SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

KENVAL THOMAS, **Plaintiff,** **v.** **MARK KRAGEL, VIRGIN ISLANDS WATER AND POWER AUTHORITY and BOLTNAGI, PC,** **Defendants.**	**CIVIL NO. ST-15-CV-573**

MEMORANDUM OPINION

Before the Court is Defendant Mark Kragel's motion to disqualify counsel for Plaintiff. Because the record does not indicate that Plaintiff's counsel, Lee Rohn, Esq., will be a necessary witness in this case, or that Rohn has a conflict of interest with her client, Kragel's motion to disqualify counsel will be denied without prejudice. Further, because the Amended Complaint fails to comply with the requirements of V.I. R. CIV. P. 8(a)(2) and V.I. R. CIV. P. 10(b), the Court will *sua sponte* direct Thomas to file a Second Amended Complaint to cure the defects.

FACTUAL & PROCEDURAL HISTORY

On October 27, 2015, Thomas filed a Complaint, amended on January 13, 2016, alleging a claim against Kragel for tortious interference with Thomas' employment agreement[1] and a claim against all defendants for defamation.[2] Kragel filed a motion to disqualify Rohn as Thomas' counsel on December 12, 2017, in response to which Thomas filed an opposition on January 8, 2018.[3]

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[1] First Amended Complaint, ¶¶ 84-90.
[2] *Id.* ¶¶ 91-95.
[3] The Court recognizes the Motion to Strike Plaintiff's Untimely Opposition to Motion to Disqualify but considers Plaintiff's Opposition on the merits as there is no danger of prejudice to the parties. *See* V.I. R. CIV. P. 6(b)(1).

STANDARD

The Court is tasked with supervising the conduct of attorneys that appear before it and has inherent power to disqualify any attorney if it finds such action is warranted.[4] "It is at the Court's discretion to determine whether disqualification is warranted."[5] "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."[6] "Although doubts are to be resolved in favor of disqualification, the party seeking disqualification must carry a heavy burden and must meet a high standard of proof before a lawyer is disqualified."[7] "Vague and unsupported allegations are not sufficient to meet this standard."[8] "Motions to disqualify are viewed with disfavor and disqualification is considered a drastic measure which courts should hesitate to impose except when absolutely necessary."[9]

ANALYSIS

Kragel moves the Court to disqualify Thomas' counsel on two bases: arguing first that Rohn and members of her firm are necessary witnesses for his defense, and second, that Rohn has a conflict of interest with her client, Thomas.[10] Kragel appears to contend that Rohn and

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[4] *Farrell v. Hess Oil V.I.*, 57 V.I. 50, 57 (Super. Ct. 2012) (citing *McKenzie Construction v. St. Croix Storage Corp.*, 961 F. Supp. 857, 859, 37 V.I. 105 (D.V.I. 1997)).
[5] *Id.* (citing ANNOT. MODEL R. PROF'L CONDUCT "Preamble and Scope: Disqualification" annot. at 9 (6th ed. 2007)) (other citation omitted).
[6] *Rodriguez v. Spartan Concrete Prods., LLC*, 2017 U.S. Dist. LEXIS 62923, at *5 (D.V.I. Apr. 25, 2017) (quoting *McKenzie*, 961 F. Supp. at 859) (internal quotation marks omitted).
[7] *Farrell*, 57 V.I. at 57 (internal quotations and citations omitted).
[8] *Denero v. Palm Horizons Mgmt., Inc.*, 2015 U.S. Dist. LEXIS 25864, at *8 (D.V.I. Mar. 4, 2015) (quoting *Cohen v. Oasin*, 844 F. Supp. 1065, 1067 (E.D. Pa. 1994)); *see also Hamilton v. Dowson Holding Co.*, 2009 U.S. Dist. LEXIS 57715, at *12 (D.V.I. July 2, 2009) (stating "mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice under this standard").
[9] *Denero*, at *7-8 (citing *Alexander v. Primerica Holdings, Inc.*, 822 F. Supp. 1099, 1114 (D.N.J. 1993)).
[10] *See* Defendant's Motion to Disqualify and Incorporated Memorandum of Law, pgs. 3-11.

members of the Rohn firm are necessary witnesses because they must testify at trial regarding an email that Kragel sent to Lee Rohn and Billy Walker on September 22, 2015, that Thomas alleges defamed him.[11] Virgin Islands Rule of Professional Conduct 211.3.7 governs lawyers as witnesses and provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 211.1.7 or Rule 211.1.9.[12]

[11] In the First Amended Complaint, Thomas asserts, in part, a claim of defamation against Kragel on the basis that the email that Kragel sent to Rohn and Billy Walker on September 22, 2015, contained false statements about Thomas. *See* First Amended Complaint, ¶ 93 ("On September 22, 2015, Kragel, despite the conclusion of the *Demming* Litigation, on his own and on behalf of Bolt Nagi P.C. [sic] falsely accused Thomas of threatening to physically harm Kragel's wife for being married to him . . . ."). In Kragel's motion to disqualify Rohn as Thomas' counsel, Kragel appears to argue that Rohn is a necessary witness because Rohn forwarded Kragel's email to others. *See, e.g.,* Defendant's Motion to Disqualify and Incorporated Memorandum of Law, pg. 5 ("The email communications published by Rohn were sent from her law office email server account such that the communications are now business records of Lee J. Rohn & Associates, LLC." (citing Exhibit 6, a chain of several emails sent on September 22, 2015, and September 23, 2015)).

[12] V.I. S. Ct. R. Rule 211.3.7. *See also* V.I. S. Ct. R. Rule 211.1.7, regarding a conflict of interest with a current client ("(a) Except as provided in paragraph (b), 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. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing"). *See also* V.I. S. Ct. R. Rule 211.1.9, with respect to 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, confirmed in writing. (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 211.1.6 and 211.1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing. (c) 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;

Additionally, "[a] necessary witness has been defined in this jurisdiction as an individual whose possible testimony is found to be 'relevant, material, and unobtainable elsewhere.'"[13]

Thomas argues that Kragel's September 22, 2015, email was defamatory because it falsely accused Thomas of making threats.[14] Assuming for argument that Rohn is a necessary witness who must testify that she received the email from Kragel,[15] any testimony by Rohn regarding her receipt of the email would be permitted by V.I. S. Ct. R. Rule 211.3.7(a)(1) as testimony relating to an uncontested issue because Kragel does not dispute that he sent the email to Rohn or Walker.[16] Further, nothing in the facts indicates that Rohn is a necessary witness regarding the veracity of the contents of Kragel's email with respect to defamation.[17] Accordingly, the portion of Kragel's motion to disqualify Rohn regarding Thomas' defamation claim based on Kragel's September 22, 2015, email must be denied.

Additionally, Kragel contends that Rohn and members of the Rohn firm are necessary witnesses with respect to Thomas' defamation allegations against Kragel because, over the

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or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.").

[13] *People of the V.I. v. Caesar*, 2016 V.I. LEXIS 122, at*12 (V.I. Super. Ct. Aug. 25, 2016) (quoting *Daily News Publ. Co. v. 29th Legislature of the Virgin Islands*, 59 V.I. 138, 145 (V.I. Super. Ct. 2012)).

[14] *See* First Amended Complaint, ¶¶ 93-94 ("On September 22, 2015, Kragel, despite the conclusion of the *Demming* Litigation, on his own and on behalf of Bolt Nagi P.C. [sic] falsely accused Thomas of threatening to physically harm Kragel's wife for being married to him . . . ."); *see also* Exhibit 6, Kragel's September 22, 2015, email, of Defendant's Motion to Disqualify and Incorporated Memorandum of Law ("Your dear friend and star witness, Kenval Thomas, went out of his way today to approach my wife and physically threaten her for being married to me. . . . God forbid that Kenval Thomas acts on his threat 'to kill' but if there is any and I mean any damages arusing [sic] from Lees sick prevented [sic] behavior I will hold both of you personally responsible.").

[15] Even if Kragel denied sending the email, because Walker also received the email, if Walker were available to testify, Rohn would not be a necessary witness as a necessary witness' testimony must be otherwise unobtainable.

[16] Kragel also attached his September 22, 2015, email to his motion to disqualify under Exhibit 6.

[17] The elements of a claim for general defamation in the Virgin Islands are: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *See Joseph v. Daily News Publ'g Co., Inc.*, 57 V.I. 566, 586 (V.I. 2012). With respect to the first element, there is nothing in the record to indicate that Rohn or any members of her firm are necessary witnesses regarding whether the statements in Kragel's email were false.

course of the another case, *Earl Demming v. Virgin Islands Water and Power Authority* (Case No. ST-11-CV-586),[18] the Rohn firm interviewed Thomas, and as a result, provided the Rohn firm with evidence relating to his defamation allegations. But, nothing in the record indicates that any testimony from Rohn or her firm members would be unobtainable elsewhere. Accordingly, the portion of Kragel's motion to disqualify Rohn based on communication between Thomas and the Rohn firm with respect to any statements Kragel made about Thomas during the *Demming* case fails to support disqualification and must be denied.

Kragel also argues that there exists a conflict of interest between Rohn and Thomas sufficient to disqualify Rohn.[19] V.I. S. Ct. R. Rule 211.1.7 governs conflicts of interests between lawyers and their clients, providing in pertinent part:

> (a) Except as provided in paragraph (b), 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.[20]

[18] *See* Defendant's Motion to Disqualify and Incorporated Memorandum of Law, pg. 5 ("In this matter, Rohn is the sole source of information and the only individual who published any alleged defamatory statement to any person outside herself and her co-counsel in the Demming Matter, Attorney Billy Walker. The publication and effect of such publications by Rohn are the primary contested issues concerning the Plaintiff's defamation claims") and pg. 7 ("What's more is that the testimony elicited from Rohn and the Rohn Firm will go directly to the heart of Plaintiff's defamation claim and the Defendants' affirmative defenses which will invariably cause confusion in the eyes of the jury given that such testimony concerns the publication of the alleged defamatory statements comingled with Rohn's unfounded conspiracy theory regarding Kragel's tenure with WAPA. Moreover, this testimony will involve facts related to Attorney Griffith's personal communications with Kragel, witness interviews with Plaintiff, trial preparation and discussions regarding same concerning the Demming matter as well as Griffith's personal communications with Rohn and other Rohn Firm staff. Thus, it is clear that Rohn's testimony and that of members from the Rohn Firm is inextricably intertwined with the Plaintiff's claims asserted in the above captioned complaint which testimony can only be obtained from Rohn herself, the staff, and attorneys in the Rohn Firm. It is beyond question that the Defendants will be prejudiced by Rohn and the Rohn Office acting as both witnesses and advocates.")

[19] *See id.* pg. 10.

[20] V.I. S. Ct. R. Rule 211.1.7(a)(1)-(2); *see also* V.I. S. Ct. R. Rule 211.1.7(b)(1)-(4):

Kragel contends that there exists a conflict of interest because Rohn has a personal interest in representing Thomas.[21] Assuming for argument that Rohn has a personal interest in representing Thomas, under V.I. S. Ct. R. Rule 211.1.7(a)(2), a personal interest is not sufficient to create a concurrent conflict of interest, because there must also exist a significant risk that the lawyer's representation of the client will be materially limited by that personal interest. Since the record is devoid of facts to demonstrate the existence of a significant risk that Rohn's representation of Thomas would be materially limited by any personal interest, the Court cannot find a concurrent conflict of interest between Rohn and Thomas. Accordingly, Kragel's motion to disqualify Rohn based on a conflict of interest must be denied.

Finally, the Court recognizes that there exists confusion between Thomas and Kragel regarding the claims asserted against Kragel in the Amended Complaint and the witnesses necessary to Kragel's defense. The confusion appears to be caused by a lack of clarity in the Amended Complaint, which alleges more claims than it has counts, because the paragraphs under Count II contain factual allegations regarding separate occurrences on which claims against Kragel could be based.[22] For example, while Count I clearly alleges a claim against Kragel for tortious interference with Thomas' employment agreement with WAPA by asserting

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(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing. [emphasis omitted].

[21] *See* Defendant's Motion to Disqualify and Incorporated Memorandum of Law, pgs. 8-11.

[22] *See* First Amended Complaint, ¶¶ 92-95 (Count II).

that Kragel made false statements about Thomas that lead to his termination,[23] Count II asserts a claim of defamation against Kragel by alleging that Kragel made false statements about Thomas while Kragel was employed by WAPA,[24] but also appears to assert separate claims of defamation against Kragel by alleging that Kragel made false statements about Thomas in an email sent on September 22, 2015, when Kragel was not employed by WAPA,[25] and by referencing allegedly defamatory statements that Kragel made in a second email that, according to exhibits filed, was sent on September 23, 2015.[26]

Although the Virgin Islands is a notice pleading jurisdiction, V.I. R. CIV. P. 8(a)(2) provides that "the pleading shall be set forth in separate numbered paragraphs as provided in V.I. R. CIV. P. 10(b), with separate designation of counts and defenses for each claim identified in the pleading[,]" and V.I. R. CIV. P. 10(b) requires that "each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense." Accordingly, the Court *sua sponte* directs Thomas to file a Second Amended Complaint that complies with V.I. R. CIV. P. 8(a)(2) and V.I. R. CIV. P. 10(b), stating each claim that is founded on a separate transaction or occurrence, in a separate count.

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[23] *See id.* ¶¶ 84-90 (Count I).
[24] *See id.* ¶ 92 (Count II).
[25] *See id.* ¶ 93 (Count II) ("On September 22, 2015, Kragel, despite the conclusion of the Demming Litigation, on his own and on behalf of Bolt Nagi P.C. [sic] falsely accused Thomas of threatening to physically harm Kragel's wife for being married to him . . .") and ¶ 68 (alleging that Kragel ended his employment with WAPA in June 2015).
[26] *See id.* ¶ 93 (Count II) ("On September 22, 2015, Kragel, . . . again accused Thomas of making false statements at trial, called Thomas a "goon", and falsely claiming Plaintiff had threatened to murder an unnamed person."); *see also* Defendant's Motion to Disqualify and Incorporated Memorandum of Law, Exhibit 6 (email sent by Kragel on September 23, 2015, at 10:03 AM providing in pertinent part: "You and Billy are 100% responsible for this goon threatening my wife and my life.").

CONCLUSION

For the foregoing reasons, Kragel's motion to disqualify plaintiff's counsel is denied without prejudice, and Thomas is ordered to file a Second Amended Complaint to cure the defects in the Amended Complaint. An Order consistent with this Memorandum shall follow.

Dated: May 1, 2018

ATTEST: Estrella George
Clerk of Court ____/____/____

by: for
Lori Baynes-Tyson
Court Clerk Supervisor 5 / 2 / 2018

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS