

*In re Estate of Rudimch*, 11 ROP 243 (Tr. Div. 2004)

**In the Matter of the Estate of  
ISIDORO RUDIMCH,  
Decedent.**

CIVIL ACTION NO. 00-10

Supreme Court, Trial Division  
Republic of Palau

Decided: February 2, 2004

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ARTHUR NGIRAKLSONG, Chief Justice:

The Administrators of the Estate of Isidoro Rudimch (“Administrators”) seek to disqualify Douglas F. Cushnie from representing claimant Miriam R. Chin due to an alleged conflict of interest. Specifically, the Court must determine whether Cushnie has a conflict of interest by virtue of his former representation of Rudimch in a 1976 contract dispute. ABA Model Rule of Professional Conduct 1.9 defines the scope of an attorney’s obligation to refrain from representing a person with interests that are materially adverse to the interests of a former client. Rule 1.9 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 after disclosure.

.....

(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.

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Because it is undisputed that Cushnie formerly represented Rudimch, the Court shall address the issue of whether this former representation compels Cushnie’s disqualification as Chin’s counsel.

A qualified fiduciary duty survives the termination of an attorney-client relationship. 1 G. Hazard & W. Hodes, *The Law of Lawyering* § 1.9:104, at 292 (2d ed. 1990). Furthermore, the death of a client does not discharge an attorney’s duty of loyalty. *In re Williams*, 309 N.E.2d 579 (Ill. 1974). Under Rule 1.9 an attorney’s subsequent representation of a person with interests

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adverse to a former client is prohibited only if the matters involved in the two representations are the same or substantially related. See generally *La Salle Nat'l Bank v. County of Lake*, 703 F.2d 252, 255 (7th Cir. 1983); *Herbes v. Graham*, 536 N.E.2d 164 (Ill. App. Ct. 1989). The party seeking disqualification bears the burden of establishing that the present and former representations are substantially related. *Hannan v. Watt*, 497 N.E.2d 1307 (Ill. App. Ct. 1986). If a substantial relationship between the two matters is not shown, then no breach of the duty of confidentiality will be found. *President Lincoln Hotel Venture v. Bank One*, 649 N.E.2d 432 (Ill. App. Ct. 1994). Attorney disqualification is a drastic measure because it destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing. *SK Handtool Corp. v. Dresser Indus., Inc.*, 619 N.E.2d 1282 (Ill. App. Ct. 1993). Thus, caution must be exercised to guard against motions to disqualify being used as tools for harassment. See *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1983); *Int'l Ins. Co. v. City of Chicago Heights*, 643 N.E.2d 1305 (Ill. App. Ct. 1994).

The ABA comment to Model Rule 1.9 advocates a fact-based evaluation of the two representations to determine whether duties to a former client would be compromised by a subsequent representation. Annotated Model Rules of Professional Conduct R. 1.9 at 165 (2d ed. 1992). Accordingly, the Court adheres to the ABA's recommendation that an attorney should not be disqualified from representing a client whose interests are adverse to a former client solely on the bases that the subsequent representation may create the appearance of impropriety. Such a standard is "simply too weak and too slender a reed" upon which to order disqualification. *Index Futures Group, Inc. v. Street*, 516 N.E.2d 890 (Ill. App. Ct. 1987). In deciding whether a substantial relationship exists between two representations, a careful examination of the factual context of the subject matters of both representations is necessary in order to determine whether disqualification is required. See *Hannan*, 497 N.E.2d at 1313.

The three-part inquiry set forth in *La Salle* provides the most practical framework for conducting a realistic comparison of the subject matters. Under the *La Salle* inquiry, a court must first make a factual reconstruction of the scope of the former representation. Then, it must determine whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, the court must consider whether the information is relevant to the issues raised in the litigation pending against the former client. *La Salle*, 703 F.2d at 256.

The subject matter of the 1976 litigation has no substantial relationship relevant to the instant action. Rudimch's 1976 assertion that he was a sole proprietor of Koror Wholesalers was ancillary to the **1246** contract dispute forming the basis of that litigation. Nothing in the record suggests that Cushnie had an obligation to ascertain the extent of Rudimch's property interests during the 1976 representation. Contrary to the Administrators' contention, Cushnie's appearance in connection with the 1976 contract dispute does not invite an inference that Cushnie necessarily obtained confidential information about Rudimch's properties which would be relevant to the present litigation. Moreover, the record in the case at bar is devoid of evidence that Cushnie represented Rudimch in any significant matter in nearly 28 years. Such a lengthy span of time counsels against finding a conflict of interest. See *English v. Local Union #46*, 654 F.2d 473 (7th Cir. 1981) (finding that an attorney is not disqualified from representing a

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defendant where the attorney's representation ended four years before the matters in the present controversy had arisen); *Knights of Columbus Fed. Credit Union v. Salisbury*, 486 A.2d 649 (Conn. Ct. App. 1985) (four years); *First Nat'l Bank v. St. Charles Nat'l Bank*, 504 N.E.2d 1257 (Ill. App. Ct. 1987) (five years); *Lemelson v. Synergistics Research Corp.*, 504 F. Supp. 1164 (S.D.N.Y. 1981) (ten years). Finally, the mere fact that Rudimch may have informed Cushnie that he was the sole proprietor of Koror Wholesalers does not in and of itself constitute confidential information because that assertion became public during the course of the 1976 litigation. See ABA Model R. Prof. Conduct 1.9(c)(1); see also *People v. Brown*, 657 N.E.2d 642 (Ill. App. Ct. 1995) (finding that confidentiality is wanting where the client intends for matters communicated to an attorney to be made public).

For the aforementioned reasons, the Administrators have failed to meet their burden of showing a substantial relationship between the matters involved in the two representations for purposes of Rule 1.9. The evidence contained in the record only establishes that the scope of Cushnie's former representation of Rudimch was limited to a 1976 contract dispute that did not entail the disclosure of confidential information relevant to the present litigation. A comparison of the subject matters of the two representations coupled with the considerable passage of time between them does not support a finding that the matters are substantially related. As such, the Administrators' Motion to Disqualify Attorney is hereby DENIED.