UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DAVRIC MAINE CORPORATION,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-238-P-H***
	)	
CRAIG J. RANCOURT, et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANT'S MOTION TO DETERMINE ISSUE OF DISQUALIFICATION

Defendant William Faucher moves for an order determining whether there is any ground upon which to disqualify the law firm of Berman & Simmons, P.A., or attorney Julian L. Sweet from continuing to represent him in the instant case. Motion of Defendant William Faucher To Determine the Issue of Disqualification ("Faucher Motion") (Docket No. 36). Plaintiff Davric Maine Corporation ("Davric") urges the court to disqualify Berman & Simmons and Sweet. Memorandum in Response to Defendant Faucher's Motion To Determine the Issue of Disqualification ("Plaintiff's Response") (Docket No. 56). For the reasons that follow, I decline to order disqualification.[1]

I. Applicable Legal Standards

Per Local Rule 83.3(d)(2), acts or omissions that violate the Code of Professional

[1]Faucher sought an immediate hearing on his motion, *see* Faucher Motion at 1; however, I find the parties' papers sufficiently enlightening to rule without need of a hearing.

Responsibility adopted by this court — which is the Code of Professional Responsibility adopted by the Supreme Judicial Court of Maine as amended from time to time — "shall constitute misconduct and shall be grounds for discipline . . . ."

Section 3.4(d)(1)(i) of the Maine Bar Rules provides: "Except as permitted by this rule, a lawyer shall not commence representation adverse to a former client without that client's informed written consent if such new representation is substantially related to the subject matter of the former representation or may involve the use of confidential information obtained through such former representation."

This rule (and others like it) exist primarily to prevent use in the subsequent representation of confidential information obtained in the former. *See, e.g., Starlight Sugar Inc. v. Soto*, 903 F. Supp. 261, 265 (D. Puerto Rico 1995). The party seeking disqualification bears the burden of proving that confidential information will or may be used adversely to a former client. *See, e.g., Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 440 (1st Cir. 1991) (noting in upholding denial of defendant's disqualification motion that defendant had not pointed to any confidential information that attorney obtained); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1028 (5th Cir. 1981) (party seeking disqualification of former counsel bears burden of proving that current and prior representations substantially related), *overruled on other grounds by Gibbs v. Paluk*, 742 F.2d 181 (5th Cir. 1984); *Soto*, 903 F. Supp. at 266 (moving party bears burden in motion to disqualify). To the extent that the movant persuades the court that two matters are substantially related, the danger of disclosure of confidences is presumed. *Kevlik v. Goldstein*, 724 F.2d 844, 850-51 (1st Cir. 1984).

II. Factual Context

As a threshold matter Faucher moves to strike the affidavit of Joseph J. Ricci given in connection with this motion on grounds that it was tardily filed without request for leave or offer of any excuse. Defendant William Faucher's Supplement to His Reply Memorandum, etc. (Docket No. 70) at 1. The Ricci affidavit in question was filed with the court on May 13, 1999, thirteen days after the filing of the Plaintiff's Response and three days after the filing of Faucher's reply to that response. Affidavit of Joseph J. Ricci (Docket No. 69); Defendant William Faucher's Reply Memorandum, etc. (Docket No. 68); Plaintiff's Response. I will strike the affidavit, which should have been filed simultaneously with the Plaintiff's Response and for the lateness of which no excuse is offered. *See* Loc. R. 7(b) ("[a]ny objections [to motions] shall include . . . affidavits and other documents setting forth or evidencing facts on which the objection is based.").

The relevant facts are as follows:

Davric filed the instant suit on June 24, 1998. Complaint and Demand for Jury Trial (Docket No. 1). Sweet, a member of Berman & Simmons, was retained to represent Faucher in this matter in August 1998. Affidavit of Julian L. Sweet, Esq. ("Sweet Aff.") (Docket No. 37) ¶¶ 1, 3. Joseph J. Ricci is the sole stockholder of the holding company that owns Davric, which in turn owns Scarborough Downs. Affidavit of Joseph J. Ricci (Docket No. 59) ¶ 2. Berman & Simmons represented Ricci and Davric from approximately 1983 to 1985. Sweet Aff. ¶ 4. Jack Simmons served as clerk of a number of Ricci's corporations, and William Robitzek performed some legal work for Ricci and Davric. *Id.* In approximately 1985 Berman & Simmons ceased to provide any work for Ricci, Davric or any other Ricci-related entity. *Id*. ¶ 5. All files in the possession of Berman & Simmons were transferred to Ricci's principal counsel, Richard Poulos. *Id*.

Ricci was deposed in connection with the instant case on November 30 and December 2, 1998. *Id.* ¶ 8. Shortly after Sweet began questioning Ricci the following dialogue ensued:

A. Can I say something else, too? I want to get this on the record.

> I'm somewhat uncomfortable answering these questions because I don't know you, okay. But I have used your firm, Berman and Simmons, to represent Scarborough Downs for over two years. And as a matter of fact, your firm through Mr. Robitzek and Mr. Simmons also did significant work for me on the ethanol project exposing Mr. Cianchette's involvement into it. And those documents I brought with me today. But I never dealt with you. So I feel very uncomfortable answering these because your firm was my lawyers for over two years and represented me at date hearings as well.

Q. Mr. Ricci, let me be clear with you. If you have any concern about the involvement of me personally or my law firm —

A. Not you personally.

Q. — in this litigation, you should express that to Mr. Campbell. And I guarantee that Mr. Campbell knows exactly what to do about that.

A. I'm just —

Q. He has not done that. And I'm not interested in hearing on the record anything you have to say about that. I want you to answer my questions.

A. I'll answer your questions.

Q. You have sued Mr. Faucher, and I represent him.

A. I just wanted to state for my purposes that I'm answering these things with those reservations.

Deposition of Joseph J. Ricci, attached as Exh. A to Sweet Aff., at 273-75.

Since August 1998 Sweet has been personally responsible for representing Faucher and has spoken and written regularly to Campbell and attended numerous depositions, frequently with Ricci present. Sweet Aff. ¶ 7. Campbell never suggested that Berman & Simmons' continuing

representation of Faucher created any conflict. *Id*. ¶ 9.

On February 24, 1999 Berman & Simmons received a Notice of Claim alleging that the representation of Faucher violated the firm's and Sweet's fiduciary duties arising from the previous representation. *Id*. ¶ 12; Notice of Claim ("Notice"), attached as Exh. B to Sweet Aff., ¶¶ 10-11. The Notice stated that Berman & Simmons and Sweet represented Ricci and Davric in "very significant respects" in the 1980s, including appearances before the Maine Harness Racing Commission, dealings related to significant financial affairs of Davric and pursuing claims related to Ricci's concerns about Ival ("Bud") Cianchette and ethanol matters. Notice ¶ 5. According to the Notice, the new representation is substantially related to the former representation inasmuch as "(a) it involves Mr. Cianchette, (b) it involves Maine harness racing (and Commission matters), and (c) it also involves the financial and personal affairs of Mr. Ricci and Davric." *Id*. ¶ 12. Davric and Ricci had communicated to Berman & Simmons confidential information that would be useful to their adversaries concerning dealings with the harness-racing commission, Davric's finances and Ricci's relationship with Cianchette. *Id*. In the current litigation Sweet had "taken the forefront of all defense counsel in pursuing a vigorous attack on the character of his former client — Joseph Ricci . . . [and had] opted to become the point man for all defense counsel in seeking financial records of Davric and attempting to belittle and humiliate Mr. Ricci." *Id*. ¶ 9.

III. Analysis

Davric identifies three grounds upon which Berman & Simmons and Sweet should be disqualified: (i) that matters upon which Berman & Simmons worked are substantially related to the current litigation, (ii) that Davric/Ricci disclosed confidences to Berman & Simmons that could be used to their detriment in the current litigation, and (iii) that the mere appearance of impropriety

suffices to warrant disqualification. *See generally* Plaintiff's Response.

Faucher argues that (i) the matters are not substantially related, (ii) Berman & Simmons possesses no confidential information related to Davric/Ricci and (iii) Davric has not timely objected to the representation. *See generally* Memorandum in Support of Motion, etc. ("Faucher Memorandum") (Docket No. 36).[2]

I turn first to the issue of whether the old and new matters are substantially related. The Complaint in the instant case focuses upon an alleged conspiracy among the defendants to cause Scarborough Downs to lose its license and/or its regular track dates with the goal of taking over Scarborough Downs or opening a replacement track. Complaint ¶ 9. The acts that form the backbone of the Complaint allegedly transpired from 1994-98, *see generally id.*, although the Complaint adverts to the "long-standing animosity" of defendant Cianchette toward Ricci, *id.* ¶ 10.

Davric contends that its 1983-85 matters and the current litigation are substantially related inasmuch as each involves Cianchette, Maine harness racing and the financial and personal affairs of Ricci and Davric. Plaintiff's Response at 7. That the previous and current matters concern Maine harness racing and Ricci's and/or Davric's personal and financial affairs does not *a fortiori* constitute a substantial nexus. Davric does not identify any manner in which the underlying facts overlap; *e.g.*, that financial affairs or harness-racing issues dating back to the mid-1980s are in any way relevant to the alleged conspiracy dating from 1994. Nor is Cianchette's long-standing animosity toward Davric/Ricci, while relevant, sufficient to forge a substantial link between the old and new matters.

[2]To the extent that Faucher argues that Davric waived any objection to the representation, *see* Faucher Memorandum at 2, 4-5, I am not persuaded. Ricci clearly expressed his discomfort at the outset of his deposition by Sweet. In addition, a delay in bringing a disqualification motion is not in itself grounds to deny such a motion given the importance of the interests at stake. *See, e.g., Kevlik*, 724 F.2d at 848.

The plain fact remains that the Complaint is predicated upon conduct of Cianchette (as well as the other defendants) from 1994 forward.

Because the old and new matters are not substantially related, the potential misuse of confidences cannot be presumed. The question remains, however, whether Davric otherwise demonstrates that Berman & Simmons did obtain confidences that could be useful in the current litigation. Faucher suggests that inasmuch as Berman & Simmons terminated any representation of Ricci or Ricci-controlled entities in 1985 and transferred files, it has no confidential information of any kind pertaining to Ricci or those entities. Faucher Memorandum at 4. I agree with Davric that these facts do not necessarily wipe the slate clean of possession of any confidential information, particularly in view of the fact that several attorneys who worked on Davric's or Ricci's matters in the mid-1980s remain at Berman & Simmons.[3] Plaintiff's Response at 6-7.

Davric nonetheless bears the burden in this context of persuading the court that Berman & Simmons and Sweet should be disqualified.[4] *See, e.g.,Soto*, 903 F. Supp. at 266 ("[T]he moving party must allege the type and nature of the confidences that were exchanged in the prior litigation that should subsequently disqualify the attorney in the latter representation. This does not mean that

[3]Davric argues, and I agree, that attorneys possess an affirmative duty to investigate whether they possess confidential information the nature of which bears upon a current controversy adverse to a former client, and that they must decline the representation or obtain a written consent from the former client if such is the case. *See* Plaintiff's Response at 7-8; Op. No. 83 Prof. Ethics Comm'n of Me. Bd. of Overseers of Bar (1988), *reprinted in* Board of Overseers of the Bar, Maine Manual on Professional Responsibility O-297-98 (1992); Op. No. 32 Griev. Comm'n of Me. Bd. of Overseers of Bar (1982), *reprinted in* Board of Overseers of the Bar, Maine Manual on Professional Responsibility O-127-29 (1992). In this case, however, Berman & Simmons essentially represents that it has satisfied itself that it possesses no such confidential information.

[4]That Davric is not technically the movant is immaterial; Davric clearly seeks the disqualification of Berman & Simmons and Sweet.

the Court will actually examine the confidential information — to do so would result in the confidentiality of the information being lost in the very process of attempting to protect it. However, the mere *allegation* that confidential information was exchanged in a prior representation will not suffice to create the 'irrebuttable presumption' of shared confidences . . . .") (emphasis in original). Davric's arguments in both the Notice and its brief amount to conclusory allegations that confidences concerning horse-racing, financial matters and Cianchette's long-standing campaign against Davric/Ricci were imparted to Berman & Simmons. *See* Notice ¶ 12; Plaintiff's Response at 7. I am thus unpersuaded that Berman & Simmons or Sweet should be disqualified on this ground.

Davric finally suggests that even the appearance of impropriety suffices to warrant disqualification, relying on Opinion No. 2 of the Grievance Commission of the Board of Overseers of the Bar, issued on October 17, 1979. Plaintiff's Response at 4-5; Op. No. 2 Griev. Comm'n of Me. Bd. of Overseers of Bar (1979), *reprinted in* Board of Overseers of the Bar, Maine Manual on Professional Responsibility O-9-12 (1992).

The Grievance Commission was careful to note that it could not resolve disputed facts concerning whether the subject matter of the old and new representation overlapped or whether confidential information derived from the old representation might be involved in the new. *Id*. at O-11. It observed that "if there is no identity of subject matter and no possibility of use of confidential information, then no impediment exists to Lawyer A's firm continuing the new representation." *Id*. It went on to suggest, however, that withdrawal was "the most appropriate course for Lawyer A's firm to take" in view of "the spirit of the ethical considerations which have long guided our legal profession . . . ." *Id*. at O-12. From this I cannot derive comfort that the mere appearance of impropriety justifies the forced disqualification of a party's chosen representative.

IV. Conclusion

For the foregoing reasons, I **GRANT** Faucher's motion to determine the issue of disqualification and decline to order disqualification.

Dated at Portland, Maine, this 2nd day of July, 1999.

David M. Cohen
United States Magistrate Judge