2014 PA Super 24

JOHN J. DOUGHERTY,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
PHILADELPHIA NEWSPAPERS, LLC, HAROLD JACKSON, PAUL DAVIS, DAVID BOYER, RUSSELL COOKE, MELANIE BURNEY, TONY AUTH AND MONICA YANT KINNEY,	:	
	:	
Appellees	:	No. 104 EDA 2013

Appeal from the Order entered December 26, 2012,
Court of Common Pleas, Philadelphia County,
Civil Division at No. 004790 March Term, 2009

BEFORE: BENDER, P.J., DONOHUE and MUSMANNO, JJ.

CONCURRING OPINION BY DONOHUE, J.: **FILED FEBRUARY 11, 2014**

I concur in the learned Majority's decision to deny Pepper Hamilton's Application to Quash and to reverse the trial court's order denying Dougherty's Motion to Disqualify Counsel. I write separately to clarify my position on certain issues and to state additional reasons for supporting reversal.

First, with respect to Pepper Hamilton's Application to Quash, pursuant to Rule 313 of the Pennsylvania Rules of Appellate Procedure, an interlocutory order may be deemed collateral if it satisfies a three-prong test: (1) it is separable from the main cause of action; (2) the right involved is too important for review to be denied; and (3) the question presented

must be such that if review is postponed until final judgment the claim will be irreparably lost. Pa.R.A.P. 313(b); ***Ben v. Schwartz***, 556 Pa. 475, 481, 729 A.2d 547, 550 (1999). In determining whether the right involved is too important to be denied review, the right must be deeply rooted in public policy such that it goes beyond the controversy at hand. ***Id.*** at 484, 729 A.2d at 552. With respect to the third prong of the test, there must be no other effective means of review available after final judgment. ***Id.***; ***Feldman v. Ide***, 915 A.2d 1208, 1211 (Pa. Super. 2007).

In my view, the trial court's order denying Dougherty's Motion to Disqualify Counsel is collateral and thus presently ripe for appeal. The first prong of the collateral order test is clearly satisfied, as the issues relating to Pepper Hamilton's disqualification are separable from the merits of Dougherty's claims of defamation as set forth in his complaint against, *inter alia*, Philadelphia Newspapers, LLC.

With respect to the second prong of the test, Dougherty's Motion to Disqualify Counsel is based upon allegations that Pepper Hamilton has violated Rule 1.9 of Pennsylvania's Rules of Professional Conduct. This rule of disqualification is designed to protect "a client's secrets and confidences by preventing even the possibility that they will subsequently be used against the client in related litigation." ***Goodrich v. Goodrich***, 158 N.H. 130, 136, 960 A.2d 1275, 1280 (2008) (quoting ***Tekni-Plex, Inc. v. Meyner and Landis***, 89 N.Y.2d 123, 131, 651 N.Y.S.2d 954, 958, 674

N.E.2d 663, 667 (1996)). As such, the primary concern in cases involving Rule 1.9 is whether "confidential information that might have been gained in the first representation may be used to the detriment of the former client in the subsequent action." ***Commonwealth Ins. Co. v. Graphix Hotline, Inc.***, 808 F.Supp. 1200, 1204 (E.D.Pa. 1992) (quoting ***Realco Services, Inc. v. Holt***, 479 F.Supp. 867, 871 (E.D.Pa. 1979)).

In this case, Pepper Hamilton does not deny that its attorneys obtained protectable attorney-client confidences during its prior representation of Dougherty, and instead claims only that an ethical screen will minimize or eliminate the use of such confidences by its attorneys in the present case.[1] Pepper Hamilton's Brief at 18. Under Pennsylvania law, however, confidential information gained by one member of a law firm "is imputable to other members of the same law firm." ***Estate of Pew***, 55 A.2d 521, 545 (Pa. Super. 1994); Pa.R.P.C. 110(a) ("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 Rule[] ... 1.9."). Our Supreme Court has repeatedly held that claims implicating the possible disclosure of confidential attorney-client information satisfy the "importance" prong of the collateral order test, as the protection of client confidences is deeply rooted in this Commonwealth's public policy

[1] I will address the use of an ethical screen in this case at greater length ***supra***.

and impacts individuals other than those involved in the instant litigation. ***See, e.g.***, ***Commonwealth v. Harris***, 612 Pa. 576, 585, 32 A.3d 243, 248 (2011) (citing ***Ben v. Schwartz***, 556 Pa. 475, 484, 729 A.2d 547, 552 (1999)).

Finally, with respect to the third prong of the collateral order test, no effective means of review would be available here after final judgment. As our Supreme Court recently reaffirmed in ***Harris***, "[w]e are particularly unconvinced that an appeal after final judgment is an adequate vehicle for vindicating a claim of privilege." ***Harris***, 612 Pa. at 586, 32 A.3d at 249. Once client confidences have been disclosed, the attorney-client privilege has been effectively destroyed and the disclosure cannot be undone. ***Id.*** at 585-86, 32 A.3d at 248-49.

On appeal, Pepper Hamilton does not argue that the trial court's order denying Dougherty's Motion to Disqualify Counsel fails to satisfy either of the three prongs of the collateral order test. Instead, relying on a line of old cases, Pepper Hamilton asserts that a blanket prohibition exists against treating any order denying a motion to disqualify counsel as a collateral order under Pa.R.A.P. 313. This line of cases begins with ***Siefert v. Dumatic Indus.***, 418 Pa. 395, 397, 197 A.2d 454, 457 (1964), in which our Supreme Court quashed as interlocutory an appeal from an order denying a motion to disqualify, and ***Middleberg v. Middleburg***, 427 Pa. 114, 115, 233 A.2d 889, 890 (1967), in which our Supreme Court quashed as

interlocutory an appeal from an order granting a motion t*o* disqualify. In subsequent cases, this Court, following the holdings in ***Siefert*** and ***Middleberg*** without any additional analysis, quashed appeals from orders denying motions to disqualify. ***See, e.g.***, ***Flood v. Bell***, 430 A.2d 1171, 1172-73 (Pa. Super. 1981), ***Pittsburgh and New England Trucking Company v. Reserve Insurance Company***, 419 A.2d 738, 739-40 (Pa. Super. 1981).[2]

In ***Siefert*** and ***Middleberg***, our Supreme Court ruled only that orders ruling on disqualification motions were not final orders, as they did not terminate the litigation in the trial court. ***Siefert***, 418 Pa. at 397, 197 A.2d at 457; ***Middleberg***, 427 Pa. at 115, 233 A.2d at 890. Neither case addressed whether such orders may in appropriate circumstances be treated as collateral orders, however, since both cases were decided well before Pennsylvania courts recognized that collateral order rule as an alternative basis for appellate jurisdiction. While it had been recognized in federal courts since the United States Supreme Court's decision in ***Cohen v. Beneficial Industrial Loan Corporation***, 337 U.S. 541, 546 (1949), the

[2] In ***In re: L.J.***, 691 A.2d 520 (Pa. Super. 1997), this Court refused to quash an appeal from a final order because the appellant had not appealed the trial court's prior denial of a motion to disqualify counsel. ***Id.*** at 528 n.8. We so ruled because we found that the trial court's prior order regarding disqualification was interlocutory, citing to, *inter alia*, ***Middleburg*** and ***Flood***, without any separate analysis of the three prong test under Pa.R.A.P. 313(b). ***Id.*** For the reasons set forth herein, including the Supreme Court's subsequent decision in ***Vaccone***, ***L.J.*** has no application in this case.

collateral order rule was not applied in Pennsylvania until our Supreme Court did so in ***Bell v. Beneficial Consumer Discount Company***, 465 Pa. 225, 228, 349 A.2d 734, 735 (1975), and ***Pugar v. Greco***, 483 Pa. 68, 73, 394 A.2d 542, 545 (1978). The collateral order rule formally recognized in March 1992 with the adoption of Pa.R.A.P. 313. Pa.R.A.P. 313 Note ("Rule 313 is a codification of existing law with respect to collateral orders.") (citing ***Pugar***). As a result, neither ***Siefert, Middleberg***, nor the cases relying upon them support Pepper Hamilton's contention that all orders denying motions to disqualify are interlocutory and not appealable as collateral orders.

To the extent that the ***Siefert*** and ***Middleberg*** line of cases had any continuing vitality, this ended with our Supreme Court's decision in ***Vaccone v. Syken***, 587 Pa. 380, 899 A.2d 1103 (2006). In ***Vaccone***, the Supreme Court affirmed this Court's decision to quash an appeal from an order granting a motion to disqualify counsel. This holding itself is not relevant for present purposes, since an order *removing* counsel from a case carries with it none of the concerns regarding the disclosure of attorney-client confidences discussed hereinabove. Importantly in ***Vaccone***, however, the Supreme Court reached its decision solely by considering the three prongs of the collateral order test in Pa.R.A.P. 313(b). It did not rely on any blanket rules regarding orders granting or denying disqualification motions, and did not even cite to ***Siefert*** or ***Middleberg*** in its opinion.

For this reason, in my view the correct approach is to apply the three-prong test in Rule 313(b) to the facts of each particular case. As demonstrated hereinabove, in this case the possibility of possible disclosure of confidential attorney-client information compels the conclusion that the order in question here satisfies all three prongs of the test and thus is a collateral order currently ripe for consideration on appeal.

With respect to the trial court's decision that Dougherty waived the Rule 1.9 conflict here by not filing his Motion to Disqualify Counsel in a timely fashion, I agree with the Majority that the certified record does not support the trial court's findings. At the status conference on October 1, 2012, Attorney Michael Baughman of Pepper Hamilton (on behalf of the Appellees) advised the trial court that while the case had been filed for some time and written discovery had been exchanged, bankruptcy proceedings and an unrelated case involving Dougherty and other employees of Philadelphia Newspapers LLC (then on appeal to this Court) had delayed any significant litigation efforts by either party. N.T., 10/1/2012, at 10-15. Specifically, Attorney Baughman advised the trial court that "[t]here has been an agreement to sort of stay – I mean, informally, you know, you don't have to respond to ours, and then we'll respond to yours 30 days later." ***Id.*** at 10. Based upon this informal stay, Attorney Baughman further advised that neither party had responded to any discovery requests up to that date. ***Id.*** at 10-11. Attorney Baughman also informed the trial court that he

intended to seek documents and information directed from the federal government relating to the federal investigation referenced in Dougherty's complaint. ***Id.*** at 16. While previously exchanged written discovery had requested from Dougherty documents relating to the federal investigation, this new revelation by Attorney Baughman highlighted Appellees' intention to focus on the details of the federal investigation in its defense against Dougherty's defamation allegations. Pepper Hamilton's prior representation of Dougherty was in connection with this same federal investigation, and thus I agree with the Majority that Dougherty's filing of the Motion to Disqualify Counsel just 23 days later was not untimely.

More fundamentally, however, I disagree with the Majority's acquiescence with the trial court's contention that a client may waive a conflict of interest under Rule 1.9 merely by failing to raise it in a timely fashion. To my knowledge, no Pennsylvania appellate court has ever held that a client must timely raise a Rule 1.9 conflict, and no language of the Pennsylvania Rules of Professional Conduct so indicates. To the contrary, the text of Rule 1.9 provides how a client may waive a conflict – by giving informed consent:

> **Rule 1.9. Duties to Former Clients**
>
> (a) 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.***
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> > (1) whose interests are materially adverse to that person; and
> >
> > (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
>
> ***unless the former client gives informed consent.***

Pa.R.P.C. 1.9(a)-(b) (emphasis added).

Rule 1.0(e) defines "informed consent" as follows:

> **Rule 1.0. Terminology**
>
> * * *
>
> (e) "Informed consent" denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Pa.R.P.C. 1.0(e). The Explanatory Comment to Rule 1.0 provides a detailed explanation of the attorney's obligations to obtain informed consent:

> The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation

> reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.

Pa.R.P.C. 1.0 Explanatory Comment.

Rule 1.9 clearly requires the attorney to obtain the informed consent of the client when a conflict under the rule exists by, *inter alia*, making all reasonable and necessary disclosures to the former client and, where appropriate, advising the former client to seek independent legal advice as to whether to provide the requested informed consent or not.[3] Nothing in the text of Rule 1.9, or the Rules of Professional Conduct generally, is there any suggestion that counsel facing a Rule 1.9 conflict may, rather than affirmatively attempting to obtain informed consent, instead take no action

[3] The Explanatory Comment to the definition of "informed consent" provides that "generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent." Pa.R.P.C. 1.0 Explanatory Comment. For this statement to apply, the former client must first seek independent legal advice regarding whether to give the requested informed consent. Nothing in the current certified record, however, suggests that Dougherty obtained any such independent legal advice regarding Pepper Hamilton's Rule 1.9 conflict of interest, so his informed consent may not be assumed in this case. Likewise, nothing in the certified record reflects that Dougherty filed the Motion to Disqualify Counsel as a delay tactic.

at all vis-à-vis its former client and wait to see if the former client fails to raise it in a timely fashion. To the contrary, Rule 1.9 expressly provides that a former client may waive a conflict in just one way – by giving informed consent after receiving and considering all reasonably necessary disclosures from counsel regarding the precise nature of the conflict and the "material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." Pa.R.P.C. 1.0 Explanatory Comment.

In finding waiver, the trial court stated as follows:

> It is common for law firms to build ethical screens such as Pepper Hamilton utilized. Further, it is apparent there was no intentional deception here. We determined, [Dougherty] is a sophisticated litigant and, therefore, he either told his attorneys of Pepper Hamilton's previous representation or he didn't tell them as he was willing to waive the potential conflict.

Trial Court Opinion, 4/18/2013, at 7. In so finding, the trial court improperly placed on the former client (Dougherty) the onus of taking affirmative action to avoid the consequences of Pepper Hamilton's Rule 1.9 conflict of interest. As discussed, the Rules of Professional Conduct unquestionably place that onus on Pepper Hamilton, namely to obtain Dougherty's informed consent after providing all reasonable and necessary disclosures. While Pepper Hamilton did not engage in any intentional deception, nothing in the certified

record on appeal indicates that Pepper Hamilton took any affirmative steps to obtain Dougherty's informed consent in this case.

Finally, contrary to the trial court's suggestion, Pepper Hamilton's use of an "ethical screen" is essentially irrelevant in these circumstances. As Pepper Hamilton acknowledges, the existence of an ethical screen does not overcome a conflict of interest under Rule 1.9.[4] Appellees' Brief at 24 n.16.

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[4] Pepper Hamilton argues that the existence of the ethical screen did not overcome the Rule 1.9 conflict, but rather that "it was [Dougherty's] own waiver that precluded any reliance on the conflict." Appellees' Brief at 24 n.16. Because this Court concludes that Dougherty did not waive the conflict, the Rule 1.9 conflict necessitates Pepper Hamilton's disqualification.

In this regard, the trial court points out that "[v]iolating ethical rules is not necessarily grounds for disqualification." Trial Court Opinion, 4/18/2013, at 7 (citing to ***Maritrans GP Inc. v. Pepper, Hamilton & Scheetz***, 529 Pa. 241, 602 A.2d 1277 (1992)). In ***Maritrans***, a former client filed a separate action against a law firm, citing to conflicts of interest under Pa.R.P.C. 1.7 and 1.9. ***Id.*** at 245, 602 A.2d at 1279. In affirming the trial court grant of a preliminary injunction precluding the representation of certain clients with conflicting interests, our Supreme Court did state that a "violation of the ethical rules concerning misuse of a client's confidences is not as such a basis for issuing an injunction." ***Id.*** at 256, 602 A.2d at 1284.

The trial court's reliance on this statement is misplaced here, however, as the Supreme Court made clear that it was the breach of the attorney's common law obligations to the client, which are incorporated and reflected in the current ethical rules, which ultimately gives rise to the power of courts to enjoin or disqualify counsel when violated. ***Id.*** at 256, 602 A.2d at 1284 ("Long before the Code of Professional Responsibility was adopted, and before the Rules of Professional Conduct were adopted, the common law recognized that a lawyer could not undertake a representation adverse to a former client in a matter 'substantially related' to that in which the lawyer previously had served the client."). The Supreme Court concluded that no distinction existed between enjoining continued representation and the grant of a motion to disqualify. ***Id.*** at 256-57, 602 A.2d at 1285 ("A motion for disqualification is simply an injunctive order issued in a case already

Pursuant to Pa.R.P.C. 1.10, an ethical screen may be used to permit continued representation of a former client despite a Rule 1.9 conflict of interest only when the conflict is created by a new lawyer to the firm who brings the conflict with him as a result of his prior employment. Pa.R.P.C 1.10(b)(1). Other than in this situation, which is not presented here, an ethical screen will not insulate a law firm from the consequences of a Rule 1.9 conflict of interest.

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pending."). To this end, the Supreme Court made clear that where a conflict of interest implicating client confidences exist, "[a] court may restrain conduct which it feels may develop into a breach of ethics; it 'is not bound to sit back and wait for a probability to ripen into a certainty.' " ***Id.*** at 255, 602 A.2d at 1284 (quoting ***United States v. RMI Co.***, 467 F.Supp. 915, 923 (W.D. Pa. 1979)).