IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

BECKETT ALEXANDRER, Plaintiff v. HESS OIL VIRGIN ISLANDS CORPORATION and HOVENSA, LLC., Defendants	)	CIVIL NO. 603/2000 ACTION FOR DAMAGES

MEMORANDUM OPINION and ORDER

THIS MATTER came before the Court on Defendant HOVIC's Motion to Disqualify Plaintiff's Counsel. The Court, having reviewed the parties' memorandums of law in support of their contentions, will **GRANT** Defendant's motion and disqualify plaintiff's counsel from further participation in this litigation.

FACTUAL BACKGROUND

On November 9, 2000, plaintiff filed a complaint against the Defendant Hess Oil of the Virgin Islands (HOVIC) and HOVENSA, LLC., alleging that while employed at HOVIC through various contractors from 1989 through 1994, defendant maintained the refinery in an unsafe condition and exposed the plaintiff to asbestos, sulfur, cyanide, and other dangerous and noxious fumes and substances. He alleges that, as a result of being exposed to those dangerous substances, he suffered physical injuries and contracted diseases related to his exposure to the toxic substances outlined in the plaintiff's complaint.

Defendant HOVIC subsequently filed a motion to disqualify plaintiff's counsel, Lee J. Rohn, Esq. Defendant alleges, as a basis for its motion, that Atty. Rohn "[f]rom 1985-1987 . . .

was employed as an attorney for the Law Office of Britain H. Bryant and Associates, PC, [and that] the vast majority of Ms. Rohn's time was spent representing one client: HOVIC, HOVIC's parent company, its affiliates, and its insurers." Additionally, that she prepared HOVIC employees for their depositions, defended the depositions, met with managers and employees of HOVIC, as well as gathered and analyzed information in order to prepare responses to interrogatories and production of documents. Defendant HOVIC has included two cases to support its contention that the present and past cases are substantially related: *Joseph v. HOVIC, et al,* (Civ. No. 1986/89, DVI-Division of St. Croix) and *Purjet v. HOVIC, et al,* (Civ. No. 1984/284, DVI-Division of St. Croix) and that Atty. Rohn, through her own admission, freely conceded in the past that cases involving claims of asbestos exposure by refinery workers are "substantially related" to her former representation of HOVIC. In plaintiff's opposition to a motion to disqualify in *Brice v. HOVIC,* (Civ. No. 1989/214 DVI-Division of St. Croix.) Atty. Rohn states:

> [a]fter leaving the Law Offices of Britain H. Bryant, PC, Lee J. Rohn refrained from taking any cases against HOVIC for a period of approximately two years. To date, Lee J. Rohn has refused cases such as paint inhalation and asbestos cases because they are ***substantially related*** to cases in which she participated in the defense of HOVIC.

Furthermore, Defendant HOVIC contends that there are similarities between the present case and the *Joseph* and *Purjet cases* in which Atty. Rohn represented HOVIC, which makes it likely that the same HOVIC information and documents which Atty. Rohn reviewed on behalf of HOVIC, and discussed with HOVIC employees, will be relevant in this case. HOVIC asserts that the similarities between the present case and the past cases, which Atty. Rohn represented HOVIC are (1) Exposure to asbestos and toxic substances, (2) Failure to warn/provide appropriate safety precautions, (3) Failure to provide appropriate safety equipment, and (4) Request for punitive damages.

Consequently, the defendant contends that the cases are so similar; it is reasonable that confidential information was passed from HOVIC to Atty. Rohn.

In the opposition to the motion to disqualify, Atty. Rohn alleges that the past and present litigations are not substantially related. As a result, she could not have received confidential information that may be used against HOVIC adversely. She further argues that any confidences she may have received through her employment with Bryant & Associates, PC, is devalued by the extensive amount of time passed between the prior and current representations. To support her contentions, Atty. Rohn relies on the decision in *Donawa v. HOVENSA, LLC.*, (Civ. No. 1999/0082, District Court of the Virgin Islands, Division of St. Croix) where the Court denied a motion to disqualify Atty. Rohn.

In an opinion written by U.S. Magistrate Judge Jeffrey L. Resnick, the Court held that there was indeed an attorney:client relationship between Atty. Rohn and HOVIC, but that the cases are not so substantially related that it can be presumed that the former client's confidences were passed. Plaintiff, therefore, argues that the same reasoning that led to the conclusion in *Donawa* should be applied in the present case.

DISCUSSION

The American Bar Association Model Rules of Professional Responsibility have been judicially adopted in this jurisdiction.[1] Under Model Rule 1.9(a) a lawyer may not "represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of [a] former client unless the former client consents after

[1] *See V.I. Bar Association v. Boyd-Richards*, 26 V.I. 299 (D.V.I. 1991).

consultation." The underlying purpose of Model Rule 1.9(a) is to guard against the possibility that confidential information an attorney gains through the representation will be used against the former client to the advantage of the new client; thereby violating the duty of loyalty.

In applying the substantial relationship test, disqualification of an attorney is warranted if (1) there was in fact an attorney: client relationship and (2) there is a substantial relationship between the former representation and the present litigation. [2]

The first prong of this two-part test is not in dispute. Atty. Rohn was employed by Bryant & Associates from 1985-1987 and performed work on behalf of HOVIC. The real issue centers on the second prong: whether there is a substantial relationship between the former representation and the present litigation.

In determining whether there is a substantial relationship, the Court examines three factors:

(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 that could be relevant and detrimental to the present action.[3]

The moving party, in a motion to disqualify, need not prove that actual confidential information was passed to the former attorney once a substantial relationship has been established. Consequently, once the moving party establishes that the cases are substantially related, it is presume[d] that confidences were disclosed during the previous relationship and that such confidences would be used against the former client in order to benefit the new client. *See*

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[2] See *McNamara v. Boehm*, (Civ. No. 141/92, July 8, 1992)
Lynch v. Lamkin, 27 V.I. 152, (Terr. Ct., STX 1992)
Bluebeard's Castle, Inc. v. Delmar Marketing, Inc., 886 F.Supp. 1204 (D.V.I. 1995)

[3] *Bluebeard's Castle, Inc. v. Delmar Marketing, Inc.*, 886 F.Supp. 1204, 1209 (D.V.I. 1995).

American Roller Company v. Budinger, 513 F.2d 982, (3rd Cir. 1975); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382 (3rd Cir. 1975). The Court must, therefore, necessarily assess the scope of the earlier representation and the scope of the present litigation in order to determine whether there is an existing conflict. *See Bluebeard's Castle, Inc.*, 886 F. Supp. 1204 (D.V.I. 1995).

An assessment of the two earlier cases reveals that in *Joseph*, the allegations were that Plaintiff Joseph was exposed to substantial quantities of asbestos resulting from his employment duties, and that HOVIC failed to warn him of the possible risk of exposure to asbestos. In *Purjet*, the allegations were that Plaintiff Purjet was exposed to asbestos when he worked at the HOVIC refinery, that HOVIC failed to warn workers of the potential risk of asbestos exposure, that HOVIC failed to warn workers that they were being exposed to ultra-hazardous material, that HOVIC failed to take appropriate safety precautions regarding the asbestos exposures of workers, and that HOVIC failed to provide safety instructions or to take any action whatsoever to prevent, eliminate, or lessen the risks faced by the workers who were exposed to asbestos. In both cases, the plaintiffs sought punitive damages.

In the present case, the plaintiff claims that he was an employee of HOVIC, that the defendant's refinery was kept in an unsafe condition because of the presence of asbestos, sulfur, cyanide, and other dangerous and noxious fumes and substances, that he was exposed to these dangerous substances, that HOVIC failed to warn of the unsafe conditions, and that HOVIC failed to take appropriate safety precautions regarding the maintenance and removal of asbestos. The plaintiff further requests punitive damages as a result of HOVIC's alleged conduct.

The Court finds that the subject matter of the present suit is substantially related to the work Atty. Rohn performed on behalf of HOVIC in previous litigations while employed at

Bryant & Associates, particularly the *Joseph* and *Purjet* cases, and therefore justifies disqualification.

Nevertheless, Plaintiff argues that the length of time that transpired from her prior representation of HOVIC and her present representation of the plaintiff is a factor to weigh against disqualification because any confidences that she may have gained during the representation of HOVIC is "irrelevant or moot by the passage of time."[4] The true intent of Model Rule 1.9(a) is not to place a limit on the duty of loyalty to a former client because there has been a lengthy passage of time between the past and present litigations—especially when the representations are substantially related. Accordingly, the passage of time does not eradicate the underlying purpose of the Model Rule to guard against material adversity created by an attorney's representation in a present litigation against a former client involving a matter substantially related to the former client's interest in the past litigation.

HOVIC has shown that the claims and allegations involved in the present suit are substantially related to the claims and allegations or cause of action involved in the past suits in which Atty. Rohn represented HOVIC. Atty. Rohn admits that she did work on HOVIC matters, but only on a limited basis. The model rule does not set a guideline on how much work is necessary in order to determine if the appropriate remedy is disqualification. As the court noted in Bluebeard's Castle, Inc., ". . . any doubts that the Court may have about the appropriateness of disqualification should be resolved in favor of the movant in order to preserve the confidences of the former client."[5] The Court finds that Atty. Rohn worked on HOVIC's legal matters, specifically asbestos and toxic torts and punitive damages, while in the employ of Bryant & Associates, and as a result, Atty. Rohn's position in this suit is substantially related to her prior

[4] *See* Plaintiff's Response to Defendant's Motion to Disqualify Lee J. Rohn , p.8
[5] *See Bluebeard's Castle, Inc.* 886 F.Supp. at 1210 (D.V.I. 1995)

representation and materially adverse to her former client's interests. Therefore, disqualification is appropriate.

For the foregoing reasons, it is hereby

ORDERED that Defendant HOVIC's motion to disqualify plaintiff's counsel, Lee J. Rohn, Esq., is **GRANTED**; and it is

FURTHER ORDERED that this action is stayed for 30 days from the date of this order so that plaintiff may retain substitute counsel.

Dated: September 25th, 2001

EDGAR D. ROSS
Judge

ATTEST:

DENISE D. ABRAMSEN
Clerk of the Court

By: Chief Deputy Clerk 9/25/01

CERTIFIED TO BE A TRUE COPY
THIS 26th day of Sept 20 01
Denise D. Abramsen
CLERK OF THE COURT
By ______ Deputy