

[14] Mr. Pepper's underinclusive conception of the interests at stake also leads him to place undue reliance on his client's waiver, which he argues should singularly determine the Court's disposition of the motion to disqualify ***400** him. The Supreme Court held in *Wheat* that, consistent with the independent judicial interest in conflict-free adjudication, courts are free to reject a client's waiver of conflict-free counsel. *Wheat,* 486 U.S. at 160, 108 S.Ct. at 1697–98; *Ross* at 1524. In *Wheat,* the Court upheld the district court's disqualification of the defendant's attorney despite the waiver by the defendant and by two of the attorney's former clients of their right to conflict-free counsel. *Id.* at 156, 108 S.Ct. at 1695. In contrast, both of the former clients in this case have refused to waive their rights. See *Model Rules,* Rule 1.9 cmt. at ¶ 12 ("Disqualification from subsequent representation is for the protection of former clients."); *see also* Rule 1.7 cmt. at ¶ 5 ("When more than one client is involved, the question of conflict must be resolved as to each client."). Because Defendant Culp is incapable of waiving either the rights of his attorney's former clients or the interests of the Court in the integrity of its procedures and the fair and efficient administration of justice, this waiver will not carry the day for Mr. Pepper. [6]

[15] As a last resort, Mr. Pepper objects that the Government's failure to bring its motion more promptly has prejudiced him because of the impending trial date. As the Court admonished him during the hearing, however, Mr. Pepper cannot in good conscience complain about a situation which is due in large part to his own professional derelictions. *Model Rules,* Rule 1.7, cmt. at ¶ 1 (representation should be declined where a conflict is apparent from inception); *id.* at ¶ 5 ("[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."); *Cuyler,* 446 U.S. at 346, 100 S.Ct. at 1717 ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises...."). Any prejudice which has inured to the detriment of Defendant will be addressed at such time as it is properly raised before this Court by Defendant's substitute counsel.

For the reasons discussed above, the Government's motion to disqualify Mr. Pepper from the representation of Conan Curtis Culp in the instant case is granted.

So Ordered.

All Citations

934 F.Supp. 394

Footnotes

1 Mr. Pepper has also previously represented Douglas Valdes' other son, and another of the Government's prospective witnesses, Kenneth R. Valdes, in connection with an unrelated state charge. In addition, Mr. Pepper had several conversations with Kenneth Valdes which related to the *Nebbia* hearing held to obtain a bond for Douglas Valdes. However, the Government states in its motion that it does not know whether Mr. Pepper's prior representation of Kenneth

Valdes is related to Kenneth Valdes' role in the drug conspiracy. *Government's Mot. to Determine Conflict of Interest, Apr. 9, 1996,* at ¶ 7. Thus, the Court will consider the alleged conflict of interest solely as it relates to Carlos and Douglas Valdes.

2 Mr. Pepper has also previously represented Douglas Valdes in connection with unrelated state charges.

3 According to the Assistant United States Attorney prosecuting the case, Carlos Valdes may but will not necessarily be called as a rebuttal witness. *Tr.* at 33:18–23. The Government intends to call Douglas Valdes as part of its case-in-chief, however, and his testimony will be critical to its case. *Government's Mot. to Determine Conflict of Interest,* at ¶ 7.

4 The lawyer's duty of confidentiality prevents not only the disclosure of confidential communications, but also any use of such communications "to the disadvantage of the client." *Model Rules,* Rule 1.8(b); Rule 1.9 cmt. at ¶ 11.

5 Mr. Pepper's averrals are strikingly at odds with his stance during a related matter before this Court, the trial of Edna Simpson. During that trial Mr. Pepper, after being called as a hostile witness by the defense, invoked the attorney-client privilege on behalf of Douglas Valdes in response to insinuations by defense counsel that Pepper had suborned the perjury of Mrs. Simpson.

6 Moreover, the Court questions whether Defendant's waiver was validly obtained, given the following commentary in the Model Rules:

> [T]here may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Model Rules, Rule 1.7, cmt. at ¶ 5.

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9.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

PROBATE DIV. CASE NO. 502012CP004391XXXXNB (IH)

IN RE: ESTATE OF SIMON L. BERNSTEIN,
Deceased.
_____/

ORDER ON MOTION TO DISQUALIFY ATTORNEY ALAN ROSE AND LAW FIRM AND RELATED MOTIONS

THIS MATTER having come before this Honorable Court on February 16, 2017, upon Motion of Creditor, William E. Stansbury ("Stansbury"), to Disqualify Alan Rose ("Rose") and the law firm of Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A ("Page Mrachek") from representing the Personal Representative of the Estate of Simon L. Bernstein, and the Court, having heard argument of counsel, considered the evidence and reviewed the pertinent Court files,

IT IS ORDERED AND ADJUDGED as follows:

1. This Motion is governed by Rule 4-1.7 of the Rules Regulating the Florida Bar, and prevailing Florida law.

2. There are currently two related legal proceedings arising out of the Estate of Simon Bernstein:

A. *William E. Stansbury v. the Estate of Simon Bernstein, et al.,* Case No. 50 2012 CA 013933 MB AA (Circuit Court, Palm Beach County, Florida);

B. *Simon Bernstein Irrevocable Trust Dtd. 6/21/95, Ted Bernstein, et al. v. Heritage Union Life Insurance Company, et al.,* Case No. 13 CV 3643, United States District Court for the Northern District of Illinois (the "Insurance Litigation").

Findings of Fact

Pending Florida lawsuit against the Estate of Simon Bernstein

3. In the case styled *William E. Stansbury v. Estate of Simon Bernstein, et al.,* Case No. 50 2012 CA 013933 MB AA (Circuit Court, Palm Beach County, Florida), Stansbury is seeking to recover money damages against the Estate of Simon Bernstein arising out of a business relationship between Stansbury, Simon Bernstein and others. The damages Stansbury claims are in excess of $2.5 million. This action was pending at the time of Simon Bernstein's death. Thereafter, the Personal Representative of the Estate of Simon Bernstein was substituted as the real party in interest, and the case is pending.

Pending Illinois lawsuit against the Estate of Simon Bernstein (the "Insurance Litigation")

4. The case styled *Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95, Ted Bernstein, et al. v. Heritage Union Life Insurance Company, et al.,* Case No. 13 CV 3643, United States District Court for the Northern District of Illinois (the "Insurance Litigation"), was commenced after Simon Bernstein's death and seeks to have the Court determine who are the rightful owners of Simon Bernstein's $1.7 Million Dollar life insurance death benefit proceeds.

5. Ted Bernstein, individually, and as an alleged Trustee of a purported lost trust document, and others, as Plaintiffs, seek to recover the $1.7 Million Dollar life insurance proceeds for the ultimate benefit of Simon Bernstein's adult children.

6. The Estate of Simon Bernstein has intervened in the Insurance Litigation and seeks to recover the same $1.7 Million Dollar life insurance proceeds. Simon Bernstein's adult children are not monetary beneficiaries of the Estate.

7. In the Insurance Litigation, Ted Bernstein takes the position that a 1995 Insurance Trust existed, that the beneficiaries of that alleged Insurance Trust are Ted Bernstein and his siblings, Lisa Sue Friedstein, Pamela Beth Simon, Jill Iantoni and Eliot Bernstein (the "Bernstein Children").

8. In the Insurance Litigation, the Estate of Simon Bernstein, through Brian O'Connell, also seeks to recover the insurance proceeds for the Estate of Simon Bernstein on the grounds that no insurance trust exists, no trust document has been produced, and that the Estate of Simon Bernstein is the rightful beneficiary of the insurance proceeds.

9. This probate matter will remain pending, at least until the two above-mentioned Florida and Illinois cases are resolved.

Conclusions of Law

Alan Rose and the Page Mrachek law firm represent Ted Bernstein, individually and in other capacities. Such representation by Rose and the Page Mrachek law firm is in direct conflict with the interests of the Estate of Simon Bernstein.

10. Alan Rose and the Page Mrachek law firm represent Ted Bernstein as Trustee of the Simon Trust, the sole residuary beneficiary of the Estate of Simon Bernstein. Additionally, Alan Rose also represents Ted Bernstein as his personal counsel in the Insurance Litigation in Illinois. He made an appearance on behalf of Ted Bernstein at the deposition of Mr. Bernstein taken on May 6, 2015, and made objections of record. Therefore, Alan Rose is representing a Party directly adverse to the Estate of Simon Bernstein.

11. Rule 4-1.7 of the Florida Rules of Professional Conduct governs conflicts of interest involving current clients. Currently, Rose and his law firm represent:

A. Ted Bernstein, individually, in the Insurance Litigation;
B. Ted Bernstein as Trustee of the Simon Bernstein Trust; and
C. The Personal Representative of the Estate of Simon Bernstein.

12. It is clear by the evidence in the record that under Rule 4-1.7(a), a lawyer must not represent a client, in this case the Estate of Simon Bernstein, if the representation of that client will be directly adverse to another client, in this case Ted Bernstein, in the Insurance Litigation. The allegations of the Illinois complaint and other pleadings there clearly put Ted Bernstein adverse to the Estate of Simon Bernstein. Therefore, Ted Bernstein's lawyers are disqualified from representing the Estate of Simon Bernstein under Rule 4-1.7.

Rose and his law firm's conflict of interest cannot be waived.

13. The conflict of interest between Alan Rose and his law firm and their representation of Ted Bernstein in addition to the interests of the Estate of Simon Bernstein cannot be waived. It is unreasonable for Rose and his firm to believe that they can provide the Estate of Simon Bernstein with competent and diligent representation while they are maintaining a position directly adverse to the Estate in the Illinois proceeding. *See, Anheuser-Busch Companies, Inc. v. Staples,* 125 So. 3d 309, 311 (Fla. 1st DCA 2013).

Stansbury has standing and the Court has inherent authority to disqualify counsel.

14. Stansbury is an interested party as he is a creditor of the Estate. Even if Stansbury lacked standing, this Court is obligated to disqualify counsel when a clear conflict of interest presents itself. *See, Kolb v. Levy*, 104 So. 2d 874 (Fla. 3d DCA 1958).

IT IS THEREFORE ORDERED AND ADJUDGED that for all of the foregoing reasons, Stanbury's Motion to Disqualify is hereby GRANTED. Alan Rose and the law firm of Page,

Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. are hereby disqualified from further representation of the Estate of Simon Bernstein in the case styled *William E. Stansbury v. Ted Bernstein, et al,* Case. No. 50 2012 CA 013933 MB AA, Palm Beach County, Florida, or in any matter involving the Estate.

DONE AND ORDERED in Palm Beach Gardens, Palm Beach County, Florida this ___ day of _____, 2017.

_____
ROSEMARIE SCHER, Probate Judge

Copies to:

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