

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. Henley Graves  
Resident Judge

SUSSEX COUNTY COURTHOUSE  
THE CIRCLE  
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September 16, 2004

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RE: Abraham Ismael Sanchez-Caza et al. v. Estate of Susan Gordon Lloyd  
Whetstone, et al.  
C.A. No. 02C-08-002

Date Submitted: September 1, 2004

Dear Counsel:

This is the Court's decision on the Motion by Kathaleen McCormick, Kathleen Lloyd, Candice A. Casey, and Key Box "5" Operatives, Inc. to disqualify David Boswell as Plaintiff's Counsel. The Motion is DENIED for the reasons set forth herein.

\_\_\_\_\_The above-referenced matter was filed in August 2002, when Abraham Sanchez-Caza, through his father and legal guardian, Rogelio Sanchez, filed this action against the Estate of Susan Whetstone seeking damages for personal injuries and the wrongful death of his mother, Nancy Suarez, arising from an automobile accident. In an amended complaint, filed on December 4, 2003, Kathaleen McCormick, Kathleen Lloyd, Candice A. Casey, and Key Box "5" Operatives, Inc. were included as Defendants in the matter. On June 22, 2004, the above Defendants filed a motion to disqualify David Boswell as plaintiff's attorney based on a prior representation of Defendant McCormick by Neil Primos, an attorney in Mr. Boswell's firm.

\_\_\_\_\_Neil Primos, a Kent county attorney with the firm Schmittinger & Rodriguez, represented Kathaleen McCormick in an action alleging assault and retaliatory firing filed in federal district court in 1997. The case went to trial in 2002. On June 13, 2002, Neil Primos issued a final bill for costs to Ms. McCormick. The following day, the case was effectively terminated when an order denying the Defendant's motion for attorney's fees was issued.

On May 8, 2002, Sussex County Schmittinger & Rodriguez counsel David Boswell,

opened up a file in the name of Abraham Sanchez-Caza, a minor, upon request of his legal guardian and father, Rogelio Sanchez. In August 2002, the case commenced with the filing of a complaint against the Estate of Susan Whetstone. As of the initial filing date, neither Kathaleen McCormick nor Key Box “5” Operatives, Inc. were named Defendants in the complaint.

In November 2003, the Plaintiff contends that it first received information, from an October 2003 Chancery Court transcript, that at the time of the automobile accident, Defendant Whetstone was acting on behalf of Key Box “5” Operatives, Inc. On December 4, 2003, Kathaleen McCormick, her corporate partners and Key Box “5” Operatives, Inc. were named Defendants in an amended complaint.

Defendants contend that as a result of the prior representation by Mr. Primos, the Schmittinger & Rodriguez firm obtained confidential information including information regarding the extent of Susan Whetstone’s involvement with Key Box “5” Operatives, Inc. [hereinafter “Key Box”], her ownership interests in Key Box, as well as confidential corporate meeting minutes. Defendants claim that such information would be relevant to any agency or employment claims brought by the Plaintiff. Defendants Kathleen Lloyd, Kathaleen McCormick, Candice A. Casey and Key Box requested the disqualification of Mr. Boswell as Plaintiff’s counsel for these reasons on June 22, 2004.

This Court has the power to “rectify and punish conduct of a party or counsel which threatens the legitimacy of judicial proceedings.”<sup>1</sup> It is necessary for trial courts to have this regulatory power over attorneys to ensure both efficiency and integrity at the outset of judicial actions.<sup>2</sup> The disqualification of an attorney, a generally disfavored motion,<sup>3</sup> is an appropriate sanction to be ordered by a trial court judge who finds that the representation frustrates the fairness of the proceedings.<sup>4</sup>

Neil Primos and David Boswell are both attorneys with Schmittinger & Rodriguez. Mr. Primos serves the Kent county office. Mr. Boswell works out of the Sussex county office.<sup>5</sup> Kathaleen McCormick and Abraham Sanchez-Caza were both clients of Schmittinger & Rodriguez for a brief period of time between May and June 2002.<sup>6</sup> However, the concurrence of these representations is irrelevant in this motion. Ms. McCormick terminated her representation

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<sup>1</sup>See *In re Appeal of Infotechnology, Inc.*, 582 A.2d 215, 221-22 (1990); *In re Estate of Waters*, 647 A. 2d 1091, 1098 (1994).

<sup>2</sup>See *In re Estate of Waters*, 647 A. 2d 1091, 1098 (Del. 1994).

<sup>3</sup>See *Acierno v. Hayward*, Del. Ch., C.A. No. 19729, Parsons, V.C. (July 1, 2004).

<sup>4</sup>See *In re Estate of Waters*, 647 A. 2d at 1098.

<sup>5</sup>Pl.’s Supp. Resp. to Mot. to Disq. Counsel at 1.

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

with Schmittinger & Rodriguez in June 2002. As of December 4, 2003, when Ms. McCormick and Key Box “5” Operatives, Inc. were named Defendants in this matter, Ms. McCormick was a former client of Schmittinger & Rodriguez.

To ensure attorney loyalty to former clients, the Delaware Lawyer’s Rules of Professional Conduct<sup>7</sup> mandate that “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.”<sup>8</sup> This duty of loyalty to a former client not only applies to the individual attorney, but is imputed to the law firm to which he belongs.<sup>9</sup> As such, “a firm of lawyers is essentially [considered] one lawyer for purposes of the rules governing loyalty to the client. . . .”<sup>10</sup> Therefore, as members of the same law firm, Mr. Primos and Mr. Boswell are expected to avoid conflicts of interests that arise not only with their own former clients, but all former clients of Schmittinger & Rodriguez.

It is clear that the firm of Schmittinger & Rodriguez, through its counsel, Neil Primos, formerly represented Kathaleen McCormick in *Kathaleen McCormick v. Richard Jefferson*.<sup>11</sup> It is equally clear that Schmittinger & Rodriguez, through its counsel David Boswell, is currently representing Abraham Sanchez-Caza, a minor with materially adverse interests to Kathaleen McCormick, a defendant in the present matter. The Court is left to determine whether the prior and current actions are “substantially related” to indicate a violation of the ethical rules.

According to Comment 3 of Rule 1.9, “[m]atters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute . . . .”<sup>12</sup> The matters at issue in this case do not involve the same facts or legal concerns at issue during Mr. Primos’ representation of Ms. McCormick. The prior representation involved a Department of Natural Resources and Environmental Control investigation of a trailer park where Ms. McCormick served as a corporate officer.<sup>13</sup> The investigation resulted in an alleged assault and retaliatory firing of Ms. McCormick.<sup>14</sup> The nature of the matter does not indicate that either Ms.

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<sup>7</sup>All subsequent textual references to the Delaware Lawyer’s Rules of Professional Conduct will be by rule number only.

<sup>8</sup>See PROF. COND. R. 1.9 (2003).

<sup>9</sup>See PROF. COND. R. 1.10 (a) (2003).

<sup>10</sup>See PROF. COND. R. 1.10 cmt. 2 (2003).

<sup>11</sup>See C.A. No. 97-307-GMS (1997).

<sup>12</sup>See PROF. COND. R. 1.9 cmt. 3 (2003).

<sup>13</sup>See *Kathleen McCormick v. Richard Jefferson*, C.A. No. 97-307-GMS (1997).

<sup>14</sup>See *id.*

McCormick's business assets or the corporate structure of Key Box were relevant, other than to prove Ms. McCormick's interest in the property as a corporate officer. The matters involved in the prior representation and the current litigation, therefore, are not likely to involve the same facts or legal issues that would result in a material disadvantage to Ms. McCormick and Key Box.

Two matters may also be substantially related if there "is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."<sup>15</sup> To make this determination, a former client is not required to reveal the specific details of information shared with the lawyer.<sup>16</sup> Instead, the Court may determine whether information ordinarily shared in that particular type of representation creates an unavoidable conflict with the present case.<sup>17</sup>

*Bowden v. Kmart Corporation* laid out an appropriate test for determining whether matters are "substantially related" for conflict purposes.<sup>18</sup> To determine whether a prior representation was "substantially related" to the current case before it, the Court considered the nature and scope of the prior representation, the nature and scope of the present lawsuit and whether the client may have revealed confidential information to its counsel during the prior representation that was relevant to the present action, and if so, whether the confidential information could be used against the former client in the current lawsuit.<sup>19</sup>

Given the nature of the prior representation, the risk that Mr. Primos may have obtained confidential information that could materially advance Abraham Sanchez-Caza's position is minimal. Any knowledge of Ms. McCormick's corporate ownership, business assets, or corporate minutes appear to be peripheral to her representation.<sup>20</sup> Defendants contend that the law firm of Schmittinger & Rodriguez was privy to information regarding the extent of Susan Whetstone's involvement with Key Box, her ownership interests in Key Box, as well as confidential corporate board meeting minutes. Mr. Primos acknowledges the receipt of corporate

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<sup>15</sup>See PROF. COND. R. 1.9 cmt. 3 (2003).

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*

<sup>18</sup>See 1999 Del. Super. LEXIS 423, \*4 (Del. Super. Ct.).

<sup>19</sup>See *id.*

<sup>20</sup> Comment 3 to Rule 1.9 suggests that general information regarding a corporate client's business practices is not enough to deny representation by a present party's chosen counsel. See PROF. COND. R. 1.9 cmt. 3 (2003). However, "knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude representation." *See id.*

minutes dated from 1988 through 1997, but is not aware of their current location.<sup>21</sup> It is unclear why or how information regarding Susan Whetstone's involvement and ownership interest in Key Box was conveyed to Mr. Primos. However, even accepting Defendant's disclosures, the limited information given to Mr. Primos regarding Ms. McCormick's corporate associations is too remote from the issue at hand to find a substantial risk of confidential information being used against her or Key Box.

In *Bowden v. Kmart Corporation*, the Court found that "indirect advantages" arising from a prior representation may be enough to disqualify an attorney from opposing a former client.<sup>22</sup> However, the issues before the Court in that case were much more similar than are present here. In *Bowden*, defense counsel challenged the representation of a slip and fall plaintiff by an attorney who, in her previous firm, defended the Kmart Corporation against another slip and fall plaintiff.<sup>23</sup> The Court found that the likelihood of the attorney knowing what to ask for, who to depose, what lines of attack to follow, and what settlements to accept would unfairly advantage the plaintiff. The attorney was disqualified, but her law firm was allowed to proceed, provided she was screened from the case.<sup>24</sup>

The facts here do not warrant the same caution. The minimal advantage that Mr. Primos might have in opposing Ms. McCormick is eliminated by Mr. Boswell's handling of the Sanchez-Caza matter. Both Mr. Boswell and Mr. Primos have assured the Court and the Plaintiffs that Mr. Boswell has no additional information outside of the appropriate discovery material that would allow him to misuse Ms. McCormick's confidence in Schmittinger & Rodriguez to her detriment. Furthermore, the corporate minutes of Key Box are not confidential corporate documents in the context of the present litigation and are subject to discovery. Rule 1.9 requires that the subsequent opposition of a former client pose a "substantial risk" that confidential information will be misused to gain advantage for a current client.<sup>25</sup> Therefore, the slight and attenuated risk that Mr. Boswell even has confidential information regarding Ms. McCormick, Key Box and Susan Whetstone's involvement therein, is not sufficient to disqualify him from representing Abraham Sanchez-Caza in this matter.

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<sup>21</sup>On August 11, 2004, Deputy Attorney General Gregg Wilson contacted Mr. Boswell, at his request, regarding the current status of the *Kathaleen McCormick v. Richard Jefferson, et al.* file to determine whether the corporate minutes had been turned over in discovery. (Boswell Aff. ¶ 3). Mr. Wilson informed Mr. Boswell that the discovery portion of the file had been destroyed, and neither he nor Deputy Attorney General Marc Niedzielski recalled the contents of the file. (Boswell Aff. ¶ 3).

<sup>22</sup>*See* Del. Super., No. 97C-10-020, Witham, J. (July 1, 1999).

<sup>23</sup>*See id.*

<sup>24</sup>*See id.*

<sup>25</sup>*See* PROF. COND. R. 1.9 cmt. 3 (2003).

The two cases here are not substantially related to qualify as a violation of either 1.9 or 1.10 of the Delaware Lawyer's Rules of Professional Conduct. The cases do not arise out of the same facts or legal question. Aside from Ms. McCormick's proof of corporate ownership in Key Box, it is unclear why the disputed facts were even relevant to the prior representation. Additionally, the confidential information that was allegedly made available to Mr. Primos does not pose a serious risk to Ms. McCormick or Key Box in the present action.

Even if a violation of Rule 1.9 existed in Mr. Boswell's representation of Abraham Sanchez-Caza, disqualification would not be warranted. A violation of Rule 1.9 does not require automatic disqualification.<sup>26</sup> Generally, disqualification motions are disfavored because they are often filed for tactical reasons rather than bona fide concerns about client loyalty.<sup>27</sup> To ensure that disqualification motions are not granted liberally, the Court reviewing the motion must weigh the effect of any alleged conflict on the fairness and integrity of the proceedings before disqualifying the challenged counsel.<sup>28</sup>

When considering a motion for disqualification, a Court must weigh the current client's choice of counsel with a "former client's right to protect confidences revealed in a prior representation."<sup>29</sup> In *Elonex I.P. Holdings, Inc. v. Apple Computer, Inc.*, the Court, in denying a motion to disqualify, considered the likelihood of an attorney's loyalty to a former client being compromised against a current client's interest in maintaining his chosen counsel.<sup>30</sup> The Court found that the facts that the matters were not directly related, the challenged counsel's work on the case was limited, and that the work was done out of different offices all weighed against disqualification.<sup>31</sup>

Similar circumstances exist in the present case. The relation between the matters handled by Schmittinger & Rodriguez counsel is incidental. Given the nature of both proceedings, it is unlikely that any significant information obtained in the prior representation would be relevant to the current case. Mr. Primos has limited knowledge of the relevant issues before the court in this matter and has assured the Court that he has shared none of the information he obtained in the prior representation regarding Kathaleen McCormick or Key Box with Mr. Boswell. Finally, the two attorneys work out of offices in different counties. The likelihood of Mr. Boswell having access to confidential files or other information is minimized by this separation. The nature of the prior representation and the physical separation of the attorneys indicates that any information

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<sup>26</sup>See *Elonex I.P. Holdings v. Apple Comp.*, 142 F. Supp 2d 579, 583 (2001).

<sup>27</sup>See *Acierno v. Hayward*, Del. Ch., C.A. No. 19729, Parsons, V.C. (July 1, 2004).

<sup>28</sup>See *id.*

<sup>29</sup>See *Cramer v. Pepper*, 1985 Del. Super. LEXIS 1217, \*2 (Del. Super. Ct.).

<sup>30</sup>See 142 F. Supp 2d 579, 583-84 (2001).

<sup>31</sup>See *id.* at 584.

that may have passed between the attorneys as members of the same law firm was incidental, non-confidential and poses no threat to the fairness of these proceedings.

The Defendants did not object to Mr. Boswell's representation of the Plaintiff until June 22, 2004, approximately six months after they were made Defendants in this action. Before objecting to Mr. Boswell's representation, the Defendants answered the second amended complaint and requested admissions and interrogatories from the Plaintiff. The length of time that passed between their first appearance in this matter and their objection to Mr. Boswell's representation does not necessarily indicate that this Motion is a tactical attempt to delay the proceedings. However, it does appear that the Defendants were not overly concerned about Schmittinger & Rodriguez possessing potentially harmful confidential information.

In his affidavit, Mr. Boswell contends that

“[i]t may be difficult for Mr. Sanchez to secure other counsel with both the experience appropriate for a wrongful death matter, and the time required to work on it on an expedited basis, as will be necessary to get up to speed on the two years' work that has transpired to date, and to comply with the scheduling order presently in effect.”<sup>32</sup>

The disqualification of Mr. Boswell would undoubtedly prejudice the Plaintiff by denying him his choice of counsel and by delaying the adjudication of the merits. This action and the companion lawsuits involve complex issues. The likely prejudice that would result from disqualification is not warranted given the limited, unrelated nature of the prior representation and the minimal risk of Mr. Boswell's access to confidential information regarding Kathaleen McCormick.

The matters at issue are substantially unrelated, the risk of confidential information being used to disadvantage the Defendants is minimal, and the fairness of the proceedings would not be endangered by the continuation of Mr. Boswell as counsel. Therefore, the Defendant's motion is DENIED.

Very truly yours,

T. Henley Graves

THG/jfg

oc: Prothonotary  
cc: Michael Silverman, Esquire  
Michael Pedicone, Esquire  
Stephen Casarino, Esquire  
Gregory Morris, Esquire

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<sup>32</sup>See Boswell Aff. ¶ 2.