

Franklin County Legal Journal

Vol. 34, No. 11

September 9, 2016

Pages 42 - 49

Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

**William W. Stewart, Plaintiff vs.
Angela L. Stewart, now known as Angela M. Mills, Defendant**
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action No. 2006-1364

HEADNOTES

Attorney and Client – Former Clients

1. Under Rule of Professional Conduct 1.9, “A lawyer who has formally represented a client in a matter shall not thereafter: (a) represent another person in the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation.” Pa.R.P.C. 1.9. The prohibition of representation disqualifies the lawyer’s entire firm.

2. “An attorney–client relationship is one of agency and arises only when the parties have given their consent, either expressed or implied, to its formation.” Clark Capital Management Group, Inc. v. The Annuity Investors Life Insurance Company, 149 F. Supp. 2d 193, 196 (E.D. Pa. 2001).

3. “When no express relationship exists, the intent to create an attorney-client relationship can be implied from the conduct of the parties. An attorney-client relationship does not only arise in agency but also where a layperson submits confidential information to a lawyer with a reasonable belief that latter is former’s attorney.” Hunter v. Jacoby and Meyers Law Offices, 1996 WL 257348 *3 (E. D. PA 1996).

4. The fundamental question in determining whether or not there is an attorney client relationship is whether or not the client (1) disclosed confidential information to the attorney, (2) with a reasonable belief that the attorney was acting in the capacity of attorney for the client throughout the course of the communication.

5. When an individual requests “general advice” from an attorney in an informal setting, without paying that attorney or formally entering into any agreement for representation, and does not convey any confidential information to the attorney, the individual cannot have a reasonable belief that the attorney was representing the individual.

Appearances:

Maria P. Cognetti, Esq., *Attorney for Plaintiff*

Nathaniel F. Spang, Esq., *Attorney for Defendant*

OPINION AND ORDER OF COURT

Before Meyers, J.

Relevant Procedural History and Factual Findings of the Court

In November 2015, this Court inherited the case which was

previously decided by Judge Richard J. Walsh, now retired. Judge Walsh's last order following a hearing was filed November 28, 2012. It appears that all remained quiet, (at least as far as Court filings), until November 16, 2015, when Mr. Stewart filed a Petition for Contempt and Modification of Custody Order. At the time of the filing, Mr. Stewart had hired Attorney Maria Cognetti to represent him. Mrs. Stewart was represented by Attorney M. Teri Stiltner.

Subsequent to the filing of the Petition for Contempt and to Modify the Custody Order, an order was signed on November 13, 2015 scheduling a Conciliation Conference for January 22, 2016. Counsel for Mrs. Stewart filed a motion to continue the Conciliation Conference due to counsel's unavailability. Attorney Stiltner also stated that the Mrs. Stewart would be seeking new counsel. On December 9, 2015, Attorney Stiltner filed a praecipe to withdraw her appearance on behalf of Mrs. Stewart. On December 18, 2015, Attorney Nathaniel F. Spang of the law firm of Walker, Connor and Spang, LLC, entered his appearance on behalf of Mrs. Stewart. On January 4, 2016 Attorney Spang filed an answer to the Plaintiff's Petition for Contempt and Modification to the Custody Order. On January 29, 2016, Attorney Cognetti filed a Custody Conciliation Memorandum on behalf of the Plaintiff. On February 2, 2016, Attorney Spang provided a Conciliation Memorandum to the Conciliator.

On February 2, 2016, Conciliator George Wenger, Esquire held a conciliation conference with the parties. On or about February 4, 2016 Mr. Stewart through his Attorney, Ms. Cognetti filed a Motion in Limine requesting that the pleadings setting forth information preceding the entry of Judge Walsh's Custody Order in 2012, be excluded from any evidentiary hearing. The Court on February 10, 2016 issued an order striking the Motion in Limine.

On or about February 18, 2016, essentially 3 months after the filing of his petition, the Prothonotary time stamped and filed of record a facsimile copy of a motion filed by Attorney Cognetti on behalf of Mr. Stewart to prohibit Attorney Nathaniel Spang from representing Mrs. Stewart due to an alleged conflict of interest under the Rule of Professional Conduct 1.9. A hard copy of the facsimile copy of the motion and order was filed of record with the Prothonotary on February 18, 2016.

On or about February 23, 2016, the Court having learned that a former unpaid summer intern Laken Lynch would be accepting a position as a paid summer clerk with Attorney Cognetti, filed an Order of Court advising the parties of the professional relationship that Ms. Lynch had with the Court during the Summer of 2015 and advised the parties under Rule 2.11 of the Judicial Canons that the parties should consult and determine

whether or not they would wish to request the judge to recuse himself from hearing the matter.

The Court having reviewed Mr. Stewart's motion for preclusion of counsel issued a rule and order that argument on the matter be held on March 30, 2016. The rule and order was filed of record on March 16, 2016. On March 21, 2016, Mr. Spang filed an answer to the motion to preclude counsel. On March 23, 2016, in response to the motion for continuance of the argument on the Motion for Preclusion of Counsel to Represent the Defendant was continued to April 13, 2016 at 1:00 p.m. During the interim time period, counsel for both parties notified the Court that they did not have any concerns or objections to the Court continuing to hear this matter based upon the court's prior professional relationship with Attorney Cognetti's new incoming law clerk Laken Lynch.

The Court initially indicated that it would only consider argument on the motion to preclude counsel, however after reviewing the case law it became apparent that the parties should be permitted to develop a record. On April 13, 2016, Mrs. Stewart's counsel Nathaniel Spang appeared for the hearing. Attorney Michael Connor was also present to testify. Mr. Stewart and Attorney Cognetti appeared as well. Attorney Cognetti called Mr. Stewart as a witness. Mr. Stewart testified that he was familiar with Mr. Connor as at one time he leased office space in a building that was occupied by the law firm of Barley Snyder of which Attorney Martha Walker, Attorney Suzanne Trinh and Attorney Michael Connor were either partners or members.

He testified that he would frequently engage in conversation with one of the secretaries of Barley Snyder. He also referenced the fact that he had paid rent for his occupancy of the building to Ms. Walker. He testified that during the course of his occupancy as a tenant he and his wife began to have marital difficulties at which time he consulted with Attorney Trinh.

Ultimately, in response to his wife's filing for divorce in 2012, he spoke to Mr. Connor about options that he may have regarding counseling.

Attorney Connor advised him of the option of demanding court-ordered counseling. Mr. Stewart alleged that on at least one occasion he met with Mr. Connor for lunch at the Chambersburg Club. A second time he and Mr. Connor traveled together to The Orchards Restaurant for a business development luncheon at which time he believed that he related information relating to his divorce to Mr. Connor. Mr. Stewart produced two email exchanges between he and Mr. Connor in the year 2012. In the initial August 8, 2012 email, Mr. Stewart indicated that he recently received divorce papers and was wondering if Mr. Connor could help him out.

In the emails, Mr. Stewart clearly stated that he wanted to file an answer to the divorce complaint and contest the date of separation since he was not agreeing to a divorce. Mr. Stewart also indicated that he was on Social Security Disability and could not afford to pay standard legal fees. He asked if Mr. Connor did pro bono work or would work for a reduced rate, and if not, could he recommend someone to him. He also requested to meet with Mr. Connor. In response Mr. Connor stated that Mid Penn Legal Services would provide referrals to attorneys that sign up for pro bono work in divorces and if they couldn't help he should get back to him.

In response, on August 9, 2012, Mr. Stewart issued an email to Mr. Connor indicating that he spoke with Mid Penn Legal Services. They were not able to help him other than to handle the child custody case which they been handling during the past year that he had been separated from his wife. He then asked if Mr. Connor had any additional ideas. Mr. Connor responded that he could not take on any more pro bono cases, but that he would meet Mr. Stewart for coffee some morning and talk with him in general about divorce procedure. On August 10, 2012, Mr. Stewart thanked Mr. Connor for the response. Subsequently, on August 14, 2012, Mr. Connor advised Mr. Stewart that he would be available for an informal meeting at Starbucks. Mr. Connor met with Mr. Stewart at Starbucks and it appears from the testimony that there was information exchanged regarding counseling and general divorce matters. This is confirmed in an email Mr. Stewart issued to Mr. Connor on Friday, August 17, 2012. In the email Mr. Stewart indicated that he wished to pursue counseling and asked if there were any sample templates or forms in Mr. Connor's possession that he could utilize. Mr. Connor then went on to advise Mr. Stewart to send a letter to his wife's attorney letting her know that he wanted to participate in marriage counseling and give the name address and phone number of the counselor. If Mrs. Stewart would not participate, Mr. Connor advised Mr. Stewart to let him know. In a final email, Mr. Stewart thanked Mr. Connor for the advice.

In response to Mr. Stewart's testimony Mr. Connor was called to testify. Mr. Connor acknowledged that he recollected seeing and speaking to Mr. Stewart. On occasion they would speak in the parking lot outside the office building. Mr. Connor also acknowledged that he was part owner of the building in which Mr. Stewart, Mr. Connor and Ms. Walker's law firm was located and that he was a recipient of monies from Mr. Stewart as his landlord. He refuted Mr. Stewart's assertion that he and Mr. Stewart had lunch at the Chambersburg Club. He acknowledged the meeting at Starbucks and also acknowledged that they traveled together by car for a business development luncheon at The Orchard's Restaurant. He could not recall the exact date or time of the business luncheon or any particular

discussion of anything of confidence during the course of their traveling to and from The Orchard's Restaurant. Mr. Connor asserted that he never entered into an attorney-client relationship with Mr. Stewart, that he never quoted Mr. Stewart fees, that they never executed a retainer agreement and that he never advised Mr. Stewart that he was acting as his attorney. Mr. Connor asserted that he could not recall any confidential information that Mr. Stewart may have shared with him during any of their discussions.

Discussion

Based upon the foregoing information the Court must decide whether or not to permit Attorney Spang as a member of Mr. Connor's firm to continue to represent Mrs. Stewart. The Court is being asked to interpret Rule of Professional [Conduct] 1.9. All of the issues that are presented to this Court for consideration have been previously addressed by the United States District Court for the Eastern District in the case of Clark Capital Management Group, Inc., v. The Annuity Investors Life Insurance Company 149 F. Supp. 2d 193 (July 6, 2001).

The first question to be answered is whether or not the Plaintiff William Stewart is a "former client" of Attorney Connor. Under Rule of Professional Conduct 1.9, "A lawyer who has formally represented a client in a matter shall not thereafter: (a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation". Pa.R.P.C. 1.9. The prohibition of representation disqualifies the lawyer's entire firm.

Since Mr. Connor is currently a partner in the law firm of Walker, Connor and Spang, PC, of which Nathaniel Spang is an attorney and current counsel for Angela Stewart, the prohibition of representation would extend to Attorney Spang.

Reviewing the testimony it is clear that an actual attorney-client relationship based upon an executed retainer agreement or the payment of professional fees did not exist. This evidence is clear and convincing and not contravened. "An attorney-client relationship is one of agency and arises only when the parties have given their consent, either expressed or implied, to its formation". Clark Capital Management Group, Inc., v. The Annuity Investors Life Insurance Company 149 F. Supp. at 196. Both Mr. Stewart and Mr. Connor stated under oath that no formal attorney-client relationship existed between them. The inquiry does not end there. "When no express relationship exists, the intent to create an attorney-client relationship can

be implied from the conduct of the parties”. Hunter v. Jacoby and Meyers Law Offices, 1996 WL 257348 *3 (E. D. PA 1996). “An attorney-client relationship does not only arise in agency but also where a layperson submits confidential information to a lawyer with a reasonable belief that latter is former’s attorney”. Id. The second part of the analysis requires this Court to determine whether or not the information that was exchanged by and between Mr. Stewart and Mr. Connor created to an attorney-client relationship.

So the fundamental question is whether or not Mr. Stewart (1) disclosed confidential information to Mr. Connor, (2) with a reasonable belief that Mr. Connor was acting in the capacity of attorney for Mr. Stewart throughout the course of the communication.

The Court finds that based upon Mr. Stewart’s testimony that he revealed to Mr. Connor that his wife was seeking a divorce. This was a matter of public record. Mr. Stewart did not concur with her decision to seek a divorce, which when discussed with Mr. Connor likely was not publicity known but became public once Mr. Stewart communicated his opposition to Mrs. Stewart’s counsel. The record is unclear as to whether or not Mr. Stewart provided specific reasons to Mr. Connor as to why he would be objecting to the divorce except to express an overall concern that his wife had filed for divorce in prior years which was rescinded and thus counseling may result in a reversal of his wife’s decision.

It is not surprising to this Court, that given the passage of time, neither Mr. Stewart nor Mr. Connor are able to specifically recall details of their conversations. The most detailed information the Court has before it was the exchange of emails. Throughout the course of the emails the general tone and tenor of Mr. Connor’s communication with Mr. Stewart was that he would not agree to serve as his attorney absent compensation. Mr. Stewart never appears to indicate at any time that he would pay Mr. Connor for his service but was seeking some “general advice”. It is clear Mr. Connor advised Mr. Stewart of his right to counseling which is prescribed by the Divorce Code. He may have offered him a sample counseling order to utilize on his own as well as suggest he contact Mrs. Stewart’s counsel to notify her of his decision to request counseling. Aside from this information, the Court cannot discern that there was any confidential information disclosed by Mr. Stewart that influenced Mr. Connor’s advice.

23 Pa. C.S. § 3302 specifically addresses counseling in divorce actions. The statute identifies multiple basis for ordering participation in counseling by the court depending on the unique circumstances confronting divorcing persons. In reviewing Mr. Connor’s emails it does not appear that he was in possession of any confidential information from Mr. Stewart

that caused him to advise Mr. Stewart of whether or not counseling could be sought under any particular subsection of 23 Pa. C.S. § 3302.

It is apparent to this Court that Mr. Connor was at most providing general advice regarding the statutory authority for requesting counseling. There is nothing to indicate that the counseling was to focus on the parties' relationship with their children or to address parenting skills. At most the counseling might aid the parties in preserving their marital relationship, which might lead to the preservation of the marital home and presumably the maintenance of the family unit which might be marginally relevant to the current custody action.

The nature of the informal meetings between Mr. Connor and Mr. Stewart noticeably lack the formality of an office consultation with Mr. Connor. The information was discussed at an informal meeting over coffee in a public locale. The discussion while traveling to and from a business meeting was also informal and spontaneous. Mr. Stewart never took the opportunity to meet with Mr. Connor within the office building itself with the particular intent of securing professional advice related to his divorce. In the end, the Court finds that Mr. Stewart did not convey confidential information to Mr. Connor and he could not have a reasonable belief that Attorney Connor was acting as an attorney for him during the course of the communications. Not only did Attorney Connor not offer to serve as Mr. Stewart's attorney he specifically advised and that he would not assume his representation at any time.

Furthermore, there is no indication or statement by Mr. Stewart that he was of the opinion that Mr. Connor was serving as his counsel at the time. Consistent with the review of the decision issued in the Clark Capital Management Group case, this Court will also address the potential concern the effect that confidential information may have been disclosed by Mr. Stewart which could potentially be used to his detriment in his ongoing custody litigation with his wife. This Court acknowledges that Attorney Connor consciously placed himself at risk of disclosing confidential information by taking the stand and offering testimony to refute Mr. Stewart's claims that confidential information was discussed. Mr. Connor was placed under oath. He testified credibly that no confidential information was disclosed and he couldn't recall any particulars of their discussion. Mr. Stewart's discussions with Mr. Connor overall, seemed to be vague but this is not surprising given the passage of time.

More importantly, Mr. Connor cannot recall any information or statements regarding Mr. Stewart's children, family life, wife or anything else that may impact the custody litigation.

For these reasons the Court finds that Mr. Spang's representation

of Mrs. Stewart will not be a violation of Pa. R.P.R. 1.9. (sic) The Court also notes that there is no testimony to indicate that Mr. Connor retained any notes or information within his client files of his discussions with Mr. Stewart. However, in order to reassure all parties in this case that there will be no taint upon the custody action based upon Mr. Spang's representation of Mrs. Stewart, the Court will issue an Order to assure no confidential information is in the possession of Connor, Walker and Spang, PC. In the end, this Court is satisfied that no confidential information was provided by Mr. Stewart to Mr. Connor in an attorney-client relationship, and so the motion to preclude representation of Mrs. Stewart by Mr. Spang will be denied.

ORDER OF COURT

AND NOW, this 26th day of April, 2016;

THE COURT HEREBY ORDERS that Michael Connor review the files of Walker, Connor and Spang, PC and confirm that he is not in possession of any type of file in which there may be notes or confidential information relating to the above captioned custody action or Mr. or Mrs. Stewart's divorce action. Mr. Connor shall file an affidavit within 10 days of the date of this order confirming that a complete investigation of the client files of Walker, Connor and Spang, PC has been completed and that no confidential information which could be used against William Stewart in his custody action involving his wife Angela Stewart is contained in the firm's files. In the event the investigation of the files reveals that there is in fact confidential information in the possession of Mr. Connor's law firm, this Court expects full disclosure to Mr. Stewart and Mrs. Stewart in accordance with the Rules of Professional Conduct and to the Court so that further action can be taken by this Court.

In the absence of such information being in the possession of Attorney Spang or Attorney Connor of the law firm of Walker, Connor and Spang, PC, this Court hereby orders that the motion to preclude Nathaniel Spang, Esquire from serving as counsel for Angela Stewart is DENIED.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.