

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

ROMAN PRAVAK, M.D.,)
)
 Plaintiff,)
)
 vs.) No. 2:07-2433-MLV
)
)
 THE MEYER EYE GROUP, PLC,)
 DAVID MEYER, M.D., and)
 ANA FLORES, M.D.,)
)
 Defendants.)

REPORT AND RECOMMENDATION ON DEFENDANTS' JOINT MOTION
TO DISQUALIFY PLAINTIFF'S COUNSEL
AND
ORDER DENYING PLAINTIFF'S REQUEST TO CONSIDER ADDITIONAL LEGAL
AUTHORITY

Before the court is the February 26, 2008 joint motion of the defendants, The Meyer Eye Group, PLC, David Meyer, M.D. ("Dr. Meyer"), and Ana Flores, M.D. ("Dr. Flores") (collectively "the Defendants"), to disqualify Matthew Cavitch, Esq. ("Cavitch"), from further representation of the plaintiff, Roman Pravak, M.D. ("Dr. Pravak"). The Defendants seek disqualification of Dr. Pravak's counsel pursuant to the Tennessee Rules of Professional Conduct 1.9, 1.10, and 3.7 because Cavitch allegedly has a conflict of interest and will be a necessary witness on more than one contested issue. Dr. Pravak filed a response in opposition to the motion. The Defendants then submitted an additional reply to which Dr. Pravak filed a surreply. The motion was referred to the United

States Magistrate Judge for a report and recommendation. For the reasons that follow, it is recommended that the Defendants' motion to disqualify Cavitch be granted.

Cavitch also requests that the court reconsider its decision in light of "six additional legal authorities," including § 124 of the Restatement 3d Law Governing Lawyers, which Cavitch believes that the court did not consider when it issued the order granting the Defendants' motion to disqualify Cavitch's counsel. (Doc. No. 136.) The court finds Cavitch's "six additional authorities" and arguments, with the exception of the Restatement and one case, to be duplicative of his earlier authorities and arguments and therefore insufficient to warrant reconsideration of the court's prior ruling. In reaching its earlier decision, the court considered Rule 1.10(a) and (b), *Harvey v. Allstate Ins. Co.*, 2004 WL 14913 (W.D. Tenn. 2004)(M.J. Vescovo); and *Cardona v. GMC*, 942 F. Supp. 968, 976 (D.N.J. 1996). Furthermore, Section 124 of the Restatement 3d and *Sorci v. Iowa Dist. Court*, 671 N.W.2d 482 (Iowa 2003) are not binding on this court, have not been adopted by the courts in Tennessee, and do not alter the court's decision. Thus, Cavitch's request for reconsideration in light of these "six authorities" is denied.

BACKGROUND

This case arises out of the formation and operation of The Meyer Eye Group, PLC ("MEG"), which is a medical practice. Dr.

Pravak alleges that he was a member of MEG, as well as The Eye Group-Memphis, PLC ("The Eye Group"), an entity that preceded the existence of MEG. On June 2, 2005, Dr. Pravak and the Defendants executed a letter of intent governing the operation of The Eye Group. (Defs.' Mem. Supp. 3; Pl.'s Mem. Opp'n 2, 4; Compl. ¶ 13.) Dr. Pravak claims that The Eye Group and MEG are one and the same, that The Eye Group simply underwent a name change to become MEG, that the Defendants breached certain promises to him that resulted in damages, and that MEG was operated in an unlawful manner, thus forcing him out of the practice. (Compl. ¶¶ 18, 67.) As the initial stages of this case have progressed, a dispute has arisen as to the appropriateness of Cavitch's representation of Dr. Pravak primarily because of Cavitch's former business association with Don Campbell, an attorney who formerly represented Dr. Meyer personally and various business entities associated with Dr. Meyer, such as The Eye Group, Spring Creek Ranch, and the Vitreoretinal Foundation ("VRF"). The Defendants also question Cavitch's representation of Dr. Pravak because of Cavitch's potential to be a witness in this case.

The Defendants claim that Campbell's representation of Meyer continued from 2005 through all of 2006 while both Cavitch and Campbell were partners at The Bogatin Law Firm. (Defs.' Mem. Supp. 2-3.) The Defendants assert that when Cavitch began representing Dr. Pravak in March of 2006, while still a partner at The Bogatin

Law Firm, the representation was adverse to the current and former clients of his law partner, Campbell. (*Id.* at 4.) They contend that this conduct is prohibited by Rules 1.9 and 1.10 of the Tennessee Rules of Professional Conduct ("TRPC") and, as a result, Cavitch must be disqualified. (See *id.* at 7-14.)

The Defendants also argue that Cavitch must be disqualified under TRPC Rule 3.7 because he will be a necessary witness on two separate, contested issues. They claim that Cavitch is an essential witness to the events that took place between the parties at the March 17, 2006 meeting. (*Id.* at 4.) The Defendants also assert that Cavitch will have to testify as a witness to a conversation between himself and Johnny McElhaney, a potential witness in the case. (*Id.* at 5-6.) They contend that Cavitch is using privileged information gained from the conversation with McElhaney, who claims he was seeking advice from Cavitch as a potential client, to support allegations in the complaint, and, because Cavitch disputes this, he will have to testify as a witness to the conversation. (*Id.*)

In opposition to the Defendants' arguments for the disqualification of Cavitch, Dr. Pravak argues that the TRPC do not require Cavitch's disqualification. Dr. Pravak denies that Campbell ever represented Dr. Meyer after Campbell became Cavitch's partner at The Bogatin Law Firm. (Pl.'s Mem. Opp'n 3.) Furthermore, Dr. Pravak points out that Dr. Meyer sued Campbell on

May 5, 2006, thus seemingly ending any continuing representation of Dr. Meyer by Campbell. (*Id.* at 3-4.) In addition, Dr. Pravak claims that Campbell's previous representation involving Dr. Meyer and Dr. Meyer-related entities, such as The Eye Group, Spring Creek Ranch, and VRF, did not substantially relate to anything that is currently in controversy. (*Id.* at 1-2.)

Dr. Pravak also contends that Cavitch is not a necessary witness to any issue that should prevent him from serving as Pravak's counsel under the TRPC. As to the March 17, 2006 meeting, Dr. Pravak claims that the audio tape of the March 17, 2006 meeting eliminates any need for Cavitch to testify about the meeting. (Pl.'s Sur-Reply 8.) Second, Dr. Pravak argues that McElhaney was never Cavitch's client and therefore no privileged information was exchanged. (Pl.'s Mem. Opp'n 11-12.) Dr. Pravak further asserts that even if McElhaney was Cavitch's client, McElhaney waived any possible claim of privilege because he repeated the information to several third parties. (*Id.* at 13-14.) Under these facts, Dr. Pravak argues that Cavitch is not a necessary witness so as to disqualify him under TRPC Rule 3.7.

PROPOSED FINDINGS OF FACT

When a motion for disqualification presents factual disputes, it is appropriate for the court to hold an evidentiary hearing. See *Gen. Mill Supply Co. v. SCA Servs., Inc.*, 697 F.2d 704, 710-11 (6th Cir. 1982). On July 2, 2008, the court held an evidentiary

hearing to resolve factual disputes of material concern to this motion. Specifically, the hearing was held to resolve factual issues related to (1) the nature, extent, and duration of Campbell's representation of Dr. Meyer and entities related to him and (2) the nature of and circumstances surrounding Cavitch's conversation with McElhaney. Based upon the evidence presented at the hearing, the court makes the following factual findings:

At the hearing, the Defendants called two witnesses, Dr. Meyer and Campbell's former paralegal, Ann Marie Charnes ("Charnes"). Dr. Pravak called Campbell as his only witness. These witnesses testified as to the extent of the relationships between Cavitch, Campbell, and Meyer. There was, however, no testimony presented by either side relating to the conversation between McElhaney and Cavitch, and, therefore, the court finds the issue of Cavitch's disqualification based on his potential to be a witness to the conversation with McElhaney is moot.¹

During the evidentiary hearing on July 2008, Cavitch attempted to impeach Dr. Meyer's testimony on matters collateral to the disqualification issues before the court by using the transcript of the audio tape surreptitiously recorded at a March 17, 2006 meeting attended by Dr. Meyers, Dr. Flores, Dr. Pravak, Cavitch, and Jerry Mitchell, an attorney with Thomason, Hendrix, Harvey, Johnson &

¹ The Defendants' counsel announced at the hearing that they were abandoning that ground for disqualification of Cavitch

Mitchell. For example, Cavitch tried to impeach Dr. Meyer's testimony that Mitchell was present in Dr. Meyer's office prior to the March 17, 2006 meeting and had not been summoned there specifically for the purpose of attending the meeting with Dr. Pravak. The court finds Cavitch's efforts to impeach Dr. Meyer failed and further finds Dr. Meyer's testimony to be credible in all aspects.

Cavitch was previously a partner at the Bogatin Law Firm, where he worked from 1995-2007. (Defs.' Mem. Supp. 2.) Cavitch left the Bogatin Law Firm on January 1, 2007, and went into private practice by himself.

Don Campbell was a partner with the Krivcher Magids Law Firm from 1991 to September 30, 2005. While a partner at Krivcher Magids, Campbell represented Dr. Meyer personally and various business entities associated with Dr. Meyer, such as The Eye Group, Spring Creek Ranch, and VRF. (Defs.' Mem. Supp. 2-3; Pl.'s Mem. Opp'n 1-2.) On September 7, 2004, Campbell, while at Krivcher Magids, created and filed the articles of organization for The Eye Group at the request of Dr. Meyer. (Defs.' Mem. Supp. 2-3; Pl.'s Mem. Opp'n 2.)

On October 1, 2005, The Bogatin Law Firm and Krivcher Magids merged, thus making Cavitch and Campbell law partners. (Defs.' Mem. Supp. 2-3; Pl.'s Mem. Opp'n 1.) Cavitch and Campbell remained law partners at The Bogatin Law Firm from October 2005 until

Cavitch left The Bogatin Law Firm on January 1, 2007, to start his own practice. (Defs.' Mem. Supp. 2-3; Pl.'s Mem. Opp'n 6.)

Dr. Meyer and Campbell had an extensive and long-running attorney-client relationship. This in-depth and confidential relationship began in 1999 and continued substantially until May 5, 2005. Dr. Meyer originally hired Campbell to advise him on transactions involving Spring Creek Ranch, a genetic engineering project, but the relationship progressed to include other areas of Dr. Meyer's life. Campbell advised Dr. Meyer personally on matters involving his personal finances, his family affairs, and his business transactions. Campbell handled a large amount of the work for Dr. Meyer's medical entities, including formation of The Eye Group, and he assisted in the administration of the Meyer family's annuities and investments. During this time, Campbell and Dr. Meyer spoke at least three to four times per week. Campbell often met with Dr. Meyer in his home, approximately once a week.

On May 5, 2005, Dr. Meyer informed Campbell that he no longer wished for Campbell to advise him on medical matters. Campbell did, however, continue his representation of Dr. Meyer in a complex business deal involving Spring Creek Ranch and Stanford Financial that was concluded in July of 2005 before Campbell joined The Bogatin Law Firm on October 1, 2005. When Campbell and other attorneys at Krivcher Magids met with the partners at The Bogatin Law Firm to discuss a merger of the two law firms, Campbell advised

The Bogatin Law Firm partners of his representation of Dr. Meyer and related business entities. Cavitch was not present at that meeting even though he was a partner with The Bogatin Law Firm at the time. While at The Bogatin Law Firm, Campbell continued to represent Spring Creek Ranch as late as May of 2007. Although Campbell was not representing Dr. Meyer personally after July of 2005, the Meyer family was still an interested party in transactions involving Spring Creek Ranch, as they held an ownership interest in it.

As a result of his extensive legal representation of Dr. Meyer and his related businesses, Campbell had access to and possessed highly sensitive and privileged information of Dr. Meyer's. This included all of the Meyer family's financial records, the existence and distribution of their investments, and information about the inner-workings of all Dr. Meyer's medical entities. Dr. Meyer placed a great deal of trust and confidence in Campbell due to his extensive representation of Dr. Meyer and his family. Dr. Meyer testified, as did Campbell, that given the extent of the attorney-client relationship between Dr. Meyer and Campbell, it would be both unexpected and improper for Campbell to ever represent a party adverse to Dr. Meyer.

After Campbell ceased representing Dr. Meyer personally, he retained and did not return the personal files of Dr. Meyer. The files were stored in a remote storage facility but anyone at The

Bogatin Law Firm could retrieve and access the files if they wished.

On March 17, 2006, Dr. Pravak appeared at the offices of Dr. Meyer for a meeting with Dr. Meyer and Dr. Flores to discuss Dr. Pravak's status in MEG. The meeting had been called by Dr. Pravak. Dr. Pravak was accompanied at the meeting by Cavitch, his attorney. Immediately prior to the meeting, Dr. Meyer had been meeting with Jerry Mitchell, an attorney with Thomason, Hendrix, Harvey, Johnson & Mitchell, on an unrelated matter. Because Dr. Pravak was represented by Cavitch at the meeting, Dr. Meyer requested Mitchell to stay and attend the meeting. Unbeknownst to Dr. Meyer, Mitchell, and Dr. Flores, Dr. Pravak was surreptitiously recording the meeting at the instruction of Cavitch.² The existence of the audio recording of the March 17, 2006 meeting was not made known to Dr. Meyer and the other Defendants until Dr. Pravak filed his surrepley in opposition to the present motion to disqualify Cavitch.

The second witness to testify, Charnes, was employed at different times by both Dr. Meyer and Campbell. Charnes initially began working for Campbell as his secretary and paralegal at Krivcher Magids in 1996. Charnes's first contact with Dr. Meyer

² The court makes no determination as to whether Cavitch's conduct in instructing his client to surreptitiously record the meeting with another attorney and others while he was present is unethical. *Compare* TRPC 4.4 (2003), *and* TRPC 8.4 (2003), *with* Bd. of Prof'l Responsibility of the Supreme Ct. of Tenn., Formal Op. 86-F-14(a), 1986 WL 311143 (July 18, 1986).

was in 1999 when Campbell began representing Dr. Meyer in transactions involving Spring Creek Ranch. While at Krivcher Magids, Charnes regularly spoke with Dr. Meyer and his secretary, she had access to all of his files, including his personal financial records, and she acted as the primary conduit for information between Meyer and Campbell. At the evidentiary hearing, she recognized and was familiar with Dr. Meyer's various companies and their purposes.

In June of 2005, while the merger between Krivcher Magids and The Bogatin Law Firm was being considered but before its consummation, Charnes left Krivcher Magids and went to work for Dr. Meyer at MEG. While employed by Dr. Meyer, Charnes performed various tasks, including the organization of medical records. In March of 2006, while still employed at MEG, Charnes had a conversation with Cavitch about Dr. Pravak and the Defendants, and she understood that Cavitch was preparing a case for litigation against Dr. Meyer. Charnes remained at MEG until May of 2006, at which time she left Dr. Meyer's employment

In October of 2006, Charnes returned to work for Campbell as a paralegal at The Bogatin Law Firm. While employed at The Bogatin Firm, Charnes shared information with Cavitch about Dr. Meyer that benefitted Cavitch's case against Dr. Meyer. Charnes testified that the information she provided to Cavitch about Dr. Meyer was information she learned while employed by Dr. Meyer and not

confidential information she learned from working on Dr. Meyer's cases while employed by Campbell. Charnes did not tell Campbell that she was assisting Cavitch with his lawsuit against Dr. Meyer and providing him information. During this period of time, Charnes had full access to all files at The Bogatin Law Firm, which included all of Dr. Meyer's files, and she continued to provide Cavitch with information via email after he left The Bogatin Law Firm on January 1, 2007, but while she was still employed at The Bogatin Law Firm.

The testimony was undisputed that Cavitch began representing Dr. Pravak on or before March 17, 2006, while a law partner of Campbell's at The Bogatin firm, in a matter materially adverse to Dr. Meyer, Campbell's former client. It is also undisputed that no screening procedures were implemented, no written notification was sent to Dr. Meyer concerning Cavitch's representation of Dr. Pravak, and Dr. Meyer never consented in writing to Cavitch's representation of Dr. Pravak. Furthermore, it was undisputed that when Charnes became employed by Campbell at The Bogatin Law Firm in October of 2006, no one instructed her not to discuss Dr. Meyer's business with Cavitch nor were there any screening procedures implemented at that time. Also, it is undisputed that Campbell never communicated any information to Cavitch regarding Dr. Meyer.

PROPOSED CONCLUSIONS OF LAW

A. Rules 1.9 and 1.10 and Imputed Disqualification

The first issue is whether Cavitch's association as a law

partner with Campbell at The Bogatin Law Firm should disqualify him from representing Dr. Pravak in an action adverse to Dr. Meyer, Campbell's former client. Because Dr. Meyer is *Campbell's* former client, Cavitch may only be disqualified under the imputed disqualification doctrine embodied in TRPC Rule 1.10. The rule provides that: "Except as permitted by paragraph (c), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), 1.9(b), or 2.2." Tenn. Sup. Ct. R. 8, RPC 1.10(a). As the court of appeals in *Clinard v. Blackwood* more simply stated, "if the conflict of interest rules require the disqualification of an individual lawyer, then all that lawyer's professional colleagues are likewise disqualified." *Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 WL 976582, at *8 (Tenn. Ct. App. Oct. 28, 1999) (citations omitted)(decided under prior Disciplinary Rule 5-105(d) of the Tennessee Code of Professional Responsibility), *aff'd*, 46 S.W.3d 177 (Tenn. 2001). Therefore, it must first be determined if Campbell would be prohibited from representing Dr. Pravak in an action against Dr. Meyer under the conflict of interest rules. If Campbell would be disqualified from representing Dr. Pravak against Dr. Meyer, then that disqualification would be imputed to Cavitch, Campbell's law partner, unless an exception applied.

Because Dr. Meyer is a former client of Campbell's, the rule

governing any possible disqualification of Campbell from representing a party adverse to Dr. Meyer is TRPC Rule 1.9. The rule, in parts relevant to application with Rule 1.10, provides:

(a) 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 consents in writing after consultation.

(b) Unless the former client consents in writing after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.

Tenn. Sup. Ct. R. 8, RPC 1.9(a), (b). Because Campbell actually represented Meyer in several different matters, Rule 1.9(a) is applicable, not Rule 1.9(b). There is no dispute that Campbell formerly represented Dr. Meyer, that Dr. Pravak's interests are adverse to the interests of Dr. Meyer, and that Dr. Meyer has provided no consent in writing authorizing Campbell, or Cavitch for that matter, to represent Dr. Pravak against him. Accordingly, the critical issue is whether Campbell's prior representation of Dr. Meyer involved a matter that is "the same" or "substantially related" to the issues in the current litigation.

The comments to Rule 1.9 give guidance in determining whether two matters are substantially related:

The current matter is substantially related to the former matter if the current matter involves the work the lawyer

performed for the former client or there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

Tenn. Sup. Ct. R. 8, RPC 1.9 cmt. 3. Campbell's previous representation of Dr. Meyer involved extensive knowledge about Dr. Meyer's private financial information and the structure and operations of his various businesses, including his medical entities. From 1999 to 2005, Dr. Meyer relied heavily on Campbell as a general counsel and advisor. Campbell's representation of Dr. Meyer was extensive and pervasive. Were Campbell to represent Dr. Pravak in a lawsuit against Dr. Meyer, there is a substantial risk some of the information Campbell acquired while previously representing Dr. Meyer would be used to aid in the representation of Dr. Pravak. This information may include how Dr. Meyer structures and runs his businesses and the types of financial resources he has available. Indeed, both Dr. Meyer and Campbell indicated that they believed it would be inappropriate for Campbell to represent a client adverse to Dr. Meyer based on their previous attorney-client relationship and the type of information exchanged.³ This is exactly the type of situation that Rule 1.9(a) seeks to

³ While Dr. Meyer and Campbell's opinions are not determining factors as to the applicability of Rule 1.9, the court notes that their opinions support the conclusion that there is a "substantial risk" that representation of Dr. Pravak would involve the use of information acquired from the representation of Dr. Meyer.

guard against.

In addition, Campbell formed and organized The Eye Group for Dr. Meyer. Dr. Meyer has testified that he had extensive discussion with Campbell on many issues relating to the creation and operation of The Eye Group, including the form of the business entity, the purpose of The Eye Group, how it would be managed, ownership structure, and operational documents. Campbell confirmed in his testimony that he discussed with Dr. Meyer the form of The Eye Group and how it would be operated. Dr. Pravak has alleged in his complaint that he signed a letter agreement which provided he would be a member of The Eye Group,⁴ that MEG is the same entity as The Eye Group with only a name change, and that MEG has successor liability for the obligations of The Eye Group. (Compl. ¶¶ 13, 18, 67.) Accordingly, this court finds that the current litigation is substantially related to work performed by Campbell for Dr. Meyer, that there is a substantial risk that representation of Dr. Pravak by Campbell would involve information Campbell acquired in the course of representing Dr. Meyer, and it would therefore be inappropriate under Rule 1.9(a) for Campbell to represent Dr. Pravak in an action against Dr. Meyer.

With Campbell personally disqualified under Rule 1.9(a) from representing Dr. Pravak in the present litigation, Cavitch, as Campbell's partner at The Bogatin Law Firm, would be prohibited by

⁴ The letter agreement was not prepared by Campbell.

Rule 1.10(a) from knowingly undertaking representation of Dr. Pravak, except as permitted by subsection (c) of the rule. Subsection (c) of Rule 1.10 allows for other lawyers associated with a lawyer who is personally disqualified from representing a particular client to nevertheless represent that client if certain precautionary measures are taken. See Tenn. Sup. Ct. R. 8, RPC 1.10(c). Chief among these measures are the prompt implementation of screening procedures to prevent the flow of information from the personally disqualified lawyer to the other lawyers in the firm and notification of the former client in writing of the screening mechanisms implemented and the reason for them. *Id.* RPC 1.10(c)(3),(4). In this case, it is undisputed that no screening procedures were used and that Dr. Meyer was never notified in writing about the possible conflict. Indeed, Campbell's paralegal, Charnes, who had access to Dr. Meyer's files and personal information, actually communicated information to Cavitch while employed at The Bogatin Law Firm to assist Dr. Pravak in his lawsuit against Dr. Meyer. Even though Charnes testified she did not communicate confidential information acquired through Campbell's representation of Dr. Meyer, the court questions whether she could actually compartmentalize all the information she had acquired about Dr. Meyer. See Bd. of Prof'l Responsibility of the Supreme Ct. of Tenn., Formal Op. 03-F-147, 2003 WL 21540653 (June 13, 2003)(imputed disqualification extends to non-lawyer staff). Because Campbell and

Cavitch were partners at The Bogatin Law Firm when Cavitch began to represent Dr. Pravak adverse to Dr. Meyer and no screening procedures were implemented, Rule 1.10(a) requires imputation of Campbell's disqualification to Cavitch.

Dr. Pravak makes the additional argument that Cavitch cannot now be disqualified under Rule 1.10 because he has since left The Bogatin Law Firm and is no longer a partner with Campbell. Essentially, Dr. Pravak argues that Cavitch "cured" any conflict of interest problem by leaving The Bogatin Law Firm. Dr. Pravak asserts that Rule 1.10's use of the language "while lawyers are associated in a firm" prevents subsequent disqualification of a lawyer who undertakes representation in violation of Rule 1.10(a) if the lawyer later leaves the firm and disassociates with the conflicted lawyer. This argument is without merit. Dr. Pravak has failed to provide any authority for this proposition, nor has the court discovered any on its own, and application of it would lead to results completely at odds with the purpose of the TRPC.

For example, if a lawyer was allowed to "cure" an imputed disqualification by simply leaving his current firm, that lawyer would be able to undertake representation of a client adverse to a partner's former client, appropriate confidential information about the former client to aid his current client, and use that information to the detriment of the former client by simply leaving his current firm and opening an office across the street. This is

not the type of conduct considered acceptable under the TRPC. Rule 1.10(a) should be applied to the facts as they existed at the time representation commenced. This rationale is supported by Rule 1.16, which provides: "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if: (1) the representation will result in a violation of the Rules of Professional Conduct or other law" Tenn. Sup. Ct. R. 8, RPC 1.16(a). The comments further state that "[a] lawyer should not accept representation in a matter unless it can be performed . . . without improper conflict of interest." *Id.* RPC 1.16 cmt. 1.

Here, Cavitch undertook Dr. Pravak's representation in violation of Rule 1.10(a). He should have either declined the representation or withdrawn once he learned that Dr. Meyer was Campbell's former client. Rule 1.16's use of the word "shall" makes Cavitch's withdrawal mandatory. Tenn. Sup. Ct. R. 8, Scope ¶ 1 ("Some of the rules are imperatives, cast in the terms 'shall' or 'shall not.'"). The TRPC do not provide any way to "cure" violations of Rule 1.10(a). Accordingly, Cavitch's departure from The Bogatin Law Firm after he began to represent Dr. Pravak against Dr. Meyer is not enough to save him from disqualification because he should have declined the representation in the first place or subsequently withdrawn.

B. Rule 3.7 and Necessary Witnesses

Because this court has determined that Cavitch must be disqualified due to his past relationship with Campbell and the resulting imputed disqualification, it need not reach the issue of whether Cavitch would be a necessary witness in any proceedings in this case.

RECOMMENDATION

It is recommended that Cavitch be disqualified from further representation of Dr. Pravak in this case because Cavitch undertook representation in violation of Rule 1.10(a),

Respectfully submitted this 4th day of September, 2008.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS FROM THE DATE OF THE REPORT. FAILURE TO FILE THEM WITHIN TEN(10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

ANY PARTY OBJECTING TO THIS REPORT MUST MAKE ARRANGEMENTS FOR A TRANSCRIPT OF THE HEARING TO BE PREPARED.