IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 101

WCC No. 9407-7090

BOBI JO CARY

Petitioner

vs

LUMBERMENS MUTUAL CASUALTY, COMPANY/KEMPER INSURANCE COMPANY and INTERMOUNTAIN CLAIMS OF MONTANA, INCORPORATED

Respondent/Insurer for

BUTTREY FOOD AND DRUG

Employer.

ORDER ON MOTION TO DISQUALIFY COUNSEL

The matter under consideration is the respondent's Motion to Disqualify Opposing Counsel. The moving parties, Buttrey Food and Drug (Buttrey) and its insurer, Lumbermens Mutual Casualty Company (Lumbermens), request the Court to order the disqualification of petitioner's attorney, Mr. J. David Slovak (Slovak), because of his past representation of both Buttrey and Lumbermens. The matter has been fully briefed. The parties were offered an opportunity for a hearing but agreed that a hearing is unnecessary.

Factual Background

Movants, as well as Slovak, have presented affidavits and information which show that Slovak personally defended three workers' compensation cases on behalf of Buttrey during his association with the law firm of Ugrin, Alexander, Zadick and Slovak. Slovak's former law firm also represented the moving parties in ten other workers' compensation and personal injury matters. In early January 1994, Slovak associated with Tom L. Lewis, P.C. Since then he has represented several claimant's in workers' compensation litigation.

In this case Slovak represents Bobi Jo Cary (Cary). According to the petition, Cary injured her back on July 17, 1992, while working at Buttrey. Her claim for compensation was accepted and the insurer thereafter paid temporary total disability benefits. However, the petition alleges that the insurer improperly terminated those benefits and that it has refused to pay for certain medical treatment. The petition also alleges that the insurer acted unreasonably and asks that a penalty be awarded.

Buttrey and Lumbermens have presented no information indicating that Slovak ever represented either of them with regard to the Cary claim, or that they ever consulted with him or provided him with information concerning the claim. They have also failed to show that any of the facts at issue in this case were at issue in any other cases handled by Slovak or his old law firm. As to the penalty issue, Slovak provides the following assurance:

At the pretrial conference, the Court requested that the basis for the penalty request in this case be provided in the Petitioner's Response with specificity. The basis is the Respondents' election to terminate certain compensation and medical benefits premised on their construction of § 39-71-407(5), MCA (1991). The Respondents contend that Petitioner sustained a non-work-related injury in January, 1994, and that as a result of that alleged occurrence, liability for continuing total disability/total rehabilitation benefits and medical benefits has been terminated. See, Respondents' Response to Petition, p.1, ¶ 2 and Scott S. Fitzpatrick's deposition, p.57 (Exhibit B). The facts of this claim are unique to themselves and give rise to the dispositive issue of Petitioner's entitlement to continuing compensation and medical benefits, and the collateral issue of a penalty as a result of the Respondents' application of § 39-71-407(5), MCA (1991) and ultimate election to terminate and deny benefits. The Court's resolution of the penalty issue will necessarily hinge on the evidence, both factual and medical, unique to this specific claim alone. That is, did Petitioner Cary suffer a non-work-related injury that terminates the Respondents' liability, and is the Respondents' decision to terminate liability reasonable? The penalty issue is straightforward and does not rest on issues of past business practices or established "claim philosophy." The issue is fact specific to this claim.

(Petitioner's Response in Opposition of Motion to Disqualify at 4, emphasis added.)

Discussion

This matter involves an application of Rule 1.9 of the Montana Rules of Professional Conduct. Rule 1.9 provides:

CONFLICT OF INTEREST: FORMER CLIENT

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 interests are materially adverse to the interests of the former client unless the former client consents after 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 has become generally known. [Emphasis added.]

In their opening brief, Buttrey and Lumbermens failed to cite Montana decisions in ***Oar Lock Land & Cattle v. Crowley,*** *253 Mont. 336, 833 P.2d 146 (1992);* ***Butler Brothers Development Co. v. Butler,*** *111 Mont. 326, 351, 108 P.2d 1041 (1941), over ruled in part on other grounds, 213 Mont. 6, 13, 689 P.2d 268, 272 (1984);* and ***State v.***

Lemmon, *214 Mont. 121, 692 P.2d 455 (1984),* an omission for which they are taken to task by Slovak. After reviewing all three cases, I find that these cases provide little guidance for the issue at hand.

Lemmon involved the prior Canons of Ethics. At issue was the permissibility of a county attorney criminally prosecuting a defendant for assault where the deputy county attorney had previously represented the ex-wife of the defendant in their divorce action and the ex-wife was the victim of the alleged assault. The Supreme Court held that a disciplinary rule concerning prosecutors applied rather than the rule concerning conflicts in representation. The case has no application to the present situation.

Butler was decided 44 years prior to the adoption of the current rule. The attorney whose disqualification was requested in that case had previously worked as an accountant, not as an attorney, for the moving party. The Supreme Court specifically found no indication that any information the attorney had gained while working as an accountant had been prejudicially used against the moving party. In the course of the decision the Supreme Court made the following general statement regarding the representation of a party adverse to a former client:

The general rule is that an attorney cannot be an attorney for both adverse parties. Nor does it affect the situation that there has been a termination of the relationship as to one adverse party. The obvious reason for the latter is that an attorney cannot use the information gained in confidence against the person confiding in him. However, this rule does not bar the attorney, when the relationship has terminated, from representing a client adverse to his former client if the matter in controversy is different or even though the controversy arises out of facts with which the attorney might have been familiar. Before appellant can complain of the participation of Stotesbury in the trial, he must show that the disclosures made in the former employment were used prejudicially against appellant.

Id. *at 351 (citations omitted).*

The quoted material from ***Butler*** was repeated in ***Oar Lock,*** which was decided in 1992, seven years after adoption of the current Rule 1.9. ***Oar Lock,*** however, was a malpractice action. The plaintiffs alleged that various members of the Crowley Law Firm (Crowley) had represented them and that Crowley committed malpractice by representing Connecticut Mutual Life Insurance Corporation(CML) in a foreclosure action against them. The Court affirmed the district court's dismissal of the claim because no attorney-client relationship existed between Crowley and plaintiffs at the time of the foreclosure. In the course of reaching this conclusion the Court quoted the passage from ***Butler*** set forth above, concluding that "Crowley was not barred from representing CML in the foreclosure proceeding above, and did not commit malpractice in doing so." The Court did not discuss Rule 1.9 or elaborate on its statement that Crowley could represent CML. However, since the decision was based on plaintiffs' failure to prove the existence of an attorney-client relationship at the time of the foreclosure, the citation to ***Butler*** was probably intended to support the general proposition that an attorney is not forever barred from representing another party in a lawsuit against a former client. It is unlikely that the Court intended its citation to ***Butler*** as a specific guideline for applying Rule 1.9.

Slovak argues that Buttrey and Lumbermens must prove "confidential disclosures and prejudice resulting therefrom," citing ***Butler.*** Subsection (b) of Rule 1.9 specifically prohibits the use of confidential information against a former client. However, subsection (a) is not limited to situations involving actual misuse of confidential disclosures. On its face it precludes a lawyer from representing another person in an action against a former client "in the same or a substantially related matter." Thus, the focus under subsection (a) is not whether Slovak has in fact acquired confidential information which may be prejudicial to movants in this action but on whether Cary's case is either a matter in which Slovak or his former firm formerly represented Buttrey or Lumbermens or is "substantially related" to some other matter in which they represented Buttrey or Lumbermens. Since there is no evidence that Slovak or his former firm ever represented Buttrey or Lumbermens with respect to the Cary claim, the question the Court must answer is whether the Cary matter is "substantially related" to other cases in which Slovak and his former firm represented the movants.

Buttrey and Lumbermens argue that the Cary case is substantially related to other workers' compensation matters Slovak and his former firm handled on their behalf. However, they make no attempt to show how the Cary case is related to any specific matter. Their position is apparently premised on their belief that Slovak's handling of any workers' compensation claim on their behalf is sufficient to disqualify him. The Court disagrees. By analogy, Buttrey and Lumbermens would have this Court declare that if an attorney defends them with regard to an automobile accident involving one of their employees, the attorney can never represent a third person in a lawsuit against them arising out of a unrelated accident occurring at a different time and place.

The cases cited by Buttrey and Lumbermens from other jurisdictions do not support their position in this case. ***In re American Airlines, Inc.,*** *972 F.2d 605 (5th Cir. 1992),* was a complex antitrust case. American asked the Court to disqualify former counsel, Vinson & Elkins (VE), from representing Northwest Airlines in a lawsuit charging American with monopolization. VE had previously represented American in other antitrust litigation. The Court of Appeals ordered disqualification after carefully examining two cases in which VE had represented American. It determined that the new case would involve proof of some of the particular anticompetitive practices at issue in the prior litigation in which VE had represented American. Specifically, the Court of Appeals determined that:

[b]oth System One [one of the prior cases] and the present case involve American's travel agency commission "practices and procedures." Given that the two cases sharing this "subject matter" allege similar antitrust violations, we find VE's representation of American in System One substantially related to its present representation of Northwest.

972 F.2d 605 (5th Cir. 1992). The Court found similar factual overlaps in comparing the second case with the Northwest case. Thus, it is apparent from the Fifth Circuit's own analysis that VE's representation of American in prior antitrust cases was not by itself sufficient to disqualify VE; that the similarity in the causes of action (monopolization) was not by itself disqualifying; and that the factual overlap among the cases was the deciding factor.

Gray v. Commercial Union Ins. Co., *468 A.2d 721 (N.J.Super Ct. App. Div. 1983),* is similarly distinguishable. In that case the basis for disqualification was confidential information concerning company internal policies which was acquired by the attorney, Robert F. Colquhoun, during his 20 year representation of the company. The Court found that the information could be used against the company in a wrongful discharge action by Gray, who was one of the company's former regional claims manager. In its discussion, the Court said:

It may not be seriously disputed that as a result of his 20 years as one of Commercial Union's lawyers, Colquhoun has obtained confidential information and possesses knowledge of certain internal policies of Commercial Union that he will be able to use against it in the Gray litigation. According to Gray's complaint, (1) Commercial Union's management opposed certain changes he made in the operation of the New Jersey claims department and retaliated by forcing him out of his job and (2) Commercial Union determined to drive out all pre-merger personnel "by making policies of personnel reduction [and] unwarranted increases in casualty reserves." Both of these charges rest upon factual allegations regarding the operation of Commercial Union's New Jersey claims department. It is exactly these facts to which Colquhoun was privy during his 20 years of defending claims for Commercial Union.

468 A.2d at 725 (emphasis added). Internal policies and practices of Buttrey and Lumbermens are not at issue in this case. Slovak has given his assurance on this point, and he will be held to that assurance.

In the case of ***In re Corrugated Container Antitrust Litigation,*** *659 F.2d 1341 (5th Cir. 1981),* one of Kraft, Inc.'s long-time outside antitrust counsel was disqualified from representing an adverse party in an antitrust case because counsel had advised Kraft about purchasing practices which were the subject of the litigation.

While different in some respects, Rule 1.9 of the ABAModel Rules of Professional Conduct uses the language "same or a substantially related matter".[(1)] Comment [2] to the rule states in relevant part:

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. . . .

The comment is apropos to the present controversy. As it indicates, an attorney is not disqualified from representing third parties against a former client merely because of the attorney's prior representation extended to matters of the same "type."

Buttrey and Lumbermens have failed to establish a basis for disqualifying Slovak in this case. Their Motion to Disqualify Opposing Counsel is **denied.**

Dated in Helena, Montana, this 7th day of November, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. J. David Slovak
Mr. Thomas A. Marra

1. Rule 1.9 of the Model Rules provides:

CONFLICT OF INTEREST: FORMER CLIENT

(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 after consultation.

(b) 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

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.