



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

FRANK E. ACIERNO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 19729
	)	
NATHAN HAYWARD, III, Secretary of	)	
the Department of Transportation of the	)	
State of Delaware, and the DEPARTMENT	)	
OF TRANSPORTATION OF THE	)	
STATE OF DELAWARE,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION**

Date Submitted: March 8, 2004  
Date Decided: July 1, 2004

Richard L. Abbott, Esquire of The Bayard Firm, Wilmington, Delaware, Attorneys for Plaintiff.

Charles M. Oberly, III, Esquire of Oberly Jennings & Rhodunda, P.A., Wilmington, Delaware, Attorneys for Plaintiff.

Collins J. Seitz, Jr., Esquire of Connolly Bove Lodge & Hutz LLP, Wilmington, Delaware, Attorneys for Defendants.

**PARSONS, Vice Chancellor**

Defendants, the Department of Transportation of the State of Delaware and its secretary, Nathan Hayward, III (collectively “DelDOT”) seek an order disqualifying Richard L. Abbott, Esquire (“Abbott”) and his law firm from representing Plaintiff, Frank E. Acierno (“Acierno”) in this litigation. DelDOT contends that Abbott is representing Acierno in a matter that is substantially related to his prior representation of DelDOT and in which Acierno’s interests are materially adverse to DelDOT’s. DelDOT contends that Abbott’s involvement in this matter violates Rule 1.9 of the Delaware Lawyers’ Rules of Professional Conduct (“DLRPC”) and that disqualification is necessary.<sup>1</sup> For the reasons stated below, Abbott and The Bayard Firm will be disqualified from representing Acierno in this litigation.

## I. FACTS

Acierno owns a 185 acre parcel of property in New Castle County near Christiana Mall (the “Acierno Parcel”). At one time, this property was part of a larger 401 acre parcel that Acierno owned with Albert Marta (“Marta”) as tenants in common (the “Acierno-Marta Parcel”). In the 1970s and early 1980s DelDOT undertook a highway construction project to improve traffic flow on State Road 7 (“SR 7”) near its interchange with Interstate 95 (“I-95”). SR 7 was to be realigned

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<sup>1</sup> Defendants’ motion to disqualify also sought a stay of discovery pending resolution of the disqualification issue. Because Plaintiff has consented to a stay, that portion of Defendants’ motion is moot.

into what is now SR 1 with a portion of the realigned highway being on the Acierno-Marta Parcel.

On September 20, 1988, Marta and Acierno granted DelDOT a right of entry onto their land to commence construction. The parties were unable to agree on the compensation due or the amount of land that was required for the construction. The State, therefore, instituted condemnation proceedings in the Superior Court to determine the appropriate compensation for the taking of approximately 41 acres used to realign SR 7. This was not a straightforward condemnation case in which the only question was the value of the condemned property. DelDOT had agreed to construct a new interchange to provide access to the Acierno-Marta Parcel (the “Road A network”). In addition, DelDOT took the position that the construction of the Road A network provided a “special benefit” that increased significantly the value of the remaining land and should offset any compensation for the condemned land.

Acierno and Marta chose to negotiate with DelDOT separately with regard to the compensation for each of their undivided interests in the condemned portion of the Acierno-Marta Parcel. Marta reached a settlement agreement with DelDOT; Acierno did not and chose to litigate.

Acierno’s case went to trial in the Superior Court (the “Condemnation Action”). The court found that DelDOT’s commitment to make further improvements to the Road A network, providing access to the Acierno-Marta Parcel from SR 1, conferred a special benefit to Acierno’s remaining property and

thus reduced the compensatory award to which he was entitled.<sup>2</sup> Acierno was awarded \$266,000 for his interest in the 41 acres. He appealed that amount to the Supreme Court as grossly inadequate.<sup>3</sup> The Supreme Court affirmed the Superior Court's holding that a special benefit had been conferred and upheld the award.<sup>4</sup>

Meanwhile, in 1992, Marta negotiated a settlement with DelDOT (the "Settlement Agreement"). The Settlement Agreement provided Marta with compensation for the taking of his interest in the remainder of the property and included language relating to the anticipated development of the property and DelDOT's commitment to provide improvements related to the Road A network.

Abbott represented DelDOT in connection with both the Condemnation Action and the Settlement Agreement. In the Condemnation Action he was DelDOT's primary attorney and advocated its position with respect to the special benefits conferred on Acierno's property.<sup>5</sup> At trial, Abbott examined Raymond E. Harbeson ("Harbeson"), DelDOT's chief engineer, regarding DelDOT's commitment to improve the Road A network.<sup>6</sup> He also defended Harbeson's

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<sup>2</sup> See *State v. Acierno*, 643 A.2d 1328 (Del. 1994)(describing and affirming the Superior Court's decision).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Affidavit of Raymond E. Harbeson, filed November 5, 2004 ("Harbeson Aff.") ¶ 3.

<sup>6</sup> Excerpts of the trial testimony are attached to Defendants' Opening Brief ("DOB") as Ex. A.

deposition on the same topic.<sup>7</sup> Abbott also led the negotiation of the Settlement Agreement for DelDOT and participated in drafting and finalizing it.<sup>8</sup> Regarding both the Condemnation Action and the Settlement Agreement, Harbeson has stated under oath that Abbott was privy to numerous confidential attorney-client communications relating to those matters, including communications regarding the scope of DelDOT's commitments to make improvements to the Road A network.<sup>9</sup>

On April 3, 1995, the Acierno-Marta Parcel was partitioned by Court order. Thereafter, Acierno sought the necessary governmental approvals to develop a shopping mall (the "Christiana Fashion Center") on his parcel. DelDOT found that traffic movements in and around the nearby interchange of I-95 and SR 1 were in failure or would be in failure if the proposed development occurred. Citing this problem, DelDOT recommended that New Castle County deny or defer the proposed development until improvements to the I-95/SR 1 interchange could be made. In taking this position, DelDOT acknowledged the commitments it made during the Condemnation Action to improve the Road A network and upon which it relied to reduce Acierno's compensation.<sup>10</sup> Because Acierno failed to

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<sup>7</sup> *Id.* Ex. B (excerpts from the Harbeson deposition).

<sup>8</sup> DOB Ex. C (excerpt from trial transcript in the *Alro* action) at 192, 240; Harbeson Aff. ¶ 4.

<sup>9</sup> Harbeson Aff. ¶¶ 3-5.

<sup>10</sup> DOB Ex. D (Ltr. from DelDOT Secretary Hayward to Gen. Mgr. of New Castle County's Dept. of Land Use (Feb. 8, 2002)).

obtain a letter of no objection from DelDOT, the County denied his applications for the proposed development. During this same time period, New Castle County adopted a new development code.<sup>11</sup>

On July 8, 2002, Acierno brought this action for injunctive relief and damages based on DelDOT's alleged breach of the obligations it undertook to Acierno in connection with the condemnation of part of the Acierno-Marta Parcel for construction of an interchange connecting SR 1 with the Christiana Mall.<sup>12</sup> To support his claims, Acierno relies on several sources. First, his Complaint cites to the decision of the Delaware Supreme Court in the Condemnation Action. In particular, Acierno noted that the special benefit the Supreme Court found to have been conferred upon his property "was expressly 'conditional upon Harbeson's

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<sup>11</sup> New Castle County, Del., Unified Development Code (Dec. 31, 1997) as amended through Mar. 31, 2004, *available at* [www.co.new.new-castle.de.us/County Code/CoCode1.htm](http://www.co.new.new-castle.de.us/County Code/CoCode1.htm) (last visited Apr. 6, 2004).

<sup>12</sup> Acierno argues strenuously about how this action should be characterized. For example, his answering brief states:

[C]ontrary to the blatant and intentional misrepresentations in Defendants' Opening Brief, this action is in no way "arising from the condemnation of land for the construction of an interchange connecting State Route 1 with Christiana Mall in the late 1980s." Such a knowing and false statement was obviously made by Defendants solely for purposes of attempting to fool this Court into believing that this action might involve matters which were at issue in the condemnation action in which Acierno's counsel represented DelDOT. Nothing could be further from the truth!

[Chief Engineer and acting Director of Preconstruction for the Department of Transportation] representation at trial that the State is committed to the future improvements necessary for the full development of the Acierno property.’’<sup>13</sup> He also relies upon the following statement in the Opinion: “Indeed the State argued at trial, and repeats the contention here, that the benefits were neither speculati[ve] nor remote. *We view the State as legally bound by its representation which had the effect of reducing its exposure to a large condemnation award.*”<sup>14</sup>

As further support for his claims, Acierno relies upon former Vice Chancellor Jacobs’s decision in *Alro Associates v. Hayward*,<sup>15</sup> Marta’s Settlement Agreement, and certain comments by DelDOT officials.<sup>16</sup> In the Marta Settlement Agreement, dated October 1, 1992, DelDOT agreed to provide improvements intended to accommodate the development of the Acierno-Marta Parcel. DelDOT further agreed that it would “not object to the total development of Marta’s one-half interest in the property.” According to Acierno, these promises were made to induce Marta to waive his right to just compensation for the taking of his

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PAB at 1. This argument, however, simply ignores the origin of DelDOT’s obligations to Acierno, which he admits arose out of the Condemnation Action. *See, e.g.*, Compl. ¶¶ 3, 5.

<sup>13</sup> Compl. ¶ 5, quoting *Acierno v. State*, 643 A.2d at 1334.

<sup>14</sup> *Id.* (emphasis added in Acierno’s Complaint).

<sup>15</sup> 2003 WL 22594526 (Del. Ch. Oct. 31, 2003), *aff’d*, 847 A.2d 1121 (Del. 2004) (table).

<sup>16</sup> Compl. ¶¶ 5, 21, 24, 25.

property.<sup>17</sup> The comments by DelDOT officials Acierno complains of occurred in July 1999, when then County Coordinator, Brockenbrough, reaffirmed DelDOT's obligations to construct the necessary improvements.<sup>18</sup>

In its answer, DelDOT contends that the Opinion and Settlement Agreement speak for themselves and denies Acierno's characterizations of those documents and the obligations he infers from them.<sup>19</sup>

Acierno's Complaint asserts eight separate counts (numbered I-VIII). The majority are based, in whole or in part, on Acierno's assertions that: (1) "DelDOT is legally obligated to provide the improvements necessary for the full development of [Acierno's] property"; and (2) DelDOT has refused to contract for those improvements.<sup>20</sup> The Complaint claims as breaches of DelDOT's obligations its refusal to provide for the necessary improvements (Counts I and V), its failure "to accommodate 100% of the development of [Acierno's] property"(Count III), its refusal to provide the required letter of no objection and its objection to the development of Acierno's property at this time (Count III (§§ 64, 66)), and its refusal to provide routine cooperation, "for the purpose of defeating or delaying the development of the Christiana Fashion Center" (Count

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<sup>17</sup> Compl. ¶ 21.

<sup>18</sup> *Id.* ¶ 25.

<sup>19</sup> Answer §§ 5, 6, 21, 24, 25, 26.

<sup>20</sup> See Complaint Counts I (§§ 53 and 54), III, V, VI, and VIII.

VI (¶ 86)). In addition, Acierno challenges other aspects of DelDOT's actions in connection with his development application, including its positions regarding the area of influence for the traffic impact study (Counts II, IV and VII). Acierno claims those actions were beyond DelDOT's authority, arbitrary and capricious, and in violation of his rights to due process and equal protection of the laws.

The relief Acierno seeks includes: (1) damages for the delay and other losses he has suffered; (2) an injunction requiring DelDOT to issue a letter of no objection and to enter into the contracts required for planning and construction of the necessary improvements<sup>21</sup> and preventing further breaches (Count VI (¶ 87)); and (3) an order rescinding Secretary Hayward's February 8, 2002 letter and any subsequent actions of DelDOT with respect to the Christiana Fashion Center (Count VIII (¶ 96)).

On or about August 2, 2003, Abbott notified DelDOT via email of his intention to enter an appearance for Acierno in this action. In a letter to Abbott dated August 6, 2003, DelDOT objected that his appearance in this action would violate DLRPC 1.9.<sup>22</sup> On August 8, 2003, Abbott responded that the relationship between this action and the Condemnation Action is "causally disjointed and

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<sup>21</sup> *E.g.*, Compl. ¶ 57.

<sup>22</sup> DOB Ex. E.

highly attenuated” and that he was entitled to move to reopen the Condemnation Action on behalf of Acierno.<sup>23</sup>

Shortly thereafter, Abbott did enter his appearance as “additional counsel” for Acierno.<sup>24</sup> On October 28, 2003, Abbott propounded discovery requests to DelDOT. A week later, DelDOT moved to disqualify him.

On October 31, 2003, Justice Jacobs, sitting by designation on the Court of Chancery, entered an opinion in *Alro*,<sup>25</sup> interpreting both Marta’s Settlement Agreement and the scope of DelDOT’s obligations arising out of the Condemnation Action.<sup>26</sup> Justice Jacobs found that DelDOT breached its contract with Alro, Marta’s successor in interest, to complete the Road A network that conferred a special benefit on the Acierno-Marta Parcel.<sup>27</sup> He held that Alro was entitled to damages for the breach, but due to public safety concerns, declined to order specific performance.<sup>28</sup> Harbeson testified at the *Alro* trial regarding the

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<sup>23</sup> DOB Ex. F. DelDOT argued that any such reopening also would violate DLRPC 1.9. DOB Ex. E.

<sup>24</sup> Charles Oberly, Esquire has been counsel for Acierno throughout this action.

<sup>25</sup> 2003 WL 22594526.

<sup>26</sup> *Id.* at \*5-7.

<sup>27</sup> *Id.* at \*7.

<sup>28</sup> *Id.* at \*8-9.

scope of the commitments that DelDOT made in connection with the Condemnation Action and the Settlement Agreement.<sup>29</sup>

## II. ANALYSIS

The Court has the inherent power to supervise the professional conduct of attorneys appearing before it.<sup>30</sup> This power includes the authority to disqualify an attorney.<sup>31</sup> Nevertheless, disqualification motions are generally disfavored because they often are filed for tactical reasons.<sup>32</sup> For this reason, the party seeking disqualification must show that continued representation would be impermissible.<sup>33</sup> “A movant for disqualification must have evidence to buttress his claim of conflict because a litigant should, as much as possible, be able to use the counsel of his choice.”<sup>34</sup>

Disqualification of counsel is a remedy designed to ensure that a client’s confidential communications to her lawyer are not used against the client when her

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<sup>29</sup> Harbeson Aff. ¶ 5.

<sup>30</sup> *Unanue v. Unanue*, C.A. No. 204-N, mem. op. at 6 (Del. Ch. Mar. 25, 2004) (Parsons, V.C.); *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 581 (D. Del. 2001).

<sup>31</sup> *Unanue*, at 6.

<sup>32</sup> *See id.* at 6.

<sup>33</sup> *Id.*; *see also Kanaga v. Gannett Co.*, 1993 WL 485926, at \*2 (Del. Super. Oct. 21, 1993).

<sup>34</sup> *Unanue*, at 6; *Kanaga*, 1993 WL 485926, at \*2. Vague and unsupported allegations are not sufficient to meet this standard. *Elonex*, 142 F. Supp. 2d at 581.

lawyer later represents a party adverse to the former client.<sup>35</sup> The ethical rules provide a framework for the Court’s analysis of a motion to disqualify. If a conflict of interest appears to exist under the ethical rules, the Court must determine whether continued representation by the conflicted attorney will so undermine the integrity and fairness of the proceedings that the client should be deprived of the counsel of his choosing.<sup>36</sup>

#### **A. Acierno’s Jurisdictional Argument**

As a threshold matter, Acierno contends that this Court does not have jurisdiction to disqualify his counsel. He correctly states that a violation of DLRPC 1.9 in and of itself may not justify disqualification. As the Delaware Supreme Court stated in *Infotechnology*, “[u]nless the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and efficient administration of justice, only [the Delaware Supreme Court] has the power and responsibility to govern the Bar, and in pursuance of that authority to enforce the Rules for disciplinary procedure.”<sup>37</sup>

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<sup>35</sup> *Manchester v. Narragansett Capital, Inc.*, 1989 WL 125190, at \*3 (Del. Ch. Oct. 19, 1989)(citing *Satellite Fin. Planning Corp. v. First Nat’l Bank*, 652 F. Supp. 1281, 1283 (D. Del. 1987)).

<sup>36</sup> *See In re Infotechnology, Inc.*, 582 A.2d 215, 216-17 (Del. 1990); *Unanue*, at 6.

<sup>37</sup> 582 A.2d at 216-17. *See also* DLRPC 1.10 cmt. 9 (“Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.”).

In this case, DeIDOT has presented evidence that arguably supports disqualification of Abbott based on a conflict of interest under Rule 1.9. For example, DeIDOT contends that the claims made in Acierno's Complaint suggest that he inevitably will be placed in a position where he might use confidential information obtained from his prior representation of DeIDOT to its disadvantage in this litigation, which DeIDOT considers substantially related. In these circumstances, the threat to the fair and efficient administration of justice is sufficiently palpable to support this Court's exercise of jurisdiction over Defendants' motion to disqualify.

**B. Is there a Conflict of Interest?**

Rule 1.9(a) of the DLRPC states:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

There is no dispute that DeIDOT is Abbott's former client. Nor is there any dispute that Acierno's interests in this litigation are materially adverse to DeIDOT's and that DeIDOT has refused to consent to the adverse representation. The only issue in dispute as to whether a conflict exists is whether this matter is "substantially related" to the Condemnation Action or the Settlement Agreement, or both.

For purposes of the ethical rules, matters are substantially related if they involve the same transaction or legal dispute or if there otherwise is a substantial

risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.<sup>38</sup>

The pending litigation centers on a dispute over the scope of DelDOT's obligations to Acierno as a result of the condemnation of the Acierno-Marta Parcel. Abbott represented DelDOT in the Condemnation Action in which the Superior Court determined the just compensation due to Acierno as a result of the taking. In that action, the Superior Court significantly reduced the amount of the compensation based on the special benefits that DelDOT had agreed to provide with respect to the property. The scope of those special benefits is likely to be a key issue in this litigation. A related issue is whether DelDOT was entitled to delay its obligations from the Condemnation Action until improvements can be made to the I-95/SR 1 interchange.<sup>39</sup> This action arises out of the same facts as the Condemnation Action. The legal issues presented are intertwined with issues

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<sup>38</sup> DLRPC 1.9 cmt. 3. *See also J.E. Rhoads & Sons, Inc. v. Wooters*, 1996 WL 41162, at \*2 (Del. Ch. Jan. 26, 1996); *Del-Chapel, Assocs. v. Ruger*, 2000 WL 488562, at \*5 (Del. Ch. Apr. 17, 2000).

<sup>39</sup> DelDOT argues that Abbott's participation in this case would "present the spectacle of a Delaware lawyer attacking his prior work for the opposing party." DRB at 1. This is an overstatement. In *Acierno v. State*, DelDOT argued that the Court should reduce the amount of just compensation due to the owners of the Acierno-Marta Parcel based on the special benefits they would receive as a result of the Settlement Agreement between DelDOT and Marta. DelDOT prevailed on that argument. Now Acierno (and Abbott) seek to *enforce* the agreement upon which DelDOT's victory in the Condemnation Action was based.

raised by the prior litigation. In fact, Acierno references the Condemnation Action, the Settlement Agreement, and the obligations of DeIDOT that arise out of them numerous times in his Complaint. Thus, the Condemnation Action and this litigation are substantially related, because they do involve some of the same transactions and legal disputes.<sup>40</sup>

DeIDOT contends that the pending action also is “substantially related” to the Condemnation Action and the Settlement Agreement under the second test enunciated in DLRPC 1.9 cmt. 3. Specifically, DeIDOT argues that there is substantial risk that Abbott will use confidential information obtained during his representation of DeIDOT to materially advance Acierno’s position in this action. The Court will address this issue below in the context of assessing whether the alleged risk of Abbott’s exploitation of confidential DeIDOT information threatens to prejudice the fairness and integrity of these proceedings.<sup>41</sup>

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<sup>40</sup> Abbott also represented DeIDOT in the negotiation and drafting of Marta’s Settlement Agreement with DeIDOT over the condemnation of the Acierno-Marta Parcel. Now he seeks to use that Settlement Agreement to support Acierno’s claims against DeIDOT. Because the Settlement Agreement simply reflects the other half of the Condemnation Action, it is substantially related as well. *See, e.g.*, DLRPC cmt. 2 (“When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited.”).

<sup>41</sup> *Infotechnology*, 582 A.2d at 216-17; *Unanue*, C.A. No. 204.

### C. The Integrity and Fairness of this Proceeding

The existence of an ethical conflict of interest between Abbott's representations of DeIDOT in the Condemnation Action and Settlement Agreement and of Acierno in this action does not necessarily require disqualification as a remedy. The Court must determine whether the conflict threatens to prejudice the fairness and integrity of the proceedings such that the current client should be deprived of the counsel of her choosing.<sup>42</sup>

An attorney who opposes a former client in a subsequent, but substantially related action is in a better position to know where to look and what questions to ask in discovery.<sup>43</sup> Abbott counseled Harbeson and DeIDOT in opposing Acierno's claims and in arguing the importance of the special benefits to be accorded to Acierno through DeIDOT's commitment to undertake improvements to the Road A network.<sup>44</sup> Abbott also negotiated the Settlement Agreement. His prior representation of DeIDOT in both the Condemnation Action and the Settlement Agreement give him a unique perspective on the issues in the litigation now before this Court. As a result, it is reasonable to infer that the knowledge

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<sup>42</sup> E.g., *Unanue v. Unanue*, C.A. No. 204-N, mem. op. (Del. Ch. Mar. 25, 2004)(denying motion to disqualify despite evidence of possible conflict of interests where there was no threat of prejudice to the fairness and integrity of the proceedings).

<sup>43</sup> *Bowden v. Kmart Corp.*, 1999 WL 743308, at \*2 (Del. Super. July 1, 1999).

<sup>44</sup> Harbeson Aff. ¶ 3.

Abbott gained in his prior representation of DelDOT will provide Acierno an unfair advantage.<sup>45</sup>

Abbott contends that “no confidential information still exists” because he provided all information to Acierno’s counsel during discovery in the Condemnation Action and because all information regarding the condemnation is public.<sup>46</sup> This reflects an overly narrow view of this action. While the Condemnation Action is memorialized in two opinions and a trial transcript, all of which are public documents, the dispute in this litigation centers on the scope of DelDOT’s obligations arising out of representations made during that litigation. Acierno’s action is not properly characterized as seeking merely a declaratory judgment about the meaning of the judicial opinions. He is seeking to enforce contract rights arising out of representations made during the prior litigation, regarding the Settlement Agreement, among other things.

The fact that the parties to this action dispute the scope of DelDOT’s obligations suggests that one, if not both, parties will argue that the obligations

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<sup>45</sup> Acierno argues that his additional counsel, Abbott, “will be a particularly worthy, experienced, knowledgeable, and expert adversary [who is] known as one of the pre-eminent authorities in the State of Delaware regarding transportation law,” and would be perceived by DelDOT as part of a “potentially deadly combination for the defense.” PAB at 15. Even if that were true, however, Abbott’s apparent conflict creates too substantial a risk that confidential information of DelDOT could be used to advance Acierno’s position.

<sup>46</sup> PAB at 13.

undertaken by DelDOT are ambiguous.<sup>47</sup> The fact that two litigants disagree about the meaning of a contract or other undertaking does not prove that it is ambiguous.<sup>48</sup> Thus, whether ambiguities exist as to the nature of DelDOT's obligations to Acierno remains to be seen. It is reasonable to expect, however, that the parties to this litigation will pursue discovery and present arguments to the Court that go beyond the public record as to the Condemnation Action and the Settlement Agreement. Consequently, the Court concludes that there is a substantial risk that if Abbott continues as Acierno's counsel confidential information such as normally would have been obtained in the prior representation of DelDOT would materially advance Acierno's position.

Moreover, this action is not limited to a declaratory judgment as to the scope of DelDOT's obligations as stated by the courts in the Condemnation Action. Acierno's complaint contains eight counts seeking injunctive relief,

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<sup>47</sup> Acierno contends that “[k]nowledge regarding what DelDOT and Raymond M. Harbeson thought the commitment was with respect to the construction of future roadway improvements to accommodate development on Acierno's lands is legally and logically irrelevant given the fact that the commitment has been and will be established solely pursuant to the language contained in the Opinion and (perhaps) the trial transcript.” PAB at 13. Although that may be Acierno's position, DelDOT's Answer indicates that it disagrees with him on the extent of DelDOT's obligations. At this early stage of the litigation, the Court is in no position to resolve that dispute or to predict with confidence the evidence that may bear upon it.

<sup>48</sup> See *In re Explorer Pipeline Co.*, 781 A.2d 705, 714 (Del. Ch. 2001); *Angelo, Gordon & Co. v. Allied Riser Communications Corp.*, 822 A.2d 1065, 1070 (Del. Ch. 2002).

rescission and damages. These other contentions and averments, particularly those seeking delay damages and alleging violations of his due process and equal protection rights, undermine Acierno's argument that the issues in this action are crystallized in the prior opinions. Abbott, as DelDOT's former counsel, may have been privy to confidential information that could support his claims for damages, the reasons for DelDOT's delays in making the necessary improvements, or the amount of damages.<sup>49</sup>

Acierno also seeks damages for DelDOT's objection to the development of the Christiana Fashion Center on the basis of factors other than the traffic that the project will generate asserting claims under 42 U.S.C. § 1983 against DelDOT for violating his due process rights, treating Acierno differently from similarly situated developers, and refusing to provide routine cooperation.<sup>50</sup> Acierno's counsel argued at oral argument that the County treats him and his client unfairly. During his representation of DelDOT, Abbott might have been privy to confidential communications that could be used to further some aspect of those claims.

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<sup>49</sup> For instance, hypothetically speaking, DelDOT might take the same position here that it took in *Alro*, and argue that it cannot specifically perform at this time because of public safety concerns. If Abbott was privy to confidential information that DelDOT held a different view in the early 1990s, he might seek to use that information to Acierno's advantage in this action.

<sup>50</sup> Counts IV and VII.

Defendants submitted a sworn affidavit that Acierno’s “additional counsel,” Abbott, was privy to confidential information during his representation of DeIDOT in the Condemnation Action and the Settlement Agreement.<sup>51</sup> DeIDOT is unable to disclose the specifics of this information due to the risk of waiving the privilege.<sup>52</sup> Nevertheless, based on the record presented, the Court concludes that there is a substantial risk that, even with the best intentions, Abbott inevitably will use confidential information gained during his representation of DeIDOT to Acierno’s advantage in this substantially related litigation. Therefore, disqualification is necessary to preserve the fairness and integrity of these proceedings.

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<sup>51</sup> Harbeson Aff. ¶¶ 3-5. In his brief Acierno asserts that “any information that Abbott may have obtained during his representation of DeIDOT in the Condemnation Action is expressly permitted to be utilized by Abbott under comment [3] to Rule 1.9 of the DLRPC.” The Court considers this argument specious. Abbott was DeIDOT’s lawyer – not a member of the general public whose access is limited to the trial transcript and opinion. Representing a client involves far more than the information that is eventually presented to the Court and opposing counsel. *See, e.g.*, Restatement (Third) The Law Governing Lawyers § 132, cmt. d(ii) (Where “the prior matter involved litigation, it will be conclusively presumed that the lawyer obtained confidential information about the issues involved in that litigation.”). It includes privileged information and *confidential* information that is exchanged pursuant to confidentiality agreements.

<sup>52</sup> For this same reason, DeIDOT is not required to point to specific confidential information that they believe Abbott possesses. *See* DLRPC 1.9 cmt. 3; Restatement § 132 cmt. d(iii).

#### **D. Disqualification of Abbott's Law Firm**

Defendants' motion also sought to disqualify Abbott's law firm, The Bayard Firm. Rule 1.10(a) of DLRPC provides in relevant part, "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . . ." As explained above, Abbott has a conflict of interest under Rule 1.9. His conflict is imputed to The Bayard Firm under Rule 1.10.<sup>53</sup> Acierno presented no argument in his papers on this motion that The Bayard Firm should be permitted to continue representing him, notwithstanding Abbott's conflict of interest. The Court, therefore, also will disqualify Abbott's law firm.

#### **E. Unclean Hands**

Acierno contends that DelDOT's motion to disqualify Abbott should be denied because "DelDOT and Hayward have brought this action for bad faith reasons; namely to try to unjustifiably knock Abbott out of the case due to his legal prowess in the areas of law at issue and to further a personal and political vendetta, respectively."<sup>54</sup> DelDOT has raised legitimate concerns about Abbott's continued participation in this action. He has a conflict of interest under DLRPC 1.9 and that conflict threatens to prejudice the fairness and integrity of these

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<sup>53</sup> Abbott was not associated with The Bayard Firm at the time he represented DelDOT in the Condemnation Action and the Marta Settlement Agreement. Rule 1.10, however, would impute Abbott's conflict to his present firm.

<sup>54</sup> PAB at 18.

proceedings. These circumstances warrant disqualification, and the Court will not speculate about DeIDOT's motivations in filing its motion.

#### **F. Abbott's Thirteenth Amendment Rights**

Acierno's final argument is that "DeIDOT's motion [to disqualify] seeks to violate Abbott's rights under the Thirteenth Amendment [of the United States Constitution]." Although the basis of this argument is not entirely clear, Abbott apparently contends that denying him the right to represent whomever he wants is an imposition of involuntary servitude in violation of the Thirteenth Amendment. Not surprisingly, no authority is cited for this argument.

In any event, it is preposterous to suggest that the Thirteenth Amendment with its most venerable history was intended to limit the power of a state court to disqualify an attorney who appears to have a conflict of interest that threatens the fairness and integrity of proceedings before it. The Court summarily rejects that argument.

### **III. CONCLUSION**

For the reasons stated above, the Court will grant Defendants' motion to disqualify Abbott and his law firm, The Bayard Firm, from representing Acierno in this litigation.

**IT IS SO ORDERED.**