

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

ROYAL BANK OF PENNSYLVANIA,	:	March Term 2004
Plaintiff,	:	
v.	:	No. 7356
WALNUT SQUARE PARTNERS,	:	
Defendant.	:	Commerce Program
	:	
	:	Control Number 121237

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WALNUT SQUARE PARTNERS,	:	February Term 2004
Plaintiff,	:	
v.	:	No. 2312
ROYAL BANK OF PENNSYLVANIA,	:	
Defendant.	:	Commerce Program
	:	

**ORDER**

**AND NOW**, this 7<sup>TH</sup> day of March 2006, upon consideration of Walnut Square Partners' Motion to Disqualify Silverman Bernheim & Vogel as Counsel for Royal Bank of Pennsylvania, Royal Banks' response in opposition, Memoranda, oral argument and all matters of record, it hereby is **ORDERED** and **DECREED** that said Motion is **Granted** and the firm of Silverman Bernheim & Vogel is disqualified as counsel for Royal Bank of Pennsylvania. This matter shall be stayed for sixty (60) days so that Royal Bank of Pennsylvania may obtain new counsel in this matter.

**BY THE COURT,**

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**HOWLAND W. ABRAMSON, J.**

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**Memorandum Opinion**

***ABRAMSON, J.***

Presently before the court for disposition is Walnut Square Partners Motion to Disqualify Silverman Bernheim & Vogel (“SBV”) as counsel for Royal Bank of Pennsylvania (“Royal Bank”) in these consolidated matters. For the reasons discussed below the court will grant the motion and disqualify SBV as counsel for Royal Bank.

**BACKGROUND**

On or about April 30, 1994, Walnut Square Partners entered into a commercial lease agreement with Crusader Savings Bank to rent commercial property at 1230 Walnut Street, Philadelphia, Pa. In June 2001 Royal Bank acquired certain assets of Crusader Savings Bank including the lease agreement for 1230 Walnut Street.

On January 16, 2004, Walnut Square Partners instituted a landlord tenant action against Royal Bank in Municipal Court alleging breach of the lease agreement by Royal Bank for failure to pay rent. On February 5, 2004, the Municipal Court ruled in favor of

Walnut Square Partners and ordered the ejection of Royal Bank. On February 12, 2004, Royal Bank appealed the order of ejection. Walnut Square Partners then filed a complaint in this court in February 2004 against Royal Bank alleging breach of the lease agreement. Royal Bank, in March 2004, filed a separate complaint against Walnut Square Partners concerning the same lease agreement. The two actions were ultimately consolidated on July 15, 2004.

The firm of Fineman, Krekstein & Harris, P.C. (“FKH”) has acted as counsel and represented Walnut Square Partners in these consolidated matters which were initiated in February and March, 2004 respectively. S. David Fineman, Esquire (“Fineman”) and Drew S. Dorfman, Esquire (“Dorfman”) were the attorneys from FKH representing Walnut Square Partners in these matters.

Royal Bank is represented by the firm of Silvermen Bernheim & Vogel (“SBV”) in the Walnut Square Partners and Royal Bank matters. Daniel S. Bernheim, Esquire (“Bernheim”) and Jonathon A. Bart, Esquire were the attorneys from SBV representing Royal Bank in these matters.

On November 11, 2005, Dorfman’s employment with FKH terminated. SBV offered Dorfman a position as a non equity partner employed at will with a scheduled start date of December 12, 2005. Dorfman accepted the position. On December 11, 2005, Bernheim forwarded an email to all attorneys and staff at SBV regarding Dorfman’s employment with the firm and the creation of a Chinese Wall. The email stated in part as follows:

...Before discussing possible employment with Drew we confirmed that as long as we established a “Chinese Wall” around the Royal Bank matter and had no discussions or shared any document, letters, emails, memos-you name it- with Drew, that it was OK to consider and eventually hire Drew. Now that he is on

board it is essential that the Chinese Wall remain in place. Thus so that there is no chance of the slightest error, not only will we segregate Drew from the one particular Royal Bank matter but, in an abundance of caution, he will be segregated from all Royal Bank matters. Thus, all open Royal Bank files will be kept exclusively in my office. No mail, e-mail, memos or any documents relating to Royal Bank are to be shared with Drew. There is to be no conversation about any of the cases with Drew nor should there even be any discussion about this arrangement. Drew is aware of these precautions and the fact that I insist on excluding him from all cases and not just the one in which were involved. Stacy will be confirming that everyone has read this memo. If anybody has any questions about this, please see me.

(Exhibit "A" to Exhibit "B" of Royal Bank's Response to Walnut Square Partners' Motion to Disqualify).

Each attorney and staff member at SBV was required to sign or initial the e mail. Twenty one employees signed the e mail on December 12, 2005, three signed on December 21, 2005 and one signed on December 23, 2005.

On or about December 15, 2005, Fineman discovered that Dorfman had joined SBV as one of its attorneys and immediately notified Walnut Square Partners. On December 19, 2005, Walnut Square Partners filed a motion seeking to disqualify SBV as counsel to Royal Bank. After the submission of all responses, the court heard oral argument on the motion.

### **DISCUSSION**

A court should grant a motion to disqualify only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule. It should consider the ends that the disciplinary rule are designed to serve and any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions. James v. Teleflex, Inc., 1999 U.S. Dist. LEXIS 1961, 7-8 (E. D. Pa. 1999). A court may disqualify counsel if it is necessary "to ensure the parties receive the fair trial which due

process requires." McCarthy v. Southeastern Pennsylvania Transp. Authority, 772 A.2d 987 (Pa. Super. 2001).

Presently, the court is asked to determine whether SBV adequately implemented a policy to screen Dorfman from the instant matter due to his prior relationship with Walnut Square Partners while employed at FKH. Rule of Professional Conduct 1.10(b) states:

When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which that lawyer, or a firm with which that lawyer, was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rule 1.6 and 1.9 (b) that is material to the matter unless:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provision of this rule.

Rule of Professional Conduct 1.10(b).

Taking into consideration the parties submissions as well as the arguments made by counsel, the court finds that SBV has not met its burden to establish compliance with Rule 1.10(b).<sup>1</sup> As an initial matter, SBV failed to provide Walnut Square Partners with prompt written notice that Dorfman accepted employment with the firm of SBV. The evidence demonstrates that Fineman discovered from a third party that Dorfman was hired by SBV and informed Walnut Square Partners of same. As a result of the discovery, Fineman filed a motion to disqualify Dorfman with the court on December 19,

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<sup>1</sup> In an attempt to muddy the waters, SBV maintains that a screen was unnecessary since Dorfman did not possess any client confidence. (Royal Banks Response to the Mt. to Disqualify p. 11). Given the number of hours and years Dorfman spent on this matter for Walnut Square Partners while at FKH, it is difficult for the court to believe that Dorfman does not possess or was not privy to some confidential discussions with Fineman regarding the client and/or Walnut Square Partners concerning litigation strategy, settlement strategy and discovery strategy. Moreover, the court is not persuaded that since "Everything is out on the table" that no client confidences exist or that the level of complexity in any given case determines whether client confidences exist.

2005. Eight days after Dorfman commenced his employment with SBV, **after** the motion to disqualify was filed with the court and **after** SBV received a copy of the motion, Bernheim communicated with Fineman regarding Dorfman's employment and the screening policy created. A client should not discover from his or her now attorney that his then attorney, with whom he closely worked, is working for the opposition and has not disclosed it. The lack of disclosure raises a specter of impropriety that no *ex post facto* Chinese Wall can contain. Put another way, the doubt created by infidelity can never be cured and the court will not instruct a party to overlook it so that a one client may have counsel of his choice, especially when the firm was in a position to avoid the harm complained of.

SBV's failure to provide prompt notice to Walnut Square Partners **before** Dorfman began his employment with the firm caused a delay in enabling Walnut Square Partners to ascertain whether there was a level of compliance with Rule 1.10 (b) that could conceivably permit the conflict to be overcome and provide it with a level of comfort.

Furthermore, the screen put in place by SBV is inadequate. The court finds that the factors identified in Dworkin v. General Motors Corporation, 906 F. Supp. 273 (E. D. Pa. 1995) helpful in analyzing the effectiveness of SBV's screen. The factors include (1) the substantiality of the relationship between the attorney and the former client, (2) the time lapse between the matters in dispute, (3) the size of the firm and the number of disqualified attorneys, (4) the nature of the disqualified attorney's involvement and (5) the timing of the wall. *See, Dworkin supra (citing Martrans GP, Inc. v. Pepper, Hamilton & Sheetz*, 529 Pa. 241, 602 A.2d 1277 (Pa. 1992)(dissenting opinion)). Here, the

substantiality of the relationship between Dorfman and Walnut Square Partners, the lapse of time, the nature of Dorfman's involvement in the present case as well as the size of SBV weigh in favor of disqualification. Despite Dorfman's claims to the contrary, a review of the parties submissions as well as the reasonable and commonsensical inferences that can be made about how law firms function and how lawyers working on the same case share information about the client, it is clear that Dorfman had a substantial relationship with Walnut Square Partners wherein confidential information protected by Rules 1.6 and 1.9 (c) was revealed.

Dorfman prepared and answered discovery, prepared and represented witnesses for depositions, prepared and took depositions, prepared and responded to petitions or motions and attended injunction hearings and settlements and pre trial conferences for Walnut Square Partners. (Exhibit "A" to Walnut Square Partner's Mt. to Disqualify). Additionally, Dorfman had numerous communications with individuals primarily responsible for overseeing Walnut Square Partners' interests in the current litigation. (Exhibit "E" to Walnut Square Partner's Mt. to Disqualify). Thus, Dorfman had a substantial relationship with Walnut Square Partners and had a significant role in this case. Moreover, the minimal time lapse between Dorfman's representation of Walnut Square Partners and his employment with SBV as well as the size of the firm, fourteen lawyers in all, weigh in favor of disqualification.

In addition, a court may consider the features of the screen itself, including: (1) the prohibition of discussion of sensitive matters, (2) restricted circulation of sensitive documents, (3) restricted access to files, (4) strong firm policy against breach, including sanctions, physical and/or geographical separation, to determine its effectiveness. James

v. Teleflex, Inc., 1999 U.S. Dist. LEXIS 1961 (E. D. Pa. 1999)(citing Dworkin, 906 F. Supp. at 280).

Notably absent from SBV's screening policy is a strong firm policy of termination or disciplinary proceedings for violators. (See Exhibit "A" to Exhibit "B" of SBV's Response to Walnut Square Partners Mt. to Disqualify.). This is significant since it is imperative that all SBV employees understand the importance of noncompliance and that Walnut Partners is assured that noncompliance with the policy is punished.<sup>2</sup> Here, the absence of a deterrent for potential violators leaves the client vulnerable to disclosures. Hence, the court finds that the screen was ineffective.

A finding that counsel is in violation of the Rules of Professional Conduct is not the end of the inquiry in deciding a motion to disqualify, the interest in enforcing the Rules of Professional Conduct must be balanced against other factors. See International Longshoremen's Association v. International Longshoremen's Association, 909 F. Supp. 287, 293 (E. D. Pa. 1995). The factors to be balanced include Walnut Square Partners interest in attorney loyalty, Royal Bank's interest in retaining its chosen counsel, the risk of prejudice to Royal Bank, and the court's interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system. Id.

Here the court's interest in protecting the integrity of the proceedings, maintaining public confidence, as well as Walnut Square Partners' interest in attorney loyalty would best be served by disqualification in this case.

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<sup>2</sup> In an expert report submitted by SBV, the expert in a footnote states that the employees were informed verbally that any employee who violates the screening policy would be punished. This court finds that a verbal statement is not an effective means to ensure absolute compliance with the screening policy.



## **CONCLUSION**

For the forgoing reasons, Walnut Square Partners' Motion to Disqualify the firm of Silverman Bernheim & Vogel as Counsel for Royal Bank of Pennsylvania is Granted. This matter is stayed for sixty (60) days so that Royal Bank of Pennsylvania may obtain new counsel in this matter.

**BY THE COURT,**

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**HOWLAND W. ABRAMSON, J.**

