

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ALLAN GOLDFARB,	:	September Term 2005
	:	
Plaintiff,	:	
	:	
v.	:	No. 1825
	:	
STEVEN KUHL,	:	
	:	
Defendant.	:	COMMERCE PROGRAM
	:	
	:	
	:	Control Numbers 091271/091270
	:	

ORDER

AND NOW, this 24TH day of October 2005, upon consideration of Plaintiff Allan Goldfarb's Petition for a Preliminary Injunction (091271) and Plaintiff's Motion for Expedited Discovery (cn 091270), all responses in opposition, Memoranda, all matters of record, after a hearing and oral argument and in accord with the Memoranda Opinion to be filed herewith, it hereby is **ORDERED** and **DECREED** that Plaintiff's Petition for Special Injunction is **Denied**.

It is further **ORDERED** Plaintiff's Motion to Expedite Discovery is **Moot**.

BY THE COURT,

C. DARNELL JONES, II, J.

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OPINION

JONES, II, J.

This action is a dispute between two shareholders of I. Rice Company. Presently before the court is a Petition for Special Injunction seeking to disqualify Buchanan Ingersoll from representing Defendant Steven H. Kuhl in this litigation and other related matters¹ and Plaintiff’s Motion for Expedited Discovery.

BACKGROUND

I.Rice Company (hereinafter “Company”) is a family owned business which manufactures syrups, sundae toppings, bakery fillings, fudge bases and specialty items for the food industry. (N.T. p. 5). Plaintiff Allan Goldfarb (hereinafter “Goldfarb”) has been the President of the Company for approximately thirty five and one half years. (N.T. p. 5-6). Additionally, Goldfarb is also a director and shareholder of the Company. (N.T. p. 6).

Steven Kuhl (“Kuhl”) is also a director/shareholder of the Company. Kuhl has been the Vice President of the Company for approximately thirty two (32) years. (Id.).

¹ The Petition for Special Injunction also seeks an order to maintain the status quo within the Company. The Petition alleged that Goldfarb was wrongfully terminated from the Company and was essentially being “squeezed out”. In light of the Arbitration proceeding which has been instituted by Kuhl as well as the 2005 Shareholders Agreement which contains a broad arbitration provision, the court finds that Goldfarb’s request for an order preserving the status quo was not properly before the court.

Goldfarb filed the instant action against Kuhl alleging claims for breach of fiduciary duty, tortious interference with contract and corporate waste. Kuhl retained Buchanan Ingersoll to represent him in the lawsuit. Goldfarb now moves to disqualify the law firm of Buchanan Ingersoll from representing Kuhl. An evidentiary hearing and oral argument on the issue of disqualification was held on September 26, 2005. The parties filed extensive briefs before the hearing. Upon consideration of all the submissions, the motion to disqualify is denied.

DISCUSSION

Plaintiff maintains that Buchanan Ingersoll should be enjoined from representing Defendant in this matter and any matter related thereto since Buchanan Ingersoll represented Goldfarb in a “similar” action instituted by a former shareholder of the Company in 1999. In support thereof, Goldfarb relies upon Pennsylvania Rule of Professional Conduct (“PRC”) 1.9 as well as the test espoused by the Superior Court in Estate of Pew, 440 Pa. Super. 195, 655 A.2d 521 (1994).

Although Kuhl agrees on the standard to be applied in analyzing whether Buchanan Ingersoll should be disqualified from representing Kuhl, he does not agree that the firm should be disqualified. Rather, Kuhl maintains that although Buchanan Ingersoll is representing a former client against another former client, the actions are not related and Buchanan Ingersoll did not obtain any confidential information as a result of the representation.

Pennsylvania Rule of Professional Conduct 1.9 provides:

“A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person’s interest are materially adverse to the interest of

- the former client unless the former client consents after a full disclosure of the circumstances and consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information had become generally known.”
- Pa. R. P. C. 1.9.

Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. Comment 3 to PRC 1.9. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Moreover, information acquired in a prior representation may have been rendered obsolete with the passage of time. *Id.* A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information that could be used adversely to the former client’s interests in the subsequent matter. *Id.* A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services. *Id.*

A former client seeking to disqualify a law firm representing an adverse party on the basis of its past relationship with a member of the law firm has the burden of **proving**: (1) that a past attorney/client relationship existed which was adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; and (3) that a member of the law firm, as attorney for the adverse party, acquired knowledge of confidential information from or

concerning the former client, actually or by operation of law. Pew, supra. 655 A.2d at 545-46.

The fact that the two representations involved similar or related facts is not, in itself, sufficient to warrant the finding of a substantial relationship so as to disqualify the attorney from the representation, **but rather the test is whether the information acquired by an attorney in his former representation is substantially related to the subject matter of subsequent representation.** Id. (citing Commonwealth Ins. Co. v. Graphix Hot Line, 808 F. Supp. 1200, 1204 (1992)).

In INA v. Underwriters Ins. Co. v. Nalibotsky, 594 F. Supp. 1199, 1207 (E.D. Pa. 1984), a case relied upon by both parties, the court explained that:

The lawyer 'might have acquired' the [substantially related] information in issue if (a) the lawyer and the client ought to have talked about particular facts during the course of the representation, or (b) the information is of such a character that it would not have been unusual for it to have been discussed between lawyer and client during their relationship. Id.

In 1999, John Liss, a shareholder in the Company, instituted a lawsuit against Goldfarb and Kuhl individually as well as the Company for breach of fiduciary duty, fraud, civil conspiracy and conversion. (N.T. p. 8). As a result of the lawsuit, Goldfarb and Kuhl retained Buchanan Ingersoll to represent them personally in the matter. (Id. pp. 9-10). The Company was represented by separate counsel.

During the course of the litigation, Buchanan Ingersoll had numerous conversations with Goldfarb wherein Goldfarb provided information to help defend himself in the action. In addition to conversations, Goldfarb turned over approximately fifty boxes of documents. The documents and conversations concerned Goldfarb's personal finances, family history and the Company's finances. The Liss litigation

ultimately settled on the eve of trial in 2003 with Goldfarb and Kuhl buying out Liss' shares in the Company. Once the Liss litigation ended Goldfarb had no contact with Buchanan Ingersoll except for the events leading up to the filing of this matter. (N. T. 15).

After analyzing the nature and scope of Buchanan Ingersoll's representation of Goldfarb in the prior action as well as Goldfarb's testimony as to the information provided, one could conclude that the information acquired is substantially related to the present action. Goldfarb testified that during the Liss litigation he met with Mark Tepper, Esquire, Doug Coopersmith, Esq. and Brian North, Esq., attorneys at Buchanan Ingresoll, and spoke to them on the phone regarding the Liss litigation. Moreover, Goldfarb testified that he also provided Buchanan Ingersoll with information concerning his personal finances, his family and personal history, his feelings about the case and the effects of the litigation could have on him personally as well on the Company. After reviewing those documents and after speaking with Goldfarb, Buchanan Ingersoll "might have acquired information" concerning his thoughts on the value of the Company, buy outs, litigation strategy and succession. Such information is the type expected to be exchanged between lawyer and client and could be relevant in this case.²

Although Goldfarb satisfied his burden of demonstrating that the information acquired in the prior representation is substantially related to the instant matter, Goldfarb has failed to satisfy his burden of demonstrating that Buchanan Ingersoll acquired **confidential information**. The evidence demonstrates that any and all information

² It is also possible that the same shareholder agreement at issue in the Liss action will also be at issue here since Goldfard questions the validity of the April 2005 agreement.

received by Buchanan Ingersoll and all advice provided to Goldfarb was fully known to and shared with Kuhl. Goldfarb testified as follows:

Q. In your discussions with Buchanan Ingersoll did you ever give them any information about yourself or about the Liss case that you instructed Buchanan Ingersoll not to share with Mr. Kuhl?

A. No.

Q. So, so far as you know, everything that Buchanan Ingersoll learned from or about you during the Liss case, Mr. Kuhl knew, as well, as your co-defendant in that case; correct?

A. He should have. He had all the information.

N. T. p. 40.

Thus information provided to Buchanan Ingersoll by Goldfarb is not confidential and therefore not disqualifying. Kuhl and Goldfarb have been in business together for almost thirty two years and are familiar with each others' personal tendencies and corporate finances. Based on the foregoing, the evidence tends to establish that confidential information was not provided to Buchanan Ingersoll in the prior action which would require this court to disqualify Buchanan Ingersoll from representing Kuhl in the present action.³

CONCLUSION

For the foregoing reasons, Plaintiff's Petition for Special Injunction is denied and the Petition for Expedited Discovery is Moot. An order consistent with this Opinion will follow.

BY THE COURT,

C. DARNELL JONES, II, J.

³ The Motion for Expedited Discovery is Moot.

