

1993

Gregory Oar v. Dale Parks and Sterling Press, Inc. : Brief of Appellant

Utah Court of Appeals

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Gregory H. Oar; Plaintiff/Appellant Pro Se.

Allen Sims; Attorney for Appellees.

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Gregory Oar
Plaintiff/Appellant Pro Se
217 Lancelot Circle
North Salt Lake City, UT 84054
(801) 292-8302

930643

IN THE UTAH COURT OF APPEALS

Gregory Oar,
Plaintiff & Appellant,

vs.

Dale Parks and Sterling Press,
Inc.

Defendants & Appellees.

APPELLANT'S BRIEF

Court of Appeals # 93-0400

PRIORITY No. 5

93-0643

On appeal from the Third District Court, Salt Lake County, Utah.

The Honorable James S. Sawaya, originally assigned to case;
subsequently the Honorable Tyrone Medley

Prusuant to Rule 29, Utah Rules of Appellate Procedure: The
Priority of Argument is 5.

FILE
Utah Co

Allen Sims of Allen Sims P.C.
Attorney for Appellees
124 South 600 East
Salt Lake City UT 84102
(801) 533-8505

Gregory H. Oar,
Plaintiff/Appellant Pro Se
217 Lancelot Circle
North Salt Lake, UT 84054
(801) 292-8302

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JURISDICTION OF APPELLANT COURT

This case originated in the Third District Court, Salt Lake County, Utah as civil case number 90-0904365PR.

It was originally assigned to the Honorable James S. Sawaya and subsequently, upon Judge Sawaya's retirement, to the Honorable Tyrone Medley.

JURISDICTION: The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Constitution, Article VIII, Section 3(a), Utah Code Ann. Section 76-2-2(3)(j) (1978), and Utah Rules of Appeals, 3(a) and 4(a) Utah Code Ann. 1953, as amended.

On October 7, 1993 it was submitted to the Superior Court clerk and was assigned to the Utah Court of Appeals

STATEMENT OF ISSUES

The Honorable James S. Sawaya, judge of the Third District court, it is asserted made an error in this case. The error alleged is stated below:

In a hearing on May 11, 1992 Judge Sawaya ruled that attorney Allen Sims should be allowed to continue as attorney for the defendant even though he had represented the plaintiff in several matters just a few years earlier. These legal matters included preparation of many of the very documents which were presented in this case thereby constituting an extremely flagrant conflict of interest.

At the same hearing a motion was heard wherein Plaintiff asked for an accounting of the rental income and expenses from the property and a check for his share of the net rental income. Allen Sims stated that there had been no accounting made and there were no funds to disburse. Allen Sims knew full well that there was a joint checking account from which the expenses of owning the property were paid since he himself, for some reason unknown to the Plaintiff, was issued a check from the account. In other words Allen Sims lied to Judge Sawaya causing Plaintiff to lose the property.

STATEMENT OF THE CASE

This case is on appeal from the Third District Court's ruling, made at a hearing on May 11, 1992, that Allen Sims was to

remain the attorney of record in this case even though the weight of evidence indicated that Sims represented Plaintiff/Appellant Gregory H. Oar on numerous occasions and was not eligible to represent Parks in this case.

Allen Sims was a member of the firm of Biele, Haslam & Hatch when Gregory Oar, as president of Sterling Press Inc., engaged them to do corporate matters along with some personal litigation for himself.

Rule 1.9 of the *Utah Rules of Professional Conduct* sets forth the circumstances under which a lawyer may not represent a party whose claims are adverse to those of a former client. That provision is as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter; a) represent another person in the same or a substantially factually related matter in which that person's interest are materially adverse to the interest of the former client unless the former client consents after consultation; or b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally know.

There is ample evidence that attorney Allen Sims is well aware that he was not and is not eligible to represent Dale S. Parks in any action involving Gregory Oar. When Plaintiff /Appellant Gregory H. Oar filed suit in *Oar vs. Parks* involving a matter where Parks defrauded Oar, Allen Sims apparently advised Parks to seek other counsel. Parks then hired Michael N. Zundel

of Jardine, Linebaugh, Brown & Dunn to handle that litigation.

In yet another case, which just recently came to light, and which is still before the court, *Oar vs. Parks and deMik*, Parks hired yet another attorney to defend him, L. Benson Mabey. If Sims really thought that he was eligible to represent Parks he certainly would have taken care of these matters in addition to this current matter before the court.

It has become standard practice for law firms to check all new client's names against a list, which is usually computerized, of their clients so that they are alerted when a possible conflict arises. This shows the importance that attorneys generally assign to adhering to Rule 1.9. Sims adhered to none of this. Sims arrogantly states, in his reply to the motion to disqualify, that he represented the corporation, Sterling Press Inc., but neither one of the principals, as if the corporation was someone else.

In yet another case (*Oar vs. Parks*), which has not yet been filed, involving Parks defrauding Oar of yet another jointly owned property Parks will undoubtedly hire yet another law firm to try to defend himself. It's inconceivable that Sims will risk further sanctions by taking on this future case.

STATEMENT OF THE FACTS

FIRST CAUSE OF ACTION

IMPROPERLY REPRESENTING FORMER PARTNER

A) For some years, beginning in the early 1970's, Plaintiff/Appellant Gregory H. Oar and Defendant/Respondent Dale S. Parks were partners in a commercial printing business known as Sterling Press Inc. Together we purchased a building at 2630 South 300 East, South Salt Lake City, Utah. In the early 1980's they decided to divide the assets of the business and go their separate ways. One major asset which they agreed to keep was this building in which Oar retained a 42.87% interest and Parks retained the remaining 57.13%. Over time Oar had some financial needs to keep his new venture afloat. He borrowed \$20,000 for 90 days from Barry Birkenshaw for which he gave a quit claim deed on the property as collateral. Before the note came due Plaintiff's business venture failed and he was unable to repay the loan. Mr. Birkenshaw recorded the quit claim deed and Plaintiff lost his interest in the property. Subsequently, Birkenshaw contacted Plaintiff's mother, Florence Bowers, and transferred his interest in the property back to Mrs. Bowers, at a discount, with the intention that Mrs. Bowers would eventually transfer the interest back to her son, Gregory Oar.

B) Later, Oar wished to withdraw some funds from the building in order to engage in other activities. Through his mother, Oar offered his portion of the building for sale subject to his partner's lease agreement, however, when he found a buyer, Parks frustrated the sale by forbidding the prospective buyer from even entering the building to inspect it.

C) On August 2, 1990, Florence Bowers, filed suit in Third District Court to increase the rent paid on her portion of the commercial building which was jointly owned by Defendant-Respondent Dale S. Parks, or alternately to partition the building either by sale or a physical partition. During 1992, Florence Bowers became ill and finding business decisions very difficult along with the extreme anxiety over the lawsuit she transferred the lawsuit over the building to her son Plaintiff/Appellant Gregory H. Oar. See stipulation (appendix #2).

D) On or about the 5th of June 1992, Plaintiff /Appellant Oar filed a motion to disqualify Defendant's attorney Allen Sims based on the premise that since Allen Sims had been Oar's attorney when he was president of Sterling Press he was no longer eligible to represent another party against Oar.

E) Oar moved the court to disqualify Sims as defendant's attorney. A hearing was held. The court ruled against Plaintiff Oar.

SECOND CAUSE OF ACTION

PERJURY

A) On May 12, 1992 the court heard Plaintiff's motion seeking release of funds held in the Sterling Press building rental account.

B) The motion specifically requested a full accounting of the rental income and a release of the funds in order to

forestall foreclosure scheduled for the following morning. Allen Sims knowingly lied to Judge Sawaya when he stated that there was no accounting and there were no funds to disburse. Proof of this became available to Plaintiff on December 10, 1992 when someone at Sterling Press made a rental payment to the new owner of the property and included an accounting which included several previous years. Allen Sims was fully aware of this special checking account since he himself had received funds from the account with Gregory Oar's forged signature.

C) As a result of Allen Sims lying to Judge Sawaya that no funds were available in the property account, when in fact there were sufficient funds to redeem the property, and the fact that plaintiff had insufficient funds to redeem the property, plaintiff lost the property at the foreclosure sale on May 13, 1992.

SUMMARY OF ARGUMENT

Attorney Allen Sims was hired and did extensive legal work for the Plaintiff Gregory H. Oar. Rule 1.9 of the *Utah Rules of Professional Conduct* clearly states that this prohibits Sims from representing Dale S. Parks in any matter involving Gregory Oar. Therefore, Allen Sims should have been dismissed as the Defendants' attorney back in July of 1992.

In addition, at a hearing on May 11, 1992, Allen Sims lied to Judge Sawaya that he had no knowledge that an accounting was being kept and that there were no funds deposited in a joint

property rental account, when in fact he himself had been issued a check from the account with Gregory Oar's forged signature.

ARGUMENT

Because Judge Sawaya's ruling was contrary to the great weight of evidence, the trial court erred in denying plaintiff's motion to disqualify counsel for conflict of interest.

A. AN ATTORNEY/CLIENT RELATIONSHIP EXISTED BETWEEN OAR AND SIMS

Rule 1.9 of the Utah Rules of Professional Conduct presupposes the existence of a prior attorney/client relationship between the challenged attorney and the party who is disputing the attorney's representation of the adversarial party in the current litigation. Thus, the first question to be answered in a motion to disqualify is whether there was a prior attorney/client relationship. *Otake v. Klien* 791 P2d 713, 717 (Hawaii 1990).

Sims initially performed services for Oar in 1981 when Sterling Press was liquidated. At that time, Sims negotiated the terms of the liquidation agreement, and drafted the documents necessary to effectuate the liquidation. Where a small, closely held corporation is involved, and in the absence of a clear understanding with the corporate owners that the attorney represents solely the corporation and not their individual interest, it is improper for the attorney thereafter to represent a third party whose interest are adverse to those of the

stockholders and which arise out of a transaction which the attorney handled for the corporation. *In Re Brownstin*, 602 P.2d 655, 657 (Or. App.1979). In actuality, the attorney in such a situation represents the corporate owners in their individual capacities as well as the corporation unless other arrangements are clearly made. *Id.* In the matter at hand, Sterling Press had only two shareholders. When Sims negotiated and drafted the liquidation agreement, he was representing not only the corporation, but also Oar and Parks in their individual capacities.

Sims was also representing Oar when he negotiated and drafted the lease for the property, and when he negotiated and drafted the 1985 agreement. In *Carlson v. Langdon*, 751 P.2d 344 (Wyo. 1988), the Supreme Court of Wyoming interpreted Rule 1.9 of the *Wyoming Rules of Professional Conduct*. That Rule is identical to Rule 1.9 of the *Utah Rules of Professional Conduct*. In that case, the court held that when an attorney does nothing to indicate or dispel a party's belief that the attorney is representing his interest, then an attorney/client relationship exists between the attorney and that party. *Id.* at 347. When Sims drafted the lease and the 1985 agreement, Oar was under the impression that Sims was representing his interests. Sims did nothing to dispel Oar's belief that he was representing him in the negotiation and drafting of these documents. As such, an

attorney/client relationship existed between Sims and Oar with regard to those agreements as well.

The fact that Oar may not have paid Sims for all of the work which he performed would not control the question of whether an attorney/client relationship existed between Sims and Oar with regard to those agreements as well.

The fact that Oar may not have paid Sims for all of the work which he performed should not control the question of whether an attorney/client relationship does not require the payment of a fee or formal retainer but may be implied from the conduct of the parties. *Matter of McGlothlen*, 663 P.2d 1330, 1334 (Wash. 1983). Payment may be an important consideration, but it is not essential to the existence of an attorney/client relationship, especially for purposes of apply Rule 1.9. *Carlson v. Langdon*, *supra*.

Because Oar was one of only two stockholders in Sterling Press, and because Sims represented Sterling Press, Sims also represented Oar with regard to the liquidation agreement. In addition, an attorney/client relationship also existed between Sims and Oar with regard to the lease and the 1985 agreement because Sims did nothing to dispel Oar's notion that he was representing his interest in those matters. An attorney/client relationship is thus presumed to have existed between Sims and Oar.

**B. THE MATTERS INVOLVED IN THIS ACTION ARE SUBSTANTIALLY
FACTUALLY RELATED TO THE MATTERS IN WHICH SIMS REPRESENTED OAR**

Once it has been established that an attorney/client relationship existed between the challenged lawyer and the party who is disputing the attorney's representation of an adversarial party in the current litigation, the court must determine whether the matters are substantially factually related. The court must determine whether in the factual context the matters involving the two clients are related in some substantial way. *Carlson v. Langdon, supra*. If the two matters have common facts, the attorney in a position to receive confidential information which possibly could be used to the detriment of the former client in a later proceeding. *Id.*

In the matter at hand, Sims' prior representation of Oar is substantially factually related to the matters being litigated in this action. In proving the allegations made in his Complaint, Oar must refer to the circumstances surrounding the negotiation and signing of the liquidation agreement, the lease, and the 1985 agreement. Sims represented Oar with regard to the drafting and the signing of all of those documents. In his representation, Sims became privy to confidential information which he could use to Oar's detriment in this matter. In fact, Sims has already used provisions of the 1985 agreement to support his argument opposing Oar's Motion for Release of funds.

Oar's recovery in this matter is predicated upon proving the facts related to the liquidation agreement, the lease, and the 1985 agreement. Sims representations are substantially factually related, and Rule 1.9 prohibits Sims from representing parties with adverse interest to Oar in this matter.

Regarding Plaintiff's Charge of Perjury against Allen Sims the record speaks for itself.

CONCLUSION

Under the *Code of Professional Ethics* Rule 1.9 it is clear that Allen Sims should have been disqualified as counsel for Dale S. Parks and Sterling Press Inc.

In addition, Allen Sims knowingly lied to Judge Sawaya when he stated that there was no accounting and there were no funds in the property rental account. The funds that existed could have prevented Appellant from losing his interest in the property in foreclosure.

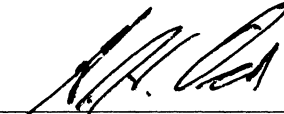
Therefore, Appellant Gregory H. Oar prays the court;

1) Order that the matter be remanded to the Third District Court for retrial but barring Allen Sims from representing Dale S. Parks and Sterling Press Inc.

2) Or alternately, that Defendant Dale S. Parks be ordered to pay Appellant Gregory H. Oar the sum of Fifty Thousand Dollars (\$50,000) for his loses as a result of Attorney Allen Sims actions.

3) Plus any other relief that the court deems appropriate.

DATED this 23rd day of November 1993.



Gregory H. Oar
Appellant acting Pro Se

APPENDIX

1. Attached herewith is a copy of **Rule 1.9, Conflict of Interest: Former Client**, from *Utah Court Rules Annotated*, Rules of Professional Conduct, pp. 972-3.
2. Stipulation substituting Oar for Bowers as plaintiff.

ent, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

Paragraph (d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

Paragraph (e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remains ultimately liable for such expenses."

Paragraph (e)(2) has no counterpart in the Code.

Paragraph (f) is substantially identical to DR 5-107(A)(1).

Paragraph (g) is substantially identical to DR 5-106.

The first clause of paragraph (h) is similar to DR 6-102(A). There was no counterpart in the Code to the second clause of paragraph (h).

Paragraph (i) has no counterpart in the Code.

Paragraph (j) is substantially identical to DR 5-103(A).

COLLATERAL REFERENCES

A.L.R. — Attorney's assertion of retaining lien as violation of ethical code or rules governing professional conduct, 69 A.L.R.4th 974.

What items of client's property or funds are not subject to attorney's retaining lien, 70 A.L.R.4th 827.

Rule 1.9. Conflict of Interest: Former Client.

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

COMMENT

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment

of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about the client when later representing another client.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.

CODE COMPARISON

There was no counterpart to paragraphs (a) and (b) in the Disciplinary Rules of the Code. The problem addressed in paragraph (a) was sometimes dealt with under the rubric of Canon 9 of the Code which provided: "A lawyer should avoid even the appearance of impropriety." EC 4-6 stated that the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.

The provision in paragraph (a) for waiver by the former client is similar to DR 5-105(C).

The exception in the last sentence of paragraph (b) permits a lawyer to use information relating to a former client that is in the public domain—a use that was not prohibited by the Code which protected only confidences and secrets. Since the scope of paragraph (a) is much broader than confidences and secrets, it is necessary under the Rules to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

Rule 1.10. Imputed Disqualification: General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially factually related matter in which that lawyer, or a firm with which the lawyer has associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client, and

(2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

COMMENT

Definition of Firm

For purposes of the Rules of Professional Conduct the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation while it might not be so regarded for pur-

poses of the rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved and on the specific facts of the situation.

Where the lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b), where a lawyer represents the government after having served private clients, the situation

MICHAEL L. CHIDESTER #5263
MOONEY & ASSOCIATES
Attorney for Plaintiff
236 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 364-5635

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---ooo0ooo---

FLORENCE BOWERS,

Plaintiff,

vs.

DALE S. PARKS, STERLING PRESS, INC., a Utah corporation, WEST ONE BANK, a Utah corporation, RICHARD G. NEWTON, and BRUCE M. GIFFEN,

Defendants.

STIPULATION


Civil No. 900904365 PR

Judge James S. Sawaya

---ooo0ooo---

Defendants, Dale S. Parks and Sterling Press, Inc., by and through their attorney of record, Allen Sims, hereby stipulate and agree that the Court may substitute Gregory Oar as plaintiff for Florence Bowers in the above-entitled matter.

DATED this 17 day of March, 1992.


ALLEN SIMS

Attorney for Defendant