

**STATE OF VERMONT  
RUTLAND COUNTY**

**PAUL E. McCLURE, JR.,**

**Plaintiff,**

**v.**

**BANSE & BANSE, P.C. and  
PETER H. BANSE, Esquire,**

**Defendants**

**Rutland Superior Court  
Docket No. 938-12-08 Rdcv**

**CONFORMED COPY  
RUTLAND SUPERIOR COURT  
JAN 20 2010**

**DECISION ON DEFENDANT'S MOTION FOR DISQUALIFICATION OF  
PLAINTIFF'S COUNSEL, FILED JANUARY 15, 2010**

Defendants Peter H. Banse, Esq. and Banse and Banse, P.C. move to disqualify plaintiff Paul E. McClure, Jr.'s counsel and law firm on the ground of a conflict of interest because of the law firm's representation of defendant Peter Banse in a prior legal malpractice case.

Plaintiff is represented by Matthew G. Hart, Esq. and Rodney McPhee, Esq. of the law firm Kenlan, Schwiebert, Facey & Goss, P.C. Defendants are represented by Kaveh S. Shahi, Esq.

**BACKGROUND**

In the instant action, Paul E. McClure, Jr. alleges fiduciary breach—conflict of interest, legal malpractice, and breach of contract against Peter H. Banse, Esq. and his law firm, Banse and Banse, P.C., arising out of representation in a real estate transaction.

In his complaint, Mr. McClure (McClure) sets forth that in early 2002, John Adams (Adams) approached McClure about the possibility of McClure purchasing land in Fair Haven from William G. Altorfer, Sr. and William G. Altorfer, Jr. (the "Altorfer

Development”). At the same time, Adams indicated to McClure his own intent to purchase land owned by the Altorfers, near the Altorfer Development. At Adams’s recommendation, McClure retained attorney Peter Banse, of Banse & Banse, P.C., to represent him in the purchase of the Altorfer Development, as attorney Banse was also representing Adams in his purchase from the Altorfers.

Attorney Banse, in addition to representing McClure and Adams in their respective purchases from the Altorfers, also drafted an agreement between McClure and Adams (the Agreement). The Agreement set forth conditions by which Adams could obtain from McClure, for no consideration, one and one-half lot from the Altorfer Development. McClure and Adams signed the Agreement at the time of their closings.

Adams recorded the Agreement in the Fair Haven Land Records. McClure, unaware of Adams’s claim of ownership, began building a house on the lot. Thereafter, Adams filed suit against McClure claiming ownership of the one and one-half lot under the Agreement. The parties settled their dispute.

McClure alleges that attorney Banse did not advise him as to the conflict of interest in representing both parties to the Agreement, did not have him sign a conflict waiver, and did not recommend that he obtain separate counsel. McClure further alleges that attorney Banse did not provide proper counsel regarding the Agreement at the time he signed it.

McClure now seeks to recover from attorney Banse the settlement he paid Adams and consequential damages. He is represented by attorneys Matthew Hart and Rodney McPhee of the law firm Kenlan, Schwiebert, Facey & Goss, P.C.

In 1992-1993, then-attorney William Cohen of the law firm Abell, Kenlan, Schwiebert & Hall (predecessor firm to Kenlan, Schwiebert, Facey & Goss, P.C.) defended attorney Banse in a legal malpractice case.<sup>1</sup> The case was entitled *Flamma v. Banse* and was heard in the United States District Court for the District of Vermont.

Mr. Flamma's (Flamma) claim for legal malpractice arose out of his purchase of lots in a condominium development near Killington. Attorney Banse's office drafted a purchase and sale agreement for the developer, which was used for the purchase. The developer sent attorney Banse the purchase contracts and the deposit, which attorney Banse placed in a client account.

Later, the transaction fell through and Flamma sought return of his deposit. Litigation ensued between Flamma and the developer. The outcome of that case allowed some of the deposit to be returned to Flamma. The developer, however, had withdrawn the money from the client account.

Flamma sued attorney Banse for legal malpractice, claiming that attorney Banse had a fiduciary obligation to properly secure the deposit funds. Attorney Banse's defense was that Flamma was not his client and he owed him no duty. The case went to trial, resulted in a plaintiff's verdict, and subsequently settled.

The Honorable William Cohen left Abell, Kenlan, Schwiebert & Hall over ten years ago. The file for *Flamma v. Banse* was destroyed in 2000. Furthermore, attorney Hart did not join Kenlan, Schwiebert, Facey & Goss, P.C. until 2009. Although attorney McPhee was with the firm in 1992, he did not work on the *Flamma v. Banse* case and has no knowledge of the matter.

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<sup>1</sup> The Honorable William Cohen is the presiding judge in the instant case and Defendants have not sought his recusal.

## DISCUSSION

Defendants argue that Plaintiff's counsel, the law firm of Kenlan, Schwiebert, Facey & Goss, P.C., should be disqualified because of their representation of attorney Banse in the 1992 legal malpractice case of *Flamma v. Banse*. Defendants argue that the facts of the instant case are substantially related to those of *Flamma*.

In Vermont, attorney conflicts of interest are addressed by the Vermont Rules of Professional Conduct, which state:

When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the *same or substantially related* to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

V.R.P.C. 1.10(b) (emphasis added).

Matters are "substantially related" when they involve the same transaction or legal dispute or if 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. V.R.P.C. 1.9 cmt. 3; see also *State v. Crepeault*, 167 Vt. 209, 216 (1997) (stating "[s]ubstantiality is present if the factual contexts of the two representations are similar or related."). The passage of time may render obsolete information acquired in a prior representation. *Id.*

Here, the *Flamma* and *McClure* matters are not substantially related. They do not involve the same transaction or legal dispute. See V.R.P.C. 1.9 cmt. 3. The *Flamma* suit involved a claim for breach of fiduciary duty arising out of a withheld deposit. The instant matter involves an alleged conflict of interest arising out of dual-representation in a real-estate transaction. The legal issues are not substantially related. That both matters involved claimed legal malpractice arising out of real estate transactions does not make them substantially related.

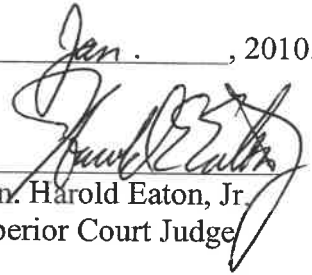
Furthermore, the *Flamma* suit occurred over 16 years ago. The Honorable William Cohen left the firm over ten years ago and the file was destroyed in 2000. The passage of time has rendered obsolete information acquired in the prior representation.

Because of the differences between the two matters and the passage of time, there is no substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance McClure's position in the instant matter. See V.R.P.C. 1.9 cmt. 3. Defendant's motion is denied.

### ORDER

Defendants' Motion for Disqualification of Plaintiff's Counsel, filed January 15, 2010, is DENIED. Jury selection is to proceed as scheduled.

Dated at Rutland, Vermont this 20 day of Jan., 2010.

  
Hon. Harold Eaton, Jr.  
Superior Court Judge