

SUPREME COURT OF THE STATE OF NEW YORK - NASSAU COUNTY

**PRESENT: HON. ROBERT A. ROSS,
Justice.**

FRED D. LIMPREVIL,

Plaintiff,

-against-

CLAUDE M. LIMPREVIL,

Defendant.

TRIAL/IAS PART 16

Motion Seq. No.: 01

Motion Submit Date: 5/20/09

Index No.:200242-09

DECISION & ORDER

The following papers have been read on this Notice of Motion by plaintiff:

Notice of Motion, Affidavit, Affirmation & Exhibits.....	1
Affirmation in Opposition & Exhibits.....	2
Reply Affidavit & Exhibits.....	3

This application by plaintiff is made pursuant to DR§5-105 to disqualify the firm of Gervase & Vallone as attorneys for the defendant. The plaintiff asserts that he previously consulted with the law firm retained by the defendant, to “possibly” act as his attorney for this litigation, more than one year ago. According to the plaintiff, he believes that “there is clearly a conflict of interest and the only way to resolve same would be for Gervase & Vallone, P.C. to be disqualified as my wife’s attorney.”

It is well settled that the disqualification of an attorney is a matter which rests within the sound discretion of the Court. See, *Olmoz v. Town of Fishkill*, 258 AD2d 447; *Fischer v. Deitsch*, 168 AD2d 599. A party’s entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted and the movant bears the burden on the motion. *Solow v. Grace & Co.*, 83 NY2d 303.

The plaintiff alludes to a consultation he had with the defendant’s attorney, which is acknowledged. While an issue of fact exists as to the substance of the information received from the plaintiff (cf. *Grover v. Viridi*, 130 AD2d 710; *Mondello v. Mondello*, 118 AD2d 549), the

attorney's notes of the consultation purportedly reflect that they had only a general conversation about divorce. If such description is accurate, the information is "unlikely to be significant or material in the litigation." See, *Kassis v. Teacher's Insurance & Annuity Association*, 93 NY2d 611.

The Code of Professional Responsibility provides that an attorney may not represent a client where he/she has formerly represented an adversary in a related matter and thereby acquired relevant confidential data. See, DR§5-108[A][1]. Under the presumption of "shared confidences," no attorney in the firm would be permitted to take on such representation. See, DR§5-105[D]. However, the presumption is rebuttable (see, *Cummin v. Cummin*, 264 AD2d 637). The blanket assertion that a consultation between a matrimonial attorney and a prospective client should result in a per se disqualification, is inaccurate.

In *Kassis v. Teacher's Insurance & Annuity Association*, 93 NY2d 611, the Court of Appeals implied that the presumption of "shared confidences" could be rebutted where confidential information previously acquired by a large firm, but never shared among its associates could be physically isolated, such as with the erection of a "chinese wall" (see, 93 NY2d, supra, at 617).

Moreover, as applied to the factual issues presented here, under New York's recently enacted Rules of Professional Conduct, the presumption could be rebutted if the defendant engaged in the communication to create the "conflict." Pursuant to the Joint Rules of the Appellate Divisions of the Supreme Court of the State of New York, the Rules of Professional Conduct effective April 1, 2009, at Rule 1.18(a),(b) and (e)(2), provides the following:

Rule 1.18:

Duties to Prospective Clients

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (e) A person who:
 - (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a).

The furtherance of "litigation parity" (see, *O'Shea v. O'Shea*, 93 NY2d 187) extends to prevent the more affluent spouse from "wearing down" the opposition. Such principle is not

limited to adjusting financial disparities in matrimonial cases, and clearly extends to litigation conduct as well. *DeCabrera v. Cabrera-Rosete*, 70 NY2d 879; *Wyser-Pratte v. Wyser-Pratte*, 160 AD2d 290. Given the discretion afforded to the Court in determining whether disqualification of an attorney is warranted (*Olmoz*, supra), and particularly considering the deference to be afforded a litigant to have his/her counsel of choice, especially in matrimonial cases, the Court sets this matter for a hearing to determine whether the plaintiff consulted with defendant's counsel's firm for the purpose of disqualifying that firm from representing the defendant in this matrimonial matter, and whether the information he imparted is a "protected confidence."

The parties and counsel shall appear before me on July 14, 2009 at 9:30 a.m. for this hearing.

This constitutes the decision and order of this Court.

Dated: Mineola, New York
June 25, 2009

E N T E R :

ROBERT ROSS
J.S.C.