STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[**FILED: October 19, 2020**]

IN RE: CHARTERCARE COMMUNITY BOARD, ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, and ROGER WILLIAMS HOSPITAL.	**:** **:** **:** **:**	**C.A. No. PC-2019-11756**

DECISION

STERN, J. Before this Court is the motion of Stephen Del Sesto (the Plan Receiver), as Receiver for the St. Joseph Health Services of Rhode Island Retirement Plan (the Plan), and Thomas Hemmendinger (the Liquidating Receiver), as Liquidating Receiver of CharterCARE Community Board (CCCB), St Joseph Health Services of Rhode Island (SJHSRI), and Roger Williams Hospital (RWH) (together, the Receivers), to enjoin Adler Pollock & Sheehan P.C. (AP&S) from representing the Prospect Entities, as defined *infra*, in matters relating to the Change in Effective Control (CEC) proceedings pending before the Rhode Island Department of Health (DOH) and the Hospital Conversion Act (HCA) proceedings pending before the Rhode Island Attorney General (AG) (the 2019 Regulatory Proceedings), and from sharing knowledge or work product with the Prospect Entities or successor counsel. AP&S and Prospect Medical Holdings Inc. (PMH) (and its affiliated entities) have objected to the motion. Those affiliated entities include Chamber Inc.; Ivy Holdings Inc.; Ivy Intermediate Holding Inc.; Prospect East Holdings, Inc.; Prospect East Hospital Advisory Services, LLC; Prospect CharterCARE, LLC; Prospect CharterCARE SJHSRI, LLC; Prospect CharterCARE RWMC, LLC; Prospect Blackstone Valley Surgicare, LLC; and Prospect CharterCARE Home Health and Hospice, LLC. For the sake of clarity, the Court will refer to these

entities collectively as the "Prospect Entities." Jurisdiction is pursuant to G.L. 1956 § 8-2-13, as well as Rule 65 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

As the parties are familiar with the details of this case, the Court will only recount those facts relevant to the instant motion. Since at least November of 2011, AP&S rendered legal services for SJHSRI, RWH, and CCCB (collectively, the Oldco Entities). *See generally* Receivers' Mem. Ex. 1. AP&S represented the Oldco Entities before the DOH and AG "for CEC and HCA approval for the transaction set forth in the September 24, 2013 Asset Purchase Agreement, which transferred ownership of the two licensed not-for-profit hospitals, Our Lady of Fatima Hospital and RWH, as well as other licensed not-for-profit medical facilities to for-profit Prospect CharterCARE, LLC . . . " (the 2013-2014 Regulatory Proceedings). (Receivers' Mem. Ex. 9 at 1-2.) AP&S also represented the Oldco Entities in obtaining CEC and HCA regulatory approval for the 2014 asset sale, whereby the Oldco Entities sold operating assets to the for-profit subsidiaries of PMH, and CCCB received a membership interest in Prospect CharterCARE, LLC (PCC) (the 2014 Asset Sale). *See* AP&S's Mem. at 3. With respect to the regulatory proceedings regarding the 2014 Asset Sale, the Oldco Entities and PMH entered into an agreement which recognized their common legal interest in obtaining regulatory approval in order to finalize the transaction. *See id.* at n.9. The Oldco Entities also retained Drinker Biddle & Reath LLP in connection with the 2014 Asset Sale. (Receivers' Mem. Ex. 17.)

Currently, AP&S represents the Prospect Entities in connection with the 2019 Regulatory Proceedings. These proceedings seek regulatory approval for a buy-out agreement whereby certain private equity investors and minority shareholders will be bought out, and PMH's original

founders will obtain a 100 percent ownership interest (the 2019 Regulatory Proceedings). Pursuant to the 2019 Regulatory Proceedings, the organizational structure of the Prospect Entities will be altered at the highest levels. *See* AP&S's Mem. Ex. 1; AP&S's Ex. 2.

The Receivers filed the instant motion for injunctive relief on July 10, 2020 seeking to enjoin AP&S from representing the Prospect Entities in the 2019 Regulatory Proceedings. AP&S filed an objection and memoranda in opposition to the Receivers' motion for injunctive relief. On September 17, 2020, this Court heard oral arguments on the motion.

II

Standard of Review

Our Supreme Court has stated that, in considering whether to grant injunctive relief, the trial justice must consider

> "'whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.'" *Vasquez v. Sportsman's Inn, Inc.*, 57 A.3d 313, 318 (R.I. 2012) (quoting *Iggy's Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999)).

"The sine qua non of this four-part inquiry [for a preliminary injunction] is likelihood of success on the merits: if the moving party cannot demonstrate that he [or she] is likely to succeed in his [or her] quest, the remaining factors become matters of idle curiosity." *New Comm Wireless Services, Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). To show a reasonable likelihood of success on the merits, the moving party is not required "to establish 'a certainty of success'[;] rather, '[the Court] require[s] only that [it] make out a prima facie case.'" *Id.* (quoting *Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 521 (R.I. 1997)).

The decision to extend injunctive relief is within the sound discretion of the trial justice. *See Hagenberg v. Avedisian*, 879 A.2d 436, 441 (R.I. 2005).

III

Analysis

The Receivers seek to enjoin AP&S from representing the Prospect Entities before the DOH and AG based on an alleged violation of Article V, Rules 1.9 and 1.10 of the Supreme Court Rules of Professional Conduct. *See generally* Receivers' Mem. Specifically, the Receivers argue that AP&S's representation of the Prospect Entities involves issues substantially related to AP&S's prior representation of the Oldco Entities, and that the Receivers did not consent to AP&S's representation of the Prospect Entities. Therefore, the Receivers argue that AP&S has violated Rules 1.9 and 1.10.

A

Timeliness of the Motion

A threshold issue in this matter is whether the Receivers' motion for an injunction was timely. As this Court has previously recognized, in numerous jurisdictions, "failure to make a reasonably prompt motion to disqualify counsel can result in waiver." *Quinn v. Yip*, No. KC-2015-0272, 2018 WL 3613145, at *3 (R.I. Super. July 20, 2018) (citing *Campbell v. Bank of America, N.A.*, 155 A.D.3d 820, 823 (N.Y. App. Div. 2017); *Zelda Enterprises, LLLP v. Guarino*, 806 S.E.2d 211, 214 (Ga. Ct. App. 2017); *Thomas v. Cook*, 170 So.3d 1254, 1261-62 (Miss. Ct. App. 2015)). "However, a mere delay in bringing a motion for disqualification for a potential breach of the attorney-client privilege with respect to a former client will not bar the motion." *Id.* (citing *Kevlik v. Goldstein*, 724 F.2d 844, 848 (1st Cir. 1984) ("[The court] must note that it is hard to see how delay alone will benefit the plaintiffs and prejudice the defendant. In any event, the need for

upholding high ethical standards in the legal profession far outweighs the problems caused by the delay in filing the disqualification motion."); R.I. Supreme Court Ethics Advisory Panel Opinion No. 1989-07 (citing with approval *Kevlik*).

Here, AP&S asserts that the Receivers unjustifiably delayed in their filing of this motion. (AP&S's Mem. at 8.) AP&S argues that, because the Receivers first raised their claim of conflict of interest on April 9, 2020 at the CEC application hearing, then waited three months before filing the current motion, the motion is untimely. *Id.* Additionally, AP&S proffers that the Receivers knew for over a year that AP&S was representing the Prospect Entities in the 2019 Regulatory Review. *Id.*

Notwithstanding AP&S's argument, and regardless of whether delay alone can constitute a waiver of a party's disqualification motion, this Court finds that the Receivers did not delay in bringing their motion to disqualify. As AP&S concedes, on April 9, 2020, the Receivers brought their objection to AP&S's representation of the Prospect Entities in the objection to the CEC application. Then, three months later, and almost two weeks before the public meeting on the CEC application, the Receivers brought the current motion. *Cf. In re Valencia v. Ripley*, 128 A.D.3d 711, 713 (N.Y. App. Div. 2015) (record reflected that defendant was aware of potential conflict for at least eight months before bringing disqualification motion, and court thus determined she waived any objection to plaintiff's choice of counsel). Further, there is no evidence that the Receivers unduly delayed in filing the motion or were acting for any improper purpose. For those reasons, this Court finds that the Receivers' motion was timely.

B

Likelihood of Success on the Merits

Moving on to the merits of the request for injunctive relief, first, the Receivers must show a likelihood of success on the merits that AP&S is disqualified from further representing the Prospect Entities before the DOH and the AG because such representation violates the Supreme Court Rules of Professional Conduct.

Though the Rhode Island Supreme Court has not expressly adopted a standard of review for a motion to disqualify an attorney from a case, it has expressed that the proponent of a motion to disqualify has a high burden to meet. *In re Yashar*, 713 A.2d 787, 790 (R.I. 1998) (party seeking disqualification of a judge based on alleged prejudice carries a substantial burden of establishing that the actions of the judge were affected by facts and events which were not pertinent nor before the court); *Olivier v. Town of Cumberland*, 540 A.2d 23, 27 (R.I. 1988) (However, [the appearance of impropriety alone] is '"simply too slender a reed on which to rest a disqualification order except in the rarest of cases."') (quoting *Sellers v. Superior Court of State, In and For County of Maricopa*, 742 P.2d 292, 300 (Ariz. Ct. App. 1987)).

Furthermore, this Court and the United States District Court for the District of Rhode Island have addressed, on numerous occasions, the standard of review for a motion to disqualify counsel. "A party seeking disqualification of an opposing party's counsel bears a 'heavy burden of proving facts required for disqualification."' *Haffenreffer v. Coleman*, 2007 WL 2972575, at *2 (D.R.I. 2007) (quoting *Evans v. Artek Systems Corp*., 715 F.2d 788, 794 (2d Cir. 1983)); *see Jacobs v. Eastern Wire Products Co*., No. Civ.A. PB-03-1402, 2003 WL 21297120, at *2 (R.I. Super. May 7, 2003) ("Because motions to disqualify are viewed with disfavor a party seeking to disqualify carries a heavy burden and must satisfy a high standard of proof.").

Additionally, pursuant to Rule 1.9(a) of the Supreme Court Rules of Professional Conduct,

> "[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 gives informed consent, confirmed in writing." (Emphasis added.)

Courts will disqualify a lawyer pursuant to Rule 1.9(a) "only upon a showing that the relationship between the issues in the prior and present cases is 'patently clear' or when the issues are 'identical' or 'essentially the same.'" *Brito v. Capone*, 819 A.2d 663, 665 (R.I. 2003) (quoting *American Heritage Agency, Inc. v. Gelinas*, 774 A.2d 220, 230 (Conn. App. Ct. 2001)). "In order to determine whether a situation requires attorney disqualification under Rule 1.9, a court needs to determine '(i) whether there [was] an attorney-client relationship and (ii) if so, whether there is a substantial relationship between the former representation and present relationship.'" *Ageloff v. Noranda, Inc.*, 936 F. Supp. 72, 75 (D.R.I. 1996) (citing *Polyagro Plastics, Inc. v. Cincinnati Milacron, Inc.*, 903 F. Supp. 253, 256 (D.P.R. 1995)).

1

Attorney-Client Relationship

The first issue the Court must address is whether the Receivers are AP&S's former clients for purposes of Rule 1.9. AP&S argues that it never represented the Plan and, therefore, that the Plan Receiver is not a former client and has no standing to challenge AP&S's representation of the Prospect Entities. Our "Supreme Court has often stated that an attorney-client relationship is contractual in nature, and thus is the product of an agreement of the parties and may be implied from their conduct." *Rhode Island Depositors Economic Protection Corp. v. Hayes*, 64 F.3d 22, 27 (1st Cir. 1995).

Here, it is undisputed that AP&S represented the Oldco Entities in the 2013-2014 Regulatory Proceedings and the 2014 Asset Sale.[1] *See* AP&S's Mem. at 3; *see also* Receivers' Mem. Ex. 9 at 1-2. However, AP&S contends that it never represented the Plan, and, as such, it does not have an attorney-client relationship with the Plan Receiver for the purposes of Rule 1.9. *See id.* at 5. Further, neither the Plan Receiver nor the Liquidating Receiver claim that AP&S represented the Plan at any time; nor has either produced any evidence purporting the same. The Plan Receiver has asserted, as approved by this Court and the United States District Court for the District of Rhode Island, that he has standing because the Plan received CCCB's 15 percent in PCC during the settlement in the District Court case. *See* Hr'g Tr. 5:10-23, Sept. 17, 2020 (Hr'g Tr.). Because it is undisputed that the Liquidating Receiver has standing to bring the instant motion, the Court need not address the Plan Receiver's standing any further because the outcome of that analysis is of no moment in this case. Thus, the Court finds that the Liquidating Receiver and Plan Receiver are AP&S's former clients for the purposes of Rule 1.9.

2

Substantially Related

The Receivers allege that the scope of AP&S's representation of the Prospect Entities involves issues substantially related to AP&S's former representation of the Oldco Entities, and that the Prospect Entities' positions in the 2019 Regulatory Proceedings are materially adverse to the Oldco Entities' interests. The Receivers contend that AP&S's representation of the Prospect Entities in the 2019 Regulatory Proceedings arises out of and concerns the same ownership interests as the 2013-2014 Regulatory Proceedings. Accordingly, the Receivers maintain that

[1] AP&S represented the Oldco Entities alongside Drinker Biddle & Reath LLP in connection with the 2014 Asset Sale.

AP&S has "switched sides," and now seeks—on behalf of the Prospect Entities—to modify and change the structure it had gained approval for—on behalf of the Oldco Entities—in the 2013-2014 Regulatory Proceedings. Specifically, the Receivers make two arguments: (1) that AP&S seeks to change the organizational structure it negotiated and gained approval for in the 2013-2014 Regulatory Proceedings; and (2) that AP&S's 2019 representation concerns ownership interest that the Oldco Entities acquired in connection with the 2013-2014 Regulatory Proceedings.

AP&S objects, arguing that AP&S's 2019 representation of the Prospect Entities is not the same or substantially similar to its 2013 representation of the Oldco Entities. Rather, AP&S maintains, while both its 2013 representation of the Oldco Entities and its 2019 representation of the Prospect Entities were with respect to regulatory matters concerning changes in ownership, the subject matter of the proceedings are different. Specifically, AP&S argues that the 2013-2014 Regulatory Proceedings involved representation before the DOH and AG for CEC and HCA approval for the transaction that transferred ownership of the two licensed not-for-profit hospitals, SJHSRI and RWH, to for-profit PCC, while the 2019 Regulatory Proceedings involved a buy-out of private equity investors and minority shareholders at the top of the corporate chain, five entities removed from the 2013-2014 Regulatory Proceedings, with PMH's original co-founders. AP&S further asserts that it did not represent the Oldco Entities as "transactional counsel"; rather, AP&S asserts that Drinker Biddle & Reath LLP represented the Oldco Entities in the 2014 Asset Sale, that AP&S was counsel only for the CEC and HCA regulatory reviews, and, that in fact, AP&S did not represent the Oldco Entities in negotiations.

a

Patently Clear Relationship

"[T]he test for determining whether matters are substantially related has been 'honed in its practical application to grant disqualification only upon a showing that the relationship between the issues in the prior and present cases is patently clear or when the issues are identical or essentially the same.'" *Brito*, 819 A.2d at 665 (quoting *American Heritage Agency, Inc.*, 774 A.2d at 230 (internal quotation marks omitted)). For purposes of Rule 1.9(a), "[t]he scope of a 'matter' . . . depends on the facts of a particular situation or transaction," and "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Rule 1.9(a) of Art. V of the Supreme Court Rules, cmt. 2. Further, the comments to Rule 1.9 state that matters are "substantially related" if

> "(1) they involve the same transaction or legal dispute; or
> "(2) there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Rule 1.9 of Art. V of the Supreme Court Rules, cmt. 3.

Our Supreme Court addressed the "substantially related" language of Rule 1.9(a) in its *Brito* decision. *See generally Brito*, 819 A.2d at 665. In *Brito*, the defendants appealed, *inter alia*, from the trial judge's denial of the defendants' motion to dismiss the plaintiff's attorney. *Id.* at 665. The defendants sought the disqualification of the plaintiff's attorney because, prior to the action that was then presently before the Superior Court, the "plaintiff's counsel represented both plaintiff and [a named defendant] in the formation of a limited liability corporation." *Id*. However, the Supreme Court held that the trial judge did not err in denying the motion because there was "no evidence in the record that the attorney's former representation of [the named defendant] and

current representation of plaintiff were substantially related." *Id.* The Supreme Court reasoned that the test for determining whether matters are substantially related has been "honed in its practical application to grant disqualification only upon a showing that the relationship between the issues in the prior and present cases is '*patently clear*' or when the issues are 'identical' or 'essentially the same.'" *Id.* (emphasis added) (citations omitted).

Here, this Court must examine the relationship between the issues in AP&S's 2013 representation of the Oldco Entities and its 2019 representation of the Prospect Entities. Thus, it is not patently clear that AP&S's 2013 representation of the Oldco Entities and the 2019 representation of the Prospect Entities are substantially related. Following, the Court will address the Receivers' material arguments *in seriatim*.

i

Changes to the Organizational Structure

The Receivers assert that AP&S's 2013 representation of the Oldco Entities is substantially similar to its 2019 representation of the Prospect Entities because AP&S sought to change the same organizational structure that AP&S negotiated and gained approval for in 2013. *See* Hr'g Tr. 47:2-6, 14-16. During the September 17, 2020 hearing, the Plan Receiver presented billing records and emails outlining AP&S's involvement in the 2014 Asset Sale negotiations. *See generally* Hr'g Tr. 44-52. The Plan Receiver argued that the emails and billing records showed AP&S's involvement in the negotiations and "transactional" deal because AP&S attorneys billed for (1) meeting with the then-president of CharterCARE, (Hr'g Tr. 44:16-25); (2) reviewing the analysis of the Plan and receivership, (Hr'g Tr. 45:13-22); and (3) reviewing issues on the proposed 2014 Asset Sale (Hr'g Tr. 47:6-12). Additionally, to demonstrate AP&S'S involvement in the 2014 Asset Sale negotiations, the Plan Receiver relied on AP&S attorneys' statements in emails and letters

including (1) AP&S's confirmation that it was representing Prospect Medical Holdings "in connection with obtaining a tax stabilization/exemption ordinance from the City of Providence," (Hr'g Tr. 48:8-16); (2) in an email between two AP&S attorneys, one states "we should confirm our representation of [CharterCARE], [RWH], [SJHSRI] in the regulatory review, and if there is a dispute between the parties regarding the property tax issue, we will not represent either one" (Hr'g Tr. 49:1-8); (3) comments, in a letter from one AP&S attorney to another AP&S attorney, on the draft asset purchase agreement, which included suggested changes to the agreement, (Hr'g Tr. 49:9-17). AP&S asserts that during the 2014 Asset Sale, it served only as regulatory counsel. (AP&S's Mem. at 8-9.) The Receivers' argument relies heavily on this Court's prior decision in *Quinn*, cited *supra*, 2018 WL 3613145, at *1.

In *Quinn*, this Court disqualified a law firm from representing a plaintiff in the case under Rule 1.9(a). *See id*. There, the law firm had previously represented the movants in the structuring and formation of the involved corporate entities (the Involved Corporations). *Id.* at *4.

> "Said representation was for a variety of business matters, including the following: (1) the structuring of [one of the Involved Corporations], including determining how particular corporate structures would serve or harm the particular interests of the individual clients; (2) the formation of [one of the Involved Corporations], including the drafting of articles of incorporation, bylaws, and partnership agreements, and the allocation of ownership interests and corporate responsibilities among particular individuals; (3) [one of the Involved Corporation's] financing and acquisition of its real estate; and (4) researching issues of Rhode Island law, including equitable interests in real property. At least four attorneys involved in the prior representation still work[ed] at [the law firm at that time], and, as recently as 2014—only one year before [the] [p]laintiff filed the [] suit—[the law firm] was retrieving and sending copies of its [related] files to [an Involved Corporation].
>
> "[I]n September 2017, [the] [p]laintiff[,] [represented by the law firm,] amended his Verified Complaint and claimed an ownership interest in the [Involved Corporations] and their real estate . . . [The law firm] not only incorporated the [Involved Corporations] and

> documented the allocation of ownership interest therein, but also represented them in acquiring the very same real estate in which [the] [p]laintiff [was then] seeking an ownership interest." *Id.* at **4-5 (internal citations omitted).

This Court disqualified the law firm from representing the plaintiff, stating that "a prior representation regarding a corporation's structure and formation is substantially related to a current representation attacking that same corporate form and structure." *Id.* at *5; *see Avigdor v. Rosenstock*, 16 N.Y.S.3d 791 (Table), at ** 12-13 (N.Y. Suppl. 2015) (holding that in lawsuit where plaintiff sought a twenty percent stake in defendant corporation defendant's allegation that subject real estate had been purchased with embezzled funds was substantially related to defendant's attorney's prior representation of plaintiff with the attempted sale of the same real estate); *see also Burnett v. Olson*, No. CIV.A 04-2200, 2005 WL 711602, at **5-6 (E.D. La. Mar. 18, 2005) (holding that counsel for plaintiff—an investor of defendant cruise ship corporation—was properly disqualified in lawsuit seeking to pierce the corporate veil where attorney previously represented one of the shareholders in creating and structuring a different cruise ship corporation during the same time period). Following that logic, this Court in *Quinn* held that the law firm's representation of the defendants disqualified it from representing the plaintiff because the law firm represented the movants in structuring and forming the Involved Corporations, and then the law firm "represented the [p]laintiff—a party materially adverse to the Movants—who question[ed] the very structure and formation of the [Involved Corporations] the law firm created approximately thirteen years" prior to their representation of the plaintiff. *Quinn*, 2018 WL 3613145, at *6.

This Court finds that *Quinn* is inapplicable to the case at hand. Here, AP&S does not deny that it represented the Oldco Entities in the 2013-2014 Regulatory Proceedings and subsequent matters; however, AP&S has argued that, while both representations deal with regulatory proceedings, the facts, issues, and type of proceedings are unrelated. This Court agrees. In 2013,

AP&S represented the Oldco Entities in an asset purchase agreement, the 2013-2014 Regulatory Proceedings, which transferred the ownership of the SJHSRI and RWH to PCC, five entities removed from the entities involved in the 2019 Regulatory Review. *See* AP&S's Mem. Ex. 1 and Ex. 2. AP&S asserts that, during that time, it did not participate in any negotiations regarding the 2014 Asset Sale. (AP&S's Mem. at 8-9.) However, the Receivers assert that AP&S was in fact involved in the negotiations and took the lead, despite retained Drinker Biddle & Reath LLP's involvement. *See* Hr'g Tr. at 44-52. Currently, AP&S is representing the Prospect Entities in the 2019 Regulatory Proceedings, which involves a buy-out of private equity investors and minority shareholders at the top of the corporate chain with PMH's original co-founders increasing their ownership interests from 40 percent to 100 percent in the ultimate parent. *Id.* at 6. *Cf. Ogden Energy Resource Corp. v. State of Rhode Island*, Civ. A. No. 92-0600T, 1993 WL 406375, at *3 (D.R.I. June 23, 1993) (disqualifying a firm from representing a client who sought to build a facility where the firm had formerly represented the town in opposing the facility because "the factual base is the same, the parties are the same, and the underlying goals of each party are the same").

Additionally, the Receivers have failed to show that AP&S's involvement rise to the same level as those of the law firm in *Quinn*. Despite the Receivers' presentation of AP&S's billing records and emails, the Receivers have not met the "heavy burden" that they must meet in a Rule 1.9 disqualification action. While it is possible that AP&S may have reviewed the negotiations for "transactional purposes," the evidence proffered by the Receivers has not convinced this Court that AP&S was involved in negotiating or designing the organizational structure that developed out of the 2013-2014 Regulatory Proceedings.

Thus, the relationship between the issues in this case is not patently clear, as it was in *Quinn*, because AP&S is not attacking the work the law firm performed in the 2013-2014 Regulatory Proceedings. In fact, AP&S's representation of the Prospect Entities in the 2019 Regulatory Proceedings is wholly unrelated to the 2013-2014 Regulatory Proceedings. Therefore, this Court finds that AP&S does not seek to change the organizational structure and it is not "patently clear" that the issues are "identical" or "essentially the same." As such, this Court finds that the cases are not substantially related.

ii

The Oldco Entities' Property Interest

The Receivers argue that AP&S's 2019 representation of the Prospect Entities is substantially related to AP&S's representation of the Oldco Entities in the 2013-2014 Regulatory Proceedings because the Receivers "vehemently dispute [CCCB's] '15% owner[ship]' figure." (Receivers' Mem. at 16.) As a result of the 2013-2014 Regulatory Proceedings, CCCB obtained a 15 percent ownership interest in PCC. (Hr'g Tr. 10:7-15.) Now, the Liquidating Receiver holds CCCB's interest in trust for the Plan as part of the settlement agreement between the Plan Receiver and the Oldco Entities in the federal court case. *See* Receivers' Mem. at 2. In addition to the 15 percent ownership interest in PCC, CCCB had the right to appoint 50 percent of the Prospect CharterCARE Board. *See id.* The Receivers argue that the 15 percent interest has now increased to almost 27 percent because the Prospect Entities have failed to fulfill the requirements of the 2013-2014 Regulatory Proceedings. *Id.* at 13. The Receivers also assert that AP&S now seeks to

affect the Plan's ownership interest in PCC through the 2019 Regulatory Proceedings and this makes the two representations substantially related. *See id.* at 14-16.

A Supreme Court Ethics Advisory Panel addressed the issue of whether matters are substantially related under Rule 1.9 when the latter matter could adversely affect a property interest in a former client. *See, e.g.*, Supreme Court Ethics Advisory Panel Opinion No. 2012-01 (Jan. 12, 2012) (stating that matters are not the same or substantially related under Rule 1.9 simply because the latter matter could adversely affect a property interest in a former client). There, "[t]he inquiring attorney ask[ed] whether there [was] a conflict of interest in the representation of the son in a bankruptcy matter in which a property interest of the [m]other, a former client, could be affected." *Id.* at 2. The Opinion provided that "[i]t [was] not a conflict of interest under Rule 1.9 for the inquiring attorney to represent the son in a bankruptcy matter in which the property of the [m]other, a former client, may be affected[]" and that the matters were not the same or substantially related. *Id.* at 2, 3.

While that advisory panel opinion focused on a bankruptcy matter, this Court finds the Opinion instructive on the issue of the Receivers' claimed affected property interest. The Opinion demonstrated that, even if the type of the current and former matters is the same (*e.g.*, both matters were bankruptcy cases), a conflict does not exist unless the subject of the two matters is the same. *See* Supreme Court Ethics Advisory Panel Opinion No. 2012-01. Therefore, this Court cannot deem two matters substantially related simply because the matters are the same *type* of proceedings; the subject matter must be the same. *See id*. As such, this Court finds that, even if CCCB's claimed interest may be affected by the 2019 Regulatory Proceedings, which the Receivers have not shown is the case through competent evidence, that is not enough to show that the 2013-2014 Regulatory Proceedings and the 2019 Regulatory Proceedings are substantially

related because, even though the proceedings were both regulatory proceedings, the subject matter of each regulatory proceedings is not the same. *See generally* Receivers' Ex. 21; Receivers' Ex. 22; Receivers' Ex. 23; Receivers' Ex. 24. Therefore, the Receivers have not met their burden of proving that it is "patently clear" that the 2013-2014 Regulatory Proceedings and the 2019 Regulatory Proceedings are substantially related or the same matters.

b

Substantial Risk that AP&S Will Use Previously Obtained Confidential Information

Many jurisdictions find that if the prior matter is substantially related to the present matter, there is an irrebuttable presumption that client confidences were obtained in the prior matter. *See, e.g., In re Marriage of Newton*, 955 N.E.2d 572, 583 (Ill. App. Ct. 2011); *Attorney Grievance Commission of Maryland v. Siskind*, 930 A.2d 328, 337 (Md. 2007); *Sullivan County Regional Refuse Disposal District v. Town of Acworth*, 686 A.2d 755, 757-58 (N.H. 1996); *Chrispens v. Coastal Refining and Marketing, Inc.*, 897 P.2d 104, 114 (Kan. 1995). For example, Rule 1.9 of the Oklahoma Rules of Professional Conduct[2] seemingly includes an irrebuttable presumption when it has been proven that an attorney-client relationship exists and that the present litigation involves a matter that is substantially related to a prior matter. *See United States v. Stiger*, 413 F.3d 1185, 1196 (10th Cir. 2005). This irrebuttable presumption recognized by the Tenth Circuit was found to be consistent with a comment to Rule 1.9 of the Oklahoma Rules of Professional Conduct, which states:

> '"A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial

[2] Oklahoma has adopted the same rule that Rhode Island follows regarding conflicts with former clients. *See* Okla. R. Prof. C. 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 to the interests of the former client unless the former client gives informed consent, confirmed in writing.")

> risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services."' *Accounting Principals, Inc. v. Manpower, Inc.*, 599 F. Supp. 2d 1287, 1292 (N.D. Okla. 2008) (quoting Okla. R. Prof. C. 1.9(a), cmt.).

Importantly, Rule 1.9 of the Rhode Island Supreme Court Rules of Professional Conduct includes the same comment. *See* Rule 1.9 of Art. V. of the Supreme Court Rules, cmt. 3. Therefore, consistent with the reasoning of many jurisdictions in this country, this Court recognizes that Rhode Island's Rule 1.9 carries with it an irrebuttable presumption that client confidences were obtained in a prior matter *if that prior matter and the current matter are the same or substantially related*. (Emphasis added.) *See Hybrid Kinetic Automotive Holdings, Inc. v. Hybrid Kinetic Automotive Corp.*, 643 F. Supp. 2d 819, 824-25 (N.D. Miss. 2009); *Exterior Systems, Inc. v. Noble Composites, Inc.*, 175 F. Supp. 2d 1112, 1116 (N.D. Ind. 2001); *Greig v. Macy's Northeast Inc.*, 1 F. Supp. 2d 397, 402 (D.N.J. 1998); *Prisco v. Westgate Entertainment, Inc.*, 799 F. Supp. 266, 271 (D. Conn. 1992); *Green v. Montgomery County, Alabama*, 784 F. Supp. 841, 843-44 (M.D. Ala. 1992).

However, this Court has found that these present matters are not substantially related to one another. Thus, the Receivers must show that AP&S has obtained client confidences and there is a "substantial risk that confidential factual information . . . would materially advance the client's position in the subsequent matter." Rule 1.9(a) of Art. V. of the Supreme Court Rules, cmt. 3. The Receivers have not alleged any facts that lead the Court to believe that there is a substantial risk that AP&S obtained any information in the 2013-2014 Regulatory Proceedings that will materially advance the 2019 Regulatory Proceedings. While AP&S may be involved in ex parte meetings with the DOH and the AG, the Court does not believe that the Receivers have shown that AP&S

is in possession of confidential information that will advance the Prospect Entities' position in the 2019 Regulatory Proceedings. For those reasons, this Court finds that there is not a substantial risk that the Oldco Entities' confidential, factual information will materially advance the Prospect Entities' position in the 2019 Regulatory Proceedings. Therefore, this Court again finds that the matters are not substantially related under Rule 1.9.

3

Materially Adverse

The Receivers allege that AP&S has taken a position on behalf of the Prospect Entities in the regulatory proceedings that is materially adverse to the Oldco Entities' interests. The Receivers also argue that, through AP&S's current representation of the Prospect Entities, AP&S is advancing positions contrary to the positions taken by the Oldco Entities, including claiming that (1) the Prospect Entities complied with the terms and conditions of the 2014 HCA conversion approval, and (2) CCCB is a 15 percent owner of PCC.

Again, AP&S objects to the Receivers' allegations, arguing that the Prospect Entities' interests in the 2019 Regulatory Proceedings are not materially adverse to the Oldco Entities. AP&S argues that the 2019 Regulatory Action and the past representation of the Oldco Entities are not materially adverse because the current transaction at the top of the corporate chain will have no effect on the Oldco Entities as (1) the Oldco Entities will not be a party to any agreement, (2) they will not undertake any additional rights or obligations, and (3) the ownership structure of PCC will not be impacted.

Rhode Island state and federal courts have not yet defined when representation of a new client becomes "materially adverse" as to a previous client. *See generally Ogden Energy Resource Corp.*, 1993 WL 406375, at **1, 2 (holding that firm was disqualified because "firm essentially

switched sides" where firm resigned from its representation of a town opposing the siting and construction of an incinerator and began work in furtherance of the of the goal of building the incinerator in the same town and case, but not defining what constitutes "materially adverse"). Nevertheless, comment 2 of Rule 1.9 states that "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." *See State ex rel. Verizon West Virginia, Inc. v. Matish*, 740 S.E.2d 84, 94 (W.Va. 2013) (stating the interest of the attorney's former and current clients must be "so diametrically opposed as to require the attorney to adopt adversarial or opposite positions in the two representations"); *Simpson Performance Products, Inc. v. Robert W. Horn, P.C.*, 92 P.3d 283, 288 (Wyo. 2004) (a material adversity analysis is case-specific and focuses on whether the "current representation may cause legal, financial, or other identifiable detriment to the former client"). The court must also consider "whether the attorney's exercise of individual loyalty to one client might harm the other client or whether his zealous representation will induce him to use confidential information that could adversely affect the former client." *Id.* (citation omitted).

Here, this Court finds that the Oldco Entities' position and Prospect Entities' position are not so diametrically opposed that AP&S must adopt adversarial or opposite positions in the 2019 Regulatory Proceedings. *See* Rule 1.9 of Art. V of the Supreme Court Rules, cmt. 2; *Matish*, 740 S.E.2d at 94. Thus, AP&S's representation of the Prospect Entities and Oldco Entities are not materially adverse. The Court will address the Receivers' material arguments *in seriatim*.

a

The $50 Million Capital Contribution

As a condition of approval of the 2013-2014 Regulatory Proceedings, the DOH and AG required the Prospect Entities to "over four years[,] put in [$50] million of long-term capital" following the approval of the proceedings. (Hr'g Tr. 14:18-19.) "In March 2019, CCCB . . . brought a Superior Court derivative action . . . [to, *inter alia*,] compel the Prospect Entities to fulfill their obligations . . . with respect to funding $50 million in long-term capital improvements at the hospitals . . . ." (Receivers' Mem. at 3.) The Receivers contend that the Prospect Entities, through AP&S, made "misrepresentations to the state regulators" regarding the 2013-2014 Regulatory Proceedings; namely, the Receivers allege that AP&S has taken the position that the Prospect Entities have fulfilled their $50 million capital contribution. *See id.* In support of their position, the Receivers rely on the July 21, 2020 HSC presentation that AP&S created (AP&S's Ex. 5) and the July 21, 2020 HSC meeting transcript (AP&S's Ex. 6). The Receivers assert that AP&S's Exhibit 5 and AP&S's Exhibit 6 are evidence of AP&S taking an affirmative position on the Prospect Entities fulfilling their required capital contribution.

However, nowhere in AP&S's Exhibits 5 or 6 did AP&S represent an affirmative position that the capital contributions were made. Although, in AP&S's Exhibit 5 and during the HSC proceeding, AP&S listed the capital expenditures that the Prospect Entities had made to date,[3]

[3] The following were the capital contributions that AP&S outlined:

> "New ED at RWMC with private bays (only ED in the state with private bay treating areas and state of the art equipment) and emergency medicine technology; ($15.1 million)
> "Dedicated Behavioral Health ED under construction ($5 million)
> "ED renovations and expansion at OLF ($4.3 million)
> "Pharmacy equipment and upgrades at RWMC and OLF ($3.3 million)

AP&S did not make affirmative representations that the Prospect Entities had fulfilled the $50 million capital contribution, or that the capital expenditures AP&S outlined went toward the required capital contribution. *See* AP&S's Ex. 5 at 15; *see also* AP&S's Ex. 6. There is no evidence in the record that shows AP&S's exercise of loyalty to the Prospect Entities might harm the Oldco Entities or that AP&S's zealous representation will require it to use confidential information that could adversely affect the Oldco Entities. *See Simpson Performance Products, Inc.*, 92 P.3d at 288. Thus, this Court finds that AP&S has not taken a position on the required $50 million capital contribution that is materially adverse to the Oldco Entities' position pursuant to Rule 1.9.

b

CCCB's Ownership Rights

The Receivers also assert that AP&S has "switched sides" as to CCCB's ownership interest in the Prospect Entities. *See* Receivers' Mem. at 22. The Receivers argue that AP&S has switched sides by affirmatively stating in the CECA and HCA applications that "PCC is owned 85% by

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"Main entrance redesigns and other facility renovations at RWMC ($6.3 million)
"Main entrance redesigns and other facility renovations at OLF ($2.3 million)
"Other infrastructure improvements including expansion of Cancer Center ($600,000)
"New medical, surgical, and imaging equipment and other upgrades at both hospitals; ($39.4 million)
"Initial start-up investment to create an integrated health delivery system to improve health outcomes and reduce cost of care ($1.4 million)
"Working capital investment ($6 million)
"Capital to support physician recruitment, physician retention, and other physician engagement strategies ($33.1 million)
"Many of [*sic*] renovations improved design and access including handicap access to the facilities, were green energy projects and allowed for growth and expansion of service lines such as behavioral and opioid addiction service lines to meet the community needs in Providence and North Providence." AP&S's Ex. 5 at 15.

Prospect East Holdings, Inc., and [] 15% by [CCCB].” *Id*.; *see* Receivers’ Ex. 24 at 9. Again, the Receivers “vehemently dispute [CCCB’s] ‘15% owner[ship]’ figure.” (Receivers’ Mem. at 16.) Thus, the Receivers argue that, because AP&S has represented that CCCB’s ownership interest is only 15 percent, AP&S has taken a position that is materially adverse to CCCB and effectively “switched sides.” *See* Receivers’ Mem. at 22.

Here, this Court finds that AP&S has not effectively “switched sides” on CCCB’s ownership interest in PCC. As a requirement of the 2013-2014 Regulatory Proceedings, CCCB obtained a 15 percent interest in PCC. (Hr’g Tr. 10:7-15.) Now, AP&S claims that CCCB has a 15 percent interest in PCC. *See* Receivers’ Ex. 24 at 9. At no point in AP&S’s representation of the Prospect Entities has AP&S claimed that CCCB’s ownership interest in PCC is any more or less than the 15 percent CCCB obtained in the 2013-2014 Regulatory Proceedings. *Cf. United States v. Caramadre,* 892 F. Supp. 2d 397, 404 (D.R.I. 2012) (recognizing a conflict under Rule 1.9(a) where counsel would need to attack former client’s credibility as part of defense strategy).

Additionally, and notwithstanding the Receivers’ argument that CCCB claims an interest greater than 15 percent in PCC, no matter the outcome of the Prospect Entities’ CEC and HCA applications, CCCB’s ownership interest will remain the same in PCC. In fact, the issue of CCCB’s ownership interest in PCC is before this Court in another matter, to which AP&S is not a party and in which AP&S does not represent the Prospect Entities. *See generally CharterCARE Community Board v. Samuel Lee et a1*., PC-2019-3654.[4] Again, this Court finds that AP&S need not take and

[4] “In March 2019, CCCB (acting both for itself and as trustee of the Hospital Interests) brought a Superior Court derivative action captioned *CharterCARE Community Board v. Samuel Lee, et* a1., PC-2019-3654, to vindicate CCCB’S interest in [PCC] and compel the Prospect Entities to fulfill their obligations (*inter alia*) with respect to funding $50 million in long-term capital improvements at the hospitals (among other relief). CCCB contends that the Prospect Entities made misrepresentations to the state regulators and certain municipalities in connection with the [2013 –]2014 Asset Sale and have failed to fulfill their obligations pursuant to the terms and regulatory

has not taken a position that is materially adverse to the position of the Oldco Entities on CCCB's ownership interest in PCC. *Cf. Caramadre*, 892 F. Supp. 2d at 404. Thus, AP&S has not effectively "switched sides" or taken a position that is "materially adverse" to CCCB on behalf of the Prospect Entities. *Cf. Ogden Energy Resource Corp*, 1993 WL 406375, at **1, 2.

Thus, the Court finds as follows: (1) the Plan Receiver is not AP&S's prior client for the purposes of Rule 1.9; (2) the Liquidating Receiver is AP&S's prior client for the purposes of Rule 1.9; (3) AP&S's representation of the Prospect Entities does not involve issues substantially related to AP&S's former representation of the Oldco Entities; (4) there is no evidence on the record that there is a substantial risk that AP&S obtained any confidential information in the 2013-2014 Regulatory Proceedings that will materially advance the Prospect Entities' position in the 2019 Regulatory Proceedings; and (5) during AP&S's representation of the Prospect Entities, AP&S has not taken positions materially adverse to those it took during its representation of the Oldco Entities. Accordingly, the Receivers have failed to establish a reasonable likelihood of success on the merits.

C

Additional Requirements for Issuance of an Injunction

Again, our Supreme Court has stated that, in considering whether to grant injunctive relief, the trial justice must consider

> "'whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo."' *Vasquez*, 57 A.3d at 318 (quoting *Iggy's Doughboys, Inc.*, 729 A.2d at 705).

conditions of that sale, for which [AP&S] obtained regulatory approval on behalf of the Oldco[] [Entities]." (Receivers' Mot. at 3.)

Further, as noted above, "the sine qua non of this four-part inquiry [for a preliminary injunction] is likelihood of success on the merits: if the moving party cannot demonstrate that he [or she] is likely to succeed in his [or her] quest, the remaining factors become matters of idle curiosity." *New Comm Wireless Services, Inc.*, 287 F.3d at 9.

This Court has already found that the Receivers have not met their burden of showing a likelihood of success on the merits; accordingly, to address the three additional prongs for an injunction would be unnecessary and a mere exploration of curiosity. As such, this Court will not address the possibility of irreparable harm, the balance of the equities, or the preservation of the status quo.

IV

Conclusion

For the foregoing reasons, the Receivers cannot meet the prongs for an injunction; the Court **denies** the motion. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**In Re: Chartercare Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital**
CASE NO:	**PC-2019-11756**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 19, 2020**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**See attached**
For Defendant:	**See attached**

In re: CharterCARE Community Board,
St. Joseph Health Services of Rhode Island,
and Roger Williams Hospital
C.A. No. PC-2019-11756

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