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

BOUCHARD MARGULES AND FRIEDLANDER,	:	
Plaintiff,	:	
v.	:	C.A. No. 01C-10-131 CLS
KIMBERLY I. GAYLORD, LISA M. GAYLORD, LORI I. GAYLORD, ROBERT M. GAYLORD, JR., and BAISE MILLER, P.C.	:	
Defendants.	:	

Submitted: June 29, 2004
Decided: August 10, 2004

On Defendants Kimberly I. Gaylord, Lisa M. Gaylord, Lori I. Gaylord, and Robert M. Gaylord, Jr.'s Motion to Demand Jury Trial.
DENIED

On Defendants Kimberly I. Gaylord, Lisa M. Gaylord, Lori I. Gaylord, and Robert M. Gaylord, Jr.'s Motion to Disqualify Bouchard Margules & Friedlander as Trial Counsel for Plaintiffs.
DENIED

MEMORANDUM OPINION

Joel E. Friedlander, Esquire, Bouchard Margules & Friedlander, Wilmington, Delaware, Attorney for Plaintiff.

Jeffrey K. Martin, Esquire, Jeffrey K. Martin, P.A., Wilmington, Delaware, Attorney for Defendants Kimberly I. Gaylord, Lisa M. Gaylord, Lori I. Gaylord, and Robert M. Gaylord, Jr.

Linda M. Gilchrist, Esquire and Edward M. McNally, Esquire, Morris James Hitchens & Williams, Attorneys for Defendant Baise & Miller, P.C.

SCOTT, J.

I. INTRODUCTION

Defendants Kimberly I. Gaylord, Lisa M. Gaylord, Lori I. Gaylord and Robert M. Gaylord, Jr. ("the Gaylords") have filed a Motion to Demand a Jury Trial[1] and a Motion to Disqualify Bouchard Margules & Friedlander ("BM&F") as Trial Counsel for Plaintiffs[2]. Upon consideration of the evidence presented at oral argument and a review of the Gaylords' motions and BM&F's and Baise & Miller, P.C.'s ("Baise") responses, this court concludes both of the Gaylords' motions should be **DENIED**.

II. BACKGROUND

The court previously detailed the factual background of this case in its ruling on the Gaylords' Motion to Dismiss.[3] This case essentially involves a fee dispute among the parties for legal services provided for a Delaware Court of Chancery action.

Oral argument on the Motion to Demand a Jury Trial and the Motion to Disqualify was held June 29, 2004.

III. STANDARD OF REVIEW

The Gaylords are apparently arguing for enlargement of time to demand a jury trial pursuant to Superior Court Civil Rule 6(b)(2) ("Rule 6"). Rule 6 gives

[1] Docket # 73.

[2] Docket # 74.

[3] Opinion dated Dec. 1, 2003, Docket # 38.

the court discretion to enlarge the time for taking action after the expiration of the time limit upon a showing of excusable neglect.[4] Excusable neglect is " . . . that neglect which might have been the act of a reasonably prudent person under the circumstances."[5] Carelessness and negligence without a valid reason is insufficient.[6]

The conduct of attorneys is governed by the Delaware Lawyers' Rules of Professional Conduct.[7] Rule 3.7(a) provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. . ."[8] Rule 1.7 prohibits an attorney from representing a client if the representation is adverse to another client.[9] Rule 1.9(a) prohibits an attorney from representing a person whose interests ". . . are materially adverse to the interests of the former client . . ."[10]

[4] Super. Ct. Civ. R. 6(b)(2).

[5] *Brannon v. Lamaina*, 622 A.2d 1094 (table), 1993 WL 61680 (Del.) (internal citation omitted).

[6] *Pressey v. Cephas*, 1988 WL 22324 at *1 (Del. Super.).

[7] Del. Supr. Ct. R. 61.

[8] DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT 3.7(a).

[9] DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT 1.7(a)(1).

[10] DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT 1.9(a).

IV. DISCUSSION

A. Motion for Demand for Jury Trial

The Gaylords argue they have "always" wanted a jury trial but previous counsel failed to make a timely demand for a jury trial. The Gaylords contend having a jury trial instead of a bench trial will prejudice none of the parties. BM&F and Baise counter that the time for demanding a jury trial has long passed and the Gaylords have failed to show excusable neglect in failing to demand a jury trial prior to filing the instant motion. Baise additionally argues having the additional expense and preparation for a jury trial instead of a bench trial will prejudice them.

The court concludes the Gaylords have failed to show the existence of excusable neglect. The court holds this is the correct standard to apply. The court holds the standard is not whether any party will be prejudiced by the change from a bench trial to a jury trial but rather that there be a showing of excusable neglect as to why the Gaylords failed to make a timely demand for a jury trial. To hold otherwise would impermissibly shift the burden from the moving to the nonmoving parties.[11] The Gaylords have not provided evidence to support a showing of excusable neglect – merely an affidavit purporting to show they "always" wanted a jury trial. The court finds this insufficient as well as unpersuasive. The court finds

[11] *Wilson v. Joma, Inc.*, 561 A.2d 993 (table), 1989 WL 68304 at **2 (Del.).

the Gaylords have had several previous counsel, all of whom failed to demand a jury trial. The court notes that substitution of counsel does not, in general, support an untimely filing of a motion.[12]

Because the court finds no basis for enlarging the time to demand a jury trial, the Gaylords' Motion to Demand Jury Trial is **DENIED**.

B. Motion to Disqualify Bouchard Margules & Friedlander as Trial Counsel for Plaintiffs.

The Gaylords contend BM&F should be disqualified from representing themselves in the present case. The Gaylords argue BM&F has an unfair advantage in knowing the facts regarding the underlying Chancery Court action. The Gaylords argue BM&F is precluded by Rule 1.9 of the Rules of Professional Conduct from taking a position in the present litigation that is adverse to them, as they are former clients. The Gaylords also argue Rule 1.7, that prevents a lawyer from representing a client if the representation involves a conflict of interest, precludes BM&F from representing themselves against a former client. Finally, the Gaylords note Rule 3.7, that provides that a lawyer may not act as advocate at trial in which the lawyer is a necessary witness, precludes their representing

[12] *See Pennewell v. State*, 822 A.2d 397 (table), 2003 WL 2008197 at **2 (Del. Super.) (holding eleventh hour substitution of counsel in a criminal case insufficient to find exceptional circumstances to support an untimely filed motion to suppress). This court notes the standard in *Pennewell* was "exceptional circumstances" and in the present case, the standard is "excusable neglect." The court finds the reasoning similar for the two standards – that "there was ample opportunity on the part of competent counsel to file [the] motions had they been warranted." *Id.*

themselves. The Gaylords argue none of the exceptions to Rule 3.7 apply to BM&F.

BM&F counters that they have violated none of the rules. BM&F also notes there is nothing in the Rules to preclude them from representing themselves in a fee dispute with a former client.

The court finds the Gaylords' arguments to be without merit. The court finds nothing in the Delaware Lawyers' Rules of Professional Conduct that precludes an attorney or law firm from representing itself in a fee dispute with a former client. While Delaware has not explicitly addressed the issue, other jurisdictions have and concluded the practice is permissible.[13] This court finds that reasoning persuasive. The court sees no reason to require a law firm to hire another firm or attorney to litigate a fee dispute with a former client.

The court notes that counsel for BM&F indicated that the two attorneys who participated in the underlying Chancery Court action would not be trial counsel in this fee dispute. The court considers this to settle any possible issue with respect to Rule 3.7 regarding the prohibition against acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. The court notes that the prohibition

[13] *See e.g. Lankler Siffert & Wohl, LLP v. Rossi*, 287 F. Supp. 2d 398, 404 (S.D.N.Y. 2003) (holding collecting unpaid fees from a former client was not a substantial relationship between the previous matter and the collection litigation); *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 90 F. Supp 2d 15, 22 (D.D.C. 2000) (holding "Rule 1.9 does not apply. . . . This suit involves plaintiff's attempt to recover attorney's fees. . . ."); *see also* Michigan Opinion RI-299 (Dec. 18,

in Rule 3.7 is against acting as an advocate at trial. The court concludes the prohibition was not intended to and does not extend to participation in pre-trial proceedings. The court also notes that the Massachusetts Bar Association has concluded that "the right to *pro se* representation effectively trumps a literal reading of Rule 3.7[(a)(2)]."[14] The court concludes there is no violation of Rule 3.7 by allowing an attorney from BM&F, different from the two who participated in the Chancery Court action, to represent the firm in this dispute.

The court finds Rule 1.7 is not applicable here. The Gaylords appear to concede they are former clients of BM&F. BM&F is representing itself, not another party, in this matter.[15] The court concludes there is nothing to preclude BM&F from representing themselves in this litigation.

1997) ("[T]he rule's prohibition does not apply when a lawyer appears *pro se*, or on behalf of the law firm, in an action to collect unpaid legal fees earned by the lawyer.").

[14] Mass. Bar Ass'n Opinion 1999-1 (July 15, 1999).

[15] *See also Baise & Miller P.C. v. Gaylord*, C.A. No. 03-5662, Order at 2 (D.C. Super. Ct. Feb. 2, 2004) (finding ". . . their interests and their clients' are perfectly aligned since the law firm is representing itself.").

V. CONCLUSION

For the above reasons, the Gaylords' Motion to Demand a Jury Trial is **DENIED**. The Gaylords' Motion to Disqualify BM&F as Trial counsel for Plaintiffs is **DENIED**.

IT IS SO ORDERED.

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Calvin L. Scott, Jr.
Superior Court Judge