IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

KHARY PENEBAKER, MARY ARNOLD,
and BONNIE JOSEPH,

Plaintiffs,

v. Case No. 3:22-cv-334

ANDREW HITT, ROBERT F. SPINDELL, JR.,
BILL FEEHAN, KELLY RUH, CAROL BRUNNER,
EDWARD SCOTT GRABINS, KATHY KIERNAN,
DARRYL CARLSON, PAM TRAVIS, MARY BUESTRIN,
JAMES R. TROUPIS, and KENNETH CHESEBRO,

Defendants.

BRIEF IN SUPPORT OF DEFENDANT JAMES R. TROUPIS'S MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL STAFFORD ROSENBAUM

INTRODUCTION

In December 2019, James R. Troupis and his wife formally retained Stafford Rosenbaum LLP ("Stafford") to develop and prepare an estate plan. Along the way, they entrusted Stafford with their sensitive personal and financial information. To date, the Troupises have not finalized their estate plan nor closed out their file with Stafford. Notwithstanding the establishment of an attorney-client relationship with Stafford, without warning or communication to the Troupises, Stafford filed a lengthy and publicized complaint accusing Troupis of engaging in a civil conspiracy, which in turn invoked several federal and criminal statutes. Feeling betrayed, ambushed, and embarrassed by Stafford, his counsel of choice, Troupis requests that Stafford be disqualified from representing the Plaintiffs in this litigation.[1]

[1] Notably, Plaintiffs have other counsel in addition to Stafford, specifically, one attorney with Law Forward, Inc., as well as five attorneys with the Institute for Constitutional Advocacy and Protection of Georgetown University Law Center. *See* (Dkt. #4–1 at 59). Thus, should the Court grant Troupis's motion to disqualify, Plaintiffs still will be represented by counsel of their choice. In order to avoid any embarrassment to the firm, and as a professional courtesy, Troupis directed his counsel in this matter to contact Attorney Mandell, in advance of filing this Motion, to explain

BACKGROUND FACTS

In November 2019, Troupis and his wife, Karen, sought new counsel regarding their estate plan. (Troupis Decl. ¶2). After speaking with Attorney Johanna J. Allex at Stafford, whom Troupis has known for many years, the Troupises executed a "Request to Transfer Files," which authorized the transfer of their estate planning files from their prior counsel to Stafford. (*Id.* ¶3). On December 9, 2019, the Troupises and Allex had a meeting and, within days, Stafford sent their soon-to-be clients an engagement letter, which they signed and returned to Stafford. (*Id.* ¶¶5,7, Ex. 1). The terms of Stafford's representation of Troupis and Karen was to "advi[s]e and assist[]" them in preparing their estate plan. (*Id.* ¶6, Ex. 1).

After formally establishing this attorney-client relationship, Troupis and Karen shared intensely private and confidential matters and information about their family, assets, and finance with Stafford. (*Id.* ¶¶7, 8). Allex or her assistant appeared to keep extensive notes and records of their conversations. (*Id.* ¶8). On December 17, 2019, Allex emailed and mailed draft copies of fifteen estate plan documents to the Troupises including, but not limited to, their respective last wills and testaments, powers of attorney, and a joint revocable trust. (*Id.* ¶9). Due to the nature and implications of the aforementioned documents, the Troupises have repeatedly met with their children and accountants to discuss their estate plan. (*Id.* ¶10). Additionally, the COVID pandemic and other intervening problems have complicated the family's ability to meet and discuss the estate plan documents. (*Id.*) The Troupises have not signed any of the aforementioned estate planning documents, *i.e.*, they have not yet finalized their estate plan. (*Id.*). Stafford charged the Troupises for its legal services in January 2020, and the Troupises promptly paid their bill. (*Id.* ¶11)

---

the background and ask the firm to withdraw. Undersigned counsel did just that and, following Mandell's refusal to withdraw, filed the Motion to Disqualify.

On May 4, 2021, Stafford sent the Troupises correspondence regarding a U.S. Senate bill dubbed the "For the 99.5% Act." Therein, Stafford explained how, if passed into law, this bill could potentially affect their estate plan. (*Id.* ¶12). Since sending the draft documents, Stafford has also communicated to the Troupises via email; however, Stafford has not sent them any correspondence suggesting that its representation of the Troupises was completed. (*Id.* ¶14). Notably, Troupis has never indicated to Allex or Stafford that he would like to close out his file, as he understands estate planning to be an ongoing process that has the potential to last many years. (*Id.* ¶¶13–14). As he and his wife have not executed their estate plan, and because they have received continuing advice regarding the same from Stafford, Troupis perceives and understands that Allex, and thus, Stafford, to be his counsel. (*Id.* ¶15). He considers himself to be a current Stafford client. (*Id.*) Stafford has not asked Troupis to waive any conflict of interest. (*Id.* ¶16). Regardless, given the nature and extent of the information Troupis has shared with Stafford, he would not waive the conflict. (*Id.*) To date, Stafford retains his file and information. (*Id.* ¶17).

LEGAL STANDARD

"A motion to disqualify counsel requires a two-step analysis. First, the court considers whether an ethical violation has occurred. Second, if the court finds such a violation, the court then determines whether disqualification is the appropriate remedy." *24-7 Bright Star Healthcare, LLC v. Res-Care, Inc.*, Case No. 1:21-cv-04609, 2022 WL 1432439, *2 (N.D. Ill. Mar. 24, 2022). The trial court "possess[es] broad discretion" when determining whether attorney disqualification is warranted. *Berg v. Marine Tr. Co., N.A.*, 141 Wis. 2d 878, 887, 416 N.W.2d 643 (Ct. App. 1987) (quoting *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976)) (internal alteration omitted). Further, "doubts as to the existence of an asserted conflict of interest should be resolved

in favor of disqualification." *Id.* at 890 (quoting *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir. 1978) (alteration omitted)).

Although "[l]awyers representing clients in federal courts must follow federal rules . . . most 'federal courts use the ethical rules of the states in which they sit.'" *Watkins v. Trans Union, LLC*, 869 F.3d 514, 519 (7th Cir. 2017) (quoting *Huusko v. Jenkins*, 556 F.3d 633, 636 (7th Cir. 2009)); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1, cmt. b, (AM. LAW. INS. 2000) ("Federal district courts generally have adopted the lawyer code of the jurisdiction in which the court sits, and all federal courts exercise the power to regulate lawyers appearing before them."). In considering a motion for disqualification, courts in this District look "to the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys . . . based on the American Bar Association's[2] Model Rules." *Fabick, Inc. v. Fabco Equip., Inc.*, 16-cv-172-wmc, 2016 WL 5718252, at *2 (W.D. Wis. Sept. 30, 2016); *see also Tucker v. George*, 569 F. Supp. 2d 834, 837 (W.D. Wis. 2008) ("In deciding attorney disqualification motions, this court looks for guidance to the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys.").

If there is a "clear difference" between the federal and state rules of professional conduct, the federal standard will control. *Silicon Graphics, Inc. v. ATI Tech., Inc.*, 741 F. Supp. 2d 970, 981 (W.D. Wis. 2010). But when the relevant federal and state rules are "the same in many respects" or "essentially identical," Wisconsin federal courts rely on state law. *Id.*; *Tucker*, 569 F. Supp. 2d at 837 (quoting *Callas v. Pappas*, 907 F. Supp. 1257, 1260 (E.D. Wis. 1995)). Because the relevant portions of the ABA and Wisconsin Supreme Court Rules at issue in this case are either identical or essentially identical, Troupis relies on state law guidance in addition to federal law.

[2] Hereinafter, Troupis refers to American Bar Association as "ABA."

I. ABA MODEL RULE 1.7 AND SCR 20:1.7: CONFLICTS OF INTEREST, CURRENT CLIENTS

Both Model Rule 1.7 and Wisconsin Rule 20:1.7 prohibit a lawyer from representing one client if such representation "will be directly adverse to another client" or "there is significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client [or] a former client . . . ."[3] Disqualification is warranted if "the attorney has undertaken representation which is adverse to the interests of a present client." *In re Steveon R.A.*, 196 Wis. 2d 171, 178, 537 N.W.2d 142 (Ct. App. 1995). Commentary explains that "loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, *even when the matters are wholly unrelated*." MODEL RULES OF PROF'L CONDUCT r. 1.7, cmt. [6] (AM. BAR. ASS'N 2020) (emphasis added). The only way that an attorney may lawfully represent a party with interests adverse to those of a present client is if the "present client has made a knowing, voluntary, written waiver of actual and potential conflicts inherent in the representation." *In re Guardianship of Lillian P.*, 2000 WI App 203, ¶12, 238 Wis. 2d 449, 617 N.W.2d 849.

II. ABA RULE 1.9 AND SCR 20:1.9: DUTIES TO FORMER CLIENTS

Alternatively, if the Court deems Troupis a former client of Stafford, Stafford must be disqualified.[4] Pursuant to ABA Rule 1.9(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

[3] The only difference between these rules is that pursuant to SCR 20:1.7(b)(4), in the event of a conflict of interest, a lawyer may represent a client if, in addition to satisfying subparagraphs (b)(1)–(3), "each affected client gives his informed consent, confirmed in a writing *signed by the client*." (emphasis added). While ABA Model Rule 1.7(b)(4) requires each affected client's informed consent confirmed in writing, such writing need not be signed by the client.

[4] Pursuant to ABA Model Rule 1.10(a), Allex's representation of the Troupises is imputed to Stafford and, thus, all attorneys at Stafford are prohibited from violating Rules 1.7 or 1.9. *See also* Wis. SCR 20:1.10(a).

> to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Wisconsin SCR 20:1.9(a) is essentially identical, adding only that the former client's informed consent be confirmed in writing "signed by the client."

When the motion to disqualify is based on an attorney's representation of a client whose interests are adverse to those of a former client, "the moving party must establish: (1) that an attorney-client relationship existed between the attorney and the former client; and (2) that there is a substantial relationship between the two representations." *Burkes v. Hales*, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991). *See also Westinghouse*, 588 F.2d at 223 (stating that the "relevant test in disqualification matters" is that "where an attorney represents a party in a matter in which the adverse party is that attorney's former client, the attorney will be disqualified if the subject matter of the two representations are 'substantially related.'"). The existence of an attorney-client relationship "depends upon the parties and is a question of fact." *In re Kostich*, 2010 WI 136, ¶16, 330 Wis. 2d 378, 793 N.W.2d 494. If the lawyer, in representing the former client, "could have obtained confidential information . . . that would have been relevant" to his current representation of the other client, a "substantial relationship" exists. *Burkes*, 165 Wis. 2d at 597. "It is irrelevant whether he actually obtained such information and used it against his former client, or whether–if the lawyer is a firm rather than an individual practitioner–different people in the firm handled the two matters and scrupulously avoided discussing them." *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983).

ARGUMENT

I. STAFFORD MUST BE DISQUALIFIED BECAUSE TROUPIS IS A CURRENT CLIENT AND ITS REPRESENTATION OF PLAINTIFFS IS DIRECTLY ADVERSE TO TROUPIS

The Troupises perceive and understand themselves to be Stafford's clients, and for the reasons explained herein, their perception is reasonable. *See In re Kostich*, 220 Wis. 2d 378, ¶16 ("Moreover, the existence of a lawyer/client relationship is determined principally by the reasonable expectations of the person seeking the lawyer's advice."). Troupis and his wife retained Stafford in late 2019 for the purpose of establishing their estate plan, which, to date, has not been finalized. At no time has Troupis conveyed to Stafford that it would like to close out his estate planning file. If, however, Troupis, an attorney by trade, did want to do so, he knows how to effectuate such termination. For example, he indicated to his former counsel that he and his wife would be hiring Stafford and directed his prior counsel to send his files to Stafford. He has not taken any such steps in this matter to close out his file with Stafford.

For its part, Stafford, a law firm established in 1879, which holds itself out as aiding clients in Wisconsin, throughout the United States, as well as internationally,[5] should know the status of its current clients, or at the very least check in with its clients to determine whether they wish to close out their files. Further, the federal and state rules of professional conduct outline the steps an attorney must take in the event a party has terminated the representation. Specifically:

> [A] lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

MODEL RULES OF PROF'L CONDUCT r. 1.16(d); SCR 20:1.16. At this time, neither Attorney Allex nor any Stafford attorneys have provided notice to the Troupises that its representation of them

[5] *See* https://www.staffordlaw.com/about-us/ (last visited July 8, 2022).

would be terminating, nor returned any papers or property to Stafford. In fact, Stafford has sent correspondence to the Troupises regarding their estate plan as recently as May 2021.

Because Troupis is a current client of Stafford, Stafford's representation of Plaintiffs against Troupis runs afoul of Rule 1.7. Plaintiffs sued Troupis, making them opposing parties in the same litigation. Rule 1.7(b)(3) and SCR 20:1.7(b)(3) make clear that Stafford cannot represent Plaintiffs under such circumstances, as its representation of Plaintiffs "involve[s] the assertion of a claim by one client against another client represented by the lawyer in the same litigation . . . ." One of the bases for this rule is Troupis's reasonable fear that, from here on out, Stafford will pursue his interests less effectively after engaging in this very public litigation against him. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. [6]. Moreover, the rule exists to mitigate the mistrust and betrayal that current clients such as Troupis must feel when their counsel, to whom they have entrusted private and sensitive information, readily files legal action against them in their personal capacity.

In light of Stafford's ethical violation towards its client, Troupis, the Court must next determine whether disqualification is warranted. There is no shortage of federal case law holding that disqualification of counsel is the appropriate remedy in the event of a concurrent conflict of interest. *See, e.g., Doe v. Nielsen*, 883 F.3d 716, 720 (7th Cir. 2018); *24-7 Bright Star*, 2022 WL 1432439, at *6–*7; *Franson v. City and Cnty. of Honolulu*, Civil No. 16–00096 DKW-KSC, 2017 WL 372976, at *1 (D. Haw. Jan. 25, 2017); *Folsom v. Menard*¸ No. 3:09–cv–94–RLY–WGH, 2011 WL 1404875, at *2 (S.D. Ind. Apr. 13, 2011). Although it claims to have a global presence, Stafford is by no means a large law firm, as it has approximately 65[6] attorneys in only two offices. Similarly, the client, James Troupis, is one man, not a corporation with different affiliates,

[6] *See* https://www.staffordlaw.com/position/attorneys/ (last visited July 8, 2022).

businesses, assets, etc. Even if this concurrent conflict could somehow be waived via screening (which it cannot), the dynamics in play make it all the more likely that Troupis's file cannot be effectively siloed so as to mitigate this problem. Lastly, "a court may disqualify an attorney for failing to avoid even the appearance of impropriety." *O'Malley v. Novoselsky*, Nos. 10 C 8200, 11 C 110, 2011 WL 2470325, *2 (N.D. Ill. June 14, 2011). Whether Stafford intentionally disregarded its duty to Troupis or conveniently forgot his status as its current client, this situation reeks of impropriety.[7] Based on the foregoing, Stafford must be disqualified from representing Plaintiffs in this litigation.

II. ALTERNATIVELY, EVEN IF TROUPIS IS A FORMER CLIENT, STAFFORD MUST BE DISQUALIFIED BECAUSE THERE IS A SUBSTANTIAL RELATIONSHIP BETWEEN STAFFORD'S REPRESENTATION OF TROUPIS AND PLAINTIFFS

Assuming, *arguendo*, that the Court deems Troupis to be Stafford's former client,[8] Stafford must still be disqualified. This is because a substantial relationship exists between Stafford's representation of the Troupises and its current representation of Plaintiffs. Again, a "substantial relationship" exists between a current and former representation if Stafford could have obtained confidential information in its representation of Troupis that is relevant to its representation of Plaintiffs. *Analytica*, 708 F.2d at 1266. It is of no consequence that Attorney Allex handled the Troupises' file at Stafford and is not engaged in its representation of Plaintiffs. *Id.* Further, it would

[7] Even if Stafford attempted to close out Troupis's file to free itself up to represent Plaintiffs in this matter, such maneuvering is commonly referred to as the "hot potato" doctrine, and is frowned upon by courts and ethics commissions alike. *See, e.g., El Camino Res., Ltd. v. Huntington Nat'l Bank*, 623 F. Supp. 2d 863, 878 (W.D. Mich. 2007) (explaining that "courts that have considered the issue have held that a firm will not be allowed to drop a client in order to shift resolution of the conflicts question from Rule 1.7 dealing with current clients, to the more lenient standard in Rule 1.9 dealing with former clients."); *In re Boy Scouts of America*, 35 F.4th 149, 161 (3d Cir. 2022) (explaining that when a law firm drops an existing client so as to avoid conflicts that would prevent it from taking on a more lucrative client, courts will apply the more stringent Rule 1.7 standard "even though representation has formally ended to discourage firms from dropping a client (like a hot potato) for self-interested reasons.").

[8] For the reasons explained in *supra*, Troupis, if not now considered Stafford's client, was definitely a former client. Thus, the establishment of an attorney-client relationship between the Troupises and Stafford should not be in question.

not matter whether Stafford actually obtained confidential information from the Troupises (which it did) and used it against them in this litigation. *Id.*

Troupis and his wife provided Stafford with sensitive information about their lives, including financial information. Such information is relevant to Plaintiffs' case against Troupis because Plaintiffs seek punitive damages from the defendants. (Dkt. #4–1 at ¶¶270–283). Typically, the "assessment of punitive damages takes into account the defendant's wealth . . . measured by net worth, the difference between the value of the defendant's assets and liability. Any other measure is illusory." *Welty v. Heggy*¸ 145 Wis. 2d 828, 836, 429 N.W.2d 546 (Ct. App. 1988). Indeed, both local and national press coverage has even broadcasted the amount of punitive damages that Stafford is seeking against Troupis and other defendants. *See e.g.*, Shawn Johnson, *Democrats File Lawsuit Against Wisconsin Republicans Who Posed As Electors*, WISCONSIN PUBLIC RADIO (May 17, 2022), available at https://www.wpr.org/democrats-file-lawsuit-against-wisconsin-republicans-who-posed-electors; Scott Bauer, *Lawsuit Seeks $2.4M Damages from Wisconsin Fake GOP Electors*, ABC NEWS, (May 17, 2022) available at https://abcnews.go.com/Politics/wireStory/lawsuit-seeks-24m-damages-wisconsin-fake-gop-electors-84778899.

Based on the foregoing, it is not "clearly discernible that the issues" in this litigation are unrelated to Stafford's representation of Troupis. *Reid v. Wrought Washer Mfg.*, 20-cv-1406-pp, 2022 WL 912129, *7 (E.D. Wis. Mar. 29, 2022) (citation and internal quotations omitted). In fact, Plaintiffs' pleadings have ensured that Stafford's representation of Troupis is very much related to this litigation. Therefore, even if Troupis is considered Stafford's former client, Stafford must be disqualified from representing Plaintiffs in this matter.

CONCLUSION

Whether the Court deems Stafford to be Troupis's current or former counsel, based on the foregoing, for the preservation of the sanctity of the attorney-client relationship and the confidences associated with the same, as well as for Troupis's protection, the Court must grant Troupis's motion to disqualify Stafford Rosenbaum LLP from this litigation.

Dated this 13th day of July, 2022.

CRAMER, MULTHAUF & HAMMES, LLP
Attorneys for Defendant, James R. Troupis

BY: *Electronically signed by Matthew M. Fernholz*
MATTHEW M. FERNHOLZ
(State Bar No.: 1065765)
ASHLEY E. McNULTY
(State Bar No.: 1107355)

CRAMER, MULTHAUF & HAMMES, LLP
1601 East Racine Avenue, Suite 200
P.O. Box 558
Waukesha, WI 53187-0558
262-542-4278
mmf@cmhlaw.com
aem@cmhlaw.com

BY: *Electronically signed by Edward D. Greim*
EDWARD D. GREIM, *Pro Hac Vice Forthcoming*

GRAVES GARRETT LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105
816-256-3181
EDGreim@gravesgarrett.com