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

ACE AMERICAN INSURANCE COMPANY	:	**July 2001**
	:	**No. 77**
v.	:	**Commerce Program**
COLUMBIA CASUALTY COMPANY et al.	:	

OPINION

Introduction

Defendant Columbia Casualty Company ("Columbia") has filed a motion to disqualify two attorneys who were admitted pro hac vice to represent plaintiff ACE American Insurance Company ("ACE"). This motion raises a novel issue: whether an attorney who represents a plaintiff should be disqualified because his wife, who is also an attorney, was formerly employed by the corporate defendant.

For the reasons set forth below, this court concludes that adoption of a per se rule of disqualification of an attorney based on the former employment of his spouse is unsupported by either relevant precedent or the Rules of Professional Conduct that Columbia invokes. The facts of the present record, moreover, do not support disqualification of J. Randolph Evans ("Evans") or Stephan Passantino, the two ACE attorneys.

Factual Background

The dispute over disqualification of ACE's attorneys arose during a deposition of Ivan Dolowich, a corporate representative of defendant Columbia. The deposition was held in New York City on May 28, 2002.[1] The general focus of the deposition was Columbia's denial of a claim for reimbursement by ACE involving a "Refuse Fuels" litigation that began in Massachusetts in December 1996. ACE had paid the settlement amount for this action on April 30, 2001. ACE is presently suing Columbia for breach of the first excess policy in refusing to reimburse ACE for its loss. ACE is also suing Columbia for bad faith for refusing its claims without a reasonable basis for doing so. Complaint, ACE American v. Columbia Casualty et al., July Term 2001, No.77 (Phila. Ct. Common Pleas),¶¶ 21, 59, 78, 83.

ACE now maintains that Columbia "failed to meaningfully appear" for the May 28th deposition for several reasons. Dolowich, as a witness, had "little or no knowledge of the designated subjects of inquiry." He was directed by counsel not to answer questions "based on invalid claims of privilege." And, most relevantly, Columbia's counsel Robert Bodzin abruptly adjourned the

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[1] **Ace had filed a motion to compel this deposition after Columbia informed ACE by letter dated April 26 that the suggested dates of April 26 and May 1 for a deposition of corporate representatives were inconvenient. ACE 5/30/2002 Memorandum at 1-2.**

deposition for the stated reason that Linda Evans, the wife of ACE's attorney J. Randolph Evans, had been previously employed by CNA, the parent company of Columbia.[2] In response, Columbia now seeks the disqualification of Evans and Passantino as ACE attorneys. Because resolution of Columbia's request for disqualification of Evans hinges, in part, on an analysis of Evans' access to confidential information as evidenced by his questioning during the Dolowich deposition, the contours of that deposition must be sketched.

Evans as ACE's attorney began the questioning of Dolowich. Dolowich stated that he had had primary responsibility for the Refuse Fuels claim after it had been handled by David Phillips.[3] Dolowich, who is an attorney, had been employed by CNA as Senior Vice President and Claims Counsel for Global Specialty lines between April 2000 until January 2002.[4] While employed at CNA, he handled claims arising out of errors and omissions coverage. He identified various "claims counsel" who reported to him: Dave

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[2] **ACE 5/30/2002 Memorandum at 2-3. ACE thereafter filed a motion seeking another deposition of Dolowich as well as sanctions against Columbia.**

[3] **Dolowich Deposition at 18-19 (hereinafter "depo.")(attached as Ex. B to Columbia 5/31/2002 Memorandum).**

[4] **Depo. at 6. Dolowich is presently employed as Senior Vice President at Kemper. Prior to working for CNA, he had been a partner in a New York law firm from May 1996 until April 2000. Depo. at 7.**

Phillips, Tim Rasul, Hillary Hughes, Tal Wittenburg, Debra Stein, Kitty Bridgeman, and Lisa Block. In addition to himself and David Phillips, he identified Debbie Stein as working on the Refuse claim. Dolowich stated that his direct supervisor was Chris Borgenson. Depo. at 9-10.

Columbia's attorney Bodzin began raising objections early in the deposition. After Evans asked Dolowich whether his wife's name was Gail and whether he had two kids[5], Evans then asked Dolowich to name everyone who had contact with the Refuse claim. At this point, Bodzin interjected:

> **MR BODZIN: Before we get into that, as you know, Mr. Dolowich is an attorney. You also know that this case involves a series of communications that occurred between Columbia and their outside counsel in connection with this matter. And in earlier correspondence that I have sent to you, I have advised ACE that Columbia will allow witnesses who have participated in the process of the Refuse Fuel Claim who may have information, factual information about the investigation of the claim, and the handling of the claim to testify about matters relating to their factual participation without getting into opinions or advice of counsel.**
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> **What I would like to tell you is that in order to avoid any assertion of the attorney-client privilege or work product doctrine that would impede any investigation as to what factually occurred here, I am will to be much more liberal in asserting the privilege and asserting work product as long as we have an understanding going forward that nothing that occurs during this deposition will be deemed a waiver of the attorney-client privilege or work product. Depo. at 13.**

Evans responded to Bodzin's request for an agreement that

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[5] **Depo. at 11.**

"nothing that occurs this deposition will be deemed a waiver of the attorney -client privilege or work product" by granting Bodzin an "continuing objection." Throughout the remainder of the deposition, Bodzin frequently directed Dolowich not to answer a question due to the attorney-client privilege, while simultaneously suggesting that Evans agree to a stipulation as to the waiver of the attorney-client privilege if he wanted Dolowich to answer his question.[6] When Evans subsequently asked whether "CNA had a monthly meeting with counsel to discuss all D & O claims," Bodzin objected and instructed Dolowich not to answer.[7] Evans nonetheless repeated his question "whether it was a practice of CNA to have a monthly meeting to discuss pending directors and officers liability claims," which was once again met with an objection. Depo. at 17. Likewise, when Evans asked Dolowich, as corporate representative, to explain the factual basis for the denial of ACE's claim, Bodzin instructed Dolowich not to answer.[8]

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[6] See, e.g., depo. at 49, 64.

[7] Depo. at 15. In so doing, Bodzin explained that he had objected because "you would not agree to what is a perfectly reasonable stipulation in order to preserve the privilege. . ." Evans responded: "I just want a simple answer to a simple question." Depo. at 16. When Evans asked whether it was a practice of CNA to have a monthly meeting to discuss pending directors' and officers' liability, Bodzin once again instructed Dolowich not to answer "if counsel was present at those meetings." Depo at 17.

[8] Depo. at 48. Bodzin offered the following explanation for this instruction to Evans: "You could do that if you would agree to

Nearly midway through the deposition, Evans asked Dolowich whether the decision to deny coverage had been made by attorneys. Bodzin interjected to object and ask Evans about his wife's former employment:

> **Objection. Instruct him not to answer the question.. . Before you continue, I have a question for you that is appropriate for the record. When you walked in here, you introduced yourself to Mr. Dolowich and sent regards from your wife, who you said was or is an employee of Columbia. Can you please disclose, so that the court has adequate record here of what your wife's relationship to Columbia is and whether she is currently an employee of Columbia? Depo. at 30-31.**

Without responding to Bodzin's question, Evans recommenced his questioning. An hour and a half into the deposition, Bodzin asked for a break. Depo. at 79. When the deposition resumed, he abruptly ended it with the following statement:

> **Before we continue any questioning, at the inception of this deposition, Mr. Evans introduced himself to Mr. Dolowich, and Mr. Evans advised that he is married to a woman by the name of Linda Bauerschmidt, and I inquired about Ms. Bauerschmidt's relationship with Columbia, and Mr. Evans did not provide any information about that.**
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> **During the break, I have been able to confirm that Ms. Bauerschmidt was--I am not sure this is her exact title--something like the Director of Legal Services at Columbia, that she had a high management position, that her management position involved supervision of the units involved in this**

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the stipulation that it would not be deemed a waiver of the attorney client privilege because some of the communications, as you already know, occurred in the presence of counsel." Depo. at 49. See also depo. at 28 (Bodzin instructed Dolowich not to identify "the person that made the decision to deny ACE's claim under the Columbia policy").

claim, and that she left the employment of Columbia approximately one year ago. Depo. at 80-81.

ACE subsequently filed a Motion for Sanctions and to Compel another deposition of Dolowich. Columbia responded by filing a motion to rescind the pro hac vice admission of J. Randolph Evans and Stefan Passantino as counsel for ACE. Columbia argues that these attorneys should be disqualified because Evans improperly obtained confidential information from his wife, who had been a high level attorney for CNA "with intimate knowledge of Columbia's claims handling department."[9]

Legal Analysis

A. Authority of Court to Disqualify Counsel

Columbia argues that Evans must be disqualified because he has violated Pennsylvania's ethical rules, and in particular, Pennsylvania Rule of Professional Conduct 4.2 and Rule 1.8(i).[10] The Pennsylvania Supreme Court has cautioned that violations of the Code of Professional Responsibility or Rules of Professional Conduct do not per se give rise to legal actions or render that misconduct actionable. Maritrans GP, Inc.v. Pepper Hamilton & Scheetz, 529 Pa. 241,245, 255-56, 602 A.2d 1277,1279, 1284 (1992). Violations of professional rules of conduct, moreover, cannot be

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[9] **Columbia 5/31/2002 Memorandum at 5.**

[10] **Columbia 5/31/2002 Memorandum at 9-11 & 13.**

used to alter substantive law, including evidentiary rules or burdens of proof. In re Estate of Pedrick, 505 Pa. 530, 542-43, 482 A.2d 215, 221 (1984).

Nonetheless, the Pennsylvania Supreme Court has "held in several cases that counsel can be disqualified for violations of the Code where disqualification is needed to insure the parties receive the fair trial which due process requires." Id., 505 Pa. at 542, 482 A.2d at 221 (citing American Dredging Co. v. City of Philadelphia, 480 Pa. 177, 389 A.2d 568 (1978)). In Slater v. Rimar, 462 Pa. 138, 338 A.2d 584 (Pa. 1975), for instance, the court disqualified an attorney who represented a plaintiff in a shareholder derivative action involving an allegedly fraudulent stock option agreement between the two corporate defendants. Evidence was presented that the plaintiff's attorney had represented one of the defendants during the time of the transaction in dispute, and then subsequently provided information for plaintiff's complaint.[11] The Supreme Court concluded that these actions clearly violated the code of professional responsibility, especially an attorney's duty to preserve the confidences of his

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[11] Slater, 462 Pa. at 150-51, 338 A.2d at 590-91. The plaintiff's attorney had also served on the boards of the corporate defendants.

clients and to avoid conflicts of interest.[12]

The Slater court observed, moreover, that while an attorney might be subject to disciplinary action for breaching client confidentiality or failing to avoid conflicts of interest, "a court is not bound to await such development before acting to restrain improper conduct where it is disclosed in a case pending in that court."[13] Rather, under its supervisory power, a court may disqualify and remove counsel for a breach of ethics or fiduciary duty to a client. Accord Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. at 245, 251-52 & n.2, 260, 602 A.2d at 1279, 1282 & n.2, 1286-87 (enjoining attorneys from representing a former client's competitors based on attorneys' breach of common law fiduciary duty upon which the Pennsylvania Rules of Professional Conduct are premised). Disqualification, however, is a serious remedy that must take into consideration the important interest of a client's right to representation by counsel of his choice.[14] In

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[12] Slater, 462 Pa. at 145-49, 338 A.2d at 587-89. The court referenced the Code of Professional Responsibility that was in effect at that time as well as its predecessor Canons of Professional Ethics, under which "it is the duty of a lawyer to preserve the confidences of his client and to refrain from representing conflicting interests except by express consent of all concerned, given after full disclosure of the facts." Id. 462 Pa. at 145, 338 A.2d at 587.

[13] Slater, 462 Pa. at 148-49, 338 A.2d at 589.

[14] Slater, 462 Pa. at 149-150, 338 A.2d at 590. See also Gsell v. Diehl, 46 Pa. D. & C. 3d 65,69 (1986)(disqualification of

the instant case, for example, ACE has presented an affidavit that Evans and his firm have "spent over thousands of hours with these issues and prosecuting this action, at a significant cost to ACE American."[15] While this court has authority for the requested relief of disqualification, the merits of Columbia's arguments must be analyzed. See generally McCarthy v. SEPTA, 772 A.2d 987 (Pa. Super. 2001)("[W]here circumstances are such as to allow a sanction for violation of a Rule of Professional Conduct, the court must have evidence in the record to support a conclusion that the attorney did violate that particular rule").

B. With the Present Record, Columbia Has Failed to Establish that Evans Should Be Disqualified for Violating Pennsylvania Rules of Professional Conduct 4.2 Based on His Marriage to an Attorney Formerly Employed by CNA

Columbia invokes the Pennsylvania Rules of Professional Conduct to support its argument that Evans should be disqualified as ACE's counsel. It thus asserts that "Mr. Evans knowingly violated Rule 4.2 when he discussed this litigation with his

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counsel "is a serious remedy which must be imposed with an awareness of the important interests of a client in representation by counsel of plaintiff's choice").

[15] Affidavit of Joan Albanese, ¶ 5 (attached as Ex. 6 to ACE 6/7/2002 Memorandum)(hereinafter "Albanese Aff."). Ms. Albanese characterizes herself as "an employee" of Plaintiff ACE "and I am directly responsible for the present action on behalf of ACE American." Id., ¶ 2.

wife."[16] To support its claim that Mr. Evans discussed this litigation with his wife, Columbia relies both on some broad assumptions as well as on questions or statements made by Evans during the deposition of Dolowich. Both these assumptions and the Dolowich deposition must therefore be analyzed in the context of Rule 4.2. Rule of Professional Conduct 4.2 addresses communications by an attorney with a person represented by counsel and provides:

> **In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyers or is authorized by law to do so. Pa.Rule Prof. Conduct 4.2.**

The comment to this Rule further provides that in the case of an organization, "the Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a <u>managerial</u> responsibility on behalf of the organization." Pa.Rule Prof. Conduct 4.2, Comment (emphasis added). Columbia argues that under this rule Evans was precluded from discussing the Refuse Fuels litigation with his wife who was formerly employed by CNA at a high managerial level.

On its face, this Rule does not apply to former employees. Courts have reached differing views on scope of Rule 4.2 as to

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[16] **Columbia 5\31\2002 Memorandum at 9.**

former employees.[17] Judge Wettick in Pritts v. Wendy's of Greater Pittsburgh, 37 Pa.D & C.4th 158, 164-65 (Allegheny Ct. Ct. Com. Pleas 1998) concluded that Rule 4.2 did not preclude plaintiff's counsel from conducting ex parte interviews with former employees of a restaurant being sued for negligence in the providing E-coli infected food, although he did caution that inquiries should not be made into matters covered by the attorney-client privilege such as conversations between the employees and defense counsel. See also Marinnie v. Nabisco Brands, 1993 WL 267453, 1 (E.D.Pa. 1993)("although it has not received a uniform interpretation, Rule 4.2 does not appear to bar ex parte contacts with former employees"). Similarly, in University Patents, Inc.v. Kligman, 737 F. Supp. 325 (E.D.Pa. 1990), the court concluded that under Rule

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[17] See ABA Comm. on Ethics and Prof. Resp.,Formal Op. 91-359 (March 1991). This opinion notes that "[w]hile Rule 4.2 does not purport by its terms to apply to former employees," courts interpreting it have reached differing conclusions. It concluded:

> While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employees, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation. Id.

4.2 an attorney is not precluded from contacting former employees.[18] Another case where the court concluded that an attorney may engage in ex parte contacts with former employees is Action Air Freight, Inc.v. Pilot Air Freight Corp., 769 F. Supp. 899, 904 (E.D.Pa. 1991), app. denied, 961 F.2d 207 (3d Cir. 1992) although the court warned that counsel "must refrain from soliciting information protected by the attorney-client privilege."

Other courts have taken a more protective view of ex parte communications, concluding Rule 4.2 would bar communication with ex-employees of corporations or other entities where there is a real or perceived risk of disclosing confidential information protected by the attorney-client privilege. See, e.g., Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, 1992 WL 68563 (E.D.Pa. 1992)(Where Counsel should not have conducted ex parte interview with corporate plaintiff's former financial vice-president who was privy to communications with counsel concerning labor negotiations

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[18] University Patents, 737 F.Supp. at 328. The court in University Patents based its conclusion on the comment to Rule 4.2 that this Rule prohibits ex parte communication by an attorney with "all institutional employees whose acts or omissions could bind or impute liability to the organization or whose statements could be used as admissions against this organization." University Patents, 737 F.Supp. at 328. Since statements by former employees could not be imputed as admissions by the organizations, the court reasoned that Rule 4.2 would not seem to apply to them although it noted that "some courts have found that it does if they held 'confidential' positions or their conduct is subject to the litigation in question." Id.

that were at issue in the litigation, counsel was required to produce copies of any statements to opposing counsel).

This precedent can, however, be reconciled as suggested by Dillon Co.,Inc. v. SICO, Co., 1993 WL 492746, 4 (E.D.Pa. 1993) since these cases draw the line at ex parte contacts with former employees that result in the disclosure of privileged communications. The degree of risk of such disclosure would necessarily vary depending on the facts of a particular case and the people involved in it. For these reasons, the Dillon court concluded that a per se ban on contacts with former employees was not mandated by either the language of Rule 4.2 or any precedent interpreting it. It proposed a test for analyzing the likelihood that ex parte contacts might lead to exposure of privileged information:

> **That assessment would depend upon weighing such factors as the positions of the former employees in relation to the issues in the suit; whether they were privy to communications between the former employer and its counsel concerning the subject matter of the litigation, or otherwise; the nature of the inquiry by opposing counsel; and how much time had elapsed between the end of the employment relationship and the questioning by opposing counsel. Dillon, 1993 WL 492746 at 5.**

These factors, when applied to the facts of this case, can help determine whether Columbia has presented sufficient evidence that Evans has violated Rule 4.2 through his contacts with his wife as a former CNA employee. The Dillon court applied this test to

declarations by attorneys involved in ex parte conversations as well as to deposition testimony to determine whether any violation of the attorney-client privilege had occurred.[19] Dillon, 1993 WL 492746 at 5. A similar factual approach is fruitful here.

One key issue under Rule 4.2 would be the position of Ms. Evans in relation to the litigation at issue, the Refuse Fuels litigation.[20] As an attorney employed by CNA, Ms. Evans would be a person "having managerial responsibility on behalf of the organization" as outlined in the Comment to Rule 4.2. There was a dispute, however, as to the exact nature of her responsibilities and whether she would have been involved with the Refuse Fuels litigation. In its initial brief, Columbia claimed that Ms.Evans had been "employed by CNA/Colmbia as Director of Claims Counsel/Legal Services. As a member of CNA's upper management, Ms. Evans participated on CNA/Columbia's claims handling committee and was aware of the need to preserve the attorney-client privilege in the matters of claims committee meetings."[21] Columbia presented an

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[19] **Dillon, 1993 WL 492746 at 5. The Dillon court was presented with a motion to preclude use of information obtained from ex parte communications, not a motion to disqualify counsel.**

[20] **See, e.g., McCarthy v. SEPTA, 772 A.2d at 993 ("The key information needed by the trial court to determine if an employee qualifies for protection from ex parte communication with opposing counsel is what status that employee has within the employee's organization").**

[21] **Columbia 5/31/2002 Memorandum at 6.**

affidavit of Christopher Borgeson in support of these averrals.

In that affidavit, Borgeson stated that he had been employed by CNA since August 1995 and was the direct supervisor of Ivan Dolowich during the period of time "relevant to CNA's consideration of the request of ACE to pay the Refuse fuels claim."[22] He stated that Linda Evans had worked closely with him during the claim period and that employment records indicated she had been employed by CNA from April 1996 until September 2000. From late 1999 to September 2000, she "was assigned to work directly with me in connection with the oversight of claims within my supervisory sphere including the claim at issue in this case." Borgeson Aff. I. ¶¶ 10-12.

Ms. Evans by affidavit specifically disagreed with Borgeson's statement that she had anything to do with the "claim at issue in this case." She asserts that "I did not handle the claim, have any knowledge about the claim or supervise anyone who handled the claim or had knowledge about the claim." Affidavit of Linda Evans, ¶ 21 (June 6, 2002), attached as Ex. 1 to ACE 6/7/2002 Memorandum (hereinafter 6/7/2002 Linda Evans Aff.). Beginning in 1999, she was Director of Legal Services and her primary responsibility was to consolidate several different professional liability panel

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[22] **Affidavit of Christopher Borgeson, ¶¶ 2 & 6, attached as Ex. A to Columbia 5/31/2002 Memorandum (hereinafter Borgeson Aff. I).**

counsel lists into a universal CNA Pro panel counsel list. She told Borgeson in January 2000 of her intent to marry Randy Evans and move to Atlanta, at which point Borgeson worked out an arrangement where she could keep her job but work part-time out of Atlanta. She stated that beginning March 1, 2000, she began working part-time out of her home office in Georgia. She took a leave of absence and her last day of work was June 29, 2000. She formally quit her job by telephone call to Borgeson on August 23, 2000. She believed that Ivan Dolowich began working for CNA in New York after she left. She did not supervise Dolowich. 6/6/2002 Linda Evans Aff., ¶¶ 6-21. In a subsequent affidavit, Borgeson conceded that Ms. Evans did not supervise Dolowich.[23]

The present record supports Ms. Evans's position that she had no involvement in the Refuse Fuels litigation. Columbia, for instance, has maintained that it was not even notified of the Refuse Fuels claim until July 2000. See Columbia's Answer and New Matter, ¶ 93. Ivan Dolowich stated in his deposition that he was primarily responsible for this claim, and though he named several others with involvement in this matter, Linda Evans was not among them. See depo. at 10. Both Linda Evans and Borgeson agree that

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[23] Affidavit of Christopher Borgeson, submitted in camera by letter dated June 17, 2002, ¶ 22 (hereinafter Borgeson in camera Aff.) Because of the potential sensitivity of statements in this affidavit, it will not be directly quoted but merely alluded to when relevant.

she did not supervise Dolowich. In his in camera affidavit, Borgeson concedes that Ms. Evans did not adjust claims during the period that she was under his supervision.[24] Finally, at oral argument, Columbia's counsel conceded that the Refuse Fuels claim was not filed until approximately one year after Linda Evans left her employment with CNA. 6/11/2002 N.T. at 6-7.

Columbia has also focused on the deposition of Ivan Dolowich--and certain questions by Randolph Evans--as evidence that Evans benefitted from confidential information. Columbia argues that the questions about Dolowich's wife and children were "a blatant attempt to intimidate" Dolowich[25] and made him uncomfortable "as to why Mr. Evans knew about these particular facts." 6/11/2002 N.T. at 5. In response, Evans stated in an affidavit that he learned this information from the internet prior to the deposition. Moreover, he stated that he obtained no information from his wife on "any matter relating to this litigation." J. Randolph Evans Aff. (6/6/2002) ¶¶ 6 & 12, attached as Ex. 2 to ACE 6/7/2002 Memorandum.

In fact, statements by Columbia's counsel during the Dolowich deposition confirm that Evans made no attempt to hide his marital relationship. Counsel for Columbia noted that "[w]hen we walked in

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[24] **Borgeson in camera Aff., ¶ 20.**

[25] **Columbia 5/31/2002 Memorandum at 7.**

here today, you introduced yourself to Mr. Dolowich and sent regards from your wife, who you said either was or is an employee of Columbia." Depo. at 30. Columbia apparently seeks to use Evans' statement to cut both ways as proof of an effort to intimidate Dolowich during the deposition and of an effort to conceal his marital relationship from opposing counsel generally. Outside the intensely adversarial context of the Dolowich deposition, however, Evans' comments clearly informed the opposing parties of his wife's former relationship with CNA.

The major source of concern that Columbia identifies from the deposition questioning is that Evans was privy to confidential information concerning monthly meetings with outside counsel as evidenced by his questioning of Dolowich. In its brief[26] and during oral argument, Columbia's counsel specifically focused on the portion of the Dolowich deposition where Evans had asked about the monthly meetings with counsel to discuss all D & O claims. 6/11/2002 N.T. at 18-19. Borgeson likewise considered these monthly meetings with outside counsel to be highly significant and confidential. Borgeson in camera Aff.¶¶ 10 & 16. Finally, in a formal brief Columbia argues that "it is nearly impossible to gauge the amount of information Ms. Evans has imparted upon Mr. Evans

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[26] See **5/31/2002 Columbia Memorandum at 8 (focusing on Evans' questions concerning monthly meetings on pages 15, 17-18 of the deposition).**

concerning CNA/Columbia during their relationship. Mr. Evans'knowledge of CNA/Columbia's monthly claims meetings with outside counsel is an example of inside information that Mr. Evans could only have received only from within CNA/Columbia. Columbia 6/11/2002 Memorandum at 4.

The problem with this argument is that during the deposition of Dolowich it was counsel for Columbia, not ACE, who elaborated on the significance of meetings with outside counsel for the bad faith claim. Thus, before Evans asked any questions about the monthly meetings on page 15 of the deposition, counsel for Columbia made the following statement when objecting to a question asking Dolowich to identify everyone who had contact with the Refuse Fuels claim:

> **MR. BODZIN: Before we get into that, as you know, Mr. Dolowich is an attorney. You also know that this case involves a series of communications that occurred between Columbia and their outside counsel in connection with this matter. Depo. at 12 (emphasis added).**

If, as counsel for Columbia suggests, the significance of meetings between Columbia and its outside counsel was a "known" key element to the bad faith claim, it strains credulity to now claim that questioning as to those meetings reflects access to privileged information gained through conversations between Evans and his wife. Moreover, in bad faith cases, the policies and procedures used to evaluate a claim are a central issue for investigation.

Bonenberger v.Nationwide Mut. Ins. Co., 791 A.2d 378, 381-82 (Pa. Super. 2002)(insurance claim manual "was relevant evidence and offers support for the court's ultimate finding of bad faith"); Conway v. State Farm Fire & Casualty Co., 1998 WL 961365 (E.D.Pa. 1998)(insurance handling policies and procedures are discoverable in bad faith actions). Columbia's assertion that questions regarding the monthly meetings evidenced access to confidential information is thus unpersuasive.[27]

C. Columbia's Suggestion of a Per Se Disqualification Under Rule 1.8(i) of An Attorney Due to His Marriage to an Attorney Formerly Employed by An Adverse Party Is Too Broad

Columbia also invokes Rule 1.8(i) and argues in broad strokes that Evans should be disqualified as ACE's counsel due to his marital relationship to an attorney formerly employed by CNA. Pennsylvania Rule of Professional Conduct 1.8 addresses conflicts of interest, with Rule 1.8(i) addressing potential conflicts due to familial relationships:

> **(i) A lawyer related to another lawyer as parent, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.**

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[27] **Evans in his affidavit states that CNA's practice of holding monthly meetings is "well-known in the industry" and many insurers follow a similar practice. Evans Aff. (June 6, 2002)¶ 11, attached as Ex. 2 to ACE 6/7/2002 Memorandum.**

In arguing for disqualification, Columbia notes that Randolph and Linda Evans had been married for two years, "during one of which she was employed by CNA/Columbia as Director and Claims Counsel/Legal Services." It characterized Linda Evans as a member of "CNA's upper management" who would be a "wealth" of information to her husband on such subjects as "claims handling issues covered by the attorney-client or work-product privileges."[28] Columbia argues that in this case, "it is impossible for CNA to have a fair trial if Mr. Evans continues as counsel for ACE."[29] Columbia thus implies that the marriage relationship itself necessarity leads to the disclosure of confidential information between the married attorneys.[30] The remedy suggested would be a per se rule of

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[28] **Columbia 5/31/2002 Memorandum at 6.**

[29] **Columbia 5/31/2002 Memorandum at 12.**

[30] **Id. at 12. Columbia offered the following reasons for this conclusion:**

> **First, it is impossible to know the degree to which Mr. Evans and his wife have by now shared information regarding CNA/Columbia's internal matters, including confidential or privileged information, either merely by virtue of sharing a household and family during the relevant time period or specifically in connection with this litigation. Even if he were so inclined, it would be impossible for Mr. Evans to set aside this knowledge of CNA/Columbia's claims handling and financial policies and separate what he has learned from his wife from what he has learned through discovery or other proper channels. There is no way the Court can have any degree of confidence that Mr. Evans will not use this information he has already learned about CNA/Columbia in this litigation, or that future contacts between Ms. Evans and Mr. Evans will not take place-- whether intentionally or inadvertently--that**

qualification. Although neither side has pointed to Pennsylvania precedent on point, courts in other jurisdictions have declined to adopt such a per se rule. See e.g., Jones v. Jones, 258 Ga. 353, 369 S.E. 2d 478 (Ga. 1988)(rejecting a per se disqualification of counsel based on marital status); Non-Punitive Segregation Inmates v. Kelly, 589 F.Supp. 1330, 1338 (E.D.Pa. 1984), aff'd, 845 F.Supp. 1330 (E.D. Pa. 1984)("Just as a court will not presume that lawyers will disclose confidences to their close friends, courts will not presume that lawyers will disclose confidences to their spouses"). Moreover, the ABA opinion that Columbia invokes to support this result does not do so. Rather, it states:

> **It is not necessarily improper for husband-and-wife lawyers who are practicing in different offices or firms to represent differing interests. No disciplinary rule expressly requires a lawyer to decline employment if a husband, wife, son or daughter, brother, father or other class relative represents the opposing party in negotiation or litigation. Likewise, it**

> **could disclose confidential information about CNA/Columbia. Accordingly, there is no possible solution to this dilemma but to rescind the pro hac vice admissions of Mr. Evans and bar him and his partner from continuing to represent ACE. Columbia 5/31/2002 Memorandum at 12-13.**

The implications of these assertions are troubling. Columbia insinuates that Evans and his wife have already shared confidential information concerning Columbia's internal affairs "either merely by virtue of sharing a family during the relevant time period or specifically in connection with this litigation." It then suggests that it would be "impossible" for Evans to disregard this ill-gotten confidential information. Finally, it concludes that there is no way this court can have confidence that Evans will not use the information he has already learned to the detriment of Columbia.

> **is not necessarily improper for a law firm having a married partner or associate to represent clients whose interests are opposed to those of other clients represented by another law firm with which the married lawyer's spouse is associated as a lawyer.**
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> **A lawyer whose husband or wife is also a lawyer must, like every other lawyer, obey all disciplinary rules, for the disciplinary rules apply to all lawyers without distinction as to marital status. We cannot assume that a lawyer who is married to another lawyer necessarily will violate any particular disciplinary rule, such as those to protect a client's confidences, that proscribe neglect of a client's interest, and that forbid representation of differing interests. . . .**
>
> **Accordingly, we conclude that a law firm employing a lawyer whose spouse is a lawyer associated with another local law firm need not fear consistent or mandatory disqualification when the two firms represent opposing interests; yet it is both proper and necessary for the firm always to be sensitive to both the possibility of disqualification and the wishes of its clients. ABA Comm. on Ethics and Prof. Resp., Formal Op. 340 (September 23, 1975)(emphasis added).**

Rather than adopting a presumption that Columbia's confidential information has been disclosed by virtue of the marital relationship between CNA's former employee and her husband, any specific evidence of such disclosure must be scrutinized.

Rule 1.8(i) applies only where related attorneys are engaged in "directly adverse" representations; hence, the timing of the employment by Ms. Evans and Evans by Columbia and ACE respectively is crucial. During oral argument, Columbia's counsel conceded that in order for Rule 1.8(i) to be triggered there would have to be overlapping representation. 6/11/2002 N.T. at 7-8. An affidavit submitted by ACE of Joan Albanese, an employee of ACE "responsible

for the present action," is problematic as to this issue of overlap since it states "Mr. Evans and Mr. Passantino have represented ACE American in this matter since well before this suit began" without specifically indicating the exact date this representation commenced.[31] While Ms. Albanese's statement of the duration of Evans' representation of the Refuse Fuels claim may be unclear, Columbia conceded that it had no evidence of any overlap.[32] In a supplemental affidavit, Evans clarified this point when he stated that his representation of ACE in this matter adverse to Columbia began March 2001. Evans Aff. (6/14/2002), ¶ 4, attached as Ex. 3 to ACE 6/17/2002 Memorandum. Columbia has conceded that Ms. Evans' employment with CNA "for all intents and purposes" ceased June 29, 2000. 6/11/2002 N.T. at 6. Columbia has thus failed to present sufficient evidence that Rule 1.8(1) would even be applicable in this case.

D. <u>Columbia's Argument that Evans Should Be Disqualified Based on His Prior Representation of CNA Is Undeveloped</u>

A final basis for disqualification of Evans that Columbia presents somewhat feebly is Evans' own prior representation of CNA. Columbia noted, for instance, "that Mr. Evans has served as counsel

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[31] **Albanese Aff., ¶5.**

[32] **<u>See</u> 6/11/2002 N.T.at 8 & 10.**

for CNA/Columbia in the past and has accordingly had an attorney client relationship with CNA/Columbia independent of the conflict posed by his wife's involvement at CNA/Columbia." Columbia 5/31/2002 Memorandum at 7. In an affidavit, however, Evans states that according to the records of his law firm, his and its last representation of a CNA entity ceased in 1999. He also states that neither he nor his law firm ever represented CNA in a Director and Officer claim. Evans Aff.(6/14/2002) at ¶¶ 4-5. In the absence of a record of conflicting representation, disqualification based on Evans' past employment by CNA ending in 1999 is denied.

Conclusion

For these reasons,Columbia's Motion to Rescind the Pro Hac Vice Admission of J. Randolph Evans and Stefan Passantino as counsel for ACE American Insurance Company is DENIED.

Date: November 26, 2002 **BY THE COURT:**

John W. Herron