

RULING NO. C2008-3/31

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Complaint of Capital One Services, Inc.

Docket No. C2008-3

PRESIDING OFFICER'S RULING DENYING
MOTION OF BANK OF AMERICA CORPORATION
TO LIMIT THE SCOPE OF THIS PROCEEDING
OR DISQUALIFY COUNSEL

(Issued October 24, 2008)

I. INTRODUCTION AND SUMMARY

On September 10, 2008, Bank of America Corporation (BAC) filed a motion seeking to limit the scope of this proceeding due to alleged violations of applicable ethics rules by BAC's former counsel.¹ In the alternative, BAC seeks to disqualify its former counsel from representing Capital One in this case. *Id.* at 14-19. In support of its Motion, BAC filed a Declaration of Jody Berenblatt which detailed the scope of BAC's former attorney's representation.²

On September 24, 2008, Capital One filed an opposition to the Motion claiming that (1) the Motion's attempt to limit issues is improper, and (2) its current counsel did not violate any ethics rules and that no disqualification or other remedial action is

¹ Motion of Bank of America Corporation to Limit the Scope of the Proceeding or, in the Alternative, to Disqualify Counsel for Complainant Capital One Services, Inc., September 10, 2008, at 1 (Motion). BAC also filed a motion to stay the proceedings pending the outcome of the Motion. Motion of Bank of America Corporation to Stay Proceedings Pending Ruling on Motion to Narrow Scope of Proceedings or, Alternatively, Disqualify Counsel of Capital One Services, Inc., September 10, 2008.

² Declaration of Jody Berenblatt, September 10, 2008 (Berenblatt Declaration).

necessary.³ In support of its Opposition, Capital One filed a Declaration of Joy M. Leong which detailed the scope of Ms. Leong's representation of BAC.⁴ The Postal Service also filed a response to the Motion arguing that the Commission should not allow participants to collaterally attack the Bank of America NSA.⁵

Prior to having the opportunity to review the Opposition filed under seal, BAC filed another "out-of-the-ordinary" related motion seeking a pre-hearing conference on the issues it raised in its Motion.⁶ Both Capital One and the Public Representative filed oppositions to this request.⁷

For the reasons that follow, the Commission finds that there has been no violation of any ethics rules by Capital One's counsel. Accordingly, BAC's Motion is denied. As a result, the issues raised by BAC's request for a pre-hearing conference are moot.

II. PARTICIPANTS' POSITIONS

BAC interprets Capital One's complaint as urging the Commission to modify or amend BAC's NSA to eliminate the alleged "undue preference." Motion at 2, 4. BAC then discusses Capital One's current counsel's former representation of BAC and the information she allegedly obtained from BAC. *Id.* at 5-6. BAC makes two specific allegations. First, BAC alleges that Capital One's counsel "was using her knowledge of

³ Answer of Capital One Services, Inc. in Opposition to the Motion of Bank of America to Limit the Scope of the Proceeding or, in the Alternative, to Disqualify Counsel (Redacted Version), September 24, 2008, at 2-6 (Opposition). Capital One also filed a version "under seal." See Notice of Capital One Services, Inc. of Filing Under Seal its Answer in Opposition to the Motion of Bank of America to Limit Scope of Proceedings or, in the Alternative, to Disqualify Counsel, September 24, 2008. It is not necessary to discuss the issues or cite to the pleading filed under seal to rule on the Motion.

⁴ Declaration of Joy M. Leong, September 24, 2008 (Leong Declaration).

⁵ Response of the United States Postal Service to Motion of Bank of America Corporation to Limit the Scope of the Proceeding, September 24, 2008, at 1 (Postal Service Response).

⁶ Bank of America Request for Pre-Hearing Conference, September 26, 2008 (Request).

⁷ Response of Capital One Services, Inc. to Bank of America's Request for a Pre-Hearing Conference, October 3, 2008 (Capital One Response); Public Representative Opposition to Bank of America Corporation Request for Pre-Hearing Conference, October 6, 2008.

[BAC] negotiation process to discredit the [Postal Service] witness.” *Id.* at 8. Second, it alleges that, through her prior representation of BAC, Capital One’s counsel has substantial information concerning how the Postal Service interprets its contract provisions as well as what BAC procedures the Postal Service would accept as fulfilling obligations under the NSA that she helped to negotiate. *Id.* at 9.

Based on these assertions, BAC makes two main arguments. First, it argues that the scope of the complaint and remedy should be limited to preclude any collateral attack on the BAC NSA. *Id.* at 9-10. Second, if the “Commission declines to enter an order limiting the scope of the proceeding and the permissible remedy,” BAC argues that Capital One’s current counsel has violated two D.C. Bar Rules of Professional Conduct—rules 1.9 and 1.6—and thus should be disqualified. *Id.* at 14-20.

In its Opposition, Capital One makes four main arguments. First, it argues that BAC is inappropriately attempting to disguise its Motion, which is really an untimely motion to dismiss. Opposition at 7. Second, it argues that the Commission should not limit the remedies available under 39 U.S.C. § 3662(c) since such a ruling would be premature. *Id.* at 12-13. Third, it argues that there is no conflict of interest because the former representation was neither the same nor substantially related to the current proceeding. *Id.* at 14-18. Forth, it contends that Ms. Leong has not, and will not breach her confidentiality obligations to BAC in her representation of Capital One in this proceeding. *Id.* at 24.

The Postal Service agrees with BAC that this docket should not be used for relitigating issues raised in Docket No. MC2007-1, but does not take a position on the disqualification aspect of the Motion. Response at 1-4. It also argues that Capital One should not be allowed to raise several issues discussed in its complaint due to the legal doctrines of *res judicata* and *collateral estoppel*.

BAC’s Request for a prehearing conference claims that Capital One’s Answer “does not deal with the issues that we have raised,” and that the most effective means of enabling the Presiding Officer to understand what is at stake and the positions of the parties is to hold a pre-hearing conference. Request at 1-2. Specifically, BAC would

like answers to the following questions: (1) Capital One's position on the governing substantive law applicable to this proceeding; (2) Capital One's position as to the relief it seeks; and (3) Capital One's position as to the scope of permissible discovery. *Id.* at 2-3.

Capital One strongly opposes BAC's Request claiming that BAC had an opportunity to raise all of the issues it is now raising at the first prehearing conference. Capital One Response at 1-2, 6-7. It argues that BAC's Motion and Request are disguised attempts to delay this complaint proceeding or to limit the scope of inquiry. *Id.* at 5. Capital One also contends that BAC is abusing Commission procedures since it is a competitor attempting to hinder Capital One's ability to prove its case. *Id.* at 8-10. Capital One then addresses the questions raised in the BAC Request in an easy to read, table format. *Id.* at 11. Finally, Capital One addresses the Postal Service's *res judicata* and *collateral estoppel* arguments. Capital One argues that in the prior proceeding it did not have a full and fair opportunity to litigate the issues raised in its complaint. *Id.* at 11-12. It explains that at the time of the BAC NSA, Capital One had no reason to believe that the Postal Service would create an undue preference that would not be available to similarly situated mailers. *Id.* at 12-13.

III. DISCUSSION

The impetus behind BAC's Motion is an alleged conflict of interest between Capital One's current attorney, Ms. Leong, and Ms. Leong's former client, BAC. BAC claims that this conflict of interest can only be remedied by either limiting the scope of the proceeding or disqualifying Ms. Leong from representing Capital One in this proceeding. If, however, there is no conflict of interest, then the Commission does not need to delve into the remaining issues raised by the Motion since they would be

rendered moot or would be premature.⁸ Accordingly, the Commission first addresses whether there is an impermissible conflict of interest between Ms. Leong's former client and her current client.

In general, courts have "become more and more skeptical of motions to disqualify counsel, and they now approach them with cautious scrutiny." *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 22, 27 (D.D.C. 1984); accord *Bowens v. Atlantic Maintenance Corp.*, 546 F. Supp. 2d 55, 86-87 (E.D.N.Y. 2008). Participants should typically be afforded their counsel of choice. *Richardson-Merrell, Inc. v. Koller*, 737 F.2d 1038, 1056 (D.C. Cir. 1984), *vacated on other grounds*, 472 U.S. 424 (1985);⁹ accord *Cauderlier & Associates, Inc. v. Zambrana*, 2006 WL 3445493 (D.D.C. 2006) (*citing Koller*). Courts are more likely to protect that right in circumstances where the attorneys sought to be disqualified have a unique and probably irreplaceable value to their client such as where the subject matter of a lawsuit is quite specialized, and without its attorney, a party would be dealt a significant, perhaps irreparable, setback. *Laker Airways*, 103 F.R.D. at 27; accord *Hewlett-Packard Co. v. Nu-Kote Intern., Inc.*, 1995 WL 110558 (N.D. Cal. 1995).

As the D.C. Court of Appeals noted, motions to disqualify "permit litigants, unfairly, to avoid the merits of a case by attacking opponent's counsel instead." *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 49 n.16 (D.C. 1984); accord see *Bowens*, 546 F. Supp. 2d 55 at 86-87 (E.D.N.Y. 1984). Such motions have the potential to be abused, as they may be brought purely for tactical reasons rather than for fear of disclosure of confidential information. See *id.*

The Commission's rules of practice demand that "individuals practicing before the Commission shall conform to the standards of ethical conduct required of

⁸ An exception to this is BAC's alleged ethical violation of D.C. Rule of Professional Conduct 1.6(a), which prohibits a lawyer from revealing a confidence or secret of the lawyer's client. That issue is discussed below.

⁹ Although the decision was vacated, it retains its precedential value as to the holdings unaffected by that decision. *Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83 (D.C.Cir.1991).

practitioners in the courts of the United States.” 39 C.F.R. § 3001.6(d). Since the Commission is located in the District of Columbia, attorneys practicing in front of the Commission must follow the current D.C. Rules of Professional Conduct.

A. D.C. Rules of Professional Conduct Rule 1.9

With respect to former clients, the participants agree that rule 1.9 applies. Rule 1.9 states:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in *the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

D.C. Rules of Prof'l Conduct R. 1.9 (emphasis added). Thus, if the current matter is not “the same or substantially related” to the former matter, there is no impermissible conflict of interest under rule 1.9.¹⁰ It is evident that the subject matter of counsel's current Capital One representation, a complaint against the Postal Service for failure to offer a functionally equivalent NSA, is not “the same” as the subject matter of the previous representation—discussions about a potential new NSA. A less clear issue is whether Ms. Leong's representation of Capital One is “substantially related” to her representation of BAC.

A D.C. Ethics Opinion on rule 1.9 is instructive. In D.C. Ethics Op. 237, the D.C. Bar Legal Ethics Committee found that the first step in applying the substantial relationships test is “analysis of the facts and legal issues to determine, in the first instance, whether the factual contexts of the two matters overlap.” D.C. Ethics Op. 237 (1992).

¹⁰ An independent ground for finding that a conflict of interest does not exist is when the clients' (former and current) interests are not “materially adverse.” Here, it is not clear that the interests of BAC and Capital One are materially adverse. See Opposition at 2 n.5, 5. However, because the matter in which Ms. Leong represented BAC is not the same or substantially related to the current proceeding, there is no need to resolve this issue.

The D.C. Rules of Professional Conduct's official comments to rule 1.9 are also helpful to this inquiry. Comment 2 to rule 1.9 states that "the underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as changing of sides in the matter in question. Rule 1.9 is intended to incorporate District of Columbia and federal case law defining the 'substantial relationship' test. See, e.g., *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) ... and its progeny." D.C. Rules of Prof'l Conduct R. 1.9 cmt. 2. The comments go on to say that "[m]atters are 'substantially related' for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." D.C. Rules of Prof'l Conduct R. 1.9 cmt. 3.

The comment also discusses the extent of the factual inquiry in these matters. It explains that a "conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and the information that would in ordinary practice be learned by a lawyer providing such services." *Id.* Thus, the Commission need not delve into the specific facts obtained by Ms. Leong during her former representation (as argued in BAC's Request). It need only review the nature of the services provided in connection with her prior representation and the information that a typical attorney would learn in providing such services.

The comment also suggests that "[i]nformation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying." *Id.* Moreover, information learned 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." *Id.* Finally, with respect to clients that are organizations such as BAC and Capital One, "general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation." *Id.*

There are several D.C. cases that weigh in on the substantial relationship test. In *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 (D.C. 1984), the seminal D.C. court case on this topic, the court found no substantial relationship between the matters even though the representations involved the same property because none of the information presented in the earlier proceeding would have benefited the property owner in the current proceeding. See *id.* at 58.

With that legal background, the Commission examines the facts associated with Ms. Leong's prior representation of BAC and her current representation of Capital One to determine if the matters are substantially related. Based on the official comments to rule 1.9, the issue becomes whether there is a substantial risk that the confidential factual information that Ms. Leong would normally have obtained in her prior representation of BAC might "materially advance" Capital One's position in the instant proceeding. See D.C. Rules of Prof'l Conduct R. 1.9 cmt. 3. In order to make that determination, the Commission reviews the instant proceeding to determine if there is anything that would normally have been learned in the prior representation that might materially advance Capital One's positions in this proceeding.

The issues and factual predicate underlying the instant case are focused on the Postal Service's actions following the consummation of its agreement with BAC. BAC could not, in the summer of 2005, have provided Ms. Leong with any confidential information bearing on Postal Service actions giving rise to the alleged unfair competition issues identified above. BAC's substantial relationship argument and the Berenblatt Declaration's statements in support of that argument do not properly take into consideration the passage of time, and the fact that the alleged discrimination relates to the actual Postal Service/BAC contract, rather than any considerations of concern to BAC that may have been mentioned during pre-contract negotiations. See P.O. Ruling C2008-3/8 at 3. The terms of the actual contract and the rationales supporting it have been made public through Docket No. MC2007-1. See D.C. Rules of Prof'l Conduct R. 1.9 cmt. 3.

Ms. Leong's representation of BAC ended 17 months before BAC reached an agreement with the Postal Service, and 34 months before this complaint proceeding began. While the potential structure of the NSA with BAC may have been confidential prior to the Postal Service publicly filing the agreement with the Commission, the actual agreement became a matter of public record in 2007. Moreover, information learned 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." *Id.* Any information on BAC volume projections, mailing operations, or business plans and objectives provided in 2005 would be outdated and obsolete in 2008. Thus, it would not materially advance Capital One's position in this matter. Additionally, negotiation and litigation strategies that BAC used in hopes of obtaining a baseline agreement would be irrelevant in 2008 to what might or might not qualify as a functionally equivalent NSA in the eyes of the Postal Service. Moreover, such information would be mere "resemblances" related to BAC's "organization, operations, and activities" that are "general and superficial" and, as such, insufficient to satisfy the substantial relationship test. *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 22, 40 (D.D.C. 1984); *accord Gaumer v. McDaniel*, 811 F.Supp. 1113, 1119 (D. Md. 1991); *see also* D.C. Rules of Prof'l Conduct R. 1.9 cmt. 3; *accord* D.C. Ethics Op. 175 (1986) (a lawyer can use legal expertise and theories gained or developed during a former representation in a subsequent representation).

Thus, the Commission concludes Capital One's positions in this matter could not be materially advanced by any information that Ms. Leong could have learned from her former client. Accordingly, the matters are not substantially similar and there is no violation of rule 1.9.

B. D.C. Rules of Professional Conduct, Rule 1.6

Both BAC and Capital One agree that Ms. Leong must not violate D.C. Rules of Professional Conduct rule 1.6(a)(3). BAC alleges a violation of that rule by Ms. Leong. That rule states:

Except where permitted [elsewhere], a lawyer shall not knowingly:...(3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or a third person.

D.C. Rules of Prof'l Conduct R. 1.6(a)(3). Rule 1.6(b) defines secret as:

Information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely detrimental, to the client.

D.C. Rules of Prof'l Conduct R. 1.6(b). BAC argues that Ms. Leong "obtained confidential and proprietary information about Bank of America's marketing and competitive circumstances, mailing operations, business plans and legal strategies" as well as "the negotiations or the negotiation process between Bank of America and the Postal Service prior to signing the Bank of America agreement." Motion at 19. For the reasons discussed above with respect to the alleged violations of rule 1.9, nothing that Ms. Leong may have learned from BAC could be used to the advantage of Capital One in this proceeding. For this reason, the Commission does not see any violation of rule 1.6(a)(3) here.

BAC has not made any allegation that Ms. Leong has actually and "knowingly" used a confidence or secret of BAC to the advantage of Capital One. BAC is merely stating that this is a "potential" occurrence. *Id.* A violation of rule 1.6(a)(3) requires knowledge and actual use of a client's information to the advantage of a third party. Furthermore, even if there were allegations of an actual, knowing violation of rule 1.6(a)(3), it is unclear how BAC expects the Commission to remedy the violation. A violation of client confidences or secrets ordinarily would not be remedied by disqualification or limitation of issues in a proceeding; it would be remedied by disciplinary action against the attorney by the bar, or in a legal malpractice action. While the Commission has the authority to oversee the practice of attorneys in front of it (for example, it may ban certain attorneys from practicing before the Commission), it does not have the authority to order an attorney to be suspended from practicing law. That is under the purview of the local bar. It also cannot adjudicate legal malpractice

actions. If BAC feels that its confidences or secrets have been knowingly released by Ms. Leong in violation of rule 1.6, it should alert the applicable bar association or take what it considers to be appropriate legal action.

C. Remaining Issues Raised by BAC's Motion

The remaining issues raised by BAC's Motion are largely rendered moot by the findings above. Since there is no violation of either rule 1.9 or 1.6, there is no need to limit discovery, the scope of this proceeding, or permissible forms of relief at this time. Additionally, it would be premature to do so. Capital One and the Postal Service are working together to narrow the issues for resolution by the Commission as discovery comes to a close. If, after meeting and conferring, parties cannot agree on the issues for resolution, the parties may file motions to limit issues with the Commission.¹¹ With respect to the spectrum of allowable relief, it simply does not make sense to make a finding on relief prior to making any findings on liability in this case.

RULING

1. The Motion of Bank of America Corporation to Limit the Scope of the Proceeding or, in the Alternative, to Disqualify Counsel for Complainant Capital One Services, Inc., filed September 10, 2008, is denied.
2. The Motion of Bank of America Corporation to Stay Proceedings Pending Ruling on Motion to Narrow Scope of Proceedings or, Alternatively, Disqualify Counsel of Capital One Services, Inc., filed September 10, 2008, is denied as moot.

¹¹ The Commission anticipates that such motions would come from either the complainant or the respondent since those are the parties directly implicated by the complaint.

3. The Bank of America Request for a Pre-Hearing Conference, filed September 26, 2008, is denied as moot.

Dan G. Blair
Presiding Officer