

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WILLIAM J. GALLAGHER, et al.

Plaintiffs,

vs.

BENJAMIN E. DAGLEY, et al.

Defendants.

) Case No. CV-17-885469
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JUDGE CASSANDRA COLLIER-WILLIAMS

OPINION AND ORDER

JUDGE C. COLLIER-WILLIAMS:

This cause came on for consideration upon Defendants Benjamin E. Dagley, Barker Products, Inc., Barker Investments, LLC, and BDP Consulting, LLC's (hereinafter "Dagley Defendants") Motion to Disqualify. The Court, having reviewed all briefs and research in this matter, and for reasons set forth more fully below, this Court hereby GRANTS Defendants' Motion to Disqualify.

PROCEDURAL AND FACTUAL HISTORY

Pursuant to the attendant briefs and record, attorney Halligan began representing the Dagley Defendants in approximately October of 2011 for the purposes of litigation purportedly unrelated to the present matter. Halligan later brought a lawsuit against the Dagley Defendants, including Dagley individually, for unpaid invoices arising from the legal services he performed. Halligan obtained a judgment in the Wayne County Court of Common Pleas which has been partially satisfied, leaving an outstanding balance of approximately \$14,000.00 to \$18,000.00.

Attorney Halligan filed this current lawsuit on behalf of Plaintiffs, William and Deborah Gallagher on March 6, 2015 in the Wayne county Court of Common Pleas. Although this case remains pending, on June 26, 2015 Plaintiffs received a default judgment against the Dagley Defendants in the amount of \$1,019,200.00, which includes an award of punitive damages in the amount of \$500,000.00. The basis of the claims asserted by Plaintiffs were monies loaned to the Dagley Defendants. On January 16, 2017 Benjamin Dagley, who had been proceeding without counsel, signed a "Waiver of Potential Conflict of Interest" regarding attorney Halligan assisting him in preparing court documents to bring claims against other parties. On January 17, 2017, the next day, Dagley did in fact file his Motion for Leave to File Crossclaim. It is uncontroverted that Halligan was the ghost writer of this "pro se" Motion and Cross Claim. There is no evidence in the record to show that Attorney Halligan's clients of record knew that he prepared a document for the Defendant. Nor is there any evidence in the record to show now, and at the time in question, the Gallaghers, ever signed any informed consent waiver. During this time period Halligan was repeatedly communicating with Dagley regarding the case, Dagley's potential crossclaim and the collection of monies. On February 23, 2017, Attorney Timothy Pettorini filed notices of appearance on behalf of the Dagley Defendants. The case was transferred to Cuyahoga County on August 4, 2017, and on May 16, 2018 the Dagley Defendants filed their Motion to Disqualify.

APPLICABLE LAW

"A motion to disqualify counsel is the proper method for a party to bring an alleged breach of ethical duties to the court's attention." *SST Castings, Inc. v. Amana Appliances, Inc.*, 250 F. Supp. 2d 863 (S.D. Ohio 2002). A trial "court has inherent authority to supervise

members of the bar appearing before it; this necessarily includes the power to disqualify counsel in specific cases.” *Kala v. Aluminum Smelting & Ref. Co.*, 81 Ohio St.3d 1, 4 (1998), see also *Royal Indemn. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31 at 35-36 (1986).

Generally, a court will not interfere with a party’s right to the counsel of its choice; however, this right is limited by the ethical rules governing attorneys. *Henry Filters, Inc. v. Peabody Barnes, Inc.*, 82 Ohio App.3d 255, 262 (6th Dist. 1992). “[L]ower courts have a duty to ensure that the attorneys who practice before it do not violate the disciplinary rules and those courts have the inherent power to disqualify an attorney from acting as counsel in a case where the attorney cannot or will not comply with the Code of Professional Responsibility and such action is necessary to protect the dignity and authority of the court.” *Carr v. Acacia Country Club Co.*, 8th Dist. No. 91292, 2009-Ohio-628, ¶15 (citing *Horen v. Bd. of Edn.*, 174 Ohio App.3d 317, 322, 2007-Ohio-6882).

Representing multiple clients in litigation with differing interests is “*prima facie* improper and the burden is on the lawyer or firm to demonstrate, at the very least, that there will be no actual or apparent conflict of loyalties.” *White Motor Corp. v. White Consolidated Indus.*, 8th Dist. No. 39295, 1980 Ohio App. LEXIS 13705 (Jan. 10, 1980), citing *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2nd Cir. 1976). “A lawyer should *never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.*” EC 5-15 (emphasis added); see also *Columbus Bar Ass’n v. Ross*, 107 Ohio St.3d 354, 358, 2006-Ohio-5, ¶ 25; *Disciplinary Counsel v. Mazer*, 86 Ohio St.3d 185, 188 (1999).

“The concurrent representation of clients whose interests are directly adverse always creates a conflict of interest.” Prof. Cond. Rule 1.7 (comment 10). Rule 1.7 provides:

Rule 1.7: Conflict of Interest: Current Clients

- (a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:
- (1) the representation of that client will be directly adverse to another current client;
 - (2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.
- (b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:
- (1) the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) each affected client gives *informed consent, confirmed in writing*;
 - (3) the representation is not precluded by division (c) of this rule.
- (c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:
- (1) the representation is prohibited by law;
 - (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

The Ohio Rules of Professional Conduct provides that a lawyer shall not accept or continue representation of multiple clients if "the representation of that client will be directly adverse to another current client" or "there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests." Prof. Cond. Rule 1.7(1) and (2) (emphasis sic). Rule 1.7 permits representation of multiple clients if "the lawyer will be able to provide competent and diligent representation to each client[,]" "each affected client gives *informed*

consent, confirmed in writing” and “the representation is not precluded by division (c) of [1.7].” Prof. Cond. Rule 1.7(b)(1) through (3) (emphasis sic). Division (c) provides that “[e]ven if each affected client consents, the lawyer shall not accept or continue the representation if . . . the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.” Prof. Cond. Rule 1.7(c)(2).

When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. Prof. Cond. Rule 1.9 (comment 1). The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. *Id.*

ANALYSIS

Attorney Halligan’s representation of both Plaintiff and Defendant in this matter does not comport with the standards set forth in Rule 1.7. There is no evidence in the record that Halligan had the Plaintiffs sign an informed consent waiver. In Plaintiffs’ most recent brief in opposition, filed on May 28, 2018, Plaintiff William J. Gallagher attached a signed affidavit which expressed an awareness of Halligan’s work executed on behalf of Dagley. Halligan’s clients had already received a large judgment against Defendant Dagley in the pending litigation. Attorney Halligan also previously obtained a personal judgment against Defendant Dagley which was not yet fully satisfied.

These facts, when taken together with Halligan’s behavior of advising of Dagley; preparing his crossclaim for the same ongoing litigation in which he represented Plaintiff; and Halligan requesting monies from Dagley via voicemail before Dagley obtained new counsel,

lead this Court to the conclusion that attorney Halligan must be disqualified to comport with the Professional Rules of Conduct and avoid any further appearance of impropriety.


A situation where both Plaintiff and Attorney Halligan would both need to collect on their judgments against the Dagley Defendants could arise. His own interests, rather than the interests of his client in the pending matter, may have led to his communications, assistance and ultimate representation of Dagley. “[L]ower courts have a duty to ensure that the attorneys who practice before it do not violate the disciplinary rules and those courts have the inherent power to disqualify an attorney from acting as counsel in a case where the attorney cannot or will not comply with the Code of Professional Responsibility and such action is necessary to protect the dignity and authority of the court.” *Carr v. Acacia Country Club Co.*, 8th Dist. No. 91292, 2009-Ohio-628, ¶15 (citing *Horen v. Bd. of Edn.*, 174 Ohio App.3d 317, 322, 2007-Ohio-6882).

Furthermore, Halligan failed to have his clients of record, the Gallaghers, sign an informed consent waiver in January of 2017. This act alone ran afoul of Rule 1.7(b)(2). Pursuant to Prof. Cond. Rule 1.7(a)(2) this Court does find a substantial risk that Halligan’s ability to consider, recommend, or carry out an appropriate course of action for his client will be materially limited by his responsibilities undertaken for his former client Dagley, and by his own personal interests. While Dagley’s current counsel of record can prosecute the Dagley Defendant’s crossclaim, as litigation continues Halligan’s potential conflicts and motivations implore this Court to have him disqualified from the current litigation.

CONCLUSION

Defendants' Motion to Disqualify is hereby GRANTED. Attorney Brian Halligan is hereby disqualified from further representation of any parties in the matter currently pending before this court (Case No. CV-17-885469). The clerk of courts is hereby ordered to remove Attorney Brian Halligan as counsel of record for Plaintiffs William J. Gallagher and Deborah A. Gallagher. Plaintiffs are granted 30 days from the date of this order to obtain new counsel.

IT IS SO ORDERED.


JUDGE CASSANDRA COLLIER-WILLIAMS