

STATE OF MAINE  
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT  
Location: Portland  
Docket No.: BCD-CV-13-48

CLAIRE DEAN PERRY, )  
 )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 WILLIAM T. DEAN, JR., )  
 DEPARTMENT OF HEALTH AND )  
 HUMAN SERVICES, as Conservator and )  
 Guardian of William T. Dean, Jr., )  
 KEYBANK, N.A. as successor to KEY )  
 TRUST COMPANY OF MAINE and )  
 Trustee of the ALICE DEAN )  
 REVOCABLE TRUST, JANICE )  
 ARCHER, DAVID VAUGHAN, DAVID )  
 G. THISTLE, and BARBARA A. )  
 CARDONE, )  
 )  
 Defendants )  
 )

**ORDER ON PENDING MOTIONS**

The court held oral argument on March 5, 2014, on three pending issues: 1) Defendant William T. Dean, Jr.'s motion to hold an evidentiary hearing on the motion of Defendant Department of Health and Human Services (the Department) to disqualify; 2) the Department's motion to disqualify Mr. Dean's counsel; and 3) KeyBank, N.A.'s motion to sever. As indicated on the record at the hearing, the court denied Mr. Dean's motion to hold an evidentiary hearing because the Department and KeyBank stipulated to the testimony that the potential witnesses would have provided and thus the evidentiary hearing was unnecessary.

At oral argument, the court indicated an intention to deny KeyBank's motion to sever without prejudice because although the time periods in question are different, the court concludes there may be common issues of fact regarding Defendant Dean. See M.R. Civ. P. 20(a), 21. However, as indicated at a discovery conference April 1, 2014, the court is reserving decision on KeyBank's motion to sever in light of a related case, *Vose v. Taylor*, recently docketed as Maine Business & Consumer Court Docket No. BCD-CV-14-14.

The last motion for the Court's determination is the motion of the Department to disqualify Attorney David Jenny. KeyBank joins the motion to disqualify. The Law Court has recently clarified the standard for disqualifying an attorney:

First, disqualification must serve the purposes supporting the ethical rules. A party moving to disqualify an attorney has the burden of demonstrating more than mere speculation that an ethics violation has occurred; she must establish in the record that continued representation of the nonmoving party by that party's chosen attorney results in an affirmative violation of a particular ethical rule. . . .

Second, [there must be] a showing that continued representation by the attorney would result in actual prejudice to the party seeking that attorney's disqualification. [C]ourts will not assume the existence of prejudice to the moving party just by the mere fact that an ethical violation was committed[.] Rather, the moving party must point to the specific, identifiable harm she will suffer in the litigation by opposing counsel's continued representation. Indeed, to allow disqualification with proof of anything less than such actual prejudice would be to invite movants to employ this obvious vehicle for abuse.

[Third], if the moving party produces evidence of both an ethical violation and actual prejudice, any court order disqualifying the attorney must include express findings of that ethical violation and resulting prejudice.

*Morin v. Me. Educ. Ass'n*, 2010 ME 36, ¶¶ 9-11, 993 A.2d 1097.

The Department asserts that M.R. Prof. Conduct 1.7 is being violated by Attorney Jenny's representation of Mr. Dean because Attorney Jenny formerly represented Ms. Perry in a probate proceeding related to DHHS's guardianship of Mr. Dean. (See DHHS Exh. E.) That same guardianship is part of the present controversy between the parties. (See Amend. Compl.

¶¶ 16-17.) In the guardianship proceeding, after Attorney Dill succeeded Attorney Jenny as counsel, Ms. Perry submitted a claim to the Probate Court for \$120,000 against Mr. Dean. (DHHS Exhs. I-J.)

Rule 1.7 prohibits the representation of a client if the representation is a concurrent conflict of interest; in this case, “a significant risk that the representation of one or more clients would be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” M.R. Prof. Conduct 1.7(a)(2). The only exception is if “(1) the lawyer reasonably believes that the lawyer would be able to provide competent and diligent representation to each affected client; and (2) each affected client gives informed consent, confirmed in writing.” M.R. Prof. Conduct 1.7(b). The Department asserts that Attorney Jenny’s representation of Mr. Dean will be materially limited both by his prior representation of Ms. Perry and his personal friendship with Ms. Perry.<sup>1</sup>

The court has serious doubts about the representation of Mr. Dean by Attorney Jenny based on the concurrent conflict of interest issue. Although Mr. Dean and Ms. Perry may settle their portion of this case, their interests are clearly adverse to one another. Adversity of interests is not affected by settlement.

Attorney Jenny asserts that he has analyzed the rule and is confident that he can provide competent representation to each client. It is the court’s understanding that Ms. Perry consents to Attorney Jenny’s representation of Mr. Dean, but the record does not indicate that she has given

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<sup>1</sup> It is worth noting that the Department is a third party to the attorney-client relationship. Nevertheless, at least one case in Maine has addressed the motion of a third party to disqualify a law firm based on that firm’s prior representation of a client. See *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 2001 WL 64775 (D. Me. Jan. 26, 2001) (Hornby, J.). The fact that the *Compact Disc* case involving a motion to disqualify class counsel does, in this court’s view, materially distinguish that case from this on the merits of the disqualification issue, but the *Compact Disc* decision is authority supporting the Department’s and KeyBank’s standing to pursue the motion.

informed consent in writing to Attorney Jenny's representation of Mr. Dean.<sup>2</sup> This Order thus requires proof of such consent as a condition to Attorney Jenny's continued representation of Mr. Dean.

In the alternative, KeyBank provides a different basis for disqualification: Attorney Jenny's status as a necessary witness. M.R. Prof. Conduct 3.7 states:

- (a) A lawyer shall not act as advocate at a tribunal in which the lawyer is likely to be a necessary witness unless:
  - (1) the testimony relates to an uncontested issue;
  - (2) the testimony relates to the nature and value of legal services rendered in the case; or
  - (3) disqualification of the lawyer would work substantial hardship on the client.

M.R. Prof. Conduct 3.7(a).<sup>3</sup>

KeyBank states that Attorney Jenny is a factual witness and that it intends to depose Attorney Jenny in the course of the litigation. KeyBank asserts that Attorney Jenny's testimony is necessary because it is relevant, material, and unobtainable from other sources. Specifically, KeyBank asserts that Attorney Jenny has knowledge of Mr. Dean's alleged acknowledgement of

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<sup>2</sup> The record includes the affidavit of Pamela Vose, Mr. Dean's conservator, who consents to the representation of Mr. Dean by Attorney Jenny (Mr. Dean Exh. D. at 2) and whose authority as conservator includes the power to "[p]lay, settle, prosecute or contest any claim involving [Mr. Dean]" (Ms. Perry Exh. 1 at 3).

<sup>3</sup> The comments to the rule instruct:

Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on whether it is a bench, jury trial, or other proceeding the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. . . .

M.R. Prof. Conduct 3.7 cmt. [4].

draining the trust, Mr. Dean's mental health status, and Mr. Dean's alleged agreement with Ms. Perry to pay her back the money he allegedly misappropriated from the trust. KeyBank contests these issues seriously. Attorney Jenny candidly admitted at the hearing that his testimony was relevant and material, but he disputes that it is unobtainable from other sources.

On the present record, the court is not persuaded that Attorney Jenny is indeed a necessary witness or that disqualification is required. However, whether he is a necessary witness depends on what material testimony he, and only he, can provide—a question that likely will require a comparison of his prospective testimony with that of other witnesses. For that reason, the court will permit any party to take Attorney Jenny's deposition upon oral examination.

Moreover, Attorney Jenny asserts that Mr. Dean would likely not be able to retain substitute counsel if Attorney Jenny is disqualified. The court's limited understanding of Mr. Dean's situation is consistent with that assertion. Thus, there is an issue of "substantial hardship" for purposes of Rule 3.7(a)(3).

On this record, considering all relevant factors, the court will deny the Motion to Disqualify without prejudice to its renewal. Attorney Jenny and Mr. Dean, and Mr. Dean's conservator, Pamela Vose, are clearly on notice of the possibility that the motion to disqualify might be renewed at a later stage of the case, such that, if the motion were granted, Mr. Dean would be disadvantaged even more than if disqualification were to occur now.

**IT IS HEREBY ORDERED:**

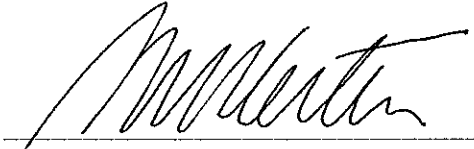
1. The Department's motion, with joinder by KeyBank, to disqualify Attorney Jenny from representing William Dean in this case is hereby denied without prejudice, on the following two conditions:

(a) within 14 days, Attorney Jenny files proof that Claire Dean Perry has provided informed consent in writing to Attorney Jenny's representation of William Dean in this case, and

(b) that Attorney Jenny consent to and participate in a deposition upon oral examination, if noticed by any party, pursuant to M.R. Civ. P. 30. At such a deposition, Attorney Jenny or any other party may object on the ground of attorney-client privilege, attorney work product or any other privilege for refusing to answer. If objection based on privilege or attorney work product is made, the answer need not be given, pending further order of court.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this order into the docket by reference.

Dated April 3, 2014

  
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A. M. Horton  
Justice, Business and Consumer Court

Entered on the Docket: 4/3/14  
Copies sent via Mail \_\_\_\_\_ Electronically