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 on December 26, 2012
in the Court of Common Pleas of Philadelphia County,
Civil Division, No. 004790 MARCH TERM 2009

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

OPINION BY MUSMANNO, J.: **FILED FEBRUARY 11, 2014**

John J. Dougherty ("Dougherty") appeals from the Order denying his Motion to Disqualify the law firm of Pepper Hamilton, LLP ("Pepper") and its attorneys from serving as counsel to any party, witness or participant in Dougherty's defamation action against Philadelphia Newspapers, LLC, Harold Jackson, Paul Davis, David Boyer, Russell Cooke, Melanie Burney, Tony Auth and Monica Yant Kinney (collectively, "Defendants"). Defendants have filed an Application to Quash the Appeal. We deny the Application to Quash, reverse the Order of the trial court and remand for the entry of an order barring Pepper and its attorneys from representing any party, witness or participant in the underlying defamation proceedings.

The trial court aptly summarized the history underlying the instant appeal as follows:

> [Dougherty] filed a Praecipe to Issue writ of Summons against [Defendants] on March 30, 2009. He filed a Complaint on March 24, 2011. The Complaint stemmed from [Dougherty's] candidacy for the Pennsylvania Senate, First Senatorial District in 2008. The Complaint alleges [that] "[D]efendants engaged in [a] continuous and systematic campaign to harm [Dougherty's] reputation by publishing a series of articles and editorials disparaging [Dougherty]."
>
> The matter before [the trial court] is [Dougherty's] Motion to Disqualify Counsel, 10/23/12. [Dougherty] requested the disqualification of [Pepper] as counsel for Defendants or any party, witness or other participant because of its alleged conflict having represented [Dougherty] in a substantially related matter. [Dougherty previously had] retained [Pepper] "regarding an open federal investigation related to a grand jury subpoena [that Dougherty] had received from the U.S. Attorney's Office." [Pepper] represented [Dougherty] and sent work invoices through February 2007. [Dougherty] argues [that Pepper] was privy to confidential communications, advised [Dougherty] concerning the grand jury subpoena and was present during a search of [Dougherty's] home. [Dougherty] argues [that] a conflict of interest exists because [Pepper] intends to pursue numerous discovery requests, including U.S. Attorney files from the federal investigation[,] while defending this defamation claim.

Trial Court Opinion, 4/18/13, at 1-2 (citations omitted).

The trial court denied Dougherty's Motion to disqualify Pepper, after which Dougherty filed a Motion for reconsideration. The trial court denied reconsideration, as well as Dougherty's request to certify the trial court's Order for immediate appeal. Dougherty subsequently filed a Notice of Appeal and an Application to Stay the trial court proceedings pending the

outcome of the instant appeal.[1] Defendants have filed an Application to Quash Dougherty's appeal as interlocutory. We first address Defendants' Application to Quash the Appeal.

Defendants argue that the denial of a motion to disqualify counsel is interlocutory and not appealable, citing, *inter alia*, ***Firestone Tire & Rubber Co. v. Risjord***, 449 U.S. 368 (1981), ***Middleberg v. Middleberg***, 233 A.2d 889 (Pa. 1967), ***Siefert v. Dumatic Indus.***, 197 A.2d 454 (Pa. 1964), and ***Pittsburgh & New England Trucking Co. v. Reserve Ins. Co.***, 419 A.2d 738 (Pa. Super. 1980), in support. Defendants further argue that, because Pepper has imposed an ethical screen separating its present counsel from counsel who previously had represented Dougherty, there is no risk of the improper disclosure of materials. Application to Quash, ¶ 32.

To be immediately appealable, a trial court order must be either a final order under Pennsylvania Rule of Appellate Procedure 341, or a collateral order under Appellate Rule 313. ***Vaccone v. Syken***, 899 A.2d 1103, 1106 (Pa. 2006). There is no claim here that an order denying the disqualification of counsel is a final order. Therefore, we must determine whether the Order at issue is appealable as a collateral order.

A collateral order is defined as

[1] This Court issued a Rule to Show Cause why the appeal should not be quashed as interlocutory. Upon receiving Dougherty's response to the Rule, this Court discharged the Rule without ruling upon the appealability of the Order.

> "an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost." Pa.R.A.P. 313(b). Our [Pennsylvania Supreme] Court has delineated three requirements that must be satisfied in order for the [collateral order] doctrine to apply. The order must be "separable from and collateral to the main cause of action;" it must involve a right that "is too important to be denied review;" and, "if review is postponed until final judgment, the claim will be irreparably lost." ***Vaccone***[, 899 A.2d at 1106]. The doctrine is to be narrowly interpreted[,] as it is an exception to the rule of finality. ***Id.***; ***see also Rae v. Pennsylvania Funeral Directors Association***, 602 Pa. 65, 977 A.2d 1121, 1126 (Pa. 2009).

In re Reglan Litig., 72 A.3d 696, 699 (Pa. Super. 2013).

Although the ***Vaccone*** court did not address the appealability of an order denying disqualification of counsel, its reasoning is instructive. In ***Vaccone***, the party seeking disqualification averred that opposing counsel would be called as a witness in the matter. ***Vaccone***, 899 A.2d at 1107. Under these circumstances, the Supreme Court concluded that the disqualification order would be inextricable from the merits of the case "because it would be impossible to determine the impact that the attorney's testimony would have on the outcome of the case." ***Id.*** The Supreme Court further recognized that the appellants would not irreparably lose their right of review of the disqualification order should the appeal be delayed until the conclusion of the trial. ***Id.*** Any error, the ***Vaccone*** Court concluded, could be corrected post-trial with the award of a new trial and the attorney's disqualification during that new trial. ***Id.***

Based upon the above analysis, the ***Vaccone*** Court, adopting the rationale of the United States Supreme Court's decision in ***Richardson-Merrell, Inc. v. Koller***, 472 U.S. 424 (1985), held that an order *disqualifying* counsel does not satisfy the collateral order exception. ***Vaccone***, 899 A.2d at 1107. The ***Vaccone*** Court, however, did not address whether an order *denying* the disqualification of counsel is appealable as a collateral order. In fact, in ***Berkeyheiser v. A Plus Investigations, Inc.***, 936 A.2d 1117 (Pa. Super. 2007), this Court concluded that an appellant's colorable claim of attorney-client privilege and attorney work-product privilege can establish the propriety of immediate appellate review. ***Id.*** at 1124.

Cognizant of our Supreme Court's analysis in ***Vaccone***, and this Court's holding in ***Berkeyheiser***, our review in the instant case discloses that the parties have averred no facts establishing that the Order at issue is inextricable from the merits of the case.[2] Further, the record does not reflect that an immediate appeal will result in undue hardship to Defendants at this stage of the proceedings. Finally, Dougherty has averred facts establishing a colorable claim of the potential disclosure of attorney work product and breach of attorney-client privilege, which could result in irreparable harm. ***See Berkeyheiser***, 936 A.2d at 1124. Under these circumstances, we conclude that the underlying disqualification Order is

[2] We note the absence of any allegation that Pepper or one of its attorneys could be called as a witness.

appealable as a collateral order.[3] Accordingly, we deny Defendants' Application to Quash the Appeal, and address the merits of Dougherty's claims.

Dougherty presents the following claims for our review:

> A. Whether the Trial Court erred when it refused to grant [Dougherty's] Motion to Disqualify [Pepper] … by Orders dated December 24, 2012[,] and January 18, 2013, as counsel for [] Defendants, … [Pepper] should be disqualified to preserve and protect privileged materials when, as here, this action is about events that occurred while Pepper represented Dougherty and Pepper now intends to use attorney-client, work product, and other privileged information acquired from their prior representation of Dougherty against him in this present[,] substantially related case[?]
>
> B. Whether the Trial Court erred when it refused to grant [Dougherty's] Motion to Disqualify [Pepper,] … by Orders dated December 24, 2012[,] and January 18, 2013, where [Dougherty] established that he did not waive the admitted conflict of interest, as Dougherty was never informed by Pepper of the conflict of interest that existed between their past representation of him and their current representation of Defendants that was in substantially-related matters, and, further, no ethical screen has been authorized to protect confidential and privileged information in a circumstance where the conflict arises from a prior client of the firm, under Pa.[R.P.C.] 1.9[?]
>
> C. Whether the Trial Court erred when it refused to grant [Dougherty's] Motion to Disqualify the Law Firm of Pepper [] after granting [Dougherty's] Motion for Reconsideration, as Defendants had acted to publicize facts about Dougherty which

[3] The United States Supreme Court's decision in ***Firestone***, the Pennsylvania Supreme Court's decisions in ***Siefert*** and ***Middleberg***, and this Court's decision in ***Pittsburgh & New England Trucking***, upon which the Defendants rely, are fact-specific and did not involve the potential disclosure of attorney work product or privileged material. Defendants' reliance upon those cases is not persuasive.

> were not generally known, despite their ongoing duties to him as his former attorneys[?]

Brief for Appellant at 2-3.

Dougherty first claims that the trial court improperly denied his Motion to disqualify Pepper as counsel to Defendants. ***Id.*** at 17. Dougherty argues that Pepper's prior representation of him creates a substantial risk that Pepper would use confidential information, obtained through its prior representation, in the instant proceedings. ***Id.*** According to Dougherty, Pepper owes him a duty that includes keeping his confidences and not using the information that Pepper gathered from its prior representation against Dougherty. ***Id.***

The Pennsylvania Supreme Court has repeatedly observed that the attorney-client privilege "is deeply rooted in our common law" and is "the most revered of our common law privileges." ***Levy v. Senate of Pa.***, 65 A.3d 361, 368-69 (Pa. 2013) (quoting ***Commonwealth v. Maguigan***, 511 A.2d 1327, 1333 (Pa. 1986)). Our Supreme Court has explained that "[a]t common law, an attorney owes a fiduciary duty to his client; such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable." ***Maritrans v. Pepper Hamilton & Scheetz***, 602 A.2d 1277, 1283 (Pa. 1992).

As our Supreme Court has recognized,

> [t]he General Assembly defines attorney-client privilege identically for purposes of criminal and civil law: "In a criminal proceeding [or civil matter,] counsel shall not be competent or

> permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa.C.S.A. §§ 5916, 5928. [The Supreme Court] recently observed that the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." ***Gillard*** [***v. AIG Ins. Co.***, 15 A.3d 44,] 47 n.1 [(Pa. 2011)] (quoting ***Upjohn Co. v. United States***, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)); ***see also*** [***Gillard***, 15 A.3d] at 57. …

Levy, 65 A.3d at 368.

This same duty of confidentiality is protected through Rule 1.9(a) of the Rules of Professional Conduct:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in ... a substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client gives informed consent.

Pa.R.P.C. 1.9(a).

In the context of Pennsylvania's Right to Know Law, 65 P.S. § 67.101 *et seq*., our Supreme Court has explained that an attorney is prohibited from undertaking a representation adverse to a former client in a matter "substantially related" to that in which the attorney previously had served the client. ***Estate of Pew***, 655 A.2d 521, 545 (Pa. Super. 1994) (citing ***Maritrans***, 602 A.2d at 1284). Further, the duty owed by an attorney to his or her client extends to members of the attorney's law firm:

> Confidential information gained by one member of a law firm is imputable to other members of the same law firm. Therefore, a former client seeking to disqualify a law firm representing an

> adverse party on the basis of its past relationship with a member of the law firm has the burden of proving: (1) that a past attorney/client relationship existed which was adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; (3) that a member of the law firm, as attorney for the adverse party, acquired knowledge of confidential information from or concerning the former client, actually or by operation of law.

Pew, 655 A.2d at 545-46. "If the attorney *might have* acquired confidential information related to the subsequent representation, Pennsylvania Rule of Professional Conduct 1.9 would prevent the attorney from representing the second client." ***Id.*** at 545 (emphasis added).

By his Motion, Dougherty alleged that he had a past attorney-client relationship with Pepper. Motion to Disqualify, 10/22/12, at ¶ 20. Dougherty averred that Pepper represented Dougherty "regarding an open federal investigation related to a grand jury subpoena [Dougherty] received from the U.S. Attorney's Office." ***Id.*** According to Dougherty, Pepper's attorneys were privy to confidential communications with Dougherty during the course of the investigation, as well as documents submitted by Dougherty in response to the subpoena. ***Id.*** Further, Pepper's attorneys had communicated with the federal investigators, and then counseled Dougherty regarding the documents to submit in response to the subpoena.[4] ***Id.*** at ¶¶ 21-22. In addition, a Pepper attorney consulted with Dougherty

[4] One of the federal prosecutors, to whom a Pepper attorney spoke, is now a partner at Pepper. Motion to Disqualify, 10/22/12, at ¶ 22 n.2.

during the execution of a search warrant at Dougherty's home. ***Id.*** at 24. Thus, Dougherty has alleged a prior attorney-client relationship with Pepper.

Our review further discloses that the subject matter of Pepper's prior representation of Dougherty is substantially related to the present matter, and that a member or members of Pepper's law firm acquired confidential information from Dougherty. In his Complaint, Dougherty averred that Defendants published a series of articles and editorials comparing him with former state senator Vince Fumo ("Fumo"), who was tried for corruption. Complaint, 3/24/11, at ¶ 19. In particular, an April 13, 2008 editorial stated,

> [Dougherty] denies sending goons to intimidate people whenever it suits his union's interests. **He denies accepting valuable favors from a lifelong friend and union colleague, as outlined in a federal criminal indictment against the friend. He denies that the feds found anything incriminating when they searched his home….**

Id. (emphasis added). Also on April 13, 2008, Dougherty averred, Defendants published an article stating, in relevant part, that

> [i]n 2003, according to federal authorities, [Dougherty] bought a North Wildwood condo from an electrician pal for $24,000 less than what you or I would have had to pay because he could, never mind that the law forbids contractors from plying union leaders with grafts.

Id. at ¶ 20. Dougherty further asserted that on April 17, 2008, Defendants published an editorial implied that Dougherty had accepted a bribe from a developer. ***Id.*** at ¶ 24.

Further, during a case management conference held on October 1, 2012, Michael E. Baughman, Esquire, of Pepper, represented that "he intended to take action to obtain from the Federal Government the U.S. Attorney's files related to an alleged investigation into [] Dougherty." ***Id.*** at ¶ 16 (citing Motion to Disqualify, Exhibit "B" (N.T., 10/1/12, at 16-17).[5] Dougherty averred, and Pepper confirmed, that Defendants would explore the subject of Pepper's representation of Dougherty, *i.e.*, the federal investigation, as part of its defense. ***Id.*** at ¶ 25; Exhibit "B" (N.T., 10/1/12, at 16).

Thus, Dougherty has established that during Pepper's prior representation, a Pepper attorney "might have acquired confidential information related to the subsequent representation[.]" ***Pew***, 655 A.2d at 545. Pennsylvania Rule of Professional Conduct 1.10 provides that "[w]hile 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." Pa.R.P.C. 1.10. Under the circumstances presented, we conclude that Pennsylvania Rules of Professional Conduct 1.9 and 1.10 bar Pepper's representation of Defendants in the instant matter. ***See Pew***, 655 A.2d at 545 (stating that "[c]onfidential information gained by one member of a law firm is imputable to other members of the same law firm.").

[5] Dougherty conceded that he was aware of Defendants' prior discovery requests pertaining to the federal investigation, but had intended not to produce such document based upon relevancy. Complaint, 3/30/09, at ¶ 17.

As to Dougherty's second claim, our review discloses that Dougherty did not waive Pepper's conflict through any delay in filing the Motion to Disqualify Pepper. Dougherty commenced the instant defamation action, by Writ of Summons, on March 30, 2009. Complaint, 3/24/11. On June 9, 2009, the matter was docketed as "Deferred" based upon a suggestion of bankruptcy filed on behalf of a defendant. Praecipe to Defer, 6/9/09. On February 25, 2011, Dougherty filed a Praecipe to reissue the summons. On March 3, 2011, during the deferral, Defendants' prior counsel withdrew its representation and Amy B. Ginensky, Esquire, an attorney with Pepper, entered her appearance on behalf of Defendants.

Although some discovery ensued during the deferral, the docket reflects that the trial court formally removed the deferral on January 30, 2012, upon the dismissal of the bankruptcy. At the October 1, 2012 case management conference, an attorney from Pepper specifically announced his intention to seek discovery related to the federal investigation. Motion to Disqualify, Exhibit "B" (N.T., 10/1/12, at 16). Dougherty filed his Motion to Disqualify less than one month later, on October 22, 2012. Under these circumstances, the record does not support a finding that Dougherty waived Pepper's conflict through a delay in filing his Motion to Disqualify.

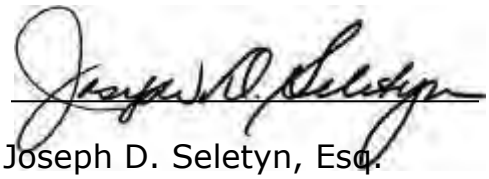
In summary, the record reflects that (a) the Rules of Professional Conduct bar Pepper's current representation of Defendants in a matter substantially related to Pepper's prior representation of Dougherty; and (b)

Dougherty did not waive Pepper's conflict through a delay in filing a disqualification motion. Accordingly, we reverse the Order of the trial court and remand for entry of an Order barring Pepper and its attorneys from representing Defendants in this matter.[6]

Application to Quash denied; Order reversed; case remanded for entry of an Order disqualifying Defendants' counsel and the law firm of Pepper Hamilton LLP; Superior Court jurisdiction relinquished.

Donohue, J., files a Concurring Opinion.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/11/2014

[6] Based upon our resolution of Dougherty's first two claims, we need not address his third claim on appeal.