[Cite as *Cargould v. Manning*, 2009-Ohio-5853.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ronalee Cargould,	:	
Plaintiff-Appellee,	:	
		No. 09AP-194
v.	:	(C.P.C. No. 08DR01-277)
Tom Manning,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 5, 2009

Wolinetz Law Offices, LLC, Barry H. Wolinetz, and *Kelly M. Gwin*, for appellee.

Lane, Alton & Horst, LLC, Maryellen Corna-Reash, and *Ray S. Pantle*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

FRENCH, P.J.

I. Introduction

{¶1} Defendant-appellant, Tom Manning, appeals the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, which denied his motions to disqualify counsel representing plaintiff-appellee, Ronalee Cargould, and for related attorney fees. Tom's appeal presents the issue of whether the trial court erred

by failing to apply the Ohio Rules of Professional Conduct in resolving his motion to disqualify or otherwise erred by denying it. We conclude that the rules provide helpful guidance in these circumstances. However, neither the rules nor the three-part test used by the trial court precluded Ronalee's chosen counsel from representing her, therefore, we affirm.

A. Background

{¶2} On January 24, 2008, Ronalee filed a complaint for divorce. Tom answered and filed a counterclaim for divorce.

{¶3} On September 12, 2008, Attorney Barry Wolinetz filed a notice of substitution of counsel, indicating that he would be acting as counsel for Ronalee. Tom moved to disqualify Mr. Wolinetz as Ronalee's counsel because he had met with Mr. Wolinetz to discuss the divorce and custody issues. Specifically, Tom contended that he and Mr. Wolinetz had formed an attorney-client relationship. Therefore, Prof.Con.R. 1.9, which governs a lawyer's duties to former clients, precluded Mr. Wolinetz from representing Ronalee. In the alternative, Tom argued that he, at least, was a prospective client, and Mr. Wolinetz should be disqualified from representing Ronalee under Prof.Con.R. 1.18, which governs a lawyer's duties to prospective clients.

{¶4} The trial court held a hearing on the motions. At the end of the hearing, the court stated that it would take the matter under advisement. On January 26, 2009, the court issued a judgment and entry, which denied Tom's motion to disqualify counsel and his motion for related attorney fees.

B. Assignments of Error

{¶5} Tom filed an immediate appeal, and raises the following assignments of error:

> I. THE TRIAL COURT ERRED IN FAILING TO APPLY OHIO RULE OF PROFESSIONAL CONDUCT 1.18 WHEN REACHING ITS DECISION.
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> II. THE TRIAL COURT ERRED IN DENYING MANNING'S MOTION TO DISQUALIFY, BECAUSE WOLINETZ'S REPRESENTATION OF CARGOULD VIOLATES OHIO RULE OF PROFESSIONAL CONDUCT 1.18.
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> III. THE TRIAL COURT ERRED IN DENYING MANNING'S MOTION TO DISQUALIFY, BECAUSE WOLINETZ'S DISQUALIFICATION IS WARRANTED UNDER OHIO RULE OF PROFESSIONAL CONDUCT 1.9 AND UNDER THE THREE-PART *DANA* TEST.
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> A. The Trial Court Erred In Failing To Find That An Attorney-Client Relationship Existed Between Manning and Mr. Wolinetz.
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> B. The Trial Court Erred In Finding That Mr. Wolinetz Did Not Acquire Confidential Information From Manning, Because There Is An *Irrebutable* Presumption That Mr. Wolinetz Acquired Such Information.
>
> C. The Trial Court Erred In Finding That Manning Failed To Demonstrate That Mr. Wolinetz Received Information From Manning That Would Not Otherwise Be Discoverable During Trial.
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> IV. THE TRIAL COURT ERRED IN CONCLUDING THAT MANNING WAS REQUIRED TO PROVE THAT HE WOULD BE PREJUDICED BY MR. WOLINETZ'S CONTINUED REPRESENTATION OF CARGOULD.
>
> V. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MANNING'S MOTION FOR ATTORNEY'S FEES.

II. Analysis

{¶6} In his first four assignments of error, Tom challenges the court's denial of his motion to disqualify counsel. A trial court holds wide discretion when considering a motion to disqualify a party's chosen counsel. *Luce v. Alcox*, 165 Ohio App.3d 742, 2006-Ohio-1209, ¶8, citing *Spivey v. Bender* (1991), 77 Ohio App.3d 17. When a trial court orders disqualification of counsel, we review that decision under an abuse-of-discretion standard. *Mentor Lagoons, Inc. v. Rubin* (1987), 31 Ohio St.3d 256. An abuse of discretion is more than a mere error of law or judgment; it requires a finding that the court's action is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶7} To resolve Tom's motion for disqualification, the trial court considered a three-part test articulated by the Sixth Circuit Court of Appeals in *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio* (C.A.6, 1990), 900 F.2d 882, 889, and relied upon by this court in *Luce*. That test requires a trial court, when considering a motion to disqualify, to determine (1) whether a past attorney-client relationship existed between the moving party and the counsel sought to be disqualified, (2) whether the subject matter of that past relationship is related to the proceedings at issue, and (3) whether the counsel acquired confidential information from the moving party.

{¶8} Using the *Dana* test, the trial court concluded that (1) it could not determine whether an attorney-client relationship existed between Tom and Mr. Wolinetz, (2) the subject matter of that relationship, if it existed, was related to the divorce proceedings, and (3) it was not clear what, if any, non-discoverable, confidential information Mr. Wolinetz had acquired. In the end, the court concluded that Tom had

not proven that allowing Mr. Wolinetz to represent Ronalee would have a prejudicial effect on Tom. Therefore, the court denied disqualification.

{¶9} A trial court has inherent authority to regulate the practice before it and to protect the integrity of its proceedings, including the authority and duty to ensure the ethical conduct of attorneys. *Mentor Lagoons* at 259, quoting *Royal Indemn. Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 33-34. This power includes the inherent authority to disqualify counsel if he or she cannot, or will not, comply with Ohio's rules governing ethics and professionalism when representing a client. Id. The Supreme Court of Ohio has emphasized that this power of the trial court to disqualify an attorney is distinct from the exclusive authority of the Supreme Court to discipline an attorney. Id., citing *Royal Indemn.* at 34.

{¶10} Tom argues on appeal that the trial court should have considered the Ohio Rules of Professional Conduct in resolving his motion. We agree that the rules, which became effective in 2007, provide helpful guidance for determining whether to grant a motion to disqualify. We note, however, that violation of a rule, by itself, does not "give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Prof.Con.R. Preamble at (20). Most important here, "violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." Id. Rather, the rules "simply provide a framework for the ethical practice of law." Prof.Con.R. Preamble at (16). With this framework in mind, we turn to the testimony and evidence presented by the parties.

{¶11} Tom testified that he met with Mr. Wolinetz on January 25, 2008, after receiving a referral from one of Mr. Wolinetz's former clients. As proof, Tom offered an affidavit from the man who referred him, a copy of Tom's calendar, on which he had noted the appointment, and a copy of a parking ticket he said he received while he met with Mr. Wolinetz. He also described Mr. Wolinetz's office and the dog that was in the office that day.

{¶12} Tom said that he told Mr. Wolinetz "everything about [his] case, and [his] wife, and personal information, and strategies." (Tr. 23-24.) He also told Mr. Wolinetz what he "was willing to settle for." (Tr. 25.) He said they discussed possible strategies concerning custody and divorce, and they discussed business issues related to the divorce. Mr. Wolinetz gave him "some possible solutions." (Tr. 25.)

{¶13} In sharp contrast, Mr. Wolinetz testified that he had no recollection or evidence of ever meeting with Tom. He presented evidence of his whereabouts and schedule on January 25, 2008, and argued that it left him virtually no time to meet with Tom at noon that day. He disputed Tom's description of his office and the dog. He also said that Tom did not recount statements that he makes to every prospective client, statements that would have indicated to Mr. Wolinetz that he had simply forgotten his meeting with Tom.

{¶14} Tom testified that he met with Mr. Wolinetz "to basically meet with him to represent [him] through the divorce." (Tr. 20-21.) He confirmed, however, that he did not hire Mr. Wolinetz that day, sign a fee agreement or pay a retainer.

{¶15} Prof.Con.R. 1.18 governs the duties of a lawyer with respect to prospective clients. For purposes of the rule, a prospective client is "[a] person who

discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." Prof.Con.R. 1.18(a). Even assuming that Tom's testimony is true, we conclude that he was a prospective client under the rule. As a prospective client, Tom "should receive some but not all of the protection afforded clients." Id. at Comment [1]. Specifically, R. 1.18 provides, in pertinent part:

> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to division (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a *substantially related matter* if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in division (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in such a matter, except as provided in division (d).
>
> (d) When the lawyer has received disqualifying information as defined in division (c), representation is permissible if either of the following applies:
>
> (1) both the affected client and the prospective client have given *informed consent, confirmed in writing*;
>
> (2) the lawyer who received the information took *reasonable* measures to avoid exposure to more disqualifying information than was *reasonably* necessary to determine whether to represent the prospective client, and both of the following apply:
>
> (i) the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) *written* notice is promptly given to the prospective client.

(Emphasis sic.)

{¶16} Prof.Con.R. 1.18 does not prohibit a lawyer "from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter." Id. at Comment [6]. In this case, the trial court did not refer to R. 1.18 or expressly consider whether Mr. Wolinetz had received "information that could be significantly harmful" to Tom. But the court did consider, in the context of the *Dana* test, whether Mr. Wolinetz had received confidential information from Tom and whether his receipt of the information could be prejudicial to Tom. Within this context, the court stated that "it was not clear to this Court what, if any, information was of such a confidential nature that it would not otherwise be discoverable during the course of trial." The court did not abuse its discretion in reaching that conclusion. While Tom testified that he and Mr. Wolinetz discussed the details of the divorce and that he revealed evidence unknown to Ronalee, Tom did not disclose those details to the court. Mr. Wolinetz testified repeatedly that he did not recall even meeting with Tom and did not recall any of the information Tom says he disclosed. Based on that evidence, the court could reasonably conclude that Mr. Wolinetz had not received information that could prejudice Tom or, in terms of R. 1.18, that could be significantly harmful to him. The court could reach this conclusion by finding that (1) the meeting never occurred, (2) the meeting occurred, but Mr. Wolinetz forgot everything Tom told him, or (3) the meeting occurred, but Tom revealed only discoverable information.

Therefore, neither the *Dana* test nor Prof.Con.R. 1.18 would preclude Mr. Wolinetz from representing Ronalee.

{¶17} Having concluded that, if the meeting with Mr. Wolinetz occurred as Tom said it did, Tom was a prospective client under R. 1.18, we may also conclude that Tom is not a "former client" under R. 1.9. That rule prohibits a lawyer who has formerly represented a client in a matter from thereafter representing another person in the same matter, unless the former client gives written, informed consent. There was no evidence that Tom is a "former client" of Mr. Wolinetz. While Tom may have expected that his communication with Mr. Wolinetz, if it occurred, would remain confidential—an expectation R. 1.18 protects—he did not testify that he understood that he had already become a "client" of Mr. Wolinetz. Instead, Tom testified that, when he left the meeting, it was his understanding that Mr. Wolinetz "would be willing to represent" him if Tom could afford the legal fees. (Tr. 28.) While Tom may have anticipated the possibility of hiring Mr. Wolinetz, he never did so. Because Tom is not a "former client" under R. 1.9, any consideration of R. 1.9 by the trial court would not have made a difference to the outcome.

{¶18} Finally, we address Tom's argument that the court erred by requiring him to show prejudice. We note, first, that this argument is inconsistent with his argument that the trial court should have considered the Ohio Rules of Professional Conduct. When analyzing requirements under Prof.Con.R. 1.18, a court would have to consider prejudice, i.e., whether disclosure of any confidential information would be "significantly harmful" to the person who was a prospective client. Second, we have already noted our agreement with the trial court's finding that Tom had not shown that non-

discoverable, confidential information had even been disclosed. The court did not err by balancing the equities.

{¶19} In the end, because this case turns on the distinction between a prospective client and a former client, and the duties owed to each, the Ohio Rules of Professional Conduct provide helpful guidance for resolving Tom's motion to disqualify Mr. Wolinetz. We have concluded, however, that neither the *Dana* test nor the rules preclude Mr. Wolinetz's representation of Ronalee. Therefore, we overrule Tom's first four assignments of error.

{¶20} In his fifth assignment of error, Tom argues that the court erred by denying his motion for attorney fees related to his motion to disqualify Mr. Wolinetz. Having concluded that the trial court did not err by denying his motion to disqualify, we also conclude that the court did not err by denying his motion for related attorney fees. Accordingly, we overrule his fifth assignment of error.

III. Conclusion

{¶21} In conclusion, we overrule all five of Tom's assignments of error. We affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.