IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**FILED**
**June 6, 2002**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 2002 Term

No. 30248

**RELEASED**
**June 7, 2002**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. THE OGDEN NEWSPAPERS, INC.,
A WEST VIRGINIA CORPORATION,
D.B.A. THE JOURNAL PUBLISHING COMPANY,
A WEST VIRGINIA CORPORATION,
Petitioner,

v.

HONORABLE CHRISTOPHER C. WILKES,
JUDGE OF THE CIRCUIT COURT OF BERKELEY COUNTY,
AND RICHARD W. SHAFFER,
Respondents

---

Petition for a Writ of Prohibition

WRIT DENIED

---

Submitted: April 2, 2002
Filed: June 6, 2002

Robert M. Steptoe, Jr.
Rodney L. Bean
Steptoe & Johnson
Clarksburg, West Virginia
Attorneys for the Petitioner

Davis M. Hammer
Robert J. Schiavoni
Hammer, Ferretti & Schiavoni
Martinsburg, West Virginia
and
Walt Auvil
Pyles & Auvil
Parkerburg, West Virginia
Attorneys for the Respondent,
Richard W. Shaffer

The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE DAVIS and JUSTICE MAYNARD concur, in part, and dissent, in part, and reserve the right to file separate opinions.

JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS

1. "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

2 "Under Rule 1.9(a) of the Rules of Professional Conduct, determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and the legal issues of the two representations. Syl. Pt. 3, *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993).

Per Curiam:

The petitioner/defendant below, Ogden Newspapers, Inc., doing business as The Journal Publishing Company (hereinafter "Ogden"), has invoked the original jurisdiction of this Court[1] by seeking a writ of prohibition against respondent, the Honorable Christopher C. Wilkes, Judge of the Circuit Court of Berkeley County, and respondent/plaintiff below, Richard W. Shaffer (hereinafter "Shaffer"). Ogden is seeking specifically to prohibit the circuit court from enforcing its order entered January 5, 2001, which denied Ogden's motion to disqualify David M. Hammer and Robert J. Schiavoni (hereinafter "Hammer and Schiavoni"), of the law firm Hammer, Ferretti & Schiavoni, and Walt Auvil (hereinafter "Auvil"), of the law firm Pyles & Auvil, from representing Shaffer in his case against Ogden alleging improper employment practices. Ogden argues that the effect of the lower court's order is to allow Hammer and Schiavoni to represent a party with interests adverse to those of Ogden in matters substantially related to work the attorneys had done for Ogden while they were associates at the law firm of Steptoe & Johnson. Ogden claims that the lower court's order violates Rule 1.9 of the Rules of Professional Conduct (hereinafter "Rule 1.9") and disregards this Court's previous holding in *State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 198 W.Va. 587, 482 S.E.2d 204 (1996) (hereinafter "*Ogden I*"), which involved an employment discrimination case from which both Hammer and Schiavoni were disqualified. Ogden further argues that if

[1]*See* W.Va. Const. art. VIII, § 3; W.Va. Code §§ 53-1-1 (1923), 53-1-2 (1933) (Repl. Vol. 2000).

Hammer and Schiavoni are disqualified under the provisions of Rule 1.9, then Auvil's association as co-counsel with Hammer and Schiavoni in the Shaffer case raises the presumption that Auvil received confidential information related to Ogden and as a consequence also should be disqualified according to the provisions of Rule 1.10 of the professional conduct rules. Having determined that mandatory disqualification of counsel pursuant to Rule 1.9 is not warranted in this case, the rule to show cause is discharged and the writ prayed for denied.

## I. Factual Background

The matter underlying this petition for a writ of prohibition is a civil action pending in the Berkeley County Circuit Court which was filed in August 2000 against Ogden by Shaffer as a former employee. Shaffer's complaint alleges that his discharge and Ogden's refusal to transfer or rehire him were motivated by discrimination based on age and Ogden's "perception of plaintiff's disability" in violation of the West Virginia Human Rights Act,[2] and claims additionally that Ogden violated West Virginia's Workers' Compensation Act[3] and common law when it terminated his continued employment because the company feared that he may apply for workers' compensation benefits for the work-related injury of stress-induced hypertension. Hammer, Schiavoni and Auvil were selected by Shaffer to serve as his attorneys in this suit.

---

[2]*See* W.Va. Code §§ 5-11-1 to -21.

[3]*See* W.Va. Code §§ 23-5A-1 to -4.

The law firm of Steptoe & Johnson is representing Ogden in the Shaffer suit. Steptoe & Johnson has provided legal representation to Ogden for over thirty years, including the periods when Hammer and Schiavoni worked for the firm as associates.[4] Based on this prior association with Steptoe & Johnson, Ogden filed a motion to disqualify Hammer and Schiavoni from the Shaffer suit; the motion also sought to disqualify Auvil on the basis that his affiliation with Hammer and Schiavoni raised a presumption that he was the recipient of confidential information about Ogden. The lower court denied the motion for disqualification by order entered January 5, 2001.

## II. Jurisdiction and Standard of Review

In syllabus point one of *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979), we summarized the considerations which influence when a rule to show cause should issue in response to a petition for a writ of prohibition as follows:

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases

[4]Schiavoni was employed as an associate at Steptoe & Johnson between June 1986 and July 1992; Hammer was an associate at the firm from June 1988 through July 1992. Both gentlemen left Steptoe & Johnson on August 1, 1992, and formed the firm of Hammer, Ferretti & Schiavoni.

> where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Furthermore, in *Ogden I* we recognized the accepted practice of filing a writ of prohibition pursuant to the original jurisdiction of this Court in order to obtain timely judicial review of a lower court's decision regarding a motion for disqualification of an attorney. 198 W.Va. at 589, 482 S.E.2d at 206. Consequently, we turn to the examination of the disqualification issue which is properly before us.

## III. Discussion

Ogden initially argues that the circuit court's order disregards a previous ruling of this Court because the disqualification issue presented in the instant case is the "identical case involving the same parties, the same judge and the same cause of action" which was before this Court in *Ogden I*. As this assertion does not reflect current case law regarding dealing with attorney disqualification under Rule 1.9, we disagree.

Disqualification of an attorney based on conflict of interest with a former client is governed by Rule 1.9 of the West Virginia Rules of Professional Conduct which states:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or substantially related matter in which that person's interest [sic] are materially adverse to the interests of the former client unless the former client consents after consultation; or

> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

In syllabus point three of *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993), we explained that "[u]nder Rule 1.9(a) of the Rules of Professional Conduct, determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations." *Id.* at 291, 430 S.E.2d at 570. In *State ex rel. DeFrances v. Bedell*, 191 W.Va. 513, 446 S.E.2d 906 (1994), we recognized that such a detailed comparative analysis is necessarily conducted on a case-by-case basis: "The determination of the existence of an attorney-client relationship depends on each cases's specific facts and circumstances." *Id.* at 517, 446 S.E.2d 910. The conclusion in *Ogden I* was based on the facts then under review, that is, Hammer and Schiavoni were disqualified from representing a specific client (Robin Wilkinson) in her specific "handicap discrimination case" against Ogden and was clearly limited to those specific facts. *See*, 198 W.Va. at 593, 482 S.E.2d at 210. Accordingly, we do not find that the lower court's order in this case denying the disqualification motion represented a disregard of the relevant ruling of this Court in *Ogden I*.

We now undertake our examination "of the facts, circumstances, and legal issues" specific to the Shaffer case in order to determine if disqualification is required under

Rule 1.9, as urged by Ogden, because a substantial relationship between the matters in the two representations exists. *McClanahan*, 189 W.Va. at 291, 430 S.E.2d at 570. Under the provisions of Rule 1.9 and our rulings regarding the same, the burden of establishing that a substantially related matter exists is on the former client. Once it is established that the matters are substantially related, the court will presume that confidential information was divulged during the earlier representation, thereby avoiding disclosure of the very information which is to be protected. *See*, Syl. Pt. 4, *McClanahan*, 189 W.Va. at 291, 430 S.E.2d at 570. We recently added further definition to the substantial relationship test in syllabus point one of *State ex rel. Keenan v. Hatcher*, 210 W.Va. 307, 557 S.E.2d 361 (2001), when we adopted the approach taken in § 132 Restatement (Third) of the Law Governing Lawyers and said that two matters are substantially related under Rule 1.9(a) if "there is a substantial risk that representation of the present client will involve the use of [confidential] information acquired in the course of representing the former client, unless that information has become generally known." The express language of section (b) of Rule 1.9 likewise acknowledges that information which is or becomes commonly known lies outside the parameters of confidential information and may be used against a former client in subsequent actions.

In addition to the petition, briefs[5] and arguments of the parties, we have before us documentary evidence, submitted under seal, of the type of legal work performed by Hammer and Schiavoni for Ogden while associates at Steptoe & Johnson.[6] Our study involves an analysis of these documents with due regard to the lower court's reasons for denying the disqualification motion as set forth in its January 5, 2001, order. In summary, the lower court's decision that a substantial relationship between the two representations did not exist was based on: the dissimilar relationship between the facts in either instance; "dramatic" changes in the relevant law; Ogden's acquiescence to Hammer and Schiavoni's representation of clients adverse to Ogden in other cases grounded in "Human Rights Act and other West Virginia laws"; the ongoing relationship Shaffer has had with Hammer and Schiavoni as legal counsel; and the passage of nine years since Hammer and Schiavoni represented Ogden.[7] We

---

[5]Ogden's petition reiterates essentially the same list that was detailed in *Ogden I* of the work assignments performed for Ogden by Hammer and Schiavoni while they were associates at Steptoe & Johnson. This list is supported by exhibits which include Steptoe & Johnson time records for Hammer and Schiavoni and an affidavit of Robert M. Steptoe, Jr., managing attorney and counsel primarily responsible for handling the labor and employment matters of Ogden, dated August 28, 1995, relating the nature of the work performed for Ogden by Hammer and Schiavoni at Steptoe & Johnson.

[6]According to Ogden's brief, these are the same records which were supplied under seal in *Ogden I*.

[7]The pertinent text from the lower court's January 5, 2001, order reads:

> 2. The Court finds that Messrs. Hammer and Schiavoni's prior representation of defendant is not substantially related factually or legally to the instant case. The facts, as plead in the Complaint, are not substantially related to any prior representation and the law has changed so dramatically from

(continued...)

note with particular interest that the common thread running through the reasoning which underpins the decision of the lower court is the change in circumstances which has occurred since Hammer and Schiavoni last represented Ogden in 1992.

Changes occurring during the interval between earlier and later representations is not a matter specifically addressed in Rule 1.9 or its commentary. However, as observed by one authority addressing the passage of time with regard to the substantial relationship question,

> [t]reating all former representations equally . . . clearly threatens over-inclusive application of the substantial relationship standard because we can be fully confident in some instances that the presumed threat of disclosure of material and confidential information gained in that representation is factually unfounded.

---

[7](...continued)
1991 until now that it too is not substantially related.

3. The Court further notes that defendant has not consistently asserted that attorneys Hammer and Schiavoni should be disqualified from representing clients adverse to defendant and its affiliates with regard to the Human Rights Act and other West Virginia laws. The Court is thus unwilling to deprive Mr. Shaffer of his chosen counsel with whom he had an ongoing relationship over the years under these circumstances.

4. The Court further finds that Rule 1.9(a) of the Rules of Professional Conduct does not require an absolute disqualification. Hammer and Schiavoni have not represented the Defendants in nine (9) years. The Court strongly relies on this nine (9) year passage of time in denying defendant's motion for disqualification.

> . . . [E]ven if facts are remembered with acute and abundant detail (perhaps because they are contained in surviving documents), the passage of time often will decrease or destroy the relevance of those facts in the latter representation. Intervening happenings and other facts will slowly erode whatever salience might originally have attached even to the former client's inner-most secrets. . . . [O]ld information may continue to be secret and thus subject to a broad duty on the part of the lawyer not to reveal or use it adversely. But if the old information is not realistically relevant to the later representation, its presumed possession should not lead to a finding of substantial relationship sufficient to bar the later representation.

Wolfram, *Former-Client Conflicts*, 10 Geo. J. Legal Ethics 677, 731-32 (1997) (footnotes omitted).

We further note that several courts have considered the passage of time to be a relevant factor in determining whether a substantial relationship exists between representations in the context of disqualification motions. *See, e.g., Schwartz v. Cortelloni*, 685 N.E.2d 871 (Ill. 1997) (law firm's appearance in guardianship case forty years earlier for purpose of selling real estate in which ward had one-sixth interest did not entail disclosure of confidential information about unrelated property that was subject of current partition action); *State ex rel. Wal-Mart Stores, Inc. v. Kortum*, 559 N.W.2d 496 (Neb. 1997) (lapse of time between representations is one of several factors a court may consider when determining existence of substantial relationship); *Phillips v. Haidet*, 695 N.E.2d 292 (Ohio Ct. App. 1997) (representation of former client seven years earlier in a personal injury action did not form the basis for disqualification in a subsequent defamation action when the medical and

financial records of the former client were not useful to the later action); *Bennett Silvershein Assocs. v. Furman,* 776 F.Supp. 800 (S.D.N.Y. 1991) (matter disclosed by prospective client during brief consultation ten years earlier not relevant to later adverse representation because most of the alleged acts in the later case had not occurred at time consultation took place); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311 (7th Cir. 1978) (vaguely related representation occurring ten years earlier did not warrant disqualification). We note with particular interest that, although decided on the basis that a direct attorney-client relationship had not been established, this Court found in *State ex rel. DeFrances v. Bedell,* 191 W.Va. 513, 446 S.E.2d 906 (1994), that a one-hour consultation with a prospective estate planning client which had occurred several years earlier was too "remote, isolated, [and] non-productive" to create a former client conflict. *Id.* at 518, 446 S.E.2d at 911. Our decision in *Ogden I* may well have been influenced by the short period of time which had elapsed between the two representations then under consideration. The underlying suit from which Hammer and Schiavoni were disqualified in *Ogden I* was filed roughly two years after Respondents left Steptoe & Johnson.

Based upon the foregoing, we conclude that the passage of time between representations is a relevant factor for a court to consider when determining under Rule 1.9 of the Rules of Professional Conduct whether a substantial relationship exists between an earlier representation of a client and subsequent employment of a lawyer adverse to the interests of a former client. We note, however, that the mere passage of time does not absolve

attorneys from being faithful to the mandates of the legal profession regarding the confidential treatment of information learned during the course of all attorney-client relationships, nor does our decision today diminish the reviewing courts responsibility to weigh and balance carefully all relevant factors in order to guard against the risk of disclosure of confidential information when addressing disqualification issues.

In the instant case, after considering the factual and legal bases of the pending suit in relation to the evidence presented regarding the former representation, we cannot construct a framework from which it can be said that a substantial relationship exists between the matter for which work was done at least nine years ago for Ogden by Hammer and/or Schiavoni as associates with Steptoe & Johnson and the case now pending before the circuit court. It is clear that neither Hammer nor Schiavoni represented Ogden during the course of their representation in any employment discrimination litigation. We do not find that the research which Respondents had performed and the related brief consultations they then had with Ogden personnel are realistically relevant to the pending case which was filed at least nine years after the research and any related consultation with Ogden was completed.

Ogden nevertheless urges this Court to adopt a position that would, in essence, make the passage of time irrelevant. In reliance on *Chugach Electric Association v. United States District Court*, 370 F.2d 441 (9th Cir. 1966), Ogden asserts that the contact Hammer and Schiavoni had with Ogden personnel about employment issues allowed the attorneys to be

exposed to a wide array of business information about specific company policies related to discrimination, lines of control and communication and methods of decision making which Ogden claims is privileged. In *Chugach*, a former general counsel to a corporation was disqualified on the premise that he had gained knowledge of private matters of general corporate affairs which gave him "greater insight and understanding of the significance of subsequent events in an antitrust context and offer[ed] a promising source of discovery." *Id.* at 443. Observing that few courts today generally follow the broad-based, "playbook" rationale for disqualification announced in *Chugach*, one authority reasons that "[p]ressed too far, the playbook rationale can give a former client an unjustifiably broad right to bar his or its former counsel from representing a later opponent; if 'insight' into intangibles is sufficient, it would be a rare case indeed that would not qualify." G.C. Hazard, Jr. & W.W.Hodes, 1 *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 13.7 (3d ed. 2000). It also appears that the playbook rationale is not favored under our Rules of Professional Conduct, with the commentary following Rule 1.9 stating: "[T]he fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about the client when later representing another client." *Id.* Even those authorities which recognize the value of a playbook basis for disqualification limit the circumstances in which it is deemed applicable. *See, e.g.*, 2 *Restatement (Third) Law Governing Lawyers* § 132 cmt. *d(iii)* (2000) (disqualification based on playbook information limited to situations in which the general information "will be directly in issue or of an unusual value in the subsequent matter.").

We do not find that the circumstances of the present case warrant application of the *Chugach* reasoning, despite the contrary implication we may have given in *Ogden I* when we said:

> The nature of the research project, as described in a confidential memorandum, clearly supports the presumption that Mr. Hammer gained some insight into the corporate policies of Ogden and its affiliates – insight that would be substantially relevant to Hammer and Schiavoni's representation of Robin Wilkinson's handicap discrimination case against Ogden.

*Ogden I*, 198 W.Va. at 592-93, 482 S.E.2d at 209-10. As previously discussed, it is not until a substantial relationship is found as a result of a thorough comparison of the two representations at issue that disclosure of confidential information – not insight into corporate policies – is presumed.[8]

Applying the *Ogden I* yardstick, we have meticulously reviewed the sealed file in the current case. We judge the pending case to be only generally similar to the earlier matters on which respondents were consulted by Ogden. We therefore are unable to identify any information in that file that will be directly in issue or of unusual value in the matter now pending in the circuit court. This is so especially in light of the passage of time, the extensive changes in the law over the intervening nine-year period and the uniformly general and even

[8]Had insight into corporate policies been the basis for disqualification in *Ogden I*, Hammer and Schiavoni would have been disqualified from all of the cases consolidated therein and not just the discrimination suit.

hypothetical nature of the information to which respondents were exposed in the earlier time frame.

In sum, as a result of our detailed and careful study of the materials submitted, we do not find a substantial relationship between the two representations which would trigger the presumption that relevant confidential information was disclosed and disqualification is therefore warranted. Vague general impressions associates may have gleaned about a client's philosophical outlook, which is the most we can formulate from the situation at hand, is not enough to warrant disqualification. Accordingly, we find that the circuit court properly denied Ogden's motion to disqualify Hammer and Schiavoni, which in turn removed the alleged Rule 1.10 basis for the imputed disqualification of Auvil. Consequently, the petition before us for a writ of prohibition is denied.

We stress that the result we have reached in this case should in no way be read as an erosion of this Court's resolve to shield the attorney-client relationship. We have simply recognized that a court faced with a Rule 1.9 motion must consider all relevant factors on a case-by-case basis in order to decide whether disqualification is warranted and that one such factor may be the amount of time which has passed since the former representation occurred. In some instances, no amount of time will remove the subsequent representation prohibition. A lawyer's formidable ethical responsibility of protecting the attorney-client relationship in a manner which steadfastly guards against improper disclosure, misapplication or misuse of

protected information obtained from a former client remains unaltered. The frank and honest discourse which is the hallmark of the attorney-client relationship can be preserved only if lawyers are faithful to selecting cases in a prudent and judicious manner so as to protect the best interests of all clients.

Writ denied.