

IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT OF FLORIDA

CASE NO.: 3D24-450
LOWER CASE NO.: 15-28846 CA (44)

TARAS. S. DIAKIWSKI,

Appellant,

vs.

CRAFT CONSTRUCTION
COMPANY, LLC, *et. al.*,

Appellees.

**APPELLEES' MOTION TO
DISQUALIFY APPELLANT'S
APPELLATE COUNSEL
IN THIS APPEAL
OF THE ORDER
DISQUALIFYING THEM**

_____ /

Pursuant to FLA. R. APP. P. 9.300 and the case law cited herein, Appellees, CRAFT CONSTRUCTION COMPANY, LLC ("**CCC**") and BARRY CRAFT ("**Mr. Craft**"), move to disqualify Appellant's appellate counsel of record, (i) Timothy S. Taylor, Esq. ("**Mr. Taylor**"); (ii) Vanessa A. Van Cleaf, Esq., ("**Ms. Van Cleaf**"); and (iii) their law firm, Taylor Corwin & Van Cleaf, PLLC ("**TCV**"), in this appeal of the February 18, 2024 order disqualifying Mr. Taylor and the entire TCV law firm (which includes Ms. Van Cleaf) from representing Appellant in his dispute against Appellees (the "**Disqualification Order**"). See Appellees' simultaneously filed appendix at A.6-39.

I. INTRODUCTION

This is a non-final appeal of the Disqualification Order, which—following *four* robust evidentiary hearings spanning almost *seven* hours and literally hundreds of pages of briefing—disqualified TCV, Mr. Taylor, and Ms. Van Cleaf (collectively, “**Disqualified Counsel**”) from serving as Appellant’s counsel due to numerous violations of the Florida Rules of Professional Conduct. (A.6-39)

The Disqualification Order concluded by giving Appellant 60 days to procure replacement counsel (*i.e.*, through and including April 18, 2024). To date, no “replacement counsel” has appeared on behalf of Appellant either in the lower court or this Court.

In the meantime, Disqualified Counsel continues to actively represent Appellant in the lower court and this Court in flagrant violation of the Disqualification Order and over Appellees’ objections. By way of example, in the lower court, Disqualified Counsel filed on Appellant’s behalf (i) a notice of appeal and (ii) a motion for an appellate stay. (A.6-39, 40-50) In this Court, Disqualified Counsel filed on Appellant’s behalf a motion for an extension of time to file Appellant’s Initial Brief. (A.51-55)

Notably, the only appellant identified in the notice of appeal of the Disqualification Order was Appellant. (A.6) (stating “Tara S. Diakiwski appeals” the Disqualification Order). Therefore, the only person or entity seeking relief in this appeal is Appellant, whom the lower court ruled Disqualified Counsel cannot represent.

Disqualified Counsel did not individually file a notice of appeal including themselves as appellant (*i.e.*, stating that “Disqualified Counsel appeals” the Disqualification Order). *Id.* Since they are not a party to this appeal, they have no right to challenge the Disqualification Order. *See, e.g., Roberts v. PNC Bank, N.A.*, 263 So. 3d 119, 121 (Fla. 5th DCA 2018) (“Because attorney Saracco did not individually appeal or include himself as an appellant, he waived any right to appellate review of his fifty-percent share of the sanctions awarded to PNC.”).

In sum, Appellees are not seeking a substantive resolution, by motion, of whether the Disqualification Order was appropriately entered. That is what this Court will decide after the briefing process is complete. Appellees are simply asking for this Court to rule that

Disqualified Counsel cannot participate or file anything in this appeal either (i) on behalf of Appellant or (ii) on behalf of themselves.

II. RELEVANT BACKGROUND

1. The underlying lawsuit is a ownership dispute between CCC (a general contractor) and its principal (Mr. Craft) (*i.e.*, Appellees), and the Appellant. (A.12-13) Appellant—formerly represented by Disqualified Counsel—seeks to disgorge, among other things, approximately \$1.4 million in CCC's profits from a development project named the Boca Project ("**Boca Project**"). (A.13)

2. On August 4, 2023, Appellees learned that Disqualified Counsel accepted representation of CCC's surety company, Berkley, in a substantially related matter to this case ("**Related Boca Matter**"). *Id.* In the Related Boca Matter, Berkley and CCC held a common interest privilege through their joint, team approach to defense against claims brought by the owner of the Boca Project. (A.12-13)

3. Disqualified Counsel's representation of Berkley in the Related Boca Matter came to light when Mr. Taylor attended a Zoom

meeting with Berkley, CCC's lawyer, and CCC's principal (Mr. Craft).
Id.

4. Mr. Taylor ***silently*** sat in the meeting through conversations between Berkley, Mr. Craft, and CCC's lawyer on the Related Boca Matter (Mr. Freddy Munoz), who was unaware of Mr. Taylor's representation of Appellant in this case until Mr. Craft noticed Mr. Taylor's presence and immediately objected. (A.12-13, 24, 33, 36)

5. This meeting occurred just days before Disqualified Counsel were scheduled to depose Mr. Craft and CCC's longtime accountant, Jesus Labrador, CPA, in this case—where they seek millions from Appellees—about the Boca Project, its profits, and CCC's finances and valuation. (A.13, 34)

6. When confronted with this conflict of interest, Mr. Taylor first attempted to convince Mr. Craft that his and his firm's interests were aligned with Appellees' interests. (A.13, 17, 32, 34)

7. Mr. Taylor later resorted to threatening Appellees' commercial interests and their attorneys. *Id.* at 34 (“The evidence

further demonstrates that when these efforts failed, Mr. Taylor threatened CCC's commercial interests as well as its counsel.”).

8. On August 18, 2023, the lower court ordered that an evidentiary hearing be held on the issue of Disqualified Counsel's conflict of interest. (A.56)

9. Before the hearing, Disqualified Counsel obstructed fact finding and undermined CCC's relationship with Berkley to serve Appellant's interests, further raising the cost and difficulty for Appellees to protect their rights. (A.36-37)

10. On September 5, 2023, as the investigation continued, Appellees moved to disqualify Disqualified Counsel (“**Motion to Disqualify**”). (A.58-94)

11. The lower court held evidentiary hearings on the Motion to Disqualify on the following dates:

- (i) October 18, 2023 (approximately two hours);
- (ii) November 3, 2023 (approximately two hours);
- (iii) November 7, 2023 (approximately one hour); and
- (iv) December 29, 2023 (approximately two hours).

(A.95-96, 97-98, 99-100, 101-102)

12. In January 2024, at the lower court's request, the parties filed written closing-argument briefs and proposed orders. (A.103-129, 130-188, 189-204)

13. On February 18, 2024, the lower court entered the Disqualification Order, which granted Appellees' Disqualification Motion and further provided Appellant 60 days to retain new counsel. (A.6-39)

14. But instead of abiding by that order and exiting the case to make way for Appellant's replacement counsel, Disqualified Counsel continues to represent Appellant in this Court in violation of the Disqualification Order, first by filing a notice of appeal only on behalf of Appellant¹ and second by filing an appellate motion for extension of time to file the Initial Brief. (A.6-39, 51-55)

15. Incredibly, the latter filing unequivocally announces that Disqualified Counsel—not court-ordered replacement counsel—intends to draft and file the Initial Brief for Appellant. (A.52-53)

¹ Disqualified Counsel did not appeal this matter on their own behalf and the time to do so has now expired, thereby jurisdictionally barring Disqualified Counsel from ever being able to appeal the Disqualification Order. *Roberts v. PNC Bank, N.A.*, 263 So. 3d 119, 121 (Fla. 5th DCA 2018).

16. Disqualified Counsel also simultaneously continues to represent Appellant in the lower court in violation of the Disqualification Order, by moving for a stay pending appeal (“**Motion to Stay Action**”). (A.40-50)

III. LEGAL STANDARD

“[I]f counsel is disqualified in an ongoing case, it must be for the *entire* case, or else the [former] client’s interests are not protected.” *Rombola v. Botchey*, 149 So. 3d 1138, 1139-45 (Fla. 1st DCA 2014) (emphasis in original); *Cordero v. Cordero*, 368 So. 3d 1065, 1069 (Fla. 3d DCA 2023) (concluding that because the case involved disqualification under Rule 4-1.9 and an irrefutable presumption that confidences were disclosed, disqualified counsel was properly disqualified from representing client throughout the entire litigation).

Aggrieved parties are entitled to “broad protection” from disqualified counsel. *Rombola*, 149 So. 3d 1138 at 1142. Disqualification orders must protect their interests during post-trial period when much appellate-related work is done and prospective

litigation strategy, including appellate strategy, is discussed. *Id.* at 1142, n.5.

Disqualification Orders that limit disqualification to the “trial level” are “fundamentally erroneous” because they “limit[] the ongoing ethical obligations of [the attorney],” even though “[e]thical responsibilities of fidelity and protection of client confidences do not change or become divisible as a case moves from pre-lawsuit discussions, to a lawsuit’s filing, through pre-trial activities and trial, and on to post-judgment and appeals...” *Id.* at 1140.

A party need not re-litigate the disqualification issue on appeal when the lawyer in question has already been disqualified by the trial court. *Id.* at 1144-45.

IV. ARGUMENT

A. Disqualified Counsel Has Already Been Disqualified From Representing Appellant.

Over the course of **four** evidentiary hearings spanning almost **seven** hours, the lower court heard substantial evidence covering Disqualified Counsel’s misconduct. Following those hearings and extensive briefing, the lower court concluded that Disqualified Counsel had violated Florida Rules of Professional Conduct 4-1.7 and

4-1.9 (prohibiting an attorney from standing adverse to a current or former client's interests in a substantially related matter), as well as Rule 4-1.6 (governing a lawyer's obligation to keep confidential information obtained in client representation), warranting their disqualification from this case. (A.12, 22, 24, etc.)

Additionally, the lower court's detailed, 30-page Disqualification Order:

- Held that Disqualified Counsel's "***extraordinary, intentional*** misconduct warrants their disqualification." (A.33) (emphasis added).
- Concluded that Disqualified Counsel's conduct "does not present a case of innocent misunderstanding" and that "Mr. Taylor understood the relationships here and knew what he was doing by invading team CCC-Berkley in the Related Boca Matter." (A.33)
- Highlighted hearing testimony that Disqualified Counsel "threatened to leverage his longtime relationship with Berkley to harm [Appellees'] business by interfering with the Berkley-

CCC relationship to force a favorable outcome for [Appellant].” (A.31)

- Held that Disqualified Counsel’s violations of Rules 4-1.7 and 4-1.9 give rise to “an irrefutable presumption that confidences were disclosed,” as required by Florida law. (A.29)
- Concluded that Disqualified Counsel withheld evidence of their unfair informational advantage and obtained privileged communications between CCC and Berkley outside of legal process. (A.30, 32)
- Found that the evidence demonstrated that, *inter alia*, Mr. Taylor: (1) silently listened to CCC’s attorneys update Mr. Craft in a meeting; (2) attempted to convince Mr. Craft that their interests were “completely aligned;” (3) threatened CCC’s commercial interests and its counsel’s interest; and (4) attempted to leverage his relationship with Berkley to force a favorable outcome for [Appellant] in this case. (A.31-34)
- Observed that “[Mr. Taylor] did not appear to consider the consequences in his representation of Mr. Diakiwski in this

case related to the Boca Project where the interests are clearly adverse.” (A.21)

- Further observed that it “is clear from the evidence, [Disqualified] **Counsel’s conduct has created** this unfortunate situation for his client.” (A.34) (emphasis added).

In sum, the lower court’s Disqualification Order makes clear that Disqualified Counsel’s continued presence in **any stage** of this litigation is unfairly prejudicial to the Appellees and incongruent with the Rule of Professional Conduct.

B. Disqualified Counsel is Disqualified From Representing Appellant in This Phase of the Litigation (i.e., this appeal).

The Disqualification Order’s language did not limit its effect to the lower court: “[Appellant’s] Counsel is disqualified from representing [Appellant] in this case.” (A.35) The Disqualification Order’s effect has not been stayed just because Appellant has appealed it. Rather, the Disqualification Order is and remains in full force and effect throughout this case. Disqualified Counsel’s continued representation of Appellant and interference in this appeal is thus a blatant violation of the Disqualification Order.

The effect of the Disqualification Order is not and cannot be limited to the phase of the underlying case that is taking place in the lower court. This is demonstrated by case law such as *Rombola v. Botchey*, where the First District Court of Appeal held that a disqualification order limiting a Rule 4-1.9 disqualification to the “trial level” was “fundamentally erroneous because of the way it limits the ongoing ethical obligations of [the attorney],” as “[e]thical responsibilities of fidelity and protection of client confidences do not change or become divisible as a case moves from pre-lawsuit discussions, to a lawsuit’s filing, through pre-trial activities and trial, and on to post-judgment **and appeals...**” 149 So. 3d at 1139–45 (emphasis added). Indeed, “[o]ngoing ethical duties obligate ongoing judicial protection of the former client's interests; if counsel is disqualified in an ongoing case, it must be for the *entire* case, or else the client's interests are not protected.” *Id.* (stating further that disqualification orders must protect interests during post-trial period when much appellate-related work is done and prospective litigation strategy, including appellate strategy, is discussed). The *Rombola* Court further added:

[L]imiting the scope of disqualification to only certain narrowly-defined 'trial' issues overlooks that every stage of an ongoing lawsuit is tautologically a 'substantially related' component of the overall proceeding to which ethical obligations continually adhere. Whittling down and splitting ethical obligations, as was done here, creates a sieve through which confidential information and protected litigation strategy may seep via an order's temporal and interpretive cracks.

Id. The *Rombola* Court also highlighted the danger and material harm in a disqualified attorney, as here, attempting to justify continued case involvement by offering "appellate-type" representation and the following explanation: "I am providing appellate consultation...I am not providing trial representation on any further issues at the trial level..." *See id.* at 1142.

This Court has likewise held that disqualification of an attorney under Rule 4-1.9 ought extend to the **entire litigation**. *Cordero v. Cordero*, 368 So. 3d 1065, 1069 (Fla. 3d DCA 2023). In that case, this Court concluded that because the case involved disqualification under Rule 4-1.9 and an irrefutable presumption that confidences were disclosed, disqualified counsel was properly disqualified from representing client throughout the entire litigation.

Further weighing in favor of removing Disqualified Counsel from this appeal, the Disqualification Order's ruling that Disqualified Counsel, in addition to having violated Rules 4-1.7 and 4-1.9, also violated Rule 4-1.6 (relating to client confidences). This, too, bars Disqualified Counsel from appearing in this appeal. *See ATC Logistics Corp. v. Jackson*, 168 So. 3d 292, 296 (Fla. 1st DCA 2015) (concluding that because counsel acquired material protected by Rules 4-1.9 and 4-1.6, and because that information was material to the appeal, counsel's firm could not represent appellant in the appeal).

Indeed, Disqualified Counsel cannot legally or ethically represent Appellant in his appeal because the Disqualification Order bars them from even communicating with Appellant about this case, including this appeal. To adequately represent Appellant in this appeal, Disqualified Counsel would necessarily have to discuss with Appellant, among other things, appellate strategy, the merits of certain trial court rulings, and interwoven aspects of the underlying case and appeal (such as whether and to what degree this case and the Related Boca Matter were substantially related under Rules 4-1.7

and 4-1.9). See Florida Rule of Professional Conduct 4-1.4 (“(a) A lawyer shall: ... (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter...”)); Rule 4–1.1 (a lawyer shall provide competent representation to a client).

And yet, for Disqualified Counsel to have those necessary discussions with Appellant during this appeal—after having been disqualified—would represent yet another breach of the Rules of Professional Conduct. See, e.g., *The Florida Bar v. Couillard*, Case No.: SC10-871, 2/1/2012 FLBN 26 (sanctioning a 30-day suspension for continuing to provide legal advice and counsel to the company, including assisting with the drafting and editing of documents to be filed with the court after attorney was disqualified from the case); see also *The Florida Bar v. Canto*, 668 So. 2d 583 (Fla. 1996) (affirming a two-year suspension, requirement that attorney pass bar examination before petitioning for reinstatement, and payment of costs of disciplinary proceedings where the attorney was disqualified as counsel several years earlier, **but had continued to**

litigate the matter); *The Florida Bar v. Gersten*, 707 So. 2d 711, 713 (Fla. 1998) (ordering a one-year suspension where attorney ignored and refused to follow a court order based upon his personal belief in the invalidity of that order); *The Florida Bar v. Birdsong*, 661 So. 2d 1199 (Fla. 1995) (affirming 30-day suspension from practice and a year-long probation conditioned on completing professional education courses where the attorney continued to formally represent client after order of disqualification was entered); *The Florida Bar v. Wilson*, 714 So. 2d 381 (Fla. 1998) (ordering one-year suspension from the practice of law where attorney continued representing a client despite a conflict of interest and attempted to recuse trial judge who found the conflict of interest warranted); *The Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010) (concluding that three-year suspension was warranted for attorney who engaged in misconduct by representing clients with unwaivable conflicts of interest and making misrepresentations to client).

In light of the foregoing well-established legal authority, this Court should enter an order reinforcing to Disqualified Counsel what it should already know from the clear and unambiguous

Disqualification Order: Disqualified Counsel is prohibited from participating or filing anything in this appeal either (i) on behalf of Appellant or (ii) on behalf of Disqualified Counsel.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, Appellees move for entry of an Order **(i)** immediately disqualifying Disqualified Counsel from representing Appellant in any capacity in this appeal; **(ii)** prohibiting Disqualified Counsel from participating or filing anything in this appeal either **(a)** on behalf of Appellant or **(b)** on behalf of Disqualified Counsel; and **(iii)** granting Appellees such other and further relief as this Court deems just and proper.

RULE 9.300(a) CERTIFICATION

I HEREBY CERTIFY that—while unnecessary given that Appellant's counsel has been disqualified—on April 6, 2024, Francis D. Murray, Esq. for Appellees conferred with Timothy Taylor, Esq. to inquire as to Appellant's position on this motion. It is now April 8, 2024, and Mr. Taylor has not responded. Appellees therefore anticipate that Appellant will promptly file an objection.

By: /s/ Francis D. Murray
Francis D. Murray

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that, this April 8, 2024, a true and correct copy of the above and foregoing was served *via* e-mail through the Florida Court's E-Filing Portal upon Vanessa A Van Cleaf, Esq., and Timothy S. Taylor, Esq. of Taylor Corwin & Van Cleak, PLLC, 255 Alhambra Circle, Suite 1170, Miami, Florida 33134, ***Disqualified Counsel for Plaintiff/Appellant, Tara S. Diakiwski***, at ttaylor@tcv.law, vvancleaf@tcv.law, vperez@tcv.law, and lvega@tcv.law.

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