IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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| ANTHONY GALATI, | ) | Case No. CV 16-872272 |
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| PLAINTIFF, | ) | JUDGE MICHAEL E. JACKSON |
| | ) | |
| v. | ) | |
| | ) | |
| AMERICAN FAMILY INSURANCE COMPANY, ET AL. | ) | **JOURNAL ENTRY AND OPINION: PLAINTIFF'S MOTION TO DISQUALIFY.** |
| | ) | |
| DEFENDANTS. | ) | |

Plaintiff Anthony Galati (Plaintiff) filed on January 20, 2017 a motion to disqualify the law firm of Roetzel & Andress, LPA (R & A) as legal counsel for Defendants American Family Insurance Company (American Family) and Kurt McCabe (collectively, Defendants). Plaintiff filed an amendment[1] to this motion on February 2, 2017 (collectively, Motion). For the reasons stated in this Journal Entry and Opinion, the Court denies Plaintiff's Motion.

## Background

The Court held a hearing on February 15, 2017 to ascertain the facts regarding R & A's representation of Defendants in order to apply the Ohio Rules of Professional Conduct (Prof. Cond.R.), specifically, Prof. Cond.R. 1.9, "Duties to Former Clients," and Prof. Cond.R. 1.10 "Imputation of Conflicts of Interest: General Rule." Attorney Tiffany Fischbach of Caryn Groedel & Associates Co. LPA, represented Plaintiff, and attorneys, Denise M. Hasbrook (Hasbrook), Robert E. Blackham (Blackman) of R & A represented Defendants.

[1] The stated purpose of filing the amended motion was to advise the Court that attorney Timothy Pettorini joined R & A less than one year after the last plaintiff *in Valerie Charms et al v. American Family Insurance Company* et al., Case No. CV 10 731986 settled his claims, not two years after the last plaintiff settled as stated in the initial Motion. See infra fn. 2 and 3.

Attorney Timothy Pettorini (Pettorini), Plaintiff's former attorney[2] and current partner of R &A, was the sole witness. The Court accepted into evidence Defendants' Exhibits A, B, D, F, G, H, and I. After counsel presented their respective arguments, the Court stated it would considered this matter.

## FACTS

**The Present Case**

On November 22, 2016, Plaintiff filed a complaint against Defendants asserting a single claim for age discrimination. From September 1, 1999 to December 1, 2010, Plaintiff asserts that American Family employed him as an insurance agent to sell its insurance products. Plaintiff claims that Defendants discriminated against him based on his age:

> by, [among other things], holding him to unattainable goals and production requirements; terminating his employment on December 1, 2010, when he failed to meet these goals; replacing him with an individual substantially younger than he; and not holding his replacement to the same unattainable goals and production requirements. Plf's Amend. Mot. p. 2.

On December 15, 2016, Defendants filed their answer through Attorneys Hasbrook, Blackham, and Nathan Pangrace of R & A, and they filed a subsequent answer to Plaintiff's amended complaint on February 3, 2017. In each answer, R & A attorneys referenced the prior lawsuit, *Valerie Charms et al v. American Family Insurance Company et al*, CV-10-731986, by Plaintiff and ten other American Family insurance agents,[3] all of whom were represented by Pettorini against American Family that was

[2] Pettorini was a partner with Critchfield, Critchfield, & Johnson at the time he represented Plaintiff and the other American Family agents/employees in *Charms*.
[3] Plaintiff asserted that he and the other insurance agents were American Family's employees. American Family disputed that claim.

represented by R & A.[4]

Plaintiff filed this Motion because Pettorini, his former lawyer in *Charms*, became a partner of R & A in January 2016. R & A Attorneys Hasbrook and Blackham represented American Family in *Charms*, as well as in this case. Plaintiff argues that Pettorini is prohibited from representing Defendants in this case because it is the "same matter" or "substantially related matter"[5] as *Charms*, and Defendants' interests are materially adverse to Plaintiff. Prof. Cond.R. 9(a). As a result, Plaintiff argues that this rule disqualifies both Pettorini and R & A attorneys from representing Defendants in this case because the conflict imputes Pettorini's disqualification to R & A. Prof. Cond.R. 1.10(a), and (c).

**<u>The Prior Case - Charms</u>**

On July 10, 2010, Pettorini, as lead counsel on behalf of Plaintiff and ten other current or former American Family insurance agents, asserted five claims in *Charms*: breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, tortious interference with business and contractual relation, and unfair competition. In addition, Plaintiff asserts in his Motion that he requested Pettorini to file an age discrimination claim, but Pettorini did not do so.

On May 19, 2012, the trial court granted summary judgment for American Family on two of Plaintiff's claims: unfair competition and breach of contract. The trial court granted American Family's motion for separate trials for each of the plaintiffs, and on July 24, 2012, Plaintiff's trial commenced on his remaining claims. On July 30, 2012,

[4] American Family is a longtime client of R & A.

[5] This term applies to Pettorini. Prof. Cond.R. 9(a). However, this term does not apply to lawyers with R & A. Prof. Cond.R. 1.10(d). The applicable term in these provisions in this case is the "same matter." Accordingly, the Court does not analyze this term in relationship to R & A.

Plaintiff and American Family entered into a confidential settlement agreement and general release, and filed a stipulation for dismissal and judgment entry. The last plaintiff in *Charms* settled his claims on January 22, 2015.

Six months later, in July 2015 and almost three years after Pettorini concluded Plaintiff's claims in *Charms,* Pettorini and R & A had their initial discussions concerning him joining R & A as a partner. In January 2016, Pettorini joined R & A as a partner, which was three and one half years after Pettorini concluded his representation of Plaintiff in *Charms,* and about one year after the last plaintiff in *Charms* settled his claims.

**<u>Plaintiff's Legal Malpractice Claim Against Pettorini</u>**

After Plaintiff settled his claims in *Charms* and while some of the other plaintiffs' claims were still pending, Plaintiff filed a legal malpractice lawsuit against Pettorini and his former law firm on June 7, 2013, alleging numerous claims, including failure to bring an age discrimination claim against Defendants in the *Charms* case.

Plaintiff states in his Motion that "Despite [P]laintiff's request that [Pettorini's law firm] assert an age discrimination claim in the [*Charms*], [Pettorini's law firm] failed to do so." Plf's Amend. Mot. p 3. Plaintiff, Pettorini, and his former law firm settled these claims on July 15, 2016, about four months before Plaintiff filed this case.

During the February 15, 2017 hearing, Pettorini answered questions about this legal malpractice suit. Pettorini testified that he did not discuss the confidences of his representation of Plaintiff in *Charms* with members of R & A.

**Law and Analysis**

The current Rules of Professional Conduct supersede the Supreme Court of Ohio's ruling in *Kala v. Aluminum Smelting & Ref. Co.*, 81 Ohio St.3d 1, 1998-Ohio-439, 688 N.E.2d 258 (former lead counsel switched firms to the client's adversary during the appeal of the case between the parties when attorney conduct was governed by Ohio Code of Professional Responsibility). However, the Supreme Court of Ohio created a three-part analysis that courts were directed to apply in addition to holding an evidentiary hearing regarding a motion to disqualify an individual counsel or firm. *Id.* The Supreme Court of Ohio determined:

> In ruling on a motion for disqualification of either an individual (primary disqualification) or the entire firm (imputed disqualification) when an attorney has left a law firm and joined a firm representing the opposing party, a court must hold an evidentiary hearing and issue findings of fact using a three-part analysis:
>
> (1) Is there a substantial relationship between the matter at issue and the matter of the former firm's prior representation;
>
> (2) If there is a substantial relationship between these matters, is the presumption of shared confidences within the former firm rebutted by evidence that the attorney had no personal contact with or knowledge of the related matter; and
>
> (3) If the attorney did have personal contact with or knowledge of the related matter, did the new law firm erect adequate and timely screens to rebut a presumption of shared confidences with the new firm so as to avoid imputed disqualification? *Id.* at ¶ 1, 2, and 3 of the syllabus.

**Prof. Cond.R. 1.9(a), "Duties to Former Clients"**

(a) Unless the former client gives informed consent, confirmed in writing, 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. …

**Prof. Cond.R. 1.10(a), (c) and (d), "Imputation of Conflicts of Interest: General Rule"**

(a) While lawyers are associated in a *firm*, none of them shall represent a client when the lawyer *knows* or *reasonably should know* that any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the *firm*.

(c) When a lawyer has had substantial responsibility in a matter for a former client and becomes associated with a new firm, no lawyer in the new firm shall knowingly represent, **in the same matter,** a person whose interests are materially adverse to the interests of the former client. (emphasis added).

(d) **In circumstances other than those covered by Rule 1.10(c),** when a lawyer becomes associated with a new firm, no lawyer in the new firm shall knowingly represent a person in a matter in which the lawyer is personally disqualified under Rule 1.9 unless both of the following apply (emphasis added):

(1) the new firm timely screens the personally disqualified lawyer from any participation in the matter and that lawyer is apportioned no part of the fee from that matter;

(2) written notice is given as soon as practicable to any affected former client.

**Prof. Cond.R. 1.0(l), (n) and Comment 2**

(l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

(n) "Substantially related matter" denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter." Prof. Cond.R. 1.0(n).

Comment 2: The scope of a "matter" for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. 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. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of

that type even though the subsequent representation involves a position adverse to the prior client. …

The other Comments to Prof. Cond.R. 1.10(c) makes two points:

> [First, this Rule] imputes the conflict of a lawyer, who has had substantial responsibility in a matter, to all lawyers in a law firm to which the lawyer moves, and prohibits the new law firm from assuming or continuing the representation of a client **<u>in the same matter</u>** if the client's interests are materially adverse to those of the former client. (emphasis added).
>
> [Second, screening [the conflicted lawyer] is not effective to avoid imputed disqualification of other lawyers in the firm, if the personally disqualified lawyer had substantial responsibility for representing the former client **<u>in the same matter</u>** in which the lawyer's new firm represents an adversary of the former client. A lawyer who was sole or lead counsel for a former client in a matter has substantial responsibility for the matter. Determining whether a lawyer's role in representing the former client was substantial in other circumstances involves consideration of such factors as, the lawyer's level of responsibility in the matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client and the former client's personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the matter. (emphasis added).

These Comments make it clear that compliance with the screening process in Prof. Cond.R. 1.10(d) concerning a disqualified lawyer removes the imputed disqualification of the firm, provided that the representation is not the “same matter.” Prof. Cond.R. 1.10(c) requires the disqualification of both the conflicted lawyer and his law firm from representation, if it is the “same matter” because the conflict is imputed to the new law firm and its members.

The Court finds that Pettorini is clearly a disqualified attorney because he had substantial responsibility for the multiple claims asserted by Plaintiff in *Charms* against American Family. Prof. Cond.R. 1.9(a). Accordingly, as a partner in R &A, Pettorini cannot participate in representing Defendants in the present case. *Id.*

This Court applies the prevailing principle that "disqualification constitutes a 'drastic measure which courts should hesitate to impose except when absolutely necessary'" because it deprives a party of the lawyer or law firm of his choosing. *Stanley v. Bobeck*, 8th Dist. Cuyahoga No. 92630, 2009-Ohio-5696, ¶ 12. For R & A to be disqualified Plaintiff must demonstrate that the present case for age discrimination is the "same matter" as the first case pursuant to Prof. Cond.R. 1.10(c), or that R & A has not satisfied Prof. Cond.R. 1.10(d).

There is no dispute that the causes of action asserted in the *Charms* case did not involve age discrimination. This is not a situation where the same claim is being asserted in a lawsuit for a second time.

To address Plaintiff's Motion, the starting point is Prof. Cond.R. 1.9, Comment 2 that explains what constitutes a "matter:"

> "The scope of a "matter" for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. 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…. .

Plaintiff offered no evidence as to quantity or quality of the information or evidence that he or Pettorini had, if any, in *Charms* regarding the unfiled age discrimination claim that Pettorini did not file after Plaintiff requested him to do so. Plaintiff had every opportunity to question Pettorini when he testified during the hearing regarding the quantity and quality of such information and the evidence. However, Plaintiff did not ask questions of Pettorini, the key witness regarding these issues, to obtain evidence relating to Comment 2 of Prof. Cond.R. 1.9. He was not asked about his participation in a "particular situation or transaction," or his "involvement in a specific transaction" concerning the unfiled age discrimination claim in *Charms*. Prof. Cond.R. 1.9 Comment 2.

Moreover, Plaintiff did not use any information gathered through discovery in the legal malpractice claim that Plaintiff filed against Pettorini and his prior law firm to establish Pettorini's involvement of representation regarding the age discrimination claim at issue. Given the fact that the attorney in this case was also his attorney in the legal malpractice case, Plaintiff's access to that information, if it existed, would not be an issue. This suggests that Pettorini may not have any special knowledge or information about an unfiled age discrimination claim in the *Charms* case.

Finally, Plaintiff was not limited to the testimony of Pettorini during this evidentiary hearing. Plaintiff attended the hearing, but did not testify regarding these matters.

Accordingly, the Court only has two unsworn statements in Plaintiff's Motion to support his contention: (1) "Despite [P]laintiff's request that [Pettorini's law firm] assert an age discrimination claim in the [*Charms*] lawsuit, [Pettorini's law firm] failed to do so," and (2) that Defendants discriminated against him based on his age:

> by, [among other things], holding him to unattainable goals and production requirements; terminating his employment on December 1, 2010, when he failed to meet these goals; replacing him with an individual substantially younger than he; and not holding his replacement to the same unattainable goals and production requirements. Plf's Amend. Mot. pp. 2, 3.

Plaintiff seems to infer that this unsworn information concerning an unfiled age discrimination claim in *Charms*, plus the filed age discrimination claim in this case is sufficient to satisfy what constitutes the "same matter" under Prof. Cond.R. 1.9(a) without offering any other evidence or explanation  why that is true. Plaintiff has underestimated the quality of the evidence required by Prof. Cond.R. 1.9(a), and has failed to offer any facts that address the evidence needed as stated in Prof. Cond.R. 1.9 Comment 2. If anything, these unsworn

statements demonstrate that while Pettorini was Plaintiff's attorney, he never represented Plaintiff in an age discrimination claim against Defendants. Prof. Cond.R 1.10(c).

Plaintiff's assertion that Prof. Cond.R 1.9(a) creates a presumption of shared confidences between Defendant and Pettorini regarding the age discrimination claim that are imputed to R & A and gives Defendants an unfair advantage, lacks merit. This rule, does not create, infer, or suggest any presumption. Moreover, the Supreme Court of Ohio abandoned such presumption in 1998, nearly ten years ago when it determined that "the time has come to abandon the rebuttable presumption that the knowledge of one attorney is the knowledge of the entire firm...." *Kala,* 81 Ohio St.3d.at 6. Plaintiff did not address the Supreme Court of Ohio's determination when Defendants relied upon this case in their Brief in Opposition to Plaintiff's Motion and during the hearing.

Plaintiff provided no facts to support his claim that Defendant had an "unfair advantage." Most importantly, Plaintiff provided no evidence that Pettorini has improperly shared any confidences between himself and Plaintiff. Pettorini testified that he has not discussed the confidences of his representation of Plaintiff with members of R & A, even though Pettorini is permitted to disclose confidences within the scope necessary to defend against Plaintiff's legal malpractice suit against him and his former firm, and to detect and resolve conflicts of interest arising out of a change in employment. Prof. Cond.R. 1.6(b)(5) and (7)[6].

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[6] A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary for any of the following purposes:
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client; ….
(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a *firm*, but only if the revealed information would not compromise the attorney- client privilege or otherwise prejudice the client.

Plaintiff claimed in his Motion that Pettorini and his former law firm failed to investigate and file an age discrimination claim when Plaintiff requested that they do so. Plf's Amend. Mot., p. 3. This is a reference to the lawsuit that Plaintiff filed against Pettorini and his former law firm for legal malpractice alleging, in part, these allegations[7]. On the one hand, Plaintiff claims that Pettorini breached his duty in failing to investigate and file an age discrimination claim in *Charms* that resulted in a settlement of his legal malpractice claim against Pettorini and his former law firm. On the other hand, Plaintiff claims that Defendants have an "unfair advantage" in this present case because of the information Pettorini may have about this claim. Not only does this argument lack merit, it is evidence that the unfiled age discrimination claim in *Charms* is not the "same matter" in this case.

Next, Plaintiff, contends that, "it is not unreasonable to infer that Pettorini was negotiating a partnership deal with [R & A] <u>while he was representing one or more of the eleven plaintiffs in the lawsuit against [Ameri[can Family]</u>, who was represented by [R & A] … with the final plaintiff … [settling] his claims … on January 22, 2015." Plf's Mot. p. 3 Plaintiff made these assertions, in bold print, in his original Motion. Defendants responded in their first Brief in Opposition by stating, "In truth R & A began speaking to Pettorini about joining the firm three years after [Plaintiff's] claims were settled and dismissed with prejudice." Def.'s Opp. p.7. The approximate time that Defendant is referring to is July 2015, which is six months <u>after</u> the last plaintiff settled his claims in *Charms*[8]. Plaintiff produced no evidence to support this allegation or rebut Defendants' evidence as to when negotiations began. This allegation lacks merit.

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[7] Plaintiff hired the same law firm that filed the legal malpractice claim to represent him in the present case.
[8] Thereafter, the parties met with the Court for a case management conference, and Defense counsel re-asserted that negotiations did not begin until July 2015. Plaintiff then inexplicitly repeated the same allegation, in bold print again, without any additional support in his amended Motion. Plf's Amend. Mot. p. 3 and fn.1. Moreover, Plaintiff's counsel made this allegation during the hearing, after the inference was rebutted by Defendants and Pettorini, and failed to introduce any evidence to support this allegation.

Plaintiff has not provided the Court with sufficient evidence to conclude that Pettorini's representation in Charms from 2010 - 2012, that resulted in a settlement and release of all claims and plainly did not include a claim for age discrimination, is the "same matter" as this case that is based solely on age discrimination. For these reasons and the fact that age discrimination claim is itself a separate claim arising out of the employment/agent relationship between Plaintiff and American Family from the claims in *Charms*, the age discrimination claim in this case does not constitute the "same matter" for the purposes of Prof. Cond.R. 1.10(c).

Finally, the Court questioned Plaintiff's counsel at the conclusion of the hearing as to the specific harm that Plaintiff is asserting by his Motion. Plaintiff's counsel responded that it was the appearance of a conflict (or words to that effect) for R & A to represent Defendant while Pettorini is a member of that firm. The answer to this concern is the screening procedure established by Prof. Cond.R. 1.10(d). R & A has the burden of establishing that the proper screening protections are implemented and followed as mandated by Prof. Cond.R. 1.10(d).

Defendant presented evidence that it complied with Prof. Cond.R. 1.10(d) by properly screening Pettorini from participating in the present case. R & A, received a pre-litigation demand letter from Plaintiff, and R & A immediately created an ethical barrier "screening" Pettorini from any participation in this matter. R & A also provided prompt notice of this ethical screen to Plaintiff's counsel. Further, R & A stated that Pettorini has not received and will not receive compensation directly related to this matter. Moreover, Pettorini testified that his offices are in the Wooster and the Akron areas, and his practice with R & A is focused on gas and oil. Conversely, R & A counsel in this case are located in the Toledo and Cleveland offices and focus on employment law.

The evidence presented demonstrates that even though Pettorini is not in the same offices or litigation section, the notice of Pettorini's screening from this representation and the measures that must be followed to maintain an ethical barrier is firm wide. The Court determines that R & A has effectively screened Pettorini from the other lawyers at R & A and effectively removed imputation of Pettorini's conflict to itself. Prof. Cond.R. 1.10(d)(1) and (2).

**CONCLUSION**

For the reasons stated above, the court denies Plaintiff's Motion to disqualify R & A from representation of Defendants, and further orders that R & A continue to maintain all appropriate and required screening provisions mandated by Prof. Cond.R. 1.10(d)(1).

**IT IS SO ORDERED.**

**DATED: ________________** ___________________________________

**JUDGE MICHAEL E. JACKSON**

**THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.**