

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LITIGATION MANAGEMENT, INC.)	CASE NO. CV 08 655349
)	
Plaintiff)	JUDGE JOHN P. O'DONNELL
)	
-vs-)	<u>JUDGMENT ENTRY</u>
)	<u>AND ORDER RE:</u>
JEAN C. BOURGEOIS, et al.)	<u>PLAINTIFF'S MOTION TO</u>
)	<u>DISQUALIFY DEFENSE</u>
Defendants)	<u>COUNSEL</u>

John P. O'Donnell, J.:

On March 31, 2008, plaintiff Litigation Management, Inc., filed a verified complaint. The complaint alleges that defendant Excelas, LLC is a competitor of the plaintiff in the medical litigation support industry. The individual defendants were employed by the plaintiff and now work for Excelas.

The complaint asserts causes of action for: breach of non-compete, non-solicitation and confidentiality agreements; intentional interference with contractual relationships; actual and threatened misappropriation of trade secrets; and unjust enrichment. A motion for temporary restraining order was also filed with the complaint.

On April 3, 2008, Mary Jo Paulett-Toumert and the law firm of Cowden & Humphrey Co., LPA, filed a notice of appearance as counsel on behalf of defendants Excelas and Jean C. Bourgeois. On April 10, Robert C. Petrulis and the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., filed a notice of appearance as counsel for defendants Linda R. Shifman, Jane D. Brunn, Mary Lou Fisher and Carol A. Maxwell. On April 18, Mr. Petrulis and his firm filed

their appearance as counsel on behalf on defendants Cheryl U. Streicher, Phyllis McNicholas, Roberta Bandel Walcer and Ruth Golladay.

On April 14, 2008, the plaintiff filed a motion to disqualify the Ogletree firm and its lawyers from representing any defendants. The defendants¹ opposed the motion by way of a brief in opposition filed on April 23 and the court held a hearing on that same date.

The basis of the motion to disqualify is that the Ogletree firm employs as an associate lawyer Kristin Ali Somich. Ms. Somich was previously employed at the law firm of Baker & Hostetler, L.L.P. At Baker she represented Litigation Management, Inc. by providing an analysis of possible causes of action that LMI may have had, as of March, 2006, against defendant Excelas and Jean C. Bourgeois.

Evidence at the hearing included plaintiff's Exhibit 1, an excerpt of a bill from Baker & Hostetler to Litigation Management, Inc. describing 14.6 hours of work charged to Litigation Management by Ms. Somich from March 3 through March 6, 2006.

Evidence also included the testimony of attorney Michelle Pierce Stronczer. She testified that she was the partner at Baker & Hostetler who asked Ms. Somich to perform legal research regarding causes of action that LMI might have against Excelas or Jean Bourgeois, considering that Jean Bourgeois left LMI in May, 2003 with a severance agreement that incorporated non-compete and non-disclosure provisions, and then started a competing business. Ms. Stronczer further testified that a legal strategy was recommended to LMI based upon Ms. Somich's research and analysis. This strategy was shared with Ms. Somich. Of four lawyers from Baker & Hostetler who charged time to LMI on this matter, Ms. Somich spent the most billed hours. Finally, Ms. Stronczer testified that the claims asserted by LMI as the plaintiff in this lawsuit are the same claims that Ms. Somich researched and analyzed in March, 2006.

¹ Not including Excelas, L.L.C., Jean C. Bourgeois, and Diane Zisis. Since then, the Ogletree firm has appeared on behalf of defendant Zisis.

Ms. Stronczer testified that she is no longer associated with Baker & Hostetler and that LMI still uses that firm for legal counsel on some matters, but that LMI specifically retained her for this matter.

Ms. Somich testified at the hearing that she has been a lawyer since November, 2005. She has been associated with the Ogletree firm since February, 2007. She admits, based upon a review of plaintiff's Exhibit 1, that she did 14.6 hours of general legal research for LMI, but she denies that she can recall the specifics of her research or any of the other details of this project, including what advice LMI was ultimately given.

Ohio Rule of Professional Conduct 1.9 provides, in pertinent part, as follows:

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) Unless the former client gives informed consent, confirmed in writing, 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.

Although she was not the primary counsel, there is no doubt that Ms. Somich represented LMI by conducting research into its possible causes of action against Excelas and Jean Bourgeois. The evidence is also clear that if the pending case does not exactly qualify as the "same" matter – because litigation wasn't yet pending - it is most certainly a "substantially related" matter and the defendants' interests here are materially adverse to the interests of LMI, Ms. Somich's former client. As a result, Ms. Somich, in the absence of informed consent by LMI, is disqualified from representing any of the defendants in this lawsuit.

Ohio Rule of Professional Conduct 1.10 pertains to imputation of a lawyer's conflict of interest to that lawyer's firm. The rule provides, in pertinent part, as follows:

**RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST:
GENERAL RULE**

* * *

(c) When a lawyer has had substantial responsibility in a matter for a former client and becomes associated with a new firm, no lawyer in the new firm shall knowingly represent, in the same matter, a person whose interests are materially adverse to the interests of the former client.

As noted above, the court finds the current litigation to be the same matter that Ms. Somich researched, prior to litigation, while representing LMI. Therefore, the only question to be resolved is whether she had “substantial responsibility” in the matter. In that regard, the court notes that for this particular project Ms. Somich billed more time than any other Baker & Hostetler lawyer. That work may not have qualified her as LMI’s primary counsel at Baker & Hostetler, but it surely qualified her as having had “substantial responsibility” for this “matter,” *i.e.* possible litigation against Excelas and others associated with Excelas.

The court agrees with the defendants that disqualification is a drastic measure that should be undertaken only when absolutely necessary. The court is loath to require the affected defendants to locate and compensate new counsel. Moreover, the court agrees that the mere fact of Ms. Somich’s association with the Ogletree firm is highly unlikely to result in the use, or misuse, of information exchanged confidentially between LMI and Ms. Somich or other lawyers at Baker & Hostetler. However, the facts of Ms. Somich’s previous representation, the mandatory nature of the language in Rules 1.9 and 1.10, and the need to maintain public confidence in the bar and our adversary system of justice lead the court to conclude that disqualification under these circumstances is necessary, if regrettable.

Therefore, the plaintiff’s motion to disqualify defense counsel is granted.

The court recognizes that this is a final appealable order pursuant to Ohio Revised Code Section 2505.02. (See, e.g., *State, ex rel Corn v. Russo* (1999), 133 Ohio App.3d 57, at 64.) In

the event that this order is appealed it would be inconsistent with the appellate court's jurisdiction for this court to consider and rule upon the motion for a preliminary injunction. In the event no appeal is filed, fairness requires that the defendants be given a chance to retain new counsel and that the new counsel has an opportunity to learn the case. For those reasons, a pre-trial conference is hereby scheduled as follows: July 23, 2008 at 11:30 a.m. In the event no appeal has been filed, a hearing on the motion for preliminary injunction will be held soon thereafter.

IT IS SO ORDERED:

Date: June 19, 2008

JOHN P. O'DONNELL, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Judgment Entry and Order was sent by regular U.S. Mail this _____ day of June, 2008, to the following:

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and

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