

JEANNE HICKS, CLERK
RECEIVED
NIGHT DEPOSITORY

2004 JUL 14 PM 5:44

FILED
[Signature]
DEPUTY CLERK

1 Mark W. Drutz, Esq., # 006772
Jeffrey R. Adams, #018959
2 MUSGROVE, DRUTZ & KACK, P.C.
1135 Iron Springs Road
3 Prescott, Arizona 86305
(928) 445-5935

4 Attorneys for Defendants

5
6 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF YAVAPAI**

8 JOHN B. CUNDIFF and BARBARA C.)
CUNDIFF, husband and wife; ELIZABETH)
9 NASH, a married woman dealing with her)
separate property; KENNETH PAGE and)
10 KATHRYN PAGE, as Trustee of the Kenneth)
Page and Catherine Page Trust,

11 Plaintiffs,

12 v.

13 DONALD COX and CATHERINE COX,)
14 husband and wife,

15 Defendants.

CASE NO. CV 2003-0399

DIVISION 1

**RESPONSE AND OBJECTION TO
MOTION TO DISQUALIFY
DEFENDANTS' COUNSEL AND
MOTION FOR PROTECTIVE ORDER**

(Assigned to the Honorable David L.
Mackey)

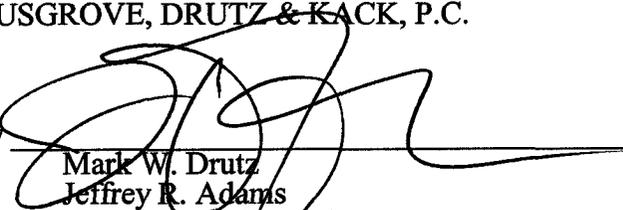
(Oral argument requested)

16
17
18 Defendants, by and through undersigned counsel, hereby respond and object to Plaintiffs'
19 Motion to Disqualify Defendants' Counsel and Motion for Protective Order (collectively, "**Motion**
20 **to Disqualify**") because no conflict of interest exists. Defendants assert further that the Motion to
21 Disqualify was filed belatedly and solely for purposes of gaining a tactical advantage to the
22 Defendants' detriment. Accordingly, Defendants request sanctions against Plaintiffs and their counsel
23 and ask that they be ordered to reimburse Defendants for their attorneys' fees and costs associated with
24 defending against the frivolous and improper Motion to Disqualify. This response and objection is
25 fully supported by the accompanying Memorandum of Points and Authorities and the record on file
26 which shall be incorporated by reference.

27
28 **DIVISION 1**
JUL 16 2004

1 RESPECTFULLY SUBMITTED this 14 day of July, 2004.

2 MUSGROVE, DRUTZ & KACK, P.C.

3
4
5 By 

6 Mark W. Drutz

Jeffrey R. Adams

Attorneys for Defendants

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. Summary of Key Facts.**

9 On June 10, 2003, Defendants inquired about this firm representing them in opposing the
10 lawsuit brought by Plaintiffs. See Affidavit of John G. Mull attached as Exhibit "1" ("**Mull**
11 **Affidavit**"). On that date they met with Mark W. Drutz and John G. Mull, both attorneys with
12 Musgrove, Drutz & Kack, P.C. ("**MD&K**"). Id. A conflict check was performed by Mr. Drutz and
13 Mr. Mull. Id. During that process, Mr. Drutz and Mr. Mull noted that MD&K, primarily through Mr.
14 Mull, had previously represented Plaintiffs Page beginning in December, 2000 and which was
15 completed approximately seven months later. Id. That work for the Pages concerned a simple dispute
16 between Plaintiffs Page and their general contractor, Jay Fagelman, regarding the construction of the
17 Pages' home. Id. That matter had nothing to do with (i) the Defendants' property that is the subject
18 matter of this case, (ii) the Defendants' use of their property that is the subject matter of this case, (iii)
19 the Declaration of Restrictions that may or may not encumber the property owned by Defendants and
20 which are at issue in this case. Id. Nor did MD&K's former representation of the Pages have anything
21 to do with the Pages's use of their property or their personal finances. At no time did the Pages impart
22 to MD&K any information that could be used by Defendants to materially advance their defense
23 against Plaintiffs' claims in the current lawsuit. Id. Based on the foregoing analysis, Mr. Drutz and
24 Mr. Mull determined that this case was neither the same as, nor substantially related to, the former
25 representation of Plaintiffs Page and that no conflict existed. Id.

1 Defendants did not retain MD&K until February, 2004. Id. Shortly after Defendants retained
2 this firm, counsel for Plaintiffs, David Wilhelmsen, was advised by telephone of MD&K's
3 representation of Defendants. See Exhibit 1 attached to Plaintiffs' Motion to Disqualify. A letter
4 confirming MD&K's representation was sent to Mr. Wilhelmsen shortly after the foregoing telephone
5 call. Id. Yet despite the fact that the Pages were fully aware that they had previously been represented
6 by MD&K from December 2000 until July 2001, they and their counsel waited until Wednesday, June
7 24, 2004, which was immediately (less than an hour) following the Pages' depositions which went
8 poorly, to assert their objection to MD&K's representation of Defendants. As a result, Plaintiffs'
9 counsel refused to allow MD&K to move forward with the depositions of the other Plaintiffs that were
10 properly noticed pursuant to Rule 30, Ariz. R. Civ. P. See Exhibits 2 and 3 attached to Plaintiffs'
11 Motion to Disqualify.

12 Following Plaintiffs' assertion that they considered MD&K to have a conflict of interest in
13 continuing to represent Defendants, the Pages' file again was reviewed by several attorneys' with
14 MD&K and a conference was held to evaluate the conflict allegation. See Exhibit "1" attached hereto
15 (Mull Affidavit). In connection with that review, a call was placed to the Arizona State Bar Counsel
16 for the State Bar Association to inquire whether the Bar believed a conflict existed under the facts
17 previously described to which the response was "no". Id. Following the foregoing process, Plaintiffs'
18 counsel was advised that no conflict existed and that MD&K would continue to represent Defendants.
19 See Exhibit 4 attached to Plaintiffs' Motion to Disqualify. Plaintiffs' 20-page Motion to Disqualify
20 followed on June 30, 2004. Interestingly, Plaintiffs ignored MD&K's offer to allow them and their
21 counsel to examine and inspect the Pages' file with this office before filing their motion in an effort
22 to ascertain whether a conflict actually existed.¹ Furthermore, only after they filed their Motion to
23 Disqualify did Plaintiffs and their counsel proceed with discovery in this case (outside of taking
24

25 ¹The Court is invited to conduct its own in-camera inspection of the Pages' file with MD&K
26 to verify that there is nothing in said file that would give rise to a conflict of interest. To
27 accommodate that inspection, the Pages' file with MD&K will be brought to the July 20, 2004, oral
28 argument for this purpose.

1 Defendants' depositions the day before they first asserted that a conflict existed). The foregoing facts
2 establish, unequivocally, that Plaintiffs have used their Motion to Disqualify and the ethical rules set
3 forth by the Supreme Court as a sword to gain a tactical advantage. Given that no conflict of interest
4 exists, Plaintiffs zeal to bolt to the Courthouse to file their meritless motion while at the same time
5 aggressively engaging in their own discovery while denying Defendants the opportunity to do so
6 certainly smacks of gamesmanship and is improper. Thus, the Motion to Disqualify must be denied.

7 **II. Plaintiffs Have Misstated The Legal Standard To Establish That A Conflict Of**
8 **Interest Exists.**

9 In their Motion to Disqualify, Plaintiffs misstate what their burden is with respect to
10 establishing that a conflict of interest exists in their effort to prevent MD&K from representing
11 Defendants. In their motion, Plaintiffs state that they can meet their burden by showing "some
12 relevance between the prior representation and the current adverse successive representation." See
13 Motion to Disqualify at p. 10, lns. 18-20. However, the foregoing is not the standard.

14 "The party seeking to disqualify an attorney bears the burden of proving that disqualification
15 is warranted." Islander East Rental Program v. Ferguson, 917 F.Supp 504, 508 (S.D. Tex 1996). The
16 legal standard in Arizona establishing whether a conflict exists, ER 1.9, Rule 42, Ariz. R. Sup. Ct.,
17 provides that a conflict does not exist unless the subsequent representation is "in the same or
18 substantially related matter in which that person's interests are materially adverse to the interests of
19 the former client...." In discussing ER 1.9, the December 1, 2003, Comment provides:

20 Matters are "substantially related" for purposes of this Rule if they
21 involve the *same transaction or legal dispute* or if there otherwise is
22 a *substantial risk* that confidential factual information as would
23 normally have been obtained in the prior representation would
materially advance the client's position in the subsequent matter....
Information acquired in a prior representation may have been rendered
obsolete by the passage of time, a circumstance that may be relevant in
determining whether two representations are substantially related.

24 In meeting their burden of establishing the existence of a legal conflict, "[t]he movant must
25 establish a preponderance of the facts indicating [a] substantial relation between the two
26 representations. Univ. Services Co., Inc. v. Ung, 882 S.W.2d 460, 468 (Tex. App. 1994) citing NCNB
27
28

1 Texas Nat'l Bank v. Coker, 765 S.W.2d 398, 399-400 (Tex. 1989) (emphasis added). "A party seeking
2 disqualification of an attorney based on the attorney's former representation of the party in a
3 substantially related matter must show disqualification to be appropriate through a specific delineation
4 of the 'subject matters, issues and causes of action' common to both representations." Id. at 510
5 (emphasis added). Hence the use of the word "substantial" in the phrase "substantially related" and
6 the commentary cited above, *supra*, establishes that a substantial risk must be present that factual
7 information will be subject to use to "materially" advance the client's position in the subsequent
8 matter. See ER 1.9, Rule 42, Ariz. R. Civ. P., December 1, 2003, Comment. The foregoing is
9 consistent with the determination made by the California Court of Appeals in Jessen v. Hartford
10 Casualty Ins. Co., 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877 (2003), a case cited by Plaintiffs:

11 [S]uccessive representations will be "substantially related" when the
12 evidence before the trial court supports a rational conclusion that
13 information material to the evaluation, prosecution, settlement or
14 accomplishment of the former representation given its factual and legal
15 issues is also material to the evaluation, prosecution, settlement or
16 accomplishment of the former representation given its factual and legal
17 issues.

18 Id. at 712 (emphasis added). In this case, Plaintiffs have failed to meet their burden. In failing to
19 meet their burden, Plaintiffs have failed to show that information material to the evaluation,
20 prosecution, settlement or accomplishment of the former representation by MD&K was obtained or
21 could have been obtained that would be material to the evaluation, prosecution, settlement or
22 accomplishment of this current case. In fact, Plaintiffs have failed to show any similarities, be they
23 factual or legal, between the two representations. Thus, there is no basis upon which to conclude that
24 the two matters are substantially related or that an improper conflict of interest exists.

25 **III. There Are No Similarities Between MD&K's Former Representation Of The**
26 **Pages And The Current Case; Nor Was Any Information Material To The**
27 **Resolution Of The Pages' Former Matter Divulged To MD&K That Would Be**
28 **Material To This Case.**

In this case, the matter now handled by MD&K for the Defendants is not substantially related
to that handled for the Pages. In fact, there are absolutely no similarities between the two
representations. This case involves allegations that Defendants have violated the Declaration of

1 Restrictions that govern the portion of Coyote Springs Ranch in which the Defendants' property is
2 located. The matter handled by MD&K for the Pages more than three years ago concerned only a
3 dispute concerning the construction of the Pages' home. That dispute was with the Pages' general
4 contractor, Jay Fagelman. Specifically, that dispute involved issues surrounding Mr. Fagelman's
5 construction and/or installation of the Pages' basement furnace, attic furnace, venting in the storage
6 closet, roof vent pipes, chimney pipe, sewer clean-out, master bathroom tub, master bedroom
7 carpeting, the kitchen sink, soffits, marble, and kitchen cabinets. The only economic issues involved
8 concerned the Pages' request for an offset against the cost of construction. The only information
9 obtained from the Pages concerning their personal finances included the receipt of a retainer check
10 and their timely payment of their bill with this office. MD&K obtained no information from the Pages
11 or from any other source as to their personal financial situation.

12 As should be obvious, the former representation of the Pages has absolutely nothing to do with
13 the matters at issue in this case. Furthermore, Plaintiffs' claim that a conflict exists because MD&K
14 might have obtained information concerning the Pages' personal finances fails for at least two reasons.
15 First, the Pages' finances had absolutely nothing to do with their efforts to secure Jay Fagelman's
16 proper performance of his job as the Pages' general contractor. Thus, their personal finances were not
17 "material to the evaluation, prosecution, settlement or accomplishment of" MD&K's former
18 representation of the Pages.

19 Second, the Pages' finances during MD&K's representation of them has absolutely no bearing,
20 much less a material bearing, on the evaluation, prosecution, settlement or accomplishment of this
21 case including the defense of laches. This case involves (i) the Defendants' property, (ii) the
22 Defendants' use of their property, and (iii) the Declaration of Restrictions that may or may not
23 encumber the property owned by Defendants. This case does not have anything to do with any
24 construction issues between the Pages and Mr. Fagelman. Furthermore, Plaintiffs have not even
25 asserted that their personal finances were material to the resolution of their conflict with Mr.
26 Fagelman.

1 Plaintiffs' claim that their personal finances are relevant to Defendants defense of laches
2 equally misses the conflict standard. "The defense of laches consists of two essential elements: (1)
3 unreasonable delay, and (2) disadvantage or prejudice to the party asserting the defense." Tovrea v.
4 Umphress, 27 Ariz.App. 513, 521, 556 P.2d 814 (1976) reh'g den., rev. den. (1976). A party's
5 financial status at the time a right could have been asserted has nothing to do with their reasonableness
6 in delay. A review of the law in Arizona governing the laches defense confirmed just this and
7 revealed not a single case providing that a party's personal finances had any impact on the
8 reasonableness of delay in asserting a right of action. Thus, even if MD&K did obtain some
9 information regarding the Pages' finances, which it did not, that information would have no bearing
10 on the validity or viability of Defendants' laches defense. Therefore, any information concerning the
11 Pages' finances is immaterial to the the evaluation, prosecution, settlement or accomplishment of this
12 case. By this standard, there is no substantial relationship between MD&K's former representation
13 of the Pages and its current representation of the Defendants and no conflict of interest exists. For the
14 foregoing reasons, the Motion to Disqualify must be denied.

15 Because there is absolutely no basis upon which to disqualify MD&K from representing
16 Defendants, it is clear that Plaintiffs possess no valid basis upon which to seek the relief requested.
17 Furthermore, given the fact that Plaintiffs delayed performing any discovery in this case until after
18 they filed their Motion to Disqualify, it is clear that Plaintiffs have used their motion to gain a strategic
19 and tactical advantage by delaying Defendants from moving forward with their discovery. Put another
20 way, Plaintiffs have used ER 1.9, Rule 42, Ariz. R. Sup. Ct., as a sword and for an improper purpose.
21 Given Plaintiffs' conduct, Defendants request that Plaintiffs be sanctioned for the costs of responding
22 to this frivolous motion pursuant to Rule 11, Ariz. R. Civ. P., and A.R.S. § 12-349. Plaintiffs should
23 likewise be ordered to allow Defendants to resume with their depositions and other discovery
24 immediately.

25 / / /

26 / / /

27 / / /

28 / / /

1 Mark W. Drutz, Esq., # 006772
Jeffrey R. Adams, #018959
2 **MUSGROVE, DRUTZ & KACK, P.C.**
1135 Iron Springs Road
3 Prescott, Arizona 86305
(928) 445-5935

4 Attorneys for Defendants
5

6 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF YAVAPAI**

8 JOHN B. CUNDIFF and BARBARA C.)
CUNDIFF, husband and wife; ELIZABETH)
9 NASH, a married woman dealing with her)
separate property; KENNETH PAGE and)
10 KATHRYN PAGE, as Trustee of the Kenneth)
Page and Catherine Page Trust,)

11 Plaintiffs,

12 v.

13 DONALD COX and CATHERINE COX,)
14 husband and wife,)

15 Defendants.
16
17

CASE NO. CV 2003-0399

DIVISION 1

**AFFIDAVIT OF JOHN G. MULL IN
SUPPORT OF RESPONSE AND
OBJECTION TO MOTION TO
DISQUALIFY DEFENDANTS' COUNSEL
AND MOTION FOR PROTECTIVE
ORDER**

18 STATE OF ARIZONA)
19 County of Yavapai) ss.

20 JOHN G. MULL, having been duly sworn upon his oath, deposes and states as follows:

- 21 1. I am over eighteen (18) years of age and have personal knowledge of the matters set
22 forth herein.
23
24 2. I have personal knowledge of, or am otherwise competent to testify as to, each and
every fact set forth in this Affidavit.
25
26 3. I am a shareholder with the law firm of Musgrove, Drutz & Kack, P.C. ("MD&K").
27
28

1 4. On December 29, 2000, Ken Page asked this firm to represent his wife and he in
2 connection with a dispute with Jay Fagelman, a licensed contractor, who was building their home in
3 Coyote Springs.

4 5. On January 3, 2001, Mark Drutz, another shareholder with MD&K, and I met with the
5 Pages to discuss their dispute with Mr. Fagelman. That dispute involved issues surrounding Mr.
6 Fagelman's construction and/or installation of the basement furnace, attic furnace, venting in the
7 storage closet, roof vent pipes, chimney pipe, sewer clean-out, master bathroom tub, master bedroom
8 carpeting, the kitchen sink, soffits, marble, and kitchen cabinets. The only economic issues involved
9 concerned the Pages' request for an offset against the cost of construction based on Mr. Fagelman's
10 failure to complete the above work or his failure to complete the work in a workmanlike fashion. The
11 only information I obtained from the Pages concerning their personal finances included my review of
12 their retainer check and confirmation of the Pages' timely payment of their outstanding bill with our
13 office. Neither I nor MD&K obtained information from the Pages or from any other source that
14 pertained to their personal finances or alleged lack thereof.

15 6. Work for the Pages was completed approximately seven months after they retained
16 MD&K. In my opinion, resolution of the dispute with Mr. Fagelman had absolutely nothing to do
17 with the Pages' finances or their financial condition, but simply required negotiation of the manner
18 and timing of Mr. Fagelman's completion, correction and repair of those items identified above in
19 Paragraph 5 and a reduction of the sums owed to Mr. Fagelman based on the Pages' right to certain
20 offsets because of his faulty, delayed or incomplete workmanship. At no time did the Pages' finances
21 become an issue during MD&K's representation of them.

22 7. On June 10, 2003, Defendants inquired about this firm representing them in opposing
23 the lawsuit brought by Plaintiffs. On that date they met with Mark W. Drutz and me and a conflict
24 check was performed by Mr. Drutz and myself. During that process, Mr. Drutz and I noted that
25 MD&K had previously represented the Pages beginning in December, 2000 and that we had
26 completed that matter approximately seven months later. We further noted that work for the Pages:
27
28

1 (i) concerned a dispute between the Pages and their general contractor, Jay Fagelman, regarding the
2 construction of the Pages' home; (ii) had nothing to do with (a) the Defendants' property that is the
3 subject matter of this case, (b) the Defendants' use of their property that is the subject matter of this
4 case, or (c) the Declaration of Restrictions that may or may not encumber the property owned by
5 Defendants and which are at issue in this case; (iii) had nothing to do with the Pages's use of their
6 property or their personal finances; and (iv) did not result in MD&K's receipt of any information that
7 could be used by Defendants to materially advance their defense against Plaintiffs' claims in the
8 current lawsuit. Based on the foregoing analysis, Mr. Drutz and I determined that this case was neither
9 the same as, nor substantially related to, MD&K's former representation of the Pages and that no
10 conflict existed.

11 8. Defendants did not retain MD&K in the subject proceedings until February, 2004.

12 9. Following Plaintiffs' assertion that they considered MD&K to have a conflict of
13 interest in continuing to represent Defendants, the Pages' file again was reviewed by, James B.
14 Musgrove, Tom Kack, Jeffrey R. Adams, each shareholders of MD&K, and myself. That review was
15 followed by a conference to evaluate the conflict allegation. In connection with the review of the
16 Pages' file and the conference to evaluate the conflict allegation, a call was placed to the Arizona State
17 Bar Counsel for the State Bar Association to inquire whether the Bar believed a conflict existed under
18 the facts previously described, to which the response was "no".

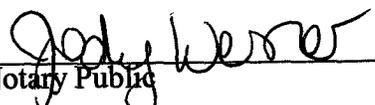
19 10. On June 25, 2004 and following the process described above, Jeffrey R. Adams and
20 I placed a telephone call to Marguerite Kirk during which she was advised: (i) that no conflict existed
21 based upon MD&K's investigation into the matter and our telephone call to Staff Bar Counsel for the
22 State Bar Association for the State of Arizona, and (ii) that MD&K would continue to represent
23 Defendants. During that conversation, Ms. Kirk was advised that we would allow her to inspect the
24 Pages' file (with their consent) but she rejected that offer.

1 AFFIANT FURTHER SAYETH NAUGHT.

2 DATED this 14 day of July, 2004.

3
4 
5 _____
6 JOHN G. MULL, AFFIANT

7 SUBSCRIBED AND SWORN TO BEFORE me this 14th day of July, 2004, by JOHN G.
8 MULL.

9 
10 _____
11 Notary Public

12 My commission expires:

13 Nov. 13, 2004

