IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

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| **CARLTON FREEMAN,**<br>Plaintiff,<br>vs.<br>**HESS OIL VIRGIN ISLANDS CORP., and ANTHONY CRANE INTERNATIONAL, L.P.,**<br>Defendants. | **CIVIL NO. 557/1998**<br>**ACTION FOR DAMAGES**<br>**JURY TRIAL DEMANDED** |
| **JAMES JOHN,**<br>Plaintiff,<br>vs.<br>**HESS OIL VIRGIN ISLANDS CORP., and ANTHONY CRANE INTERNATIONAL, L.P.,**<br>Defendants. | **CIVIL NO. 487/1998**<br>**ACTION FOR DAMAGES**<br>**JURY TRIAL DEMANDED**<br>**NOT FOR PUBLICATION** |

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**CABRET, P.J.**

## MEMORANDUM OPINION
(May 9, 2002)

**THIS MATTER** is before the Court on the following motions[1]: 1) Defendant Anthony Crane International's Motion to Disqualify the law firm of Attorney Lee J. Rohn ("the Rohn firm" or "Attorney Rohn") as Plaintiffs' counsel, and the Plaintiffs' opposition; 2) Plaintiffs' Motion to Deny the Defendant's Motion to Disqualify as Moot, and the Defendant's opposition; 3) Plaintiffs' Motion for Substitution of Counsel and the defendant's opposition; 4) Plaintiffs' Motion to Lift the Stay on Discovery, and 5) Plaintiffs' oral motion for mediation.

While the Court recognizes that disqualification of counsel represents an extreme remedy in any case, in light of all the circumstances presented here, the Court has determined that disqualification of the Rohn firm is appropriate and will grant Defendant's motion in that regard. Additionally, the Court will deny the Plaintiffs' Motion to Dismiss the Motion to Disqualify counsel as moot, grant Plaintiffs' motion to substitute counsel, grant Plaintiffs' motion to lift the stay on discovery, and order this case to mediation.[2]

### I. FACTS

Plaintiffs Carlton Freeman and James John separately commenced these actions for damages against Defendant Anthony Crane International on June 19, 1998 and May 27, 1998, respectively. At that time, the Law Offices of Lee J. Rohn, formerly the Law Offices of Rohn &

1 The above-captioned cases involve the identical disqualification issues and attorneys and are, therefore, combined for the purpose of the instant motions.

2 A separate mediation order follows.

Cusick, represented Plaintiffs, and the Law Firm of Dudley Clark & Chan, represented Defendant. Attorney Lee Rohn ("Attorney Rohn") signed the Plaintiffs' complaints, and Attorney Mary Faith Carpenter ("Attorney Carpenter"), then a member of Dudley Clark & Chan, signed Defendant's answers. Attorney Carpenter remained counsel of record in these cases until an Order, entered on October 5, 1998, granted her leave to withdraw as counsel. On October 4, 1999, Attorney Carpenter joined the Rohn firm.

Defendant argues that the hiring of Attorney Carpenter, absent notice and waiver, constitutes a conflict of interest that violates the Model Rules of Professional Conduct governing the conduct of lawyers and, as such, the Rohn firm should be disqualified as counsel for Plaintiffs. Defendant contends the Rohn firm never disclosed that the defendant's former counsel had become employed by that firm, and further claims the Rohn firm never requested that Defendant waive the conflict of interest resulting from such employment. Defendant reasons that, as its former counsel in this litigation, Attorney Carpenter became privy to confidential client information which disqualifies her as counsel for Plaintiffs, and that such disqualification should be imputed to the Rohn firm.

Plaintiffs do not dispute Attorney Carpenter's conflict arising from her prior representation of the defendant. Instead, Plaintiffs argue that Attorney Carpenter's conflict should not result in the automatic disqualification of the Rohn firm. Moreover, Plaintiffs assert that the Rohn firm created a "Chinese Wall"[3] to protect the interests of the clients of both law firms and prevent confidences

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[3] A "Chinese Wall" or screen is "a fictional device used to prevent the disqualification of an entire firm simply because one member of the firm previously represented a client who is now an adversary of a client currently represented by the firm and is typically implemented by restricting a member's access to files, informing attorneys working on the case of the barrier, and excluding the disqualified member from fees generated by the representation." 6 A.L.R. $5^{th}$ 242 (1992).

from passing from the conflicted attorney to the rest of the firm. This "Chinese Wall," Plaintiffs assert, ensures Attorney Carpenter would have no access to any files, papers, memoranda or communications of any kind pertaining to cases in which the law firm of Dudley, Clark & Chan served as opposing counsel.

In instituting these measures, the Rohn firm issued memoranda informing its staff of the need to screen certain cases from Attorney Carpenter. The first memorandum, dated three days before Attorney Carpenter joined the firm, indicated that Attorney Carpenter should be screened from all *Pueblo* cases, as well as two other cases. The second memorandum, dated four days after Attorney Carpenter joined the firm, added the instant cases to the list of cases to be screened from Attorney Carpenter. The final memorandum, dated seven days after Attorney Carpenter joined the firm, listed 19 cases to be screened from Attorney Carpenter, including the instant cases. Those cases were segregated in the office of another attorney at the firm, and Attorney Carpenter was denied computer access to any of those files. The Rohn firm has five attorneys.

Defendant notes that the Rohn firm's screening process did not include the two cases involving Anthony Crane International until four days after Attorney Carpenter joined the firm. Defendant further contends that the alleged "Chinese Wall" did not go into effect until one week after Attorney Carpenter joined the firm.

This Court heard oral arguments on the Motion to Disqualify and took the matter under advisement. The Court also stayed all discovery pending a decision on the disqualification motion. Before the Court could rule on the defendant's motion, however, the plaintiffs substituted Attorney Gordon Rhea ("Attorney Rhea") as their counsel. Thereafter, Attorney Rhea filed a motion to deny the defendant's motion to disqualify as moot,[4] and a motion to lift the stay on discovery. The Court heard arguments on the latter motions on May 6, 2002.[5]

## II. DISCUSSION

This case presents the question whether a law firm should be disqualified from representing a party, when it employs an attorney who represented the defendant in the identical litigation while employed at another private law firm.

The underlying principle in considering motions to disqualify counsel is safeguarding the integrity of the court proceedings, and the purpose of granting such motions is to eliminate the threat that the litigation will be tainted. *See McKenzie Constr. v. St. Croix Storage Corp.*, 961 F. Supp. 857, 859 (D.V.I. 1997) (citations omitted). A motion to disqualify counsel requires the court to balance the right of a party to retain counsel of its choice and the substantial hardship which might result from disqualification of counsel, against the public perception of and the public trust in the judicial system. *Id.* (citations omitted). Whether counsel should be disqualified must be decided on

[4] The Rohn firm and Attorney Rhea stipulated to his substitution. Attorney Rhea avers that he regularly works with other attorneys and, in this instance, will be the sole attorney for the plaintiffs and will be independent of the Rohn firm. Plaintiffs argue that the substitution of the Rohn firm for Attorney Rhea obviates the need for the court to determine whether the Rohn firm should be disqualified from representing the plaintiffs in these cases. Defendant opposed that motion, arguing, in part, that a ruling was required to protect the integrity of the legal process and to preclude the Rohn firm from continuing an attorney-client relationship with any of the plaintiffs or participating in any way in these cases. The Court agrees and will deny the plaintiffs' motion to deny the disqualification motion as moot and will now rule on the merits of that motion.

[5] The defendant initially raised concerns in its brief regarding the propriety of Attorney Rhea's representation, given his close working relationship with the Rohn firm, and the possibility that Attorney Carpenter's conflict could be imputed to Attorney Rhea as a result of that working relationship. However, at the hearing on May 6, 2002, Defendant indicated it did not intend to challenge Attorney Rhea's averments regarding his separate identity from the Rohn firm and, therefore, presented arguments only with regard to whether the motion to disqualify should be deemed moot as a result of plaintiff's new representation.

a case by case basis. *Id.* In this jurisdiction, the American Bar Association (ABA) Model Rules of Professional Conduct governs the conduct of lawyers. *See* Terr. Ct. R. 303(a); LRCi. 83.2(a)(1); *V.I. Bar Association v. Boyd-Richards*, 26 V.I. 299 (D.V.I. 1991).

**1. Disqualification of Attorney Carpenter**

Conflicts of interest created by prior representation of an adverse party are governed by Rule 1.9 of the ABA Model Rules of Professional Conduct. Rule 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Model Rules of Professional Conduct 1.9(a) (1983) (emphasis added). In interpreting this rule, courts generally focus on whether a substantial relationship existed between the earlier and later representations. *Bluebeard's Castle Inc. v. Delmar Marketing, Inc.*, 32 V.I. 205, 207-08 (D.V.I. 1995). In determining whether a substantial relationship exists, the Court examines:

> 1) the nature and scope of the earlier representation; (2) the nature of the present lawsuit; and (3) the possibility that the client might have disclosed confidences during the earlier representation which could be relevant and detrimental to the present action.

*Id.* at 211.

As the Court noted in *Bluebeard's Castle*, the substantial relationship test "presumes that confidences were disclosed during the previous relationship and that such confidences would be used against the former client. . . [and] does not require that the moving party be able to show that confidences actually were passed or to detail their contents." *Id.* at 208 (citation omitted). Although courts in other jurisdictions require a movant to show more, courts in this jurisdiction presume that confidential information was passed between the attorney and the former client, notwithstanding the attorney's declarations to the contrary. *Id.* (citations omitted). The Court in *Bluebeard's Castle* further stated that, where a conflict arises which threatens the confidentiality and loyalty of the attorney-client relationship, counsel must disclose the conflict to the client or decline the representation. *Id.* at 210.

Applying Model Rule 1.9 and the three-part inquiry, it is clear that Attorney Carpenter must be disqualified. Documents submitted to this Court demonstrate that Attorney Carpenter represented the defendant in these same matters prior to joining the Rohn firm. It is undisputed that Attorney Carpenter signed defendant's answer to Plaintiffs' complaints, and that she remained counsel of record for approximately four months. Although Attorney Carpenter claims that to the best of her recollection she only represented the defendant in two litigation matters, and her participation was limited, this Court will presume that confidences were disclosed during that relationship, and that such confidences could be used against the defendant in this case. Further, as the defendant stated in its affidavit to this Court, Attorney Carpenter never informed it that she would be joining the law offices of Plaintiffs' counsel, wherein a conflict proscribed by the ABA Model Rules would arise. Defendant never consented to such representation. For these reasons, this Court has no choice but to disqualify Attorney Carpenter from serving as Plaintiffs' counsel in the instant cases.

**2. Imputed Disqualification of the Rohn Firm**

Plaintiffs argue that even if Attorney Carpenter is disqualified, that disqualification should not be automatically imputed to the Rohn firm. Indeed, Plaintiffs are correct that disqualification of the entire firm is not automatic. *See Brice v. Hess Oil Virgin Islands Corp.*, 769 F. Supp. 193, 195 (D.V.I. 1990). As the Court noted in *Brice,* a court "should disqualify an attorney only when it determines, on the facts of a case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule." *See id.* In determining whether the disqualification of one lawyer should be imputed to an entire law firm, Rule 1.10 of the ABA Model Rules of Professional Conduct provides, in relevant part:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2. . . .
>
> ( c ) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Model Rules of Professional Conduct 1.10. This jurisdiction has applied a strict interpretation of Rule 1.10 to impute disqualification of an attorney to a law firm, where the law firm hired an attorney who would be disqualified under Rule 1.9 because of involvement in identical litigation. *See McKenzie,* 961 F. Supp. at 862 (applying Rule 1.10 to disqualify Attorney Rohn's firm, where that firm hired an attorney who previously served as a mediator in the identical litigation). Likewise, the facts of this case, the case law, and the plain language of Rule 1.10 compel this Court to impute the disqualification of Attorney Carpenter to the Law Offices of Attorney Rohn.

Plaintiffs argue that the advanced stage of these proceedings weighs against imputed disqualification of counsel. However, as Defendant points out, expert depositions and discovery have not yet begun, and the case is not set for trial. Furthermore, it was Plaintiffs who hired

Attorney Carpenter, thereby creating this conflict, almost a year and a half after these proceedings began. Under these circumstances, this Court will not permit a law firm to knowingly hire a lawyer who would be automatically disqualified under Model Rule 1.9, without consulting or obtaining a waiver from the former client, and then argue a year later that the stage of the proceedings should bar disqualification.

In addition, this Court is not convinced that the Rohn firm's purported "Chinese Wall" would sufficiently safeguard the integrity of these proceedings or guard against a possible taint of this litigation. The Rohn firm did not start "screening" the cases involving the defendant until after Attorney Carpenter joined the firm. In addition, given the small size of the firm and the sheer number of cases required to be screened from Attorney Carpenter -- in this case, 19 -- this Court questions how effective such "screening" could be. In general, the use of "Chinese Walls" as a screening mechanism for lawyers who move between private law firms are disfavored because of "the difficulty in monitoring the effectiveness of the screening, the risk that the new lawyer may make inadvertent disclosures, the possibility that proving an abuse of the confidentiality might result in the disclosure of confidences sought to be protected, the economic incentive of the lawyer to disclose confidences of the opposing client, and the need to apply a brightline rule in determining when a law firm should be disqualified." *See* M. Peter Moses, *Chinese Walls: A Means of Avoiding Law Firm Disqualification when a Personally Disqualified Lawyer Joins the Firm*, 3 Geo. J. Legal Ethics 399, 403 (1990).

While there may be instances where courts allow the "screening" of a tainted lawyer to prevent the imputed disqualification of a firm, *see e.g. INA Underwriters, Ins. Co. v. Rubin*, 635 F.

Supp. 1, 5 (E.D.Pa. 1983) (allowing screen where lawyer worked for large law firm, client was promptly notified of conflict, lawyer contact with client was limited to one meeting, and only one document from that meeting required screening), this Court declines to do so under the facts of this case. Where a law firm hires a lawyer who was formerly employed by opposing counsel in the identical litigation, both Rule 1.10 and the need to maintain the integrity of the court proceedings mandate disqualification of that law firm. Accordingly, the Rohn firm is disqualified.

## III. CONCLUSION

For the foregoing reasons, the Court grants the Defendant's Motion to Disqualify and denies the Plaintiff's Motion to Dismiss the Defendant's Motion to Disqualify as Moot. Additionally, the Court will lift the stay on discovery and permit this case to proceed with Attorney Gordon Rhea as substituted counsel for the plaintiffs. The Court's order, and an order referring this case to mediation, follow.

MARIA M. CABRET
Presiding Judge

ATTEST:
Denise Abramsen
Clerk of the Court
By: ______________
Chief Deputy Clerk
Dated: 5/10/02