

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

CLAUDE THEODULE; JOHN and )  
ROSALINE ST. ROSE; and )  
GEORGE AND BLONDELLE LOUISON, )

Plaintiff, )

vs. )

HESS OIL VIRGIN ISLANDS (HOVIC); )  
HOVENSA L.L.C.; AMERADA HESS )  
CORPORATION; LITWIN PAN-AMERICAN )  
CORPORATION; RIGGERS & ERECTORS )  
INTERNATIONAL, INC.; RARITAN SUPPLY )  
COMPANY, Individually and as successor in )  
interest to Bridge Supply Company; 3M a/k/a )  
MINNESOTA MINING & MANUFACTURING )  
COMPANY; CLEMCO INDUSTRIES )  
CORPORATION; INGERSOLL RAND )  
CORPORATION; and JOHN DOE )  
DEFENDANTS, )

Defendant. )

**CIVIL NO. 604/2004**

**ACTION FOR DAMAGES**

**(JURY TRIAL DEMANDED)**

**MEMORANDUM OPINION AND ORDER**

This matter is before the Court on Plaintiffs' Motion for Reconsideration, the Opposition of Defendants Hess Oil Virgin Islands Corp. ["Hess"], HOVENSA LLC ["HOVENSA"], and Amerada Hess Corp. ["Amerada Hess"], and Plaintiffs' Reply. Plaintiffs assert in their Motion that this Court's Order of October 2005 disqualifying counsel was clear error and would result in manifest injustice. For the reasons below, the Motion for Reconsideration will be denied.

**Background**

Plaintiffs are suing Defendants for alleged exposure to silica dust during the course of their employment at the St. Croix oil refinery at various, overlapping points between 1967 and 1993. Defendants Hess, HOVENSA, and Amerada Hess filed a Motion to Disqualify Plaintiffs' Counsel, prompting an Opposition from Plaintiffs and a Reply by Defendants. Plaintiffs' counsel, Attorney Lee Rohn the principal in the law firm Rohn & Cameron, represented Defendants HOVIC and Amerada Hess when she was employed at the law firm Bryant & Associates from 1985 to 1987. Her work included defending these companies in litigation relating to exposure to toxic substances. This Court, by Order dated October 27, 2005, disqualified Plaintiffs' counsel from working on this case for Plaintiffs because of her past legal work for these defendants.

**Standard for Motion for Reconsideration**

A motion to reconsider shall be granted if based upon an intervening change in controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice. LRCi 7.4. Plaintiffs allege that this Court's decision on October 27, 2005, disqualifying Plaintiffs' counsel was a clear error of law and would result in manifest injustice to them.

**Discussion**

The standard for disqualification comes from the ABA's Model Rules for Professional Responsibility. *See Isidor Paiewonsky Associates, Inc. v. Sharp Properties, Inc.*, 1990 WL 303427, \*7 (D.V.I. 1990). ABA Model Rule 1.9(a) provides that "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.”

Applying Model Rule 1.9, a court must first examine whether an attorney-client relationship arose between Attorney Rohn and the Defendants. “If such a relationship existed, the Court must then examine whether a substantial relationship exists between that representation and the present litigation.” *Bluebeard's Castle, Inc. v. Delmar Marketing, Inc.*, 886 F.Supp. 1204, 1207 (D. V.I. 1995). In this case, Plaintiffs do not dispute that there was an attorney-client relationship between Attorney Rohn and Defendants HOVIC and Amerada Hess.

The matter turns, therefore, on whether there is a “substantial relationship” between Attorney Rohn’s earlier representation and the current litigation. To determine whether there was a substantial relationship, a court examines: (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 which could be relevant and detrimental to the present action. *Bluebeard's Castle*, 886 F.Supp. at 1209 (D. V.I. 1995). The test is not about “whether counsel has actually obtained confidential information through its prior representation; the resolution of the question involves a comparison of the past and present representation to determine whether the counsel in question *might* have acquired information substantially related to the current litigation.” *Reading Anthracite Co. v. Lehigh Coal & Nav. Co., Inc.*, 771 F.Supp. 113, 115 (E.D.Pa. 1991) (internal quotations and citations omitted); *see also Bluebeard's Castle*, 886 F.Supp. at 1209 (explaining that “the substantial relationship test presumes that confidences were disclosed during the previous relationship and that such confidences would be used against the former client [and]

does not require that the moving party be able to show that confidences actually were passed or to detail their contents.” (internal quotations and citations omitted)).

A court can additionally balance various factors relating to the public interest. *See In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 162 (3d Cir. 1984) (“We recognize that in some cases there may be relevant countervailing considerations. This court has often employed a balancing test in determining the appropriateness of the disqualification of an attorney.”) Courts have balanced the moving party’s request for disqualification, its interest in the continued loyalty of counsel and other prophylactic justifications for enforcing the rule against the other party’s interest in retaining its chosen counsel, its interest in avoiding the time and expense required to familiarize a new attorney with the matter, and the policy that attorneys be free to practice without excessive restrictions. *Bluebeard’s Castle*, at 1211.

Plaintiffs challenge the Court’s October 27, 2005 Order on various specific grounds. The bulk of Plaintiffs’ Motion for Reconsideration details their objection that “the Court did not determine Attorney Rohn was privy to confidences in the course of her prior representation which will compromise the defense of this action.” Plaintiffs’ Motion for Reconsideration at page 4. Specifically, Plaintiffs assert that the Court failed to detail what confidential information Attorney Rohn may have possessed from her former client, failed to explain why Attorney Rohn had duties to her former client, erroneously placed the burden of proof on this matter on the Plaintiffs, and failed to recognize that the passage of time has diluted any advantage to Plaintiffs’ counsel. Plaintiffs also assert that this litigation is factually distinct from the work that Attorney Rohn did for HOVIC and Amerada Hess. Finally, Plaintiffs assert that the Court failed to weigh the competing interests at issue in the case.

This Court properly determined in its October 2005 Order that there is a substantial relationship between Attorney Rohn's past representation and the instant lawsuit. Regarding the first prong of the "substantial relationship" test, the nature and scope of the previous representation, the Court found that the earlier representation involved a range of duties connected to representation of the Defendants in toxic tort cases, specifically exposure to asbestos. This conclusion was well-grounded. Attorney Rohn was primary counsel defending HOVIC and Amerada Hess in cases dealing with inhalation of toxic substances.

As to the second prong, the Court found that the nature of Attorney Rohn's present representation involved primary representation in a toxic tort suit, relating to alleged silica dust exposure. This finding is undisputed by the litigants.

The third prong of the "substantial relationship" test was addressed in the Court's Order dated October 27, 2005. An attorney should not be disqualified unless "the client might have disclosed confidences during the earlier representation which could be relevant and detrimental to the present action." *Bluebeard's Castle* at 1209. However, Plaintiffs assert in their Motion for Reconsideration that the "key inquiry in making a determination on the [substantially related] test is whether the attorney was privy to confidences or secrets in the course of her prior representation which would compromise the former client's position in the present action" and that "Defendants must establish what confidences it claims were imparted to Rohn." Neither statement is accurate.

As discussed above, the substantial relationship test "*presumes* that confidences were disclosed during the previous relationship and that such confidences would be used against the former client [and] does not require that the moving party be able to show that confidences actually were passed or to detail their contents." *Bluebeard's Castle*, 886 F.Supp. at 1209 (emphasis added).

Plaintiffs argue that Defendants misstate the law when they claim that there is such a presumption. Plaintiffs' Reply at pages 2-3. Plaintiffs cite *Host Marriott Corp. v. Fast Food Operators, Inc.*, 891 F.Supp. 1002, 1007 (D. N.J. 1995) for the proposition that "[t]he substantial relationship test is not implicated, however, until the movant shows..." Plaintiffs' Reply at pages 2-3. A fuller quote from that case, however, would have clarified the state of the law: "Once the three prongs have been satisfied, the court need not inquire whether the attorney in fact received confidential information, because the receipt of such information will be presumed. The substantial relationship test is not implicated, however, until the movant shows that the attorney was in a position *where he could have received information which his former client might reasonably have assumed the attorney would withhold* from his present client." (citation and internal quotation omitted; emphasis added) *Host Marriott* at 1007. In this case, as discussed above, that Attorney Rohn was in such a position is inarguable; the dispute between the parties concerns whether there is a substantial relationship between her prior representation and this representation.

With the state of the law clarified, the third prong of the substantial relationship test can be applied. The third prong concerns the possibility that the client might have disclosed relevant and detrimental confidences. This Court found that the present litigation will call into question actions and procedures of HOVIC and Amerada Hess "at the time and predating the time Rohn acted as their counsel in toxic tort actions similar to the instant action." This conclusion was not clear error, nor does it result in manifest injustice to the Plaintiffs. Plaintiffs, in arguing that this litigation is not substantially related to the past litigation, stress that silica is a different substance than asbestos. However, Attorney Rohn's past representation and this litigation both center around inhalation of toxic substances. A substantial overlap in practices and events is likely. Attorney Rohn's work for

Bryant & Associates, for example, in preparing employees of Defendants for depositions could easily have implicated relevant confidences which would now be detrimental to Defendants' legal interests. Plaintiffs cite *Brice v. Hess Oil Virgin Islands Corp.*, 769 F.Supp. 193, 195 (D. V.I. 1990), which found that knowledge of "accident investigation procedures, record keeping systems, contractor indemnity agreements, and policies concerning worker safety is discoverable during the normal course of the litigation." That case is distinguishable from the current case because it involved a personal injury suit that arose out of an accident that took place after the attorney had ceased working for the defendants. In this case, the attorney represented the Defendants in closely related legal matters during the time period at issue in this litigation.

This Court, in its October 2005 Order, also noted that Attorney Rohn had been disqualified from serving as plaintiff's counsel in other cases filed by her against these Defendants. *See Alexander v. Hess Oil Virgin Islands Corp.*, Civ. No. 603/2000 (Terr. Ct. 2001) (disqualifying Attorney Rohn from representing plaintiffs in a suit over alleged exposure to "asbestos, sulfur, cyanide, and other dangerous and noxious fumes and substances"); *see also Paul Peter v. Hess Oil Virgin Islands Corp.*, Civ. No. 408/1994 (Terr. Ct. 1996) (disqualifying Attorney Rohn from representing plaintiffs in a suit concerning inhalation of "toxic vapors, substances, and particulates"). This Court's decision to disqualify Attorney Rohn was in line with, and relied on, earlier cases which reached the same conclusion.

To meet the third prong of the substantial relationship test, Defendants need not show by a preponderance of the evidence that Plaintiffs' attorney actually received confidences, only that she might have received such confidences. That much they have done. Plaintiffs raise a variety of other contentions that do not compel a different conclusion (Plaintiffs contend that different

manufacturers, compounds, witnesses, and protective equipment are involved, that no third party action has been filed in the current case, and that Plaintiffs are alleging a knowing and negligent failure to provide proper gear rather than failure to warn). None of these differences changes the central fact that Attorney Rohn might have received confidential information from her clients relating to inhalation of toxic substances by employees working at the refinery operated by Defendants.

Plaintiffs also note that, according to the comments to Model Rule 1.9, passage of time may be a relevant factor in determining whether there is a substantial relationship. In this case, however, Attorney Rohn represented Defendants during a period of time implicated in this lawsuit. Confidences she may have received, then, include not just general matters of company policy and practice, but specific matters and events relevant to this lawsuit. While it is conceivable that at some point in time Defendants may not prevail in disqualifying Plaintiffs' counsel, the passage of time under these facts and circumstances does not eliminate Attorney Rohn's duties to her past client in this situation.

In the balancing test that courts can invoke after applying the "substantially related" analysis, courts have balanced the moving party's request for disqualification, its interest in the continued loyalty of counsel and other prophylactic justifications for enforcing the rule against the other party's interest in retaining its chosen counsel, its interest in avoiding the time and expense required to familiarize a new attorney with the matter, and the policy that attorneys be free to practice without excessive restrictions. *Bluebeard's Castle*, at 1211. In its October 2005 opinion, this Court stressed the importance of Rule 1.9's purpose of protecting former clients from the possibility that confidential information will be used against them. This conclusion is well-grounded. This Court



finds that the interests of Plaintiffs and their attorney are insufficient to outweigh Defendants' interests in the continued loyalty of counsel, and the importance to the legal system generally of enforcing this rule.

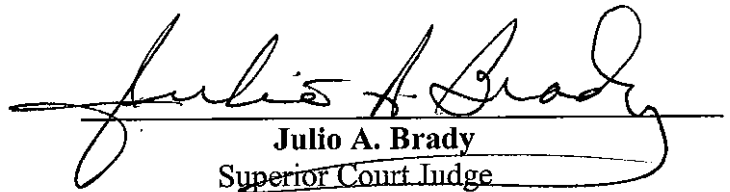
Regarding the appropriateness of disqualifying Plaintiffs' counsel as a means of enforcing Rule 1.9, Plaintiffs cite dicta from *U.S. v. Miller*, 624 F.2d 1198, 1201 (3d Cir. 1980). That court noted that "The district court should disqualify an attorney only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule." *Id.* (internal quotations omitted). The dicta cited by Plaintiffs does not relate to Model Rule 1.9. In *Miller*, the Third Circuit Court of Appeals affirmed the disqualification of a law firm to represent a defendant in a criminal tax case because one of its partners had been an assistant United States Attorney who specialized in such prosecutions. Even though the former government lawyer testified that he had no involvement with the case against the defendant, the District Court (Judge Stanley S. Brotman), relying upon an interpretation of the disciplinary rule DR 9-101(B) of the ABA's Code of Professional Responsibility by the Supreme Court of New Jersey, disqualified the entire law firm. *Id.* at 1203. In point of fact, the cases that *Miller* relied on for its assertion that "disqualification never is automatic" have no legal connection to Model Rule 1.9 nor any factual similarity to the current case. For the assertion that Plaintiffs cite, *Miller* relied on one case that dealt with whether to disqualify attorneys who were likely to be called as witnesses at trial, *International Electronics Corp. v. Flanzer*, 527 F.2d 1288, 1293-1294 (2d Cir. 1975), another case determining whether or not to disqualify a firm who had screened out conflicted attorneys, *Central Milk Producer's Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 990-991 (8th Cir. 1978), and finally an effort by the Church of Scientology of California to disqualify an attorney defending its

opponent in a slander suit on the grounds that the attorney had consulted with the Church on a zoning matter. *Church of Scientology v. McLean*, 615 F.2d 691, 691 (5th Cir. 1980). None of these cases involve the application of Model Rule 1.9, nor do they have any factual resemblance to the instant case. Model Rule 1.9 contemplates only one means of enforcement—disqualification. It provides that an attorney “*shall not* thereafter represent another person” with materially adverse interests in the same or a substantially related matter. Model Rule 1.9 (emphasis added).

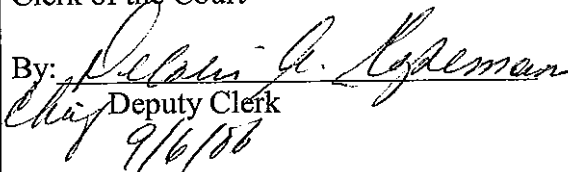
This Court’s prior determination that there is a substantial relationship between Attorney Rohn’s past representation and this litigation, and that disqualification is an appropriate means of enforcing Model Rule 1.9, was not in clear error, nor did it result in manifest injustice to Plaintiffs. Therefore, it is hereby

**ORDERED** that Plaintiffs’ Motion for Reconsideration is **DENIED**.

**Dated:** September 5, 2006

  
**Julio A. Brady**  
Superior Court Judge

ATTEST:  
**Denise D. Abramsen**  
Clerk of the Court

By:   
Deputy Clerk  
9/6/06