STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1856
A12-1867

State of Minnesota, by its Attorney General Lori Swanson, et al.,
Appellants (A12-1856),
Plaintiffs (A12-1867),

Covington & Burling, LLP,
Appellant (A12-1867),

City of Lake Elmo,
plaintiff/intervenor,
Respondent,

Metropolitan Council,
plaintiff/intervenor/counterclaim defendant,
Respondent,

vs.

3M Company,
defendant/counterclaim plaintiff,
Respondent.

Filed July 1, 2013
Affirmed; motion granted.
Peterson, Judge

Hennepin County District Court
File No. 27-CV-10-28862

Lori Swanson, Attorney General, Alethea M. Huyser, Beverly M. Conerton, Assistant Attorneys General; and

Alan I. Gilbert, Solicitor General, St. Paul, Minnesota (for appellant State of Minnesota)

John W. Lundquist, Thomas S. Fraser, Kevin C. Riach, Fredrickson & Byron, P.A., Minneapolis Minnesota; and

John K. Villa, Michael S. Sundermeyer (pro hac vice), Joseph M. Terry, Williams & Connolly, LLP, Washington, D.C. (for appellant Covington & Burling, LLP)

David K. Snyder, Johnson & Turner Attorneys at Law and Mediation Center, Forest Lake, Minnesota (for respondent City of Lake Elmo)

Daniel L. Abelson, St. Paul Minnesota; and

Linda E. Benfield, Paul Bargen, Catherine Basic, Laura Schulteis Kwaterski, Foley & Lardner, LLP, Milwaukee, Wisconsin; and

Dorothy Watson, Foley & Lardner, LLP, Orlando, Florida (for respondent Metropolitan Council)

Peter Gray, Michael T. Nilan, Amanda Cialkowski, Nilan Johnson Lewis, P.A., Minneapolis, Minnesota; and

Michael C. McCarthy, Maslon Edelman Borman & Brand, LLP, Minneapolis, Minnesota; and

William A. Brewer, III, Michael J. Collins, Robert W. Gifford, Bickel & Brewer, Dallas, Texas; and

Delmar R. Ehrich, Faegre & Benson LLP, Minneapolis, Minnesota (for respondent 3M Company)

Considered and decided by Peterson, Presiding Judge; Cleary, Judge; and Smith, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

Appellant State of Minnesota challenges the disqualification of its attorney, appellant Covington & Burling, LLP based on a conflict of interest, arguing that the district court erred because (1) the current litigation and Covington's former

representation of respondent 3M Company are not substantially related and therefore there is no conflict; (2) 3M waived its right to request disqualification by waiting for more than one year to move for disqualification; and (3) even if Covington's representation violated professional rules related to conflicts, disqualification is not mandatory. Covington, in a separate appeal, also challenges its disqualification. 3M moves this court to dismiss Covington's appeal because the law firm lacks standing to challenge the disqualification order.

Because we conclude that Covington lacks standing to appeal the district court's disqualification order, we grant 3M's motion and dismiss Covington's appeal. And because Covington's former representation of 3M is substantially related to the current litigation and the state's interests in the current litigation are materially adverse to those of 3M, we conclude that Covington has a conflict of interest under Minn. R. Prof. Conduct 1.9(a) that precludes it from representing the state in this matter. We therefore affirm the district court's disqualification order.

FACTS

3M is a Delaware corporation whose principal place of business and headquarters are in Minnesota. Between 1950 and 2000, 3M manufactured perfluorochemicals (PFCs); 3M used PFCs in a variety of products that it manufactured and sold PFCs to other manufacturers. In the early 1990s, 3M sought approval from the federal Food and Drug Administration (FDA) to use PFCs in high-temperature food-packaging applications.

In 1992, 3M retained Covington attorney Peter Hutt, an expert in FDA regulatory matters, to represent it in petitions to the FDA. From 1992 to 2000, Hutt represented 3M on regulatory matters before the FDA concerning the use of PFCs; Hutt vigorously advocated on 3M's behalf for the use of PFCs in food packaging and supported 3M's position that PFCs were not hazardous. Hutt also participated in meetings with a group of attorneys from different law firms that included discussions of environmental issues related to 3M's manufacture of PFCs. 3M characterized this group as a "virtual law firm." The members of the group discussed a broad range of issues, including regulatory actions or regulations of the Environmental Protection Agency, the FDA, the Consumer Product Safety Commission, and other agencies.

In 2000, 3M decided to stop producing and using PFCs; with Hutt's help, 3M informed the FDA of its decision to phase out production of PFCs, while maintaining its position that PFCs posed no human-health risk. After this, Covington attorneys advised 3M about Freedom of Information Act issues.

In addition to its PFC work, Covington advised 3M on a number of different topics over the years, including insurance-coverage, intellectual-property, product-liability, and employee-benefit issues. In 2010, Covington attorney Seth Safra advised 3M about employee retirement benefits; this was the only work Covington performed for 3M in 2010. Safra concluded his legal work in August 2010; at Covington's request, 3M sent an email on December 22, 2010, formally terminating the contract for Covington's legal services.

In November 2010, the state approached Covington about representing it in a natural-resources-damages (NRD) lawsuit against 3M based on 3M's disposal of PFCs into the state's surface and ground waters. Covington had represented the state in several environmental matters between 1995 and 2010, including advising the state about issues related to the Landfill Cleanup Act (LCA) and the Minnesota Environmental Response and Liability Act (MERLA). Covington also represented the state in seven actions under the LCA to recover damages from 75 insurers of manufacturers to pay for the investigation, monitoring, and cleanup of environmental contamination in various landfills. 3M had used some of these landfills to dispose of hazardous wastes and, therefore, responded to requests from the Minnesota Pollution Control Agency (MPCA) for information about 3M's use of the landfills and its insurance coverage for disposal of industrial waste. Because some of 3M's insurers were involved in these actions, 3M was informed of its right to participate in settlement negotiations.

In 2007, the MPCA and 3M entered into a consent order that required 3M to remediate three sites where it had disposed of PFCs. The consent order did not provide for damages. In this action, the state seeks to recover damages from 3M for pollution of surface and ground waters. As part of the consent order, 3M agreed to give MPCA access to all documents within its control relating to

> (1) the health or environmental effects of any PFC; (2) actions or precautions considered or recommended by 3M for managing, treating or disposing of wastes containing any PFC; and (3) any characteristic of any PFC or PFC waste that might cause the PFC or waste to be considered a hazardous substance or a hazardous waste as those terms are used in MERLA or in the hazardous waste rules of the MPCA.

Documents "subject to attorney-client privilege or to protection as attorney work product" were excluded from this disclosure requirement.

On December 30, 2010, the state appointed Covington as a "Special Attorney" to investigate and litigate damages claims against 3M related to the release of PFCs into the state's ground and surface waters. The state appointed Covington because it did not have the budgetary resources or the staff expertise to bring the action. Covington agreed to front all costs of litigation and to recover costs, disbursements, and attorney fees only if the state is successful in the action against 3M.

In January 2011, three Covington attorneys, including lead counsel William Greaney, who had represented the state in the seven LCA actions, were admitted to practice in Minnesota *pro hac vice*. The Covington attorneys began a rigorous schedule of discovery. Covington served interrogatories about 3M's knowledge of the hazardous character of PFCs and requested all documents that referred or related to the effects of PFCs on human health, or designated PFCs as a toxic substance, and all documents and information relating to 3M's communication with regulatory agencies, including the FDA, about PFCs and about 3M's decision to phase out production of PFCs. Covington also deposed or scheduled depositions of 3M employees and former employees who worked on PFCs, including some who had been advised by Hutt. The state estimates that more than six million documents were generated during discovery and more than 50 depositions were taken. The trial scheduling order stated that all pretrial discovery was to be completed by June 1, 2012, in anticipation of trial on July 15, 2013.

In March 2012, fifteen months after Covington began representing the state, one of the law firms representing 3M discovered Covington's name in the documents that 3M produced for discovery. 3M demanded that Covington disclose all files on which Covington had represented or advised 3M. In April 2012, after reviewing the disclosures, 3M asked Covington to withdraw, and Covington refused. On April 30, 2012, 3M moved the district court to disqualify Covington from representing the state. Although 3M argues that it was unaware of Covington's work for 3M on PFCs, in March 2011, 3M's general counsel, Marschall Smith, noted in an exchange of emails with a Covington attorney that he was displeased that Covington was representing the state in an environmental action against 3M and "making law that is harmful to your corporate clients." Smith mentioned the NRD lawsuit a second time in a letter to Covington attorneys in November 2011 and wondered whether 3M should have raised the conflict issue.

A hearing on the disqualification motion was held in the district court. Before hearing the motion, the presiding judge disclosed to the parties potential conflicts that he had with both parties. Despite the potential conflicts, the parties agreed to proceed with that judge presiding over the motion hearing. Two days after the hearing, 3M requested that the judge recuse. The judge recused, and the disqualification motion was heard by another judge, who ruled that Covington was disqualified from representing the state. Both the state and Covington appeal from this order.

D E C I S I O N

I.

As a preliminary matter, 3M moves to dismiss Covington's appeal on the basis of a lack of standing. "Standing is a jurisdictional doctrine, and the lack of standing bars consideration of the claim by the court." *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011). We review the issue of standing de novo, as a question of law. *Id.* A party acquires standing in one of two ways: standing is conferred on a party because of a statute or other legislative enactment, or a party has standing because of an injury-in-fact. *Id.* "An injury-in-fact is a concrete and particularized invasion of a legally protected interest." *Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007).

Covington asserts two bases for standing: reputational injury and financial injury. Covington argues that the district court's disqualification order impugns its professional reputation by finding that the law firm violated its professional responsibilities. Covington also argues that it invested heavily in the litigation and, under its agreement with the state, it will not be able to recover any of its expenditures because payment is contingent on a successful litigation outcome.

The right of a client to appeal the disqualification of the client's chosen attorney is well established. *See In re Estate of Janacek*, 610 N.W.2d 638, 642 (Minn. 2000) (holding that order disqualifying party's attorney of choice is a final order in a special proceeding appealable under Minn. R. Civ. App. P. 103(g)). The supreme court reasoned that a party has "a substantial right to be represented by its attorney of choice." *Id.* But an attorney does not have the same substantial right to continue representing a client.

See, e.g., Trenti, Saxhaug, Berger, Roche, Stephenson, Richards & Aluni, Ltd. v. Nartnik, 439 N.W.2d 418, 420-21 (Minn. App. 1989) (noting that a client may discharge an attorney with or without cause at any time, although the client may still be liable for quantum meruit payment), *review denied* (Minn. Jul. 12, 1989). This makes it difficult to conclude that a disqualified attorney suffers "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992) (discussing minimum requirements of concept of standing) (quotations and citations omitted). If Covington is subject to discharge by the state at any time, it does not have a legally protected right to continue representing the state.

In *Richardson-Merrell, Inc. v. Koller*, the United States Supreme Court discussed whether disqualification orders are collateral orders subject to immediate appeal. 472 U.S. 424, 424-25, 105 S. Ct. 2757, 2758 (1985). Concluding that the orders were not subject to immediate appeal, the Supreme Court rejected "the disqualified attorney's personal desire for vindication as an independent ground for interlocutory appeal." *Id.* at 434-35, 105 S. Ct. at 2763. The Supreme Court further noted that "the decision to appeal should turn entirely on the client's interest." *Id.* The state has chosen to challenge the district court's disqualification order, and its appeal is properly before this court. But Covington has not demonstrated that it has a corresponding legally protected interest that gives it standing to appeal the district court's order. We, therefore, grant 3M's motion to dismiss Covington's appeal on the basis of a lack of standing.

II.

"This court applies a clearly erroneous standard of review to factual findings underlying an attorney disqualification, and we apply a *de novo* standard of review to the district court's interpretations of rules of court, which present questions of law." *Niemi v. Girl Scouts of Minn. and Wis. Lakes and Pines*, 768 N.W.2d 385, 387 (Minn. App. 2009) (citation omitted). The party seeking disqualification has the burden of proving that disqualification is merited. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Academy*, 781 F. Supp. 2d 852, 855 (D. Minn. 2011); *Olson v. Snap Prods., Inc.*, 183 F.R.D. 539, 542 (D. Minn. 1998).

Minn. R. Prof. Conduct 1.9(a) 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.

This rule provides the basis for the district court's decision to disqualify Covington from representing the state. *See Niemi*, 768 N.W.2d at 387 (describing rule 1.9(a) as providing the legal basis for a disqualification motion). The question on appeal is whether the district court correctly interpreted the phrase "a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Minn. R. Prof. Conduct 1.9(a).

The supreme court has stated that the "interpretive guidance furnished in the commentary following Rule 1.9" provides a materially helpful framework for analysis of

the rule. *Prod. Credit. Ass'n of Mankato v. Buckentin*, 410 N.W.2d 820, 823-24 (Minn. 1987). Comment [3] to rule 1.9 states that "[m]atters are 'substantially related' . . . if they involve the same transaction or legal dispute or if there otherwise 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." We presume that when there was an attorney/client relationship, the client conveyed confidential information to the attorney. *Niemi*, 768 N.W.2d at 390. Although Covington's former representation of 3M in the FDA regulatory matters had a different focus than its current representation of the state in the NRD lawsuit, both matters at their heart concern the risk that PFCs pose to human health, and at least facially, the matters are "substantially related."

A lawyer can avoid a violation of the conflict rules by obtaining the informed written consent of the client. Minn. R. Prof. Conduct 1.9(a). But a former client can give informed consent only after being advised of the nature of the conflict and the potential risks it creates. *In re SRC Holding Corp.*, 364 B.R. 1, 48 (D. Minn. 2007), *rev'd on other grounds*, 553 F.3d 609 (8th Cir. 2009). The client's knowledge of the conflict is not sufficient; the lawyer has a duty to fully inform and to obtain consent from the client. *Id.* Covington did not obtain nor try to obtain 3M's informed consent to its representation of the state. Therefore, this exception to the rule does not apply to Covington.

Historically, an appellate court reviewing a disqualification order was permitted to weigh "competing equities," which introduced "an element of greater discretion into the decision of whether to impute disqualification." *Lennartson v. Anoka-Hennepin Indep.*

Sch. Dist. No. 1, 662 N.W.2d 125, 129, 133 (Minn. 2003) (quotation omitted) (analyzing rule 1.10 and *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720 (Minn. 1983)). But in the 2003 *Lennartson* decision, the supreme court commented that, following extensive amendments to the rules of professional conduct in 1985 and 1999, the plain language of the rule no longer permits a weighing of equities and, therefore, the supreme court rejected the *Touche Ross* rule that had permitted the weighing of other equitable factors. *Id.* at 132-35. In 2009, this court affirmed that the analysis in *Lennartson*, which addressed a conflict analysis under Minn. R. Prof. Conduct 1.10, applied equally to rule 1.9 and concluded that the rule does not permit a weighing of equitable considerations. *Niemi*, 768 N.W.2d at 389.

In 2005, between *Lennartson* and *Niemi*, the rules of professional conduct were once again extensively revised. The language of rule 1.9(a) was not materially changed, but the comments were "vastly expanded."[1] Kenneth L. Jorgensen & William J. Wernz, *New Directions in Professional Conduct: The Devil is in the Details*, 62 Bench & Bar of Minn., Sept. 2005, at 14, 17. In the new comments to rule 1.9, the task force stated the following:

> Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's

[1] The supreme court has not formally adopted the comments; despite this, the comments are "extremely important" because they "will influence disciplinary and civil standards." *Supra* at 15, 17.

> policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

Minn. R. Prof. Conduct 1.9 cmt [3].

This court's decision in *Niemi*, rejecting disqualification of Niemi's former attorney from representing her current employer in an employment-discrimination lawsuit, turned on the lengthy period of time that passed between the former and the current representation. 768 N.W.2d at 386, 391. Applying this analysis, this court concluded that the matters were not substantially related, based primarily on the passage of time. *Id.* at 391-92.

This case presents similar considerations. Although a decade, more or less, has passed since Covington represented 3M in matters concerning PFCs, the current lawsuit implicates some of the same issues that arose in the former representation. We acknowledge that, in the interim, 3M entered into a consent order with the state, in which 3M agreed to provide the state with and to make public information regarding the human-health risks associated with PFCs, actions it took with regard to disposal of PFCs, and characteristics of PFCs that might make them hazardous waste within the definitions of MERLA and MPCA. But the consent order specifically excluded documents that are subject to attorney-client privilege or protected as attorney work product. It is this type of confidential information that the conflict rules are designed to protect. The integrity of the legal system demands that scrupulous care be taken so that client confidences are protected and legal counsel acts as a vigorous advocate without a conflict of interest. We

therefore conclude that Covington's representation of the state in the current litigation violates the directives of rule 1.9(a) and that disqualification is an appropriate remedy. *See Niemi*, 768 N.W.2d at 387-88 (stating that disqualification is "necessary" for a violation of rule 1.9(a)).

We are also mindful of a party's substantial right to select counsel of its choice, within the limitations of the rules of professional conduct. *Janacek*, 610 N.W.2d at 642 (recognizing a party's "substantial right" to be represented by chosen counsel). While Covington represented 3M before the FDA in matters concerning PFCs from 1992 through 2000, it also represented the state from 1995 through 2010 in environmental actions, and therefore has a lengthy history with the state as a client as well. But we are constrained by the plain language of rule 1.9(a) and its mandatory directive that a lawyer *shall not* represent a client in a matter substantially related to former representation when the new client's interests are materially adverse to the former client's interests.

Regarding the state's assertion that 3M waived its right to seek disqualification by waiting until the end of discovery to raise the conflict issue, we note that the rule provides for informed consent, but not for waiver. The burden of obtaining informed consent is on the attorney. Minn. R. Prof. Conduct 1.0(f), cmts. [7], [8]; *SRC*, 364 B.R. at 48. As to waiver by conduct, "[w]aiver is the intentional relinquishment of a known right." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009). "Knowledge and intent are essential elements of waiver." *Id.* We will not assume that a client has the requisite knowledge and intent when the attorney has failed to be frank

about representing a new client with interests that are adverse to a former client's interests.

Although we affirm the district court's disqualification order, we note that the rules warn that "the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons." Minn. R. Prof. Conduct, Scope [20]. The timing of 3M's motion to disqualify, 15 months after the admission of Covington's attorneys, after production of several million pages of documents and more than 50 depositions, and shortly before the discovery deadline, might well be perceived as tactical maneuvering. And 3M's claim that it only realized at that late date that there may be a conflict is contradicted by the record. But 3M's knowledge of the conflict, by itself, is not sufficient to avoid disqualification. Covington had the duty to avoid conflicts and to obtain the informed consent of its former client, and it failed to obtain this consent.

We conclude that the district court did not err when it disqualified Covington from representing the state in the current litigation. We therefore affirm the district court's disqualification order and remand this matter for further proceedings.

Affirmed; motion granted.