STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 3, 2022)

6 BLACKSTONE VALLEY PLACE, LLC *Plaintiff, Defendant-in-Counterclaim*	:	
v.	:	
PRIME HEALTHCARE SERVICES LANDMARK, LLC *Defendant, Counterclaim Plaintiff, Third-Party Plaintiff*	:	
v.	:	**C.A. No. PC-2019-4524**
ABDUL BARAKAT, M.D. and A&B ANESTHESIA ASSOCIATES, P.C. *Third-Party Defendants*	:	
_____	:	**Consolidated with**
ABDUL BARAKAT, M.D. and A&B ANESTHESIA ASSOCIATES, P.C. *Plaintiffs*	:	
v.	:	**C.A. No. PC-2019-4999**
MICHAEL R. SOUZA, TIMOTHY SPURELL, EARLE ASSANAH, GARRON LAMP, GLEN FORT, GREG YEARWOOD, SRIPARTHI KARANTH, AHMED NADEEM, X-RAY ASSOCIATES, INCORPORATED, PRIME HEALTHCARE SERVICES-LANDMARK, LLC, also known as Landmark Medical Center, PRIME HEALTHCARE SERVICES, INC. and PREM REDDY *Defendants*	:	
_____	:	

DECISION

M. DARIGAN, J. Before the Court in this consolidated case is the motion of Abdul Barakat, M.D. (Dr. Barakat) and A&B Anesthesia Associates, P.C. (A&B) (collectively Movants), as Plaintiffs in PC-2019-4999 and Third-Party Defendants in PC-2019-4524, to disqualify Cameron & Mittleman, LLP (C&M) from representing Michael R. Souza, Timothy Spurell, Earle Assanah, Garron Lamp, Glen Fort, Greg Yearwood, Sriparthi Karanth, Ahmed Nadeem and Prem Reddy (collectively Prime Individual Defendants) and Prime Healthcare Services - Landmark, LLC and Prime Healthcare Services, Inc. (both Prime entities, collectively Prime). Objection to the motion was timely filed. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 8-2-14. For the following reasons, Movants' Motion to Disqualify C&M is denied.

I

Facts[1] and Travel

A

The Lease Lawsuit

Plaintiff 6 Blackstone Valley Place, LLC (6BVP)[2] filed a Verified Complaint (Lease Lawsuit) against Prime Healthcare Services-Landmark, LLC on April 3, 2019 alleging breach of contract based on Prime's alleged unlawful termination of a multi-year lease (Lease) and refusal to meet rental payment obligations under the Lease. (Verified Compl. (PC-2019-4524) 1.) Specifically, 6BVP alleged that Prime breached its Lease with 6BVP on March 1, 2019 when

1 The Court recounts only the facts that are most relevant to Movants' Motion to Disqualify.

2 6BVP has separate counsel from Dr. Barakat and A&B. Although 6BVP was represented by C&M during the same periods and received the same services as Dr. Barakat and A&B, 6BVP has not joined Movants' Motion to Disqualify.

Prime failed to make its monthly rent payment. *Id.* ¶¶ 11-14. 6BVP sought to recover the balance of all payments due under the Lease. *Id.* ¶¶ 18-19.

On May 14, 2019, Prime answered 6BVP's Verified Complaint and asserted counterclaims against 6BVP stating that the correct party in interest to bring the Lease Lawsuit was either Dr. Barakat and/or A&B because 6BVP's corporate charter had (allegedly) been revoked by the Rhode Island Secretary of State. (Countercl. ¶¶ 2, 3.) In large part, Prime's Counterclaim was premised on the assertion that failure to maintain corporate registration with the Secretary of State undermined the legitimacy of the Lease. *Id.* ¶¶ 5, 6. Specifically, Prime averred that revocation of 6BVP's charter prevented 6BVP from mitigating its damages under the Lease because without its corporate entity status it could not lawfully mitigate damages. *Id.* ¶ 5. Prime's Counterclaim assumed that 6BVP's corporate charter was revoked and "treating [6BVP] as a separate entity would sanction a fraud and promote injustice, and an inequitable result would follow." *Id.* ¶ 6. Prime's theory was that Dr. Barakat and A&B took a key role in negotiating the Lease with Prime, and therefore, Dr. Barakat and A&B were "unnamed [and] indispensable part[ies]" in the action. *Id.* ¶ 9.

Prime also filed a Third-Party Complaint on May 14, 2019 against now Third-Party Defendants, A&B and Dr. Barakat, premised largely on the same allegations concerning corporate formalities discussed above. (Third-Party Compl. ¶¶ 1-6.)

After these filings, counsel for Dr. Barakat and A&B contacted Prime's counsel, C&M partner Bruce Gladstone (Attorney Gladstone), to inform him that 6BVP's charter was not revoked. (Gladstone Aff. ¶ 12; Gladstone Dep. 24:16-25:16.) On May 20, 2019, Prime amended its Answer, Affirmative Defenses, Counterclaim and Third-Party Complaint, removing all references to the revocation of 6BVP's corporate charter. (*Compare* Answer and Countercl., Third-

Party Compl. *with* Am. Answer and Countercl., Am. Third-Party Compl.) Attorney Gladstone later testified that he misread the summary sheets on the Secretary of State website, mistakenly believing that 6BVP's corporate charter was revoked when, in fact, the website said "revocation pending." (Gladstone Aff. ¶ 12; Gladstone Dep. 24:16-25:16.) Since 6BVP's corporate charter was not revoked, Prime was no longer pursuing a Counterclaim theory or Third-Party Complaint theory premised on failure to maintain corporate registration, but instead Prime focused more generally on "[f]raudulent activity of the true parties in interest A&B and/or Dr. Barakat." (Am. Answer and Countercl. ¶ 2; Am. Third-Party Compl. ¶ 2.) On July 12, 2019, Third-Party Defendants Dr. Barakat and A&B answered Prime's Amended Third-Party Complaint. On July 17, 2019, 6BVP replied to the Amended Counterclaim.

B

The Hospital Practices Lawsuit

On April 22, 2019, Dr. Barakat and A&B initiated a lawsuit (Hospital Practices Lawsuit) against the Prime Individual Defendants and Prime for alleged unlawful retaliation against Dr. Barakat surrounding his disagreements with a policy change at Prime concerning labor and delivery policies. (Compl. (PC-2019-4999) 1.) They filed an Amended Complaint on June 18, 2019. (Am. Compl. (PC-2019-4999) 1.) Specifically, Dr. Barakat and A&B alleged that the Prime Individual Defendants and Prime retaliated against Dr. Barakat by breaching an exclusive anesthesia services contract between A&B and Prime, unlawful hiring of medical personnel in violation of this exclusive contract, and unlawful destruction of Dr. Barakat's medical practice and reputation. (Am. Compl. ¶ 3.) By July 15, 2019, all defendants[3] answered Dr. Barakat and A&B's

[3] Defendants Earle Assanah and X-Ray Associates, Incorporated each filed separate Answers on July 12, 2019. All other defendants filed their Answers on July 15, 2019.

Amended Complaint denying the claims and asserting that the controverted policy changes were neither unethical nor illegal and that Prime did not breach any contract between A&B and Prime. (Am. Answer and Countercls. ¶ 1.) Prime also asserted counterclaims against Dr. Barakat and A&B in the Hospital Practices Lawsuit alleging breach of contract, breach of fiduciary duty, abuse of process, and related claims. *Id*. at 46-50.

C

Consolidation of the Lease Lawsuit and the Hospital Practices Lawsuit

On July 15, 2019, Defendants in the Lease Lawsuit and the Hospital Practices Lawsuit filed a Motion to Consolidate the actions. (Mot. to Consolidate 1.) Defendants claimed that:

> "[T]he primary parties are common to both the [Lease Lawsuit] and the [Hospital Practices Lawsuit], with interrelated facts, claims, counterclaims, defenses and third party claims. While the [a]ctions have what appear to be different Plaintiffs, the principal of the limited liability company which is a Plaintiff in PC-2019-4524 [Lease Lawsuit] is also a named Plaintiff in PC-2019-4999 [Hospital Practices Lawsuit], and the principal of the Co-Plaintiff in PC-2019-4999 [Hospital Practices Lawsuit][.]" (Mot. to Consolidate 2.)

On August 1, 2019, this Court granted the Motion to Consolidate for discovery purposes only. (Order, Aug. 1, 2019 (M. Darigan, J.).)

D

C&M's Representation of Prime

Beginning in 2012, Prime retained and consulted Attorney Cynthia Warren (Attorney Warren), a partner at C&M. (Warren Aff. ¶ 1.) Attorney Warren characterized the matters she performed as "[r]egulatory work . . . for [Prime's] hospital conversion before the [Rhode Island] Department of Health." (Warren Dep. 34:2-7.)

It is undisputed that C&M was not involved with either party in drafting, negotiating, or consulting on the Lease between Prime and 6BVP. (Aff. Souza ¶¶ 7-9; Warren Aff. ¶ 8.) C&M's

only involvement with the Lease occurred when Attorney Warren attended a December 2015[4] meeting at the 6BVP location on behalf of Prime. (Warren Aff. ¶ 7.) This meeting concerned Prime's negotiations with the 6 Blackstone Valley Place Condominium Association[5] about Prime's interest in installing an elevator in the building located at 6 Blackstone Valley Place. *Id.* Attorney Warren attended the meeting at the request of Prime and was tasked with persuading the 6 Blackstone Valley Place Condominium Association to cut through the roof of the building to install an elevator. *Id.* Dr. Barakat was aware that Attorney Warren represented Prime during this meeting, and there was no objection by Dr. Barakat to this limited representation of Prime in connection with the Lease. (Barakat Aff. ¶¶ 5, 6; Warren Aff. ¶ 7.)

On February 11, 2019, Prime, through its in-house counsel, called Attorney Gladstone at C&M to discuss the prospect of C&M representing Prime in connection with the Lease. (Gladstone Dep. 38:18-39:20; Gladstone Aff. ¶ 4.) Prime told Attorney Gladstone that they were considering retaining him in the lease dispute between 6BVP and Prime because Attorney Gladstone had successfully represented Prime in a previous, unrelated lease dispute.[6] (Gladstone Aff. ¶ 4.) After this conversation, Attorney Gladstone performed a conflict check for this potential matter and testified that "nothing showed up" regarding 6BVP. (Gladstone Dep. 40:15-19.)[7] Later that day, Prime told Attorney Gladstone to perform no further work as Prime would try to resolve the matter itself. (Gladstone Aff. ¶ 5.) However, on February 12, 2019, Attorney Gladstone had an

[4] As discussed *infra* Section I.E, C&M's representation of Dr. Barakat and his entities began in November 2015.

[5] 6 Blackstone Valley Place Condominium Association is not a party to this case.

[6] This other representation of Prime was not identified in the record on the Motion to Disqualify.

[7] The details of the firm's conflict checking procedures were not identified in the record. It is evident that C&M represented 6BVP prior to February 2019, however, and one would expect 6BVP to have "shown up" in a conflicts check.

attorney unassociated with C&M perform a title search on the 6 Blackstone Valley property to "see [if there was] anything on the record [to provide] an easy defense to the case." (Gladstone Dep. 43:8-12.) On February 20 and February 21, 2019, Attorney Gladstone billed and performed work for Prime regarding the title search of the 6 Blackstone Valley property. (Movants' Suppl. Mem. Ex. 6 (C&M Invoice March 21, 2019), at 2-3.) According to Attorney Gladstone, he has been "actively representing [Prime regarding the Lease] since February 25, 2019." (Gladstone Aff. ¶ 2.)

Attorney Gladstone entered his appearance in the Lease Lawsuit for Prime on April 24, 2019 and thereafter asserted the Counterclaims and Third-Party Complaints discussed above. He contends that

> "[a]t no time, either prior to, nor in the course of, this litigation have I had any knowledge of any facts (information) other than what I have learned from the clients for whom I have entered my appearance in this matter, and/or through arm's length discovery and/or public record." (Gladstone Aff. ¶ 3.)

It is also undisputed that C&M did not represent Dr. Barakat, A&B, or any of the Prime-related defendants in establishing the business relationships or adopting the hospital policies and procedures that form the basis for the Hospital Practices Lawsuit. (Barakat Aff. ¶¶ 14, 15, 16; Warren Aff. ¶¶ 5, 6.) Attorney Warren stated that "[she] was not aware of the nature of the . . . relationship between Prime Healthcare and [Dr.] Barakat" and that "[Attorney Warren and C&M] had no involvement whatsoever, nor knowledge of any disputes between Prime Healthcare and [Dr.] Barakat prior to [her] reading [of the] Complaint in this matter." (Warren Aff. ¶¶ 5, 6.)[8] Attorney Warren further stated that "[t]o [her] knowledge, any adversarial matters between [Dr.]

[8] The parties dispute the content and significance of a chance meeting between Dr. Barakat and Attorney Warren in March 2018 where Dr. Barakat alleges he shared with Attorney Warren details about his deteriorating relationship with Prime. *See* Section I.F, *infra*.

Barakat and Prime Healthcare were handled by Prime Healthcare's in-house counsel or staff and neither [Attorney Warren], nor any other attorney at . . . C&M, had any involvement whatsoever." *Id*. ¶ 5.

On April 22, 2019, Dr. Barakat and A&B initiated the Hospital Practices Lawsuit. On May 16, 2019, Attorney Gladstone entered his appearance on behalf of Prime and the Prime Individual Defendants and filed the above-referenced Answer and Counterclaim for these defendants on July 15, 2019.

E

C&M's Representation of Dr. Barakat, A&B, and Other Businesses

Dr. Barakat and/or his wife owned several businesses, including 6BVP and A&B. (Barakat Aff. ¶ 4.) In November 2015, Dr. Barakat contacted Attorney Warren by phone and asked her for assistance in filing certain annual reports for the entities he was associated with that had their corporate entity status revoked by the State. (Warren Aff. ¶ 2; Warren Dep. 38:6-8; Barakat Aff. ¶¶ 4, 8.) In November 2015, Dr. Barakat was aware that C&M represented Prime. (Barakat Aff. ¶¶ 5, 6; Warren Dep. 44:24-25.) Attorney Warren was also aware that Dr. Barakat was a practicing anesthesiologist at Prime's hospital. (Warren Dep. 41:25-42:10.) C&M performed a conflict of interest check at this time regarding Dr. Barakat's entities, and Attorney Warren testified that the check passed. (Warren Dep. 42:19- 43:8.)[9]

On December 28, 2015, Dr. Barakat's accountant e-mailed Attorney Warren confirming a conversation they had that day. (C&M's Obj. Mem. Ex. E (E-mail), at 2.) In that e-mail, the

[9] As noted, little to no information is in the record detailing C&M's conflict checking protocols so it is unclear what was checked and how it was checked. C&M does not dispute that there is no written disclosure or consent documentation relative to C&M's concurrent representation of Movants and Prime. Further, C&M does not dispute that potential conflict of interest waiver letters were not signed by either party.

accountant restated Dr. Barakat's goal to restore the corporate entity status of several corporate entities that Dr. Barakat was involved with, including A&B and 6BVP. *Id.* Specifically, Dr. Barakat sought to reinstate the corporate charters of five of the entities owned by Dr. Barakat and/or his wife. *Id.* A paralegal at C&M performed these corporate maintenance services and Secretary of State filings under Attorney Warren's supervision. (C&M's Obj. Mem. Ex. F. (C&M Invoices Feb. 2016 to Oct. 2016), at 2-3; *see also* Warren Dep. 17:8-18:6.) C&M successfully reinstated the corporate charters of Dr. Barakat's entities in May 2016 and listed Attorney Warren as the Registered Agent for those entities. (Warren Dep. 74:25-75:2.)

Notably, the only work performed by C&M for Movants (and for non-moving party 6BVP) relates to securing A&B and 6BVP's corporate reinstatement and making other related corporate maintenance filings. (Warren Aff. ¶ 2; Warren Dep. 30:23-32:3; Barakat Aff. ¶¶ 8, 9, 10; C&M's Obj. Mem. Ex. F, at 2-21 (C&M Billing Records February 2016-October 2016); C&M's Obj. Mem. Ex. G (C&M Billing Records April 2017-January 2018), at 2-14; C&M's Obj. Mem. Ex. I (C&M Billing Records August 2018-November 2018), at 2-8.)[10]

[10] Movants argue that C&M did not have a defined scope of services with Dr. Barakat or A&B and therefore the firm's engagement was "unlimited." (Movants' Suppl. Mem. 3; Warren Dep. 40:18-41:14.) Presuming the engagement was unlimited, Movants argue that C&M was exposed to "confidential information about the Barakat Entities' finances, assets, corporate structure, employment practices, business strengths and weaknesses and relations with [Prime.]" (Movants' Suppl. Mem. 4; *see also* Barakat Aff. ¶ 13.) Attorney Warren contends that C&M's representation of Movants was "limited [and] matter-specific." (Warren Aff. ¶ 2.) Attorney Warren also recognized during her deposition that "[w]e are supposed to send out engagement letters to all clients." (Warren Dep. 41:19-20.) This case illustrates the importance and value to having specific engagement letters with a well-defined scope of representation. Sup. Ct. R. Prof. Conduct 1.2(d); *see also* Sup. Ct. R. Prof. Conduct 1.2(d) cmt. 7 ("A limited scope representation may be appropriate because the client has limited objectives for the representation."). While a written agreement would have assisted this Court in determining whether the representation was truly limited, the absence of a written agreement limiting the scope of representation here does not change the actual scope of the services provided by C&M to Movants, which was confined to routine corporate maintenance matters.

C&M performed the same corporate maintenance services for Dr. Barakat's other businesses and sporadically performed additional discrete legal services. The billing records, deposition testimony, and affidavits clarify that any work beyond corporate maintenance work was not performed for Movants, but rather for other entities that Dr. Barakat was associated with, such as Ocean State Wellness. (C&M's Obj. Mem. Ex. F, at 7, 9, 10, 13; C&M's Obj. Mem. Ex. I, at 3, 4, 6, 8.) While Dr. Barakat's Affidavit refers to 6BVP, A&B, Merit Anesthesia of New England PC, and Ocean State Wellness, PC collectively as "The Barakat Group," C&M's billing records clarify what work was done for each distinct entity.[11]

C&M supports its position that the majority of the services provided to Movants were ministerial in nature and performed by a paralegal under the supervision of Attorney Warren with the billing records between C&M and Movants. The invoices from December 2015 to December 2018 indicate that C&M billed Dr. Barakat for a total of 59.3 billable hours. (C&M's Obj. Mem. Exs. F, G, I, K.) Of those 59.3 total billable hours, C&M's paralegal billed 39.3 hours and Attorney Warren billed 20 hours. (C&M's Obj. Mem. Exs. F, G, I, K.) Of Attorney Warren's 20 billable hours, only 5.55 related to corporate maintenance work, whereas the other 14.45 hours were billed for various other legal services, distinct from the corporate maintenance work Dr. Barakat contacted C&M to complete. (C&M's Obj. Mem. Exs. F, G, I, K.) For example, from March 2016 to October 2016, Attorney Warren prepared an employment agreement, a termination letter, and

[11] Somewhat complicating the task of determining what work C&M performed and for whom, C&M did not open separate files for the various services provided to the different business entities associated with Dr. Barakat. Further, despite performing discrete tasks for Dr. Barakat's different businesses, C&M did not separately bill those entities for those services. C&M sent one billing statement for all work performed for Dr. Barakat and his entities, purportedly at the direction of Dr. Barakat. (C&M's Obj. Mem. Ex. F at 2-5 (Invoices directed to A&B and "Attn: Abdul Barakat"); C&M's Obj. Mem. 5 ("Dr. Barakat directed C&M to send all legal bills to A&B, and therefore A&B was the named client on the invoices[.]"); C&M's Obj. Mot. Exs. C, F, G, I, J, K (C&M Invoices with named client A&B.))

consulted on a potential unemployment claim by an employee of Ocean State Wellness, an entity associated with Dr. Barakat and not a party to these lawsuits. (C&M's Obj. Mem. Ex. F, at 7, 9, 11, 13, 20.) In July 2018 through November 2018, Attorney Warren assisted that same entity, Ocean State Wellness, in a collection dispute with Siemens where Attorney Warren worked out a payment schedule between Ocean State Wellness and Siemens. (Warren Dep. 31:12-21, 64:11-21; C&M's Obj. Mem. Ex. I, at 3-4; C&M's Obj. Mem. Ex. K, at 2.) From January 1, 2019 to December 31, 2019, C&M did not bill Movants or any of Dr. Barakat's businesses for any legal services. (Soares Aff. ¶ 4.)

Attorney Warren testified that around November 2018 Dr. Barakat was not paying his invoices and was uncooperative with C&M's efforts to file Dr. Barakat's companies' annual reports. (Warren Aff. ¶ 14; C&M's Obj. Mem. Ex. L (e-mail regarding past due balance), at 2-3.) Attorney Warren testified that this caused her, in a January 2019 telephone conversation, to terminate the representation of Dr. Barakat and his entities. (Warren Dep. 79:5-24.) Attorney Warren stated that she terminated her relationship with Dr. Barakat as a client over the phone and "my relationship as an attorney for [Dr.] Barakat ended in January of 2019 . . . ." (Warren Aff. ¶ 4; Warren Dep. 76:21-77:3.)

Movants point to two e-mails in the record from January 30, 2019 and February 13, 2019 to rebut C&M's theory that C&M terminated its representation of Movants in January 2019. The January 30, 2019 e-mail states:

> "We just received an annual report for Merit Anesthesia. Is this an entity that you want to keep open? Also, I explained to our Management Committee that you would be making monthly payments to work down your invoice. I don't believe I saw a payment from you in January. Am I mistaken?" (C&M's Obj. Mem. Ex. L at 4.)

The February 13, 2019 e-mail states "[f]ollowing up on the note re Merit Anesthesia. Note that it will be revoked if you do not file." *Id.* While neither the January 30, 2019 e-mail nor the February 13, 2019 e-mail establish termination dates of C&M's representation of Movants, the e-mails could reasonably be construed as C&M continuing to render legal advice in both instances. Conversely, both e-mails could be construed as mitigating damage to Movants as terminated clients in conformance with Rhode Island's Rules of Professional Conduct. Sup. Ct. R. Prof. Conduct 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . . .").

Unfortunately, C&M never sent Dr. Barakat a termination letter, nor are there any writings unequivocally memorializing the date that C&M ceased representing Dr. Barakat's entities. (Warren Dep. 77:4-19.) Dr. Barakat contends that on February 20, 2019, Attorney Warren sent him an e-mail "terminating C&M's representation of the Barakat Group, and that she would be resigning as resident agent for the corporate entities in the Barakat Group." (Barakat Aff. ¶ 24; C&M's Obj. Mem. Ex. M, at 2-3.) However, this e-mail is not determinative, nor does it establish the termination date as Dr. Barakat claims in his Affidavit. (C&M's Obj. Mem. Ex. M, at 2-3.) First, the e-mail is not dated February 20, 2019, it is dated February 22, 2019. *Id.* Second, the e-mail does not "terminat[e] C&M's representation of the Barakat Group," as stated in Dr. Barakat's Affidavit. (*Compare* Barakat Aff. ¶ 24 *with* C&M's Obj. Mot. Ex. M, at 2-3.) The e-mail from February 22, 2019 states in the subject line "[p]lease see attached resignations as Resident Agent" with an attached resignation letter for 6BVP signed by Attorney Warren. (C&M's Obj. Mem. Ex. M, at 2-3.) Nowhere does this e-mail explain the termination of the attorney-client relationship between C&M and Movants. (*Compare* Barakat Aff. ¶ 24 *with* C&M's Obj. Mem. Ex. M, at 2-3.)

This communication is devoid of detail or context, leaving the Court to have to determine when C&M's representation of Movants ended.[12]

F

The Prime and Dr. Barakat Controversy

In August 2016, relations between Dr. Barakat and Prime began to deteriorate because of Prime's adjustment of Prime's labor and delivery services. (Barakat Aff. ¶ 15.) Prime altered its labor and delivery services surrounding use of certain anesthetics in a way that seemed problematic to Dr. Barakat, an anesthesiologist at Prime's hospital. (Hospital Practices Lawsuit Am. Compl. ¶¶ 39-74.) Ultimately, on August 4, 2017, Dr. Barakat's privileges at Prime's hospital were revoked by Defendant Glen Fort. *Id.* ¶ 80. On March 1, 2018, Prime ordered Dr. Barakat and A&B to stop providing anesthesiology and pain management services at the hospital. (Barakat Aff. ¶ 16.)

As noted earlier, it is undisputed that C&M never represented Prime, Dr. Barakat, or A&B relative to the development nor break-up of their business relationship. There is, however, a dispute about a conversation between Dr. Barakat and Attorney Warren at the Rhode Island Department of Health elevator lobby on or about March 1, 2018. Dr. Barakat recalled running into Attorney Warren and initiating a conversation where he "mapped out the conflicts that had arisen in [his] relationship with Prime Landmark." (Barakat Aff. ¶¶ 16, 17.) Dr. Barakat further averred that he told Attorney Warren that "[his] troubles with Prime Landmark had gotten to the point where they had caused significant financial harm to the Barakat Group," and that "the [Barakat] entities . . . planned to file suit against Prime . . . and the reasons why." *Id.* ¶¶ 18, 19. In contrast, Attorney Warren testified to a "very quick . . . interaction" where she saw Dr. Barakat in the lobby

[12] *See* Section III.A.1, *infra*.

and did not even recognize him. (Warren Dep. 66:16-67:24.) The only thing Attorney Warren recalls Dr. Barakat saying, as the elevator door closed, was "strange things are happening at the hospital." (Warren Dep. 66:16-67:17.)

On October 24, 2018, attorneys for Dr. Barakat and A&B sent a demand letter to Prime alleging breaches of their agreement which Dr. Barakat alleged contractually obligated Prime to allow Dr. Barakat and A&B to exclusively provide pain management and anesthesia services. (Barakat Aff. ¶ 21.) On November 1, 2018, in-house counsel for Prime responded to this demand in an e-mail, stating they were reviewing the matter and would retain outside counsel and be in touch soon. (Movants' Suppl. Mem. Ex. 3, at 2.)

The next communication was a letter from Prime's in-house counsel to 6BVP on February 11, 2019 stating that Prime would be terminating its obligations under the lease of the 6 Blackstone Valley property and "cease making all [payment of] rental, tax, condo fee, and condo assessment . . . immediately." (Movants' Suppl. Mem. Ex. 4, at 2.) Prime then did not pay its March rent to 6BVP. (Barakat Aff. ¶ 27.)

This litigation began on April 3, 2019 when 6BVP filed the Lease Lawsuit against Prime. Then, on April 22, 2019, Dr. Barakat and A&B filed the Hospital Practices Lawsuit against Prime and other hospital employees. On July 15, 2019, Movants filed their first Motion to Disqualify C&M only in the Hospital Practices Lawsuit. On January 29, 2020, after the Hospital Practices Lawsuit and the Lease Lawsuit were consolidated, Movants filed their Motion to Disqualify C&M in the consolidated case. (Movants' Mem.) Movants filed a Supplemental Memorandum in Support of their Motion to Disqualify (Movants' Suppl. Mem.) on March 18, 2021 and filed a Second Supplemental Memorandum (Second Suppl. Mem.) on October 8, 2021. On November 5,

2021, C&M filed an Objection with supporting memorandum (C&M's Obj. Mem.) in response to Movants' four filings. This Court heard the parties' arguments on December 9, 2021.

II

Standard of Review

A

Motions to Disqualify

The Rhode Island Supreme Court has expressed on numerous occasions that the proponent of a motion to disqualify has a high burden to meet. *See, e.g., In re Yashar*, 713 A.2d 787, 790 (R.I. 1998). The Supreme Court also has held that "the appearance of impropriety alone is 'simply too slender a reed on which to rest a disqualification order except in the rarest of cases.'" *Olivier v. Town of Cumberland*, 540 A.2d 23, 27 (R.I. 1988) (internal quotation omitted.) The Rhode Island Rules of Professional Conduct adopted by the Supreme Court echo these principles:

> "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. *In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation . . .* Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." Sup. Ct. R. Prof. Conduct, Art. V, Scope [20] (emphasis added).

In deciding whether a party's counsel should be disqualified, this Court must balance a party's right to choose its counsel against the need to protect the integrity of the judicial process. *Buonanno v. Village at Waterman Lake, L.P.*, No. PC-06-5797, 2010 WL 2024916, at *6 (R.I. Super. May 17, 2010). Rhode Island Superior Courts have cautioned against the "increasing tendency by counsel to invoke a claim of a breach of Rules of Professional Conduct in connection

with contentious matters." *Weetamoe Condominium Association v. Town of Bristol*, No. PB-02-2517, 2003 WL 21296848, at *1 (R.I. Super. May 7, 2003). As that court stated:

> "Oft times it appears . . . that the rules are used as a sword to preclude a parties' choice of counsel in litigation so as to attempt to gain a perceived tactical advantage rather than as a shield against inappropriate conduct where such conduct might inure to the detriment of the moving party in the dispute as well as to public perception of the legal profession as a whole." *Id.*

Trial judges have also emphasized that "motions to disqualify are viewed with disfavor." *Jacobs v. Eastern Wire Products Co.*, No. PB-03-1402, 2003 WL 21297120, at *2 (R.I. Super. May 7, 2003); *Fregeau v. Deo*, No. PC-03-4179, 2005 WL 1837011, at *3 (R.I. Super. Aug. 2, 2005) ("motions to disqualify are generally disfavored because they separate a client from a chosen attorney, inevitably cause delay, and are often made only for tactical reasons").

Nonetheless, Rule 1.16 of the Rhode Island Rules of Professional Conduct obligates an attorney to withdraw from representation of a client if the representation will result in violation of the Rules of Professional Conduct. Sup. Ct. R. Prof. Conduct 1.16(a)(1). A conflict of interest under Rule 1.7 or Rule 1.9 would constitute such a violation.

B

Rule 1.7

According to Rule 1.7(a)(1) of the Rhode Island Rules of Professional Conduct, a lawyer should not represent a client if that representation involves a concurrent conflict of interest with another client. Sup. Ct. R. Prof. Conduct 1.7(a)(1); *DeCurtis v. Visconti, Boren & Campbell, Ltd.*, 152 A.3d 413, 425-26 (R.I. 2017). A concurrent conflict exists if: "(1) the representation of one client will be directly adverse to another client . . . ." *Id.* at 426. Rule 1.7 clarifies in comment [6]:

> "Loyalty to a current client prohibits undertaking representation *directly adverse* to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one

> matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." Sup. Ct. R. Prof. Conduct 1.7 cmt. 6 (emphasis added).

Additionally, a lawyer should not represent a client if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or third person. Sup. Ct. R. Prof. Conduct 1.7(a)(2). Rule 1.7 clarifies in comment [8]:

> "The *mere possibility of subsequent harm* does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Sup. Ct. R. Prof. Conduct 1.7 cmt. 8 (emphasis added).

C

Rule 1.9

Rule 1.9(a) of the Rhode Island Rules of Professional Conduct provides that a lawyer should not represent a client in a matter involving a former client, where the current and former clients' interests are adverse and the matter involves the same or substantially related issues. Sup. Ct. R. Prof. Conduct 1.9(a). The Supreme Court has used the substantially related test in its determination of whether disqualification is appropriate in instances where violations of Rule 1.9(a) are alleged. *See Olivier*, 540 A.2d at 25; *see also Brito v. Capone*, 819 A.2d 663, 665 (R.I. 2003). In *Brito v. Capone*, the Court stated "the test for determining whether matters are substantially related has been 'honed in its practical application to grant disqualification only upon a showing that the relationship between the issues in the prior and present cases is 'patently clear' or when the issues are 'identical' or 'essentially the same.'" *Brito*, 819 A.2d at 665 (internal quotation omitted).

Under Rule 1.9(c), a lawyer who formerly represented a client in a matter shall not use information relating to the representation to the disadvantage of the former client or reveal information relating to the representation. Sup. Ct. R. Prof. Conduct 1.9(c). Rule 1.9(c) carries with it an irrebuttable presumption that client confidences were obtained in a prior matter if that prior matter and the current matter are the same or substantially related. Sup. Ct. R. Prof. Conduct 1.9(c) cmt. 3; *In re CharterCARE Community Board, et. al.*, No. PC-2019-11756, at 18 (R.I. Super. Oct. 19, 2020). Rule 1.9 clarifies in comment 3:

> "Matters are 'substantially related' for purposes of this Rule 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." Sup. Ct. R. Prof. Conduct 1.9(c) cmt. 3.

III

Analysis

A

Movants' Arguments Under Rule 1.7

Movants urge this Court to find that the rules regarding concurrent conflicts of interest in Rule 1.7 disqualify C&M from representing Prime. (Movants' Second Suppl. Mem. 2.) Movants present three theories of concurrent conflict under Rule 1.7. *Id.* 2-3. First, Movants argue that C&M's representation of Dr. Barakat and A&B overlapped with C&M's representation of Prime in February 2019 while the parties were adverse, creating a concurrent conflict of interest in violation of Rule 1.7(a)(1). *Id.* 2. Second, Movants argue that there was a significant risk that C&M's representation of Movants would be materially limited by the Movants' representation of Prime in violation of Rule 1.7(a)(2). (Movants' Suppl. Mem. 10.) Third, Movants argue that, at best, C&M began representing Prime against Dr. Barakat and A&B concerning the Lease only

four days after C&M dropped Dr. Barakat and A&B as clients, arguing that C&M improperly dropped them like a "hot potato." (Second Suppl. Mem. 2-3 (citing *Markham Concepts, Inc. v. Hasbro, Inc.*, 196 F. Supp. 3d 345, 348-49 (D.R.I. 2016).) For the reasons below, this Court disagrees with all three arguments.

1

Overlapping Representation – Rule 1.7(a)(1)

Rule 1.7 governs when and under what circumstances a lawyer is prohibited from representing a client in the face of a concurrent conflict of interest. *Buonanno*, 2010 WL 2024916, at *5. Rule 1.7(a) provides that:

> "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > "(1) the representation of one client will be directly adverse to another client; or
> >
> > "(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Sup. Ct. R. Prof. Conduct 1.7(a).

Movants and Prime are directly adverse as it relates to the Lease Lawsuit and the Hospital Practices Lawsuit. Accordingly, at issue in this analysis is whether Movants and Prime were "concurrent" clients of C&M. The dates surrounding C&M's representation of both Movants and Prime are disputed. Movants contend C&M's representation ended on February 20 [*sic*], 2019 by e-mail from Attorney Warren. (Second Suppl. Mem. 3; Barakat Aff. ¶ 24.) In contrast, Attorney Warren maintains that she terminated the relationship in a phone call in January 2019. (Warren Aff. ¶ 4; Warren Dep. 76:21-77:3.) Movants also contend that Attorney Gladstone was retained by Prime to address the Lease on February 11, 2019. (Second Suppl. Mem. 4.) In contrast, Attorney

Gladstone stated his representation of Prime began on February 25, 2019. (Gladstone Aff. ¶ 2.) If Movants were successful in demonstrating that the representation of Movants and Prime overlapped, Rule 1.7 would compel disqualification since the "representation of one client [would] be directly adverse to another client." Sup. Ct. R. Prof. Conduct 1.7(a)(1).

The Court has carefully considered the evidence presented by the parties as to C&M's termination of the relationship with Movants and Prime's engagement of C&M in the Lease dispute. On February 12, 2019, Attorney Gladstone began his inquiry into the title of the 6 Blackstone Valley Place property with the intention of finding possible defenses that would help Prime in its efforts to get out of the Lease with 6BVP. (Gladstone Aff. ¶¶ 4,6; Movants' Suppl. Mem. Ex. 6, at 2-4.) Attorney Gladstone billed Prime for work he performed on Prime's behalf for the period February 12, 2019 to February 26, 2019. (Movants' Suppl. Mem. Ex. 6, at 2-4.) This Court views the title inquiry as the beginning of C&M's representation of Prime against 6BVP regarding the Lease. *See DiLuglio v. Providence Auto Body Inc.*, 755 A.2d 757, 766 (R.I. 2000).[13] The Court therefore finds that Attorney Gladstone was engaged by Prime and representing Prime as of February 12, 2019.

However, the Court finds that the attorney-client relationship between C&M, Dr. Barakat, and A&B (and 6BVP) was terminated in January 2019, before C&M was contacted by Prime concerning the Lease. While Movants maintain that the relationship with C&M was not terminated until Attorney Warren's February [22], 2019 e-mail, the Court does not find that assertion persuasive. Attorney Warren's testimony that she terminated the relationship with Dr. Barakat and his entities in a phone call in January 2019 is unrebutted, as is her assertion (and supporting

[13] An attorney-client relationship may be created by implication through the conduct of the parties such as when "the advice and assistance of the attorney are sought and received in matters pertinent to the attorney's profession as a lawyer[.]" *DiLuglio* 755 A.2d at 766.

documentation) that she terminated the relationship due to lack of payment of C&M's invoices and the difficulties communicating with Dr. Barakat and obtaining information needed for corporate filings. Movants rest their position on the February [22], 2019 e-mail and the statements made in Dr. Barakat's Affidavit. (Second Suppl. Mem. 7-9.)

A plain reading of Attorney Warren's February 2019 e-mail that Dr. Barakat refers to in his Affidavit, coupled with Attorney Warren's unrebutted testimony, strongly suggests that the e-mail message was a follow up to a previous communication. (C&M's Obj. Mem. Ex. M (E-mail), at 2-3; Warren Aff. ¶ 4; Warren Dep. 76:21-77:3). Attorney Warren testified that she terminated her relationship with Dr. Barakat as a client over the phone for nonpayment of his past due balance and "my relationship as an attorney for [Dr.] Barakat ended in January of 2019 . . . ." (Warren Aff. ¶ 4; Warren Dep. 76:21-77:3; *see also* Soares Aff. ¶ 4 ("I . . . found no [billing] entries for services . . . during the period of January 1, 2019, through December 31, 2019").) Attorney Warren's February 22, 2019 e-mail is not consistent with continuing an attorney-client relationship, rather, it indicates an administrative step taken in follow up to a previously terminated representation.[14] (C&M's Obj. Mem. Ex. M, at 2-3.)

It is logical that shortly after Attorney Warren terminated the representation of Movants, she took the administrative step of resigning as resident agent of Movants and the related entities. *Id*. Further, despite this Court's critiques of C&M's adherence to various aspects of the Rhode Island Rules of Professional Conduct, this Court does not believe that Attorney Warren terminated Movants as clients by merely sending Dr. Barakat a copy of her resignation letter to the Secretary

[14] The Court acknowledges Attorney Warren's two e-mails from January 30, 2019 and February 13, 2019 that could be read as C&M continuing to render legal advice or as C&M mitigating any damages to Movants as terminated clients (*see* Section I.E, *supra*) but finds that the weight of C&M's evidence, when contrasted with Dr. Barakat's Affidavit, compels the Court to disagree with Movants' assertions that these e-mails evince an ongoing attorney-client relationship.

of State without any explanation of why she was resigning as registered agent. The evidence presented by C&M leads the Court to conclude that C&M was winding down the representation of Movants in January 2019. Accordingly, the Court finds that the attorney-client relationship between C&M, Dr. Barakat, and his entities was terminated in January 2019 over the telephone.

Based on the Court's findings that the attorney-client relationship between Movants and C&M was terminated in January 2019, and that C&M's representation of Prime in connection with the Lease began on February 12, 2019, there was no point where C&M's representation of Movants overlapped with C&M's representation of Prime in connection with what ultimately became the Lease Lawsuit. Accordingly, this Court cannot conclude that a Rule 1.7(a)(1) violation has occurred, which would compel this Court to grant the extreme sanction of disqualifying Prime's counsel.

2

Materially Limited Representation – Rule 1.7(a)(2)

Movants argue that "before C&M's representation of the Prime Entities became directly adverse to its representation of [Movants], C&M was already in violation of Rule 1.7(a)(2) as a result of its earlier concurrent representation of these two sets of clients." (Movants' Suppl. Mem. 10.) Specifically, Movants state that even before the parties were materially adverse, C&M violated Rule 1.7(a)(2) because there was a significant risk that C&M's ability to consider, recommend, or carry out an appropriate course of action for Movants would be materially limited, because of C&M's responsibilities relating to Prime. *Id.* Rule 1.7 at comment 8 contemplates the argument the Movants make stating:

> "The mere *possibility of subsequent harm* does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional

> judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Sup. Ct. R. Prof. Conduct 1.7 cmt. 8 (emphasis added).

Here, Movants hired C&M while fully aware that C&M represented Prime (Barakat Aff. ¶¶ 4, 5; Warren Dep. 44:24-25), and it is undisputed that C&M had no involvement for any party relative to the formation nor deterioration of Movants' business relationships with Prime. Movants argue that "it was surely foreseeable to Attorney Warren that C&M's duties to one set of clients, the Prime Entities, and its duties to another set of clients, Dr. Barakat and the Barakat Entities, could result in a conflict given the clients' various relationships[.]" (Suppl. Mem. 10.) Movants, however, do not point to any evidence on the record that would support this argument. *Id.* 10-11. Movants' allegations, at best, present a "mere possibility of subsequent harm." Sup. Ct. R. Prof. Conduct 1.7 cmt. 8. Movants have not demonstrated to this Court that there was a significant risk that C&M's representation of Movants, confined to ministerial and corporate registration assistance,[15] was materially limited by C&M's responsibilities to Prime, which prior to February 2019 concerned regulatory work for Prime before the Department of Health. Sup. Ct. R. Prof. Conduct 1.7(a)(2). The Court does not find that disqualification is warranted under Movants' second Rule 1.7 theory.[16]

[15] *See* Section III.B.1, *infra*.

[16] Further, even if the scope of services that C&M provided to both sets of clients prior to 2019 were related such that C&M's responsibilities could be limited by the dual representation, it does not follow that disqualification in this litigation is appropriate. "[V]iolation of a Rule does not necessarily warrant . . . disqualification of a lawyer in pending litigation." Sup. Ct. R. Prof. Conduct, Art. V, Scope [20].

3

Hot Potato Doctrine – Rule 1.7

Movants also urge this Court to adopt the "hot potato doctrine," which is "a judicially-created rule which bars an attorney and law firm from curing the dual representation of clients by expediently severing the relationship with the preexisting client." (Movants' Second Suppl. Mem. 2 (citing *Markham Concepts, Inc.*, 196 F. Supp. 3d. at 348).) Movants contend that, at the very least, C&M impermissibly began representing Prime regarding the Lease only days after C&M dropped Dr. Barakat and A&B as clients like a "hot potato." (Movants' Second Suppl. Mem. 2.)

In *Markham Concepts, Inc. v. Hasbro, Inc*., the defendant, Hasbro, moved to disqualify a firm when two attorneys representing Markham Concepts changed law firms. *Markham Concepts, Inc.*, 196 F. Supp. 3d. at 347. Hasbro claimed that the two attorneys for Markham Concepts moved from Cadwalader, Wickersham & Taft LLP to Greenberg Traurig (GT) and in doing so created a conflict. *Id.* Until the attorneys changed firms, GT represented Hasbro in several patent applications and was seeking to expand representation of the company. *Id.* The two attorneys, however, sought to bring the Markham case to their new firm, which would have created a direct conflict with GT's representation of Hasbro. *Id.* When Hasbro declined GT's request to waive the conflict, GT terminated its relationship with Hasbro and took on the Markham litigation. *Id.* Ultimately, Hasbro successfully moved to disqualify GT from the Markham litigation on the grounds that GT was conflicted out under Rule 1.7 because of the "hot potato doctrine." *Id.* at 348.

The Federal District Court of Rhode Island examined, first, whether the "hot potato doctrine" applies to the Rhode Island Rules of Professional Conduct and, second, whether the conduct fell within the scope of the doctrine. *Id.* at 349. The Rhode Island Supreme Court has not expressly adopted the "hot potato doctrine," and courts interpreting the Rhode Island Rules of

Professional Conduct have only referenced it in passing. *Id.* However, the *Markham Concepts* court stated that "the hot potato doctrine is consistent with, and furthers the purpose of, the RIRPC. Therefore, the [c]ourt will apply it here." *Id*.

In doing so, the court found:

> "GT's treatment of Hasbro falls squarely within the scope of the doctrine. Prior to the Markham conflict, GT had not only represented Hasbro for eight years, but was actively seeking to expand its relationship with the company. Then, as far as the Court can tell, GT decided to *abruptly drop Hasbro as a client only after Hasbro refused to waive the Markham conflict*. If GT could *convert Hasbro to its former client by quickly dropping it in the face of an imminent conflict, then any firm could avoid Rule 1.7 'by simply converting a present client into a former one.*' *Picker Int'l, Inc.* [*v. Varian Assocs., Inc*.], 670 F. Supp. [1363], 1366 [(N.D. Ohio 1987)]. Such a rule would render meaningless the duty of loyalty a lawyer owes to his or her clients. Accordingly, for the purposes of this Motion, Hasbro is GT's current client." *Markham Concepts, Inc.*, 196 F. Supp. 3d. at 349 (emphasis added).

This Court has already made a finding that C&M terminated the representation of Movants in January 2019 and that C&M commenced its representation of Prime on February 12, 2019. At the time C&M terminated Movants, no one had yet contacted C&M on behalf of Prime for assistance with the Lease dispute. Thus, the factual scenario necessary for a "hot potato doctrine" claim, that one client was dropped to take on another, does not exist here. In any event, as stated in *Markham Concepts*, there is no *per se* disqualification even if the "hot potato doctrine" applies because "a motion to disqualify requires a careful examination of the allegedly conflicting representations." *Id*. Even if this Court were to apply the "hot potato doctrine," the Court must determine whether the record in this case warrants disqualification under the doctrine.

Movants assert that C&M terminated its relationship with them so C&M could take on the more profitable client and utilize confidential information to Prime's benefit. (Movants' Second

Suppl. Mem. 2.) C&M's position is that C&M's representation of Movants was terminated because Movants stopped responding to C&M's e-mails and continually failed to pay their legal bills. (Warren Aff. ¶¶ 12, 14.) Specifically, Attorney Warren stated:

> "I'm very busy, and I didn't want to be chasing him for payment . . . [w]e had an agreement for [Movants] to pay monthly, and [Movants] didn't. So I just felt like the representation wasn't valued by him, and I really didn't want to be . . . associated with him any longer. We had finished what we needed to do. It was a good time, and it didn't appear that he would pay . . . it just made sense . . . for us to part ways." (Warren Dep. 79:3-24.)

C&M provided an invoice from November 2018, which stated that Dr. Barakat had a past due balance of $4,467.75. (C&M's Obj. Mem. Ex. K, at 2.) C&M also provided e-mails sent to Dr. Barakat in November 2018, December 2018, and January 2019, demonstrating Attorney Warren's efforts to secure payment for Movants' past due legal bills. (C&M's Obj. Mem. Ex. L, at 1-3.) Movants have not rebutted this testimony or documentation, instead relying primarily on Dr. Barakat's Affidavit in support of their position that C&M terminated Movants to take on Prime because it was the more profitable client. (Movants' Second Suppl. Mem. 2.)

Having considered the evidence presented by the parties on this issue, the Court finds the position advanced by C&M to be more persuasive. There is no evidence that the termination of Movants was motivated by or had anything to do with C&M's representation of Prime besides Dr. Barakat's suppositions. Instead, the record indicates that C&M was not performing any matters for Movants in 2019 and was winding down the attorney-client relationship while attempting to collect on past due bills. (Soares Aff. ¶¶ 3-4; C&M's Obj. Mem. Ex. L, at 2-3.) Eventually, after struggling to collect on a past due bill and in efforts to communicate with Movants, C&M terminated the client relationship in January 2019. On the record before it, the Court finds that the reason for C&M's termination of Movants' representation was the nonpayment of legal bills and

breakdown of communication between C&M and Movants. Even if C&M somehow did have an idea they were going to be contacted by Prime, the record does not support a finding that C&M was "drop[ping] [Movants] *solely* to assume a conflicting representation." *Markham*, 196 F. Supp. 3d at 349 n.1 (emphasis added). The Court declines to apply the "hot potato doctrine" to the facts of this case.

In sum, this Court understands that the timeline as to C&M's termination of Movants as clients and C&M's representation of Prime appears suspicious to Movants[17] and, certainly, C&M could have avoided many of the claims at issue in Movants' motion with better documentation with both Movants and Prime and heightened attention to the ethical rules around client engagement.[18] However, this Court cannot conclude based on the record that a Rule 1.7 violation has occurred warranting the extreme sanction of disqualifying Prime's counsel of choice. Accordingly, the Court denies the Motion to Disqualify under Rule 1.7.

[17] Dr. Barakat's discomfort with C&M's representation of Prime appears to have developed only with this litigation. When Movants retained C&M, Dr. Barakat was aware that C&M represented Prime, and Attorney Warren was aware that Dr. Barakat was a practicing anesthesiologist at Prime's hospital. (Barakat Aff. ¶¶ 5, 6; Warren Dep. 44:24-25 ("I know that Dr. Barakat was aware that I represented Prime during our discussion.").) No complaints to this arrangement were raised. Nor was there objection to Attorney Warren's advocating for Prime relative to the elevator buildout at the 6 Blackstone Valley property in December 2015. (Barakat Aff. ¶¶ 5, 6; Warren Aff. ¶¶ 5, 7.) The Court is mindful that contentious litigation can spawn disqualification claims based on alleged violations of the Rules of Professional Conduct.

[18] For example, C&M could have sent a letter (or at least an e-mail) after Attorney Warren's January 2019 phone call with Dr. Barakat confirming the termination of the attorney-client relationship. Additionally, C&M could have addressed the potential for conflict between Prime and Dr. Barakat when Dr. Barakat first sought out C&M's assistance with the Secretary of State by obtaining both clients' written informed consent to the mutual representation.

B

Movants' Arguments Under Rule 1.9

Movants urge this Court to find that Rule 1.9 governing former clients precludes C&M from representing Prime in these matters. Movants assert two grounds for disqualification under Rule 1.9. First, they argue that C&M's prior representation of the Movants is substantially related to this litigation in which C&M is representing Prime, in violation of Rule 1.9(a). (Movants' Mem. 8-9.) Second, Movants argue that C&M should be disqualified under Rule 1.9(c) for using Movants' confidential information in C&M's current representation of Prime to their disadvantage. (Movants' Mem. 10-11.) For the reasons below, this Court disagrees with both arguments.

1

Substantially Related Matters – Rule 1.9(a)

After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client in violation of Rule 1.9. Rule 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." Sup. Ct. R. Prof. Conduct 1.9(a) (emphasis added).[19]

Accordingly, there are three elements to this rule's application: (1) the proponent must be a former client of the lawyer; (2) the lawyer must be representing another person in a matter that is the same

[19] "Matters are 'substantially related' for purposes of this Rule 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. . . " Sup. Ct. R. Prof. Conduct 1.9 cmt. 3.

or a substantially related matter; and (3) the person the lawyer is representing must have an interest materially adverse to the former client. *See id.*

Here, two of these criteria are easily met. Movants are former clients of C&M and C&M is now representing Prime, which is materially adverse to Movants in both the Lease Lawsuit and the Hospital Practices Lawsuit. Thus, the central issue this Court must resolve is whether the former representation of Movants and the current representation of Prime are "the same or . . . substantially related." *See id.* In doing so, the Court must compare the subject matter of the past representation and subject matter of the current representation. *Quinn* v. *Yip*, No. KC-2015-0272, 2018 WL 3613145, at *3 (R.I. Super. July 20, 2018). As stated by the Supreme Court, "the test for determining whether matters are substantially related has been 'honed in its practical application to grant disqualification only upon a showing that the relationship between the issues in the prior and present cases is 'patently clear' or when the issues are 'identical' or 'essentially the same.'" *Brito*, 819 A.2d at 665 (internal citation omitted). The trial court in *Fregeau v. Deo*, put it this way:

> "In determining whether a 'substantial relationship' between the former representation and the current representation is said to exist, the court should focus on the 'practical consequences of the attorney's representation of the former client.' . . . Specifically, the court should examine the similarities between the two factual situations, the legal questions posed, the nature and extent of the attorney's involvement with the case, the time spent by the attorney on the earlier cases, the type of work performed, and the attorney's possible exposure to formulation of policy or strategy. . . . Thus, 'successive representations will be 'substantially related' when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues.'" *Fregeau*, 2005 WL 1837011, at *3 (internal citations omitted).

Movants rely heavily on *Quinn v. Yip*, where the trial court examined whether matters were substantially related for Rule 1.9(a) purposes, noted the scarcity of Rhode Island case law in this area, and looked to other jurisdictions for guidance. *Quinn*, 2018 WL 3613145, at *3. In particular, the *Quinn* court referred to Massachusetts case *R & D Muller, Ltd. v. Fontaine's Auction Gallery, LLC.*, 906 N.E.2d 356 (Mass. App. Ct. 2009). In that case, the plaintiff sought to pierce the corporate veil of two defendant business entities alleging that they failed to follow corporate formalities, had nonfunctioning officers or directors, and failed to maintain corporate records. *Quinn*, 2018 WL 3613145, at *5 (citing *R & D Muller, Ltd.*, 906 N.E.2d at 357-58). The defendants filed a motion to disqualify the plaintiff's attorney because, approximately twenty years prior to the suit, the plaintiff's attorney helped incorporate one of the defendant business entities, advised on the proper maintenance of the corporate formalities, and reminded the owner of the entity to maintain the corporate records. *R & D Muller, Ltd.*, 906 N.E.2d at 358. The Appeals Court of Massachusetts affirmed the disqualification of the plaintiff's counsel, finding that the plaintiff's attorney advised the owner and the defendant's business entity with respect to corporate formalities and provided them with "backdated corporate resolutions to facilitate [the owner's] belated compliance." *Id.* at 359. This case was cited in *Quinn* for the proposition that prior representation regarding a corporation's structure and formation is substantially related to current representation attacking that same corporate structure and form. *Quinn*, 2018 WL 3613145, at *3.

Utilizing this analysis, the *Quinn* court examined the factual circumstances surrounding the subject law firm's prior representation of the moving parties and ultimately decided that the representation was substantially related to the firm's former representation of the movants. *Id.* at *7. The court compared the facts surrounding the earlier representation, which included tasks such as the drafting provisions in bylaws, articles of incorporation, and subscription agreements,

concluding that the present litigation attacking movants' corporate structure and form was substantially related to the documents that movants' former attorney previously drafted and effectuated on their behalf. *Id.*

Here, the Court is presented with an asserted conflict that is substantially less clear than the conflicts presented in either *Quinn* or *R & D Muller, Ltd.* The relationship between C&M's corporate maintenance work for Movants and the Lease Lawsuit and the Hospital Practices Lawsuit is not "patently clear," and preparing and submitting routine corporate maintenance filings is not "identical or essentially the same" subject matter as the disputed issues involved in either of the instant cases. The Lease at issue in the Lease Lawsuit (between Prime and 6BVP) was not drafted by C&M, neither side ever consulted C&M regarding the formation of the Lease, and the letter of intent to breach the Lease was not drafted by C&M. (Warren Aff. ¶ 5; Gladstone Aff. ¶¶ 2-4; Souza Aff. ¶ 9.) There is no evidence in the record that C&M was even aware of the potential Lease litigation until February 11, 2019. (Warren Aff. ¶ 5; Gladstone Aff. ¶¶ 2-4.) The only interaction C&M had with the Lease was one meeting in December 2015 regarding an elevator installation, which Attorney Warren attended on behalf of Prime with Dr. Barakat's knowledge and consent. (Warren Aff. ¶ 7; Barakat Aff. ¶¶ 5,6.) The Hospital Practices Lawsuit alleges claims of breaches of contract and the covenant of good faith and fair dealing, unjust enrichment, promissory estoppel, Rhode Island Whistleblower's Protection Act, and tortious interference arising from Dr. Barakat's disagreement with certain labor and delivery practices at Prime's hospital and the alleged retaliation against Dr. Barakat and A&B. Prior to the initiation of the Hospital Practices Lawsuit, it is undisputed that C&M never advised either party relative to these issues.

Upon careful review of C&M's billing records, it is clear that C&M's representation of Movants was limited to reinstatement of corporate entity status of A&B and maintenance of A&B's corporate status. (C&M's Obj. Ex. F (December 2015-October 2016 Invoices), at 2-21; C&M's Obj. Ex. G (April 2017-January 2018 Invoices), at 2-14; C&M's Obj. Ex. I (April 2018-November 2018 Invoices), at 2-8.) It is also clear that the majority of this work was performed by a paralegal under the supervision of Attorney Warren. Of the 59.3 total hours billed by C&M, C&M's paralegal billed 39.3 hours while Attorney Warren billed 20 hours. (C&M's Obj. Exs. F, G, I, J, K.) Attorney Warren billed only 5.55 hours related to corporate maintenance work (for all of Dr. Barakat's entities), and 14.45 hours were billed for other, infrequent work for entities owned by Dr. Barakat that are not parties to this case, making that work irrelevant to the analysis. Attorney Warren's time entries reflect short review sessions after the paralegal had performed a number of hours of work, confirming her supervisory role. (*See, e.g.*, C&M's Obj. Ex. F. (Invoices), at 3.) It is not alleged by Movants, nor does the record before the Court reflect, that Attorney Warren acted as outside general counsel or otherwise took on any role in providing substantive corporate advice to Movants. Rather, C&M's work for Movants was limited to the mostly clerical tasks associated with maintaining filings with the Secretary of State's Office.[20]

[20] Dr. Barakat asserts in his Affidavit:

> "Through the course of the work [Attorney Warren] did for the Barakat Group, Attorney Warren gained intimate confidential knowledge about these parties. Attorney Warren was privy to the Barakat Group's confidential financial information, business strategies, short- and long- term business plans, personal strengths and weaknesses and legal strategies, many of which were directly related to contractual relationships with Prime Landmark." (Barakat Aff. ¶ 13.)

This bold assertion is conclusory and not supported by the evidence. Indeed, it is difficult to comprehend how Attorney Warren had access to Movants' business strategies, business plans, strengths and weaknesses, or legal strategies when her work for Movants was confined to no more than 5.5 hours over a three year period where she supervised basic corporate maintenance filings.

The evidence does not support "a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." *Fregeau*, 2005 WL 1837011, at *3. Accordingly, the Court finds that Movants fail to make the required showing that the issues worked on by C&M for Movants and the issues in the instant cases are "identical" or "essentially the same." *Brito*, 819 A.2d at 665. Therefore, the rationale which supported both courts' findings of Rule 1.9 violations in *Quinn* and *R & D Muller* are unsuitable to the instant circumstances and do not support disqualification of C&M. The Court denies the Motion to Disqualify under Rule 1.9(a).

2

Using Confidential Information – Rule 1.9(c)

Protection of client confidential information is a hallmark of the Rhode Island Rules of Professional Conduct and former clients are not exempted. Rule 1.9(c) states:

> "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> "(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> "(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client." Sup. Ct. R. Prof. Conduct 1.9(c).

The comments to Rule 1.9 clarify:

> Information that has been *disclosed to the public* or to other parties adverse to the former client ordinarily will *not be disqualifying* . . . In the case of an organizational client, *general knowledge of the*

> *client's 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*. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the *nature of the services* the lawyer provided the former client and *information that would in ordinary practice be learned* by a lawyer providing such services." Sup. Ct. R. Prof. Conduct 1.9 cmt. 3 (emphasis added).

The trial court in *In re CharterCARE*, No. PC-2019-11756 at 18 (R.I. Super. Oct. 19, 2020) stated "Rhode Island's Rule 1.9 carries with it an irrebuttable presumption that client confidences were obtained in a prior matter *if that prior matter and the current matter are the same or substantially related*." *In re CharterCARE*, No. PC-2019-11756 at 18 (emphasis in original). This Court has found that the present litigation is neither the same nor substantially related to C&M's former representation of Movants. Thus, to successfully argue a Rule 1.9(c) violation, Movants must show that C&M has "obtained client confidences and there is a 'substantial risk that confidential factual information . . . would materially advance the client's position in the subsequent matter.'" *Id.* (citing Sup. Ct. R. Prof. Conduct 1.9 cmt. 3).

This Court is not convinced Movants have demonstrated that C&M is in possession of confidential information that will advance Prime's position in either the Lease Lawsuit or the Hospital Practices Lawsuit. Movants have not alleged any specific facts that would lead the Court to believe that C&M obtained relevant confidential information in their representation of Movants. Attorney Warren and Attorney Gladstone contest Dr. Barakat's claims that C&M's previous work exposed them to any confidential information that would give Prime an unfair advantage in the litigation. (Warren Aff. ¶ 13; Gladstone Aff. ¶¶ 3, 12.) Dr. Barakat has not challenged or otherwise

responded to either of these statements. Instead, Movants support their argument with Dr. Barakat's Affidavit which contends generally that:

> "Through the course of the work [Attorney Warren] did for the Barakat Group, Attorney Warren gained intimate confidential knowledge about these parties. Attorney Warren was privy to the Barakat Group's confidential financial information, business strategies, short- and long-term business plans, personal strengths and weaknesses and legal strategies, many of which were directly related to contractual relationships with Prime Landmark." (Barakat Aff. ¶ 13.)

While it can be presumed that C&M gained general knowledge about the corporate structure and status of Dr. Barakat's various entities in order to prepare the corporate registration filings, the Court finds that the nature of the limited services provided by C&M to Movants does not support the conclusion that C&M has knowledge of specific facts or strategies that are relevant to this litigation. Movants' alleged violation of Rule 1.9(c) as set forth in Dr. Barakat's Affidavit is speculative, unsubstantiated, and contradicted by the record.

This case differs from *Quinn v. Yip*, where it was demonstrated that the law firm's prior representation presented a clear opportunity and arguable fact that the law firm had obtained confidential information when the firm had performed complicated corporate formation and transactional matters for the former client and the subsequent litigation challenged that corporate structure and transactions. *Quinn*, 2018 WL 3613145, at *7. Instead, here, C&M performed largely ministerial, corporate maintenance work for Movants, specifically for A&B, which was an already organized entity, but had failed to file annual reports. (C&M's Obj. Ex. E, at 2.) Dr. Barakat's generalized contentions that C&M has and would use Movants' confidential information to benefit Prime do not meet the demanding standard required for disqualification.

Movants more specifically allege that the original pleadings filed by Attorney Gladstone on behalf of Prime in the Lease Lawsuit (alleging that 6BVP's charter had been revoked) utilized

confidential information gained during the firm's representation of Movants to attack the same corporate structure it helped Movants create. (Mot. to Disqualify 10-11.)[21] The corporate charter of 6BVP was in jeopardy at the time of Prime's filings because it failed to name a successor registered agent upon Attorney Warren's resignation from that position in February 2019. Movants contend that Attorney Gladstone used knowledge about 6BVP's corporate status gleaned from Attorney Warren, or, at least, that Attorney Warren's action in resigning created a legal registration issue for 6BVP that Attorney Gladstone could exploit for the benefit of Prime. (Mot. to Disqualify 8-9; Barakat Aff. ¶¶ 30, 34, 35.) Movants assert that the subsequent amendments to Prime's pleadings do not cure the alleged problem.

These contentions are speculative and unsupported. Both Attorney Gladstone and Attorney Warren vehemently deny that any consultation and coordination between them occurred. Furthermore, entity status is a matter of public record on the Secretary of State's website, and Attorney Gladstone testified that while he misread the website page regarding 6BVP's corporate status, his information regarding 6BVP's corporate status came "only from that public source." (Gladstone Aff. ¶ 12.); Sup. Ct. R. Prof. Conduct 1.9 cmt. 3 ("Information that has been disclosed to the public . . . ordinarily will not be disqualifying."). On the record before it, this Court cannot conclude that Attorney Gladstone drafted Prime's original Answer, Counterclaim and Third-Party

[21] *See also*, Dr. Barakat's Affidavit:

> "I believe that Attorney Warren and Attorney Gladstone's actions in the Lease Lawsuit were undertaken in consultation and coordination, that the same coordination . . . will occur . . . in the Hospital [Practices] Lawsuit . . . and we would be put at a particular disadvantage in prosecuting our claims . . . if C&M is allowed to continue representing any of the parties adverse to us in these two lawsuits." (Barakat Aff. ¶ 35.)

Complaint, making allegations respecting 6BVP's corporate status, based upon confidential information known to Attorney Warren.[22]

Movants also allege that confidential information, specifically pertaining to the Hospital Practices Lawsuit, was communicated by Dr. Barakat to Attorney Warren during a March 1, 2018 encounter in the Rhode Island Department of Health lobby. (Movants' Mem. 9-10.) Dr. Barakat recalled a conversation where he ran into Attorney Warren and "mapped out the conflicts that had arisen in [his] relationship with Prime Landmark." (Barakat Aff. ¶ 17.) Dr. Barakat further states that he told Attorney Warren that "[his] troubles with Prime Landmark had gotten to the point where they had caused significant financial harm to the Barakat Group[,]" and that "the Barakat [entities] planned to file suit against [Prime] and the reasons why." *Id.* ¶¶ 18, 19. Attorney Warren only remembered a "very quick . . . interaction" where she saw Dr. Barakat in the lobby and Dr. Barakat said, as the elevator was closing, "strange things are happening at the hospital." (Warren Dep. 66:16-67:24.)

Other than the statements contained in Dr. Barakat's Affidavit, there is no evidence in the record that demonstrates Attorney Warren received any confidential information regarding either the Lease Lawsuit or the Hospital Practices Lawsuit from Dr. Barakat during this chance encounter in the elevator lobby of the Department of Health. Attorney Warren denies that any confidential information was conveyed. (Warren Dep. 66:16-67:24.) Despite knowing Attorney Warren's

[22] At oral argument, Movants' counsel made several references to the "unusual" and "aggressive" defenses and affirmative claims made by Attorney Gladstone in the original pleadings he filed for Prime in "attacking" 6BVP's corporate status. The Rhode Island Rules of Professional Conduct require zealous advocacy for a client. Sup. Ct. R. Prof. Conduct Preamble [2]. In this Court's experience, oftentimes one attorney's "zealous advocacy" is another attorney's "aggressive tactics."

differing recollection of the event, Dr. Barakat has not supplemented or expanded upon his Affidavit and to date Attorney Warren's testimony stands unrebutted.

For these reasons, this Court finds that there is no confidential information held by C&M regarding Movants that would materially advance Prime's position in either the Lease Lawsuit or the Hospital Practices Lawsuit. The factual basis that Movants allege to support a finding of a Rule 1.9(c) violation does not meet the demanding standard for motions to disqualify, as the impropriety perceived by Dr. Barkat is "too slender a reed on which to rest a disqualification[.]" *Olivier*, 540 A.2d at 27 (internal quotation omitted). Accordingly, this Court does not disqualify C&M under Rule 1.9(c).

C

Imputation of the Conflict to C&M as a Firm – Rule 1.10

Movants argue that if the Court finds a conflict under Rule 1.7(a), 1.9(a), or 1.9(c) the conflict should be imputed to all C&M attorneys under Rule 1.10[23] and, therefore, the whole firm should be disqualified. (Movants' Second Suppl. Mem. 12.) This Court does not find a conflict pursuant to Rule 1.7(a), 1.9(a), or 1.9(c) and therefore does not address this argument.

IV

Conclusion

The parties have expended much time and effort making and defending the disqualification claims discussed in this Decision. This Court believes that most, if not all, of this effort could

[23] "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, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Sup. Ct. R. Prof. Conduct 1.10(a); *see also Hughes v. State*, 656 A.2d 971, 972 (R.I. 1995) ("Rule 1.10 . . . prohibits lawyers associated in a firm from representing a client when any one of them practicing alone would be prohibited from doing so.").

have been avoided had C&M paid greater attention to the Rhode Island Rules of Professional Conduct around client engagement, record-keeping, and termination. Even if C&M's protocols and practices were inadequate, however, "violation of a Rule [of Professional Conduct] does not necessarily warrant … disqualification of a lawyer in pending litigation." Sup. Ct. R. Prof. Conduct, Art. V, Scope [20]. Rather, the Court must assess the evidence presented by the parties on a case-by-case basis, keeping in mind the high burden a movant has to meet, *see In re Yashar*, 713 A.2d at 790, and that the "appearance of impropriety alone is 'simply too slender a reed on which to rest a disqualification order except in the rarest of cases.'" *Olivier*, 540 A.2d at 27 (internal citation omitted). Applying these standards, this Court finds that C&M is not disqualified from representing Prime or the Prime Individual Defendants in this consolidated case under Rules 1.7(a), 1.9(a), 1.9(c), or 1.10(a) of the Rhode Island Rules of Professional Conduct and denies Movants' Motion to Disqualify.

Counsel shall present the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**6 Blackstone Valley Place, LLC v. Prime Healthcare Services Landmark, LLC** **and** **Abdul Barakat, M.C. v. Michael R. Souza, et al.**
CASE NO:	**PC-2019-4524 consolidated with PC-2019-4999**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 3, 2022**
JUSTICE/MAGISTRATE:	**M. Darigan, J.**
ATTORNEYS:	
For Plaintiff:	**Mark C. Hamer, Esq.**
For Defendant:	**Bruce Gladstone, Esq.; Chip Muller, Esq.; Joseph Hoefferle, Jr., Esq.; David A. Wollin, Esq.; Mary C. Dunn, Esq.**