SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

- X

Probate Proceeding, Will of

PETER T. DEMETRIOU,

Deceased.

File No. 338987

Dec. No. 324

- X

This is a motion to disqualify Kenneth Weinstein, Esq. and Rosenberg Calica & Birney LLP ["RCB"], a law firm which is of counsel to Mr. Weinstein. Mr. Weinstein and RCB represent Evan DeFrancesco, the sister of the decedent and one of the co-fiduciaries nominated in a document purporting to be the decedent's will dated August 31, 2005 (the "lost will"), the original of which is said to have been lost. A lost will proceeding is pending. The movants are the attorneys for the objectants in the lost will proceeding, Irene Demetriou, Theodore Demetriou, Michael Demetriou, Chrysanthi Demetriou and Themis Vassiliou.

By way of background, the decedent Peter Demetriou died on September 11, 2005. He was survived by a wife, Irene Demetriou, and three children, Michael P. Demetriou, Theodore Demetriou and Chrysanthi Demetriou. A petition to probate the decedent's Last Will and Testament dated January 8, 2003 ("2003 will") was filed with this court on September 19, 2005. The 2003 will bequeathed the decedent's personal property, shares of Rehab Services Corp., and real property in East Hampton to his wife. A unified credit shelter trust was established for the benefit of the decedent's wife and upon her death the property was to be held in trust for the decedent's three children until they reached age thirty. Article Sixth provides that the decedent's interest in "the Corporation and Hempstead property" is to be held in trust for the benefit of decedent's wife but s

decedent nominated a friend, Themis Vassiliou as Executor. The 2003 will was admitted to probate on September 21, 2005.

Subsequently, a proceeding was commenced to probate a copy of the later will dated August 31, 2005. The 2005 will revoked all prior wills and left the decedent's wife her elective share with the remainder to the decedent's mother, Joanna Demetriou. The movants in this proceeding filed objections to the lost will and alleged that the 2005 will was not duly executed, the decedent lacked testamentary capacity, the will was the product of undue influence, fraud, duress and/or coercion.

As part of the lost will proceeding, and as set forth in great detail in the courts decision dated June 29, 2006 (Dec. No. 490), the proponent must establish that the will has not been revoked, execution is proved in the manner required for the probate of an existing will and all of the provisions of the will must be clearly proved (SCPA 1407). One who seeks to establish a lost or destroyed will bears the burden of overcoming the presumption that the will was revoked by the testator (*Matter of Straiger,* 243 NY 468, 471 [1926]; *see also Collyer v Collyer,* 110 NY 481 [1888]). The proponents of the lost will allege, *inter alia*, the following in support of their application: the decedent's wife commenced an action to divorce the decedent in June of 2005; the decedent met with an attorney in August of 2005 and allegedly executed a new will on August 31, 2005; the decedent had numerous conversations with people about his will; he allegedly delivered an envelope to Maryanne Buckley, a person with whom he had a close, personal relationship and told her that the package contained his will and asked her to put it into a safe in her home; the decedent died of a heart attack on September 11, 2005; and that on that same day some of the objectants broke into the decedent's office and car and had unfettered access to the decedent's papers and that the original will was never found.

A preliminary conference order was entered into on July 12, 2006 by the attorneys for the parties and was so ordered by the court. Depositions have been taken of decedent's children Theodore Demetriou and Chrysanthi Demetriou. As set forth in the affidavit of Irene Demetriou attached in support of the present motion, in October of 2006, after a confluence of factors relating to the deposition of her daughter Chrysanthi, Mrs. Demetriou realized that she had consulted with Mr. Weinstein in the fall of 2004 to discuss his potential representation of her in a divorce proceeding. According to Mrs. Demetriou, she discussed the following with Mr. Weinstein: her children, including their ages, employment history and relationship to the family business; the circumstances of her husband leaving the marital residence; details about the family business and its value; the potential marital infidelity of the decedent; details of her childrens' relationship to the decedent; financial matters and concerns; the type of lifestyle she was accustomed to and the family history of horse riding and the business of horses. Mr. Weinstein, in turn, admits that he had a brief consultation with Mrs. Demetriou in November of 2004 and that he had forgotten about the meeting and had "barely a legal page of handwritten perfunctory notes." Mr. Weinstein further argues that Rosenberg Calica and Birney are of counsel to him on this matter and the two attorneys from that firm who have worked on the matter have averred that Mr. Weinstein has not discussed the consultation with them, that they were unaware that Mr. Weinstein had consulted with Mrs. Demetriou and that they have gained no knowledge from the consultation. The attorneys further aver that their firm (RCB) is comprised of approximately twelve to fourteen attorneys and that Mr. Weinstein and his staff (two attorneys and three secretaries) rent space in "one end" of RCB's suite.

It is well settled that a party seeking to disqualify an attorney or law firm "must establish (1) the existence of a prior attorney-client relationship and (2) that the former and current

representations are both adverse and substantially related" (*Solow v Grace*, 83 NY2d 303, 308[1994]). Of utmost importance is the protection of client confidences and "[a]ttorneys owe a continuing duty to former clients not to reveal confidences learned in the course of their professional relationship" (*Kassis v Traveler's Insurance and Annuity Assoc*, 93 NY2d 611,615 [1999]). Further, "to obtain disqualification of the attorney, the former client need not show that confidential information necessarily will be disclosed in the course of the litigation, rather, a reasonable probability of disclosure should suffice" (*Greene v Greene*, 47 NY2d 447, 453 [1979]; *see also Cardinale v Golinello*, 43 NY2d 288, 295-296 [1977], [where the court found that "[i]rrespective of any actual detriment, the first client is entitled to freedom from apprehension and to certainty that his interests will not be prejudiced in consequence of representation of the opposing litigant by the client's former attorney"]). Disqualification of counsel, however, "conflicts with the general policy favoring a party's right to representation by counsel of choice, and it deprives current clients of an attorney familiar to the particular matter (*Tekni-Plex v Meyner and Landis*, 89 NY2d 123, 131 [1996]). Thus, the courts must carefully appraise whether there is a prior attorney client relationship, a substantial relationship between the representations and the adversity of interests (*id* at 132). If the movant satisfies these criteria, an irrebutable presumption of disqualification arises (*Solow v Grace*, 83 NY2d 303, 313 [1994]).

With regard to the first prong of the analysis, the attorney-client relationship "extends to a preliminary consultation by a prospective client with a view toward retention of the lawyer, even where actual employment does not arise" (*Ocko v Liebovitz*, 155 AD2d 426 [2d Dept 1989]; *see also Burton v Burton*, 139 AD2d 554 [2d Dept 1988]). Clearly, Mr. Weinstein and Mrs. Demetriou had an attorney-client relationship thus satisfying the first prong of the analysis. Moreover, there is no question that the interests of Mrs. Demetriou and Mr. Weinstein's clients

are adverse, thereby satisfying the third part of the analysis.

The second part of the analysis requires that the court find a substantial relationship between the initial consultation in the divorce proceeding and the lost will proceeding. A substantial relationship has been defined by several appellate courts to mean that the matters are "essentially the same" (*Sgromo v St. Joseph's Hosp. Health Ctr.*, 245 AD2d 1096 [4th Dept 1997] or "identical to...those in the prior case..." (*Lightning Park, Inc. v Wise Lerman & Katz,* 197 AD2d 52, 54 [1st Dept 1994] citing *Dinger v Gulino* 661 F Supp 438,444 [ED NY]).

The Second Department declined to either endorse or reject whether the formulation of the "substantial relationship" test in *Lightning Park* represents a correct statement of the law (*Bloom v St. Paul Travelers Companies*, 24 AD3d 584, 586 [2d Dept. 2005]) but clearly instructs that any doubt regarding a motion to disqualify counsel should be resolved in favor of disqualification (*Stober v Gaba & Stober, P.C.*, 259 AD2d 554 [2d Dept 1999]; *108th St. Owners Corp. v Overseas Commodities*, 238 AD2d 324 [2d Dept 1997]).

The movants argue that the matters are substantially related in that the relationship that the decedent had with his spouse and children is relevant and at issue regarding whether the decedent revoked the lost will. Further, the movant argues that the affidavits in support of Evan DeFrancesco's motion to propound the lost will and the depositions taken of Theodore Demetriou and Chrysanthi Demetriou in the lost will proceeding refer repeatedly to the relationship of the decedent to his wife and his children. The affidavits filed by Evan DeFrancesco in support of the proceeding to admit the lost will to probate and revoke letters testamentary contain the following allegations:

> "In or about April, 2004, Peter moved out of his marital residence at Lloyd Harbor, New York and took up residence in an apartment in Roslyn Heights, New York. In June, 2005, Peter's then estranged wife, Irene Demetriou, commenced a

matrimonial action against him seeking a divorce. By that point, Peter had chosen to make my home...his permanent address where we lived together until his death" (Affidavit of Maryanne Buckley dated December 28, 2006)

"Peter (the decedent)had previously informed me that he'd changed his will and, except for what the law required him to leave to his wife so long as they were still legally married, he had elected to leave the balance of his estate to his mother. I was very much aware that Peter was very saddened and disappointed with the bad treatment he had been receiving from his children over an extended period of time, and I knew that it was his intention that they not benefit from his estate in the event of his death, other than giving an option to his son, Michael..." (Affidavit of Maryanne Buckley dated December 28, 2005)

"I had known for a very long time that my brother was unhappily married and that his wife had begun divorce proceedings against him. I was also aware, from my many conversations with my brother, that he was very unhappy and extremely disappointed with his children, with whom he had always been very generous. He often confided in me on this issue, because he could not comprehend what he perceived to be his childrens' unrestrained and unwarranted sense of entitlement to the fruits of his years of hard work and effort building a successful business" (Affidavit of Evan DeFrancesco dated December 30, 2005)

" During one of our conversations, just days before his untimely death, my son told me that he changed his Will and was leaving everything to me. I knew, from my weekly conversations with my son, that he was very unhappy with his children and therefore I was not surprised to hear that he had changed the terms of his Will. He also told me that he intended to marry Maryanne Buckley after his divorce was final" (Affidavit of Joanna Demetriou, dated December 29, 2005).

"In 2005, the Decedent informed me he wished to change that will, in light of his changed circumstances, including, among other things, the commencement of divorce proceedings against him by his wife as well as a deteriorating relationship with his children" (Affidavit of Peter C. Cotelidis, attorney/draftsman, Dated December 29, 2005).

Moreover, in the deposition of Theodore Demetriou, approximately 28 pages are devoted to questioning by the attorneys for Evan DeFrancesco about the marital difficulties of the deponent's parents as well as questions about his father's extramarital affair. In addition, questions were asked about the horse back riding business which Irene Demetriou alleges she discussed with Mr. Weinstein as part of the initial consultation.

The respondent argues, in turn, that the matters are not substantially related because the lost will proceeding concerns events that occurred a year after the consultation with Mrs. Demetriou and concerned the decedent's wishes regarding a testamentary plan and had nothing to do with a matrimonial proceeding. Furthermore, Mr. Weinstein argues that even if the court found that a substantial relationship existed, he has "built a wall" by having RCB act as of counsel to him.

An issue that is clearly before the court in the lost will proceeding is the relationship between the decedent and his wife and children. Relevant to the proceeding is the question of whether the decedent's relationship with his wife and children caused him to change his testamentary plan and whether there was some change in that same relationship which would have caused him to revoke the 2005 will. Under any analysis, the issues are substantially related and the motion to disqualify Mr. Weinstein is granted.

The analysis does not end here, however, as Mr. Weinstein argues that he never discussed the consultation with RCB, RCB is of counsel to him and that RCB should not be disqualified. A lawyer may be designated "of counsel" on letterhead if "there is a continuing relationship with a lawyer or law firm other than partner or associate" (22 NYCRR 1200.7[a][4]). Moreover, an " of counsel" designation means more than a relationship involving only "occasional collaborative efforts" among unrelated attorneys (Formal Opinion No. 1995-8, Committee on Professional and

Judicial Ethics, Association of the Bar of the City of New York, May 31, 1995). In determining whether Mr. Weinstein's disqualification will be imputed to RCB under the principal of attribution, particular consideration must be given to the facts of each case (*see generally, Cardinale v Golinello,* 43 NY2d 288 [1977] and *Kassis v Teacher's Insurance and Annuity Association,* 93 NY2d 611 [1999]). Thus, where the setting is "characterized by a certain informality and conducive to 'constant cross-pollination'", there is a greater likelihood that confidences may be acquired (*Kassis v Teacher's Insurance and Annuity Association,* 93 NY2d 611, 617-618 [1999]). Further, "[d]emonstating that no significant client confidences were acquired by the disqualified attorney...does not wholly remove the imputation of disqualification from a law firm. Because even the appearance of impropriety must be eliminated, it follows that even where it is demonstrated that the disqualified attorney possesses no material confidential information, a firm must nonetheless erect adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation" (*id.* at 618). In the instant proceeding and as set forth previously, Mr. Weinstein rents space from RCB. RCB is not a large law firm, rather it employs twelve to fourteen attorneys and Mr. Weinstein has been involved in the litigation from its inception.

Under all of these circumstances, the disqualification of Mr. Weinstein will be attributed to RCB. The motion is therefore granted.

Settle order.

Dated: June 26, 2007

JOHN B. RIORDAN
Judge of the
Surrogate's Court