

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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ARLANDUS HARVEY, )  
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 Plaintiff, )  
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 vs. ) No. 03-2721MLV  
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 ALLSTATE INSURANCE COMPANY, )  
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 Defendants. )

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REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION TO DISQUALIFY  
THE COCHRAN LAW FIRM FROM FURTHER REPRESENTATION  
OF THE PLAINTIFF, ARLANDUS HARVEY, BE GRANTED

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Before the court is the motion of Allstate Insurance Company ("Allstate"), filed October 12, 2004, to disqualify the Cochran Firm from further representation of the plaintiff, Arlandus Harvey ("Harvey"), under the provisions of Tenn. Sup. Ct. Rule 8, RPC 1.10 of the new Rules of Professional Conduct. This motion was referred to the United States Magistrate Judge for a report and recommendation. For the following reasons, it is recommended that the motion be granted.

BACKGROUND

On December 1, 1997, the partnership of Mills & Cooper was established in Nashville, Tennessee. The law firm was created by two former partners of a larger firm then known as Brewer, Krause, Brooks & Mills. On or about August 11, 1998, William Bryan Smith

("Smith") was hired as an associate at Mills & Cooper. Smith had previously worked for the Brewer firm as well. After Smith joined the firm, Mills & Cooper consisted of only three attorneys.

While working for Mills & Cooper, Smith represented Allstate in fifty-eight Special Investigative Unit cases. Twenty-two of these cases involved auto fraud. In his capacity as counsel for Allstate in these matters, Smith was involved in the development of defense strategy, discussions of evidence and evaluation of claims, trial preparation, and communications with investigators during litigation and during claim investigations. During this time, Smith had direct communications with Special Investigative Unit employees. Smith also worked on files investigated by Allstate's expert witness Richard Pacheco, whose methods of analysis are at issue in this case.

It is undisputed that Smith represented Allstate in the original lawsuit brought by Arlandus Harvey in Tennessee state court. Billing statements provided by Mills & Cooper show that Smith spent approximately eight hours on Harvey's case. In these eight hours, Smith appeared and argued a motion to dismiss in open court in Shelby County Circuit Court, reviewed the file for around twenty minutes, placed a call to the plaintiff's attorney regarding a scheduling order, and performed research for a motion to set aside the verdict. The Harvey case was still pending in state

court when Smith left Mills & Cooper; it has since been removed to federal court.

In June of 2000, Smith left Mills & Cooper to join the Memphis firm of Armstrong Allen. During Smith's stint with Armstrong Allen, another attorney, Parke Morris, was assigned a case representing plaintiff, Shirley Perry, against Allstate Insurance Company. Mike Neal, a partner with Armstrong Allen, was placed in charge of implementing a "Chinese Wall"<sup>1</sup> so that Smith would be prevented from sharing information he may have had regarding his prior representation of Allstate while with Mills & Cooper. Although Neal claims that he and Parke Morris maintained custody of the plaintiff's file and never discussed the case with Smith, he never informed Allstate or its attorneys, Holley, Waldrop, Nearn & Lazarvo, of Smith's possible conflict of interest.

In 2002, Parke Morris left Armstrong Allen and joined the Cochran Firm. Shortly thereafter, in 2003, Harvey retained Morris to represent him in the present lawsuit. Smith soon left Armstrong Allen and joined the Cochran Firm in February of 2004. On October

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1. A Chinese Wall is "a fictional device used as a screening procedure which permits an attorney involved in an earlier adverse role to be screened from other attorneys in the firm so as to prevent disqualification of the entire law firm simply because one member of the firm previously represented a client who is now an adversary of the client currently represented by the firm." *Black's Law Dictionary* 240 (6th ed. 1990).

7, 2004, Michael Mills, defense counsel for Allstate in the present case and a partner in the firm of Mills & Cooper, learned that Smith had joined the Cochran Firm. On October 12, 2004, Mills filed this motion to disqualify the Cochran Firm pursuant to Tenn. Sup. Ct. Rule 8, RPC 1.10.

#### ANALYSIS

Allstate contends that the Cochran Firm should be disqualified from representing Arlandus Harvey under subsection (d) of Rule 1.10, or in the alternative, under subsection (c) of Rule 1.10. First, Allstate claims that Smith was specifically and substantially involved in the Harvey lawsuit when working as a member of Mills & Cooper. (Brief in Supp. of Def.'s Mot. for Disqualification at 1.) Indeed, Smith did spend time researching issues for the case as well reviewing the Harvey file. (*Id.* at 3.) Furthermore, Smith attended a court proceeding in the Shelby County Circuit Court to argue a motion to dismiss in this matter. (*Id.*) Allstate claims that Smith has "switched sides" in this litigation by joining the Cochran Firm while this matter is still pending. (*Id.*)

It is undisputed that Smith represented Allstate in fifty-eight Special Investigative Unit cases, twenty-two of which were auto fraud cases. (*Id.* at 5.) Allstate claims that during the course of Smith's representation, he routinely advised Allstate

adjusters on legal issues during the investigation and defense of fraud claims. (*Id.*) According to Allstate, a review of Smith's billing records indicates he discussed investigations, expert witnesses, defense strategy, and trial planning with Special Investigative Unit personnel, all of which may be relevant to the pending Harvey matter. (*Id.* at 4.)

In a sworn affidavit, Kevin W. Merritt, who works as an as Special Investigative Manager for Allstate, stated that during the time that Smith worked for Mills & Cooper, Smith had access to confidential information. (Merritt Aff. ¶ 4.) Merritt contends that from 1997 through 2000, Allstate routinely provided diary notes, internal communications, and other privileged information. (*Id.*) Privileged information regarding coverage, investigation, defense theories, expert witnesses, and witness testimony were shared during this time with attorneys at Mills & Cooper, including Smith. (*Id.*) Moreover, Merritt claims that the Harvey file contained information which Allstate considered privileged, specifically diary notes and communications between Allstate and outside counsel, which Smith had direct access to. (*Id.*)

Harvey claims that the motion to disqualify should be denied because Smith was not "substantially involved" in defending the case at bar. (Pla.'s Resp. to Def.'s Mot. to Disqualify at 6.) Harvey contends that Smith did not gain any confidential knowledge

regarding Allstate's practices, policies, and procedures while working on Allstate cases at the Mills & Cooper firm. (*Id.* at 5.)

Smith avers in a sworn affidavit that his involvement in the Harvey state court case was "minimal" and that he was not involved in the investigation or denial of Harvey's claim. (Smith Aff., Pla.'s Resp. to Def.'s Mot. to Disqualify at Ex. C.) Smith also contends that he did not correspond about the case with Frank Halliburton, Rand Smith, Richard Pacheco or Gary Bobo, all of whom were involved in the denial of Harvey's claim. (*Id.*) Smith does not deny, however, that he worked on Allstate Special Investigative Unit files while working for Mills & Cooper. In fact, Smith admits that he had limited contact with Frank Halliburton, Rand Smith and Richard Pacheco, along with a few other adjusters, in regard to separate Allstate cases. (*Id.*) Finally, Smith states that he did not obtain or does not currently possess any confidential information regarding the pending case. (*Id.*) Nevertheless, Smith states that he is not sure what information concerning Allstate would be considered "confidential" in nature. (*Id.*)

If the court determines that Smith was not "substantially involved" with the representation of Allstate while working for Mills & Cooper, Allstate urges the court to disqualify the Cochran Firm on the basis of Rule 1.10(c). Allstate contends that Parke Morris, lead counsel for Harvey, knew that Smith had previously

represented Allstate but Morris did not provide written notice of the circumstances that warranted implementation of screening procedures in violation of Rule 1.10(c)(4). (Brief in Supp. of Def.'s Mot. for Disqualification at 1.) It is still unclear to Allstate what type of screening mechanism has been implemented to prevent the flow of confidential information.

The Cochran Firm claims that proper screening procedures have been used and imputed disqualification is not proper in this case. (Morris Aff., Pla.'s Resp. to Def.'s Mot. to Disqualify at Ex. A.) In particular, Parke Morris avows that 1) he and Smith share no cases or staff; 2) Smith will not share fees in this case; 3) the file remained in his custody the entire time Smith was with the Cochran Firm; 4) his office and Smith's are on opposite sides of the building and 5) they never discussed the case. (*Id.*)

Despite the fact that Morris knew that Smith's association with the Cochran Firm presented a potential conflict of interest, he admits that he did not provide written notice to Allstate about the screening procedures that were put in place after Smith joined the firm. (*Id.*) Instead, Morris argues that written notice was not necessary because he and Smith had agreed to continue the "Chinese Wall" that had been implemented while they both worked for Armstrong Allen. (*Id.*) This screening mechanism, however, was implemented for a case not involving Harvey. Moreover, Morris and

several former Allstate attorneys admitted that notice was not provided to Allstate in the other matter, either. (Id.)

The Tennessee Rules of Professional Conduct became effective March 1, 2003, and replaced the Code of Professional Conduct. The Rules govern the ethical conduct of attorneys practicing law in Tennessee. Attorneys practicing in federal court are required to abide by the Tennessee Rules of Professional Conduct. (Local Rule 83.1(e).) The new Rules apply to relationships existing on or conduct taken after March 1, 2003, and govern this case.

Tenn. Sup. Ct. Rule 8, RPC 1.10 sets forth the rule for "imputed disqualification" which comes into play when an attorney "switches sides" during the course of pending litigation. "Imputed disqualification," or vicarious disqualification, of a law firm refers to circumstances in which none of the lawyers associated with a firm are allowed to knowingly represent a client because one of them practicing alone is prohibited from doing so under the Rules of Professional Conduct. Rule 1.10 (c) states that:

*Except with respect to paragraph (d) below, if a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may nonetheless represent the person if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:*

(1) Identify that the personally disqualified lawyer is

prohibited from participating in the representation of the current client; and

(2) Determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by RPC 1.9(c); and

(3) Promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and

(4) Advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this rule and of the actions that have been taken to comply with this rule.

Rule 1.10(d) states:

(d) The procedures set forth in paragraph (c) *may not be used* to avoid imputed disqualification of the firm, if:

(1) The disqualified lawyer was substantially involved in the representation of a former client; and

(2) The lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and

(3) The proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.

In essence, Rule 1.10(d) provides a threshold inquiry that, if met, bars a law firm from relying on the provisions of Rule 1.10(c), particularly the screening mechanism, to cure the taint of a potential conflict of interest. If the three criteria of Rule 1.10(d) for disqualification are met, the entire firm of the

current client shall be disqualified. The two criteria set forth in paragraphs (2) and (3) of Rule 1.10(d) are straightforward and can easily be determined in the context of any case, but the criterion in paragraph (1) of Rule 1.10(d) which concerns whether a lawyer was "substantially involved" in the representation of the former client presents a much more difficult issue.

In *Clinard v. Blackwood*, 46 S.W.3d 177, 184 (Tenn. 2001), the Tennessee Supreme Court addressed the issue of imputed disqualification under Tenn. Sup. Ct. Rule 8, DR 5-105 of the Code of Professional Conduct which governed the ethical conduct of attorneys practicing in Tennessee prior to the adoption of the new Rules of Professional Conduct. DR 5-105 was a general rule which, as written, provided for mandatory imputed disqualification when a conflict of interest of interest was present.<sup>2</sup> However, in *Clinard*, the Supreme Court held that disqualification was not automatic and that screening procedures provided an exception to the rule which appeared to be mandatory on its face.

The ruling in *Clinard* was based on Tennessee Formal Ethics Opinion 89-F-118. Tenn. Bd. of Prof'l Resp., Formal Op. 89-F-118,

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2. Former Tenn. Sup. Ct. Rule 8, DR 5-105 stated: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with that lawyer or that lawyer's firm may accept or continue such employment."

1989 WL 534365 (1989). The ethics opinion set forth a three-step analysis known as the "substantial relationship test," which the Court in *Clinard* adopted, to determine whether an attorney's prior representation mandated vicarious disqualification.<sup>3</sup> *Id.*

In analyzing imputed disqualification, the Court in *Clinard* stated that "[a] relationship is substantial when 'the subsequent representation is adverse to the matters at issue in the previous relationship' or when 'the lawyer was so involved in the matter that the subject of representation can be justly regarded as a changing of sides in the matter in question.'" *Clinard*, 46 S.W.3d at 184 (quoting Tenn. Bd. of Prof'l Resp., Formal Op. 89-F-118, 1989 WL 534365, \*3 (1989)). Tennessee Formal Ethics Opinion further stated that "[s]ubstantiality is present if the factual contexts of the two representations are similar or related." *Id.* at \*1.

The three-step approach of *Clinard*, however, is no longer relevant in light of the recent adoption of the Tennessee Rules of Professional Conduct. Tenn. Sup. Ct. Rule 8, RPC 1.10(d) now provides an exact formula for determining imputed disqualification. Nevertheless, the prior approach does provide guidance as to the meaning of "substantially involved" in the context of new rule

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3. This approach was adopted from *Schiessle v. Stephens*, 717 F.2d 417, 420-21 (7th Cir. 1983).

1.10(d).

If it is determined that the criteria of 1.10(d) have not been satisfied, then a firm may avoid imputed disqualification under Rule 1.10(c) by properly maintaining screening mechanisms to prevent the flow of information from the disqualified attorney to the attorneys representing the current client and by providing written notice to the disqualified attorney's former client about the circumstances that warranted the implementation of screening procedures. It is often difficult to determine whether a certain screening procedure has been effective to reduce the potential for prejudicial misuse of client confidences in the context of a given case. The Supreme Court in *Clinard* provided a non-exhaustive list of factors which provide guidance as to whether a screening mechanism is effective. This list includes:

- 1) the structural organization of the law firm or office involved,
- 2) the likelihood of contact between the "infected" person and the specific attorneys and support personnel involved in the present representation,
- 3) the existence of law firm or office rules which prevent the "infected" person a) from access to relevant files or other information pertaining to the present litigation and b) from sharing in the fees derived from such litigation.

*Clinard*, 46 S.W.3d at 184. The court further stated that evidence of these factors must be "objective and verifiable." *Id.* It must

also be noted that Rule 1.10(c) requires, without exception, that the former client be notified in writing of the screening mechanism that is in place and of the actions taken to comply with the rule. If notice is not given, a firm shall be disqualified.

Disqualification under Rule 1.10(d)

The question of whether the Cochran Firm should be disqualified under Rule 1.10(d) will be considered first as it is a threshold determination for whether a firm can avoid disqualification under Rule 1.10(c). Determining what is meant by the terms "substantially involved" is no simple task given the lack of case law defining the term. In fact, the Tennessee ethical provisions did not contain this term until the recent adoption of the Rules of Professional Conduct. However, the limited amount of guidance that has been provided from prior decisions and ethical opinions of the Tennessee Supreme Court lead this court to believe that Smith was "substantially involved" with the representation of Allstate while working with Mills & Cooper. Therefore, the Cochran Firm should be disqualified from further representation of Arlandus Harvey.

The court bases its decision on several factors. Smith represented Allstate's Special Investigative Unit in more than twenty cases involving auto fraud while working with Mills & Cooper, including direct involvement in the case at bar. Smith had

communications with numerous Allstate agents during this time. These conversations included discussions about investigations, defense strategy, and trial planning. Smith also communicated with Allstate's expert witness, Richard Pacheco, who is a key expert witness in the case at bar. Finally, although Smith claims that he did not know what information was privileged, it is clear to the court that Smith had access to privileged information contained in the Harvey file as well as files of several other plaintiffs who were involved in litigation with Allstate.

Given these factors alone, the Cochran Firm's representation of Harvey is clearly adverse to Smith's representation of Allstate in the same lawsuit involving Harvey and similar lawsuits involving other plaintiffs. Moreover, the court feels that Smith's direct representation of Harvey, limited as it may have been, clearly "can be justly regarded as a changing sides in the matter in question." Thus, it is submitted that Allstate's motion to disqualify the Cochran Firm should be granted pursuant to Tenn. Sup. Ct. Rule 8, RPC 1.10(d).

Disqualification under Rule 1.10(c)

In the alternative, if Smith was not "substantially involved" in the prior representation of Allstate in the case at bar, then the Cochran Firm should still be disqualified on the basis of Tenn. Sup. Ct. Rule 8, RPC 1.10(c). The Cochran Firm did not act

reasonably to advise Smith's former client, Allstate, in writing of the circumstances that warranted the implementation of the screening procedures, nor did it provide any notice of the actions that had been taken to comply with Rule 1.10(c). While the court applauds the Cochran Firm for continuing a screening procedure that had been created at another law firm in regard to another case, Rule 1.10(c)(4) is clear. In order to overcome the appearance of impropriety and the consequences of imputed disqualification, notice of the potential conflict and the steps taken to correct it must be provided to the former client.

Here, Smith joined the Cochran Firm in February of 2004. Allstate learned of this through its own research on October 7, 2004. Despite the fact that Parke Morris knew of Smith's prior involvement in this case for over seven months, he did nothing to notify Allstate. The plaintiff's reliance on the agreement that was created between Morris and Smith while working for Armstrong Allen is not enough to satisfy the rule that is clearly stated in Rule 1.10(c)(4). Accordingly, it is recommended that Allstate's motion to disqualify the Cochran Firm from further representation of Arlandus Harvey be granted on this basis as well.

Respectfully submitted this 16th day of December, 2004.

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DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE

