

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original certificates for proposed water and wastewater system, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, LLC.

DOCKET NO. 090478-WS  
ORDER NO. PSC-10-0222-PCO-WS  
ISSUED: April 7, 2010

ORDER DENYING HERNANDO COUNTY'S MOTION  
TO DISQUALIFY APPLICANT'S COUNSEL

BACKGROUND

On October 16, 2009, Skyland Utilities, LLC, (Skyland) filed its application for original certificates to operate a water and wastewater utility in Hernando and Pasco Counties and for approval of initial rates and charges (Application). On November 13, 2009, Hernando County (Hernando) timely filed Hernando County's Objection to Application of Skyland Utilities, LLC and Request for Formal Administrative Hearing (Objection). On December 2, 2009, the law firm of Rose, Sundstrom & Bentley, LLP (RSB) entered its appearance on behalf of Skyland in this matter.

HERNANDO'S MOTION

On December 18, 2009, Hernando filed Hernando County's Motion to Disqualify Applicant's Counsel with Incorporated Memorandum of Law in Support Thereof (Motion). In the Motion, Hernando states that in 2003, it retained RSB to represent it with regard to the acquisition of the assets of Florida Water Services Corporation (Florida Water), a private water and wastewater utility operating in Hernando County, and with regard to the issuance of water and sewer bonds to finance the purchase of those assets. Hernando states that RSB did not provide it with any advance notice of its appearance on behalf of Skyland in this docket. The Motion states that by letter on December 7, 2009, Hernando requested RSB to withdraw from its representation of Skyland in this docket (Motion Exhibit "D"). On December 16, 2009, RSB declined to do so (Motion Exhibit "E") by responsive letter. Hernando argues that RSB should not be allowed to represent Skyland in this proceeding due to conflict of interest, referencing Rules Regulating the Florida Bar, Chapter 4, Rules of Professional Conduct, Rule 4-1.9, Conflict of Interest; Former Client (Rule 4-1.9).<sup>1</sup>

<sup>1</sup> Rule 4-1.9 states that a lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) 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; or
- (b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

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Hernando acknowledges that the disqualification of a party's counsel is an extraordinary remedy and should be resorted to sparingly. Hernando states that a tribunal addressing a motion to disqualify must consider the competing interests of maintaining professional standards and preserving client confidences, and on the other hand, permitting a party to hire their counsel of choice. Hernando states that an order involving the disqualification of counsel must be tested against the standards imposed by the Florida Bar Rules of Professional Conduct. Estright v. Bay Point Improvement Ass'n., Inc., 921 So. 2d 810, 811 (Fla. 1st DCA 2006).

Hernando gives the following additional legal analysis. A party seeking to disqualify opposing counsel based on a conflict of interest must demonstrate that: (1) an attorney-client relationship existed, thereby giving rise to an irrefutable presumption that confidences were disclosed during the relationship, and (2) the matter in which the law firm subsequently represented the interest adverse to the former client was the same or substantially related to the matter in which it represented the former client. The irrefutable presumption which arises upon establishment of the attorney-client relationship acknowledges the difficulty of proving that confidential information useful to the attorney's current client was given to the attorney and also protects the client by not requiring disclosure of confidences previously given to the attorney. State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991).

With regard to the first prong of the test for disqualification of counsel, Hernando argues that the retainer agreement (Motion Exhibit "A") and bond opinion letter (Motion Exhibit "B") clearly establish that a prior attorney-client relationship existed between Hernando and RSB and that, therefore, an irrefutable presumption arose that RSB received confidential information from Hernando during the course of the representation.

Hernando states that the second prong of the test requires a showing of a substantial relationship between the prior and current matters. Hernando states that no uniform test has evolved to determine whether the prior matter and the current matter are substantially related. Accordingly, it states, whether the two matters are substantially related depends upon the specific facts of each particular situation or transaction. The Florida Bar v. Dunagan, 731 So.2d 1237, 1240 (Fla. 1999). Hernando argues that the facts establish that RSB's representation of Skyland in this docket is adverse to the interests RSB advanced on behalf of Hernando in its acquisition of Florida Water's assets.

#### SKYLAND'S RESPONSE

By agreement of the parties, Skyland filed its Response to Hernando County's Motion to Disqualify Applicant's Counsel (Response) on January 8, 2010.

Skyland's Response states that RSB accepted, reviewed, and processed Hernando's December 7, 2009, request to withdraw from representing Skyland and the Motion as a very serious matter. Skyland states that Hernando's request to withdraw was subjected to internal and external review by RSB, both of which concluded that there is no basis for the disqualification of RSB and that RSB should continue in its role as counsel for Skyland.

Skyland states that should the Commission decide to rule upon the Motion, that decision is within the sound determination of the Commission. The Response further states that Rule 4-1.9 addresses two issues. First, the rule addresses whether a lawyer is representing 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. Second, the rule prohibits the lawyer from using information relating to the representation to the disadvantage of the former client.

Skyland asserts that the first issue that the Commission must consider is whether Skyland's 2009 application for a water and wastewater certificate in Hernando and Pasco Counties is the same or a substantially related matter as assisting Hernando in 2003 – 2004 in the acquisition of one of the dozens of systems being sold around the state by Florida Water. The Response states that Hernando has failed to explain the similarities, the nexus, or the substantial relationship between the two matters. Further, Skyland argues that Hernando has not alleged that RSB's representation of Skyland will lead to any practical, measurable, or ascertainable difference in this proceeding compared to Skyland's representation by other counsel.

As to its second point, Skyland argues that the representation of Hernando was a transaction in the sunshine, on behalf of a public entity, and the Motion alleges no specific information in the possession of RSB which it could use to place Hernando at a disadvantage in this docket. Rather, Skyland argues, Hernando relies upon a presumption that confidences were disclosed.

#### ANALYSIS

Pursuant to Chapter 120, F.S., hearing officers in administrative proceedings have the same power that courts exercise to disqualify a lawyer from representing a party to the proceeding if that representation would be in violation of law or Rules of Professional Conduct applicable to lawyers. See Lee v. Florida Department of Insurance and Treasurer, 586 So. 2d 1185, 1188, fn. 3 (Fla. 1st DCA 1991); see also, e.g. Professional Practices Council v. Green, Div. of Admin. Hearings Case No. 79-2275, 1980 WL 14909 (denying motion to disqualify school board's attorney, finding no basis for same).

Hernando accurately explains the legal test and considerations for determining whether a lawyer should be disqualified from representing a party based on a conflict of interest between its current and former clients. The two prong test for such disqualification is whether:

(1) an attorney-client relationship existed, thereby giving rise to an irrefutable presumption that confidences were disclosed during the relationship, and

(2) the matter in which the law firm subsequently represented the interest adverse to the former client was the same or substantially related to the matter in which it represented the former client.

Pursuant to the Florida Supreme Court case State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d at 632, the ethical principle at issue, as embodied in the Rule 4-1.9 and Rule 4-1.6

(Confidentiality of Information), is an attorney's duty to maintain the confidences of the client. The official Comment to Rule 4-1.9 is instructive in this regard, stating:

. . . The principles in rule 4-1.7<sup>2</sup> determine whether the interests of the present and former client are adverse. . . .

. . . 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. . . .

Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client. . . .

Rule 4-1.9 is designed to protect client confidentiality and is aimed at the problem of attorneys switching sides. Estright v. Bay Point Improvement Association, 921 So. 2d at 811, citing Kenn Air Corp. v. Gainesville-Alachua County Reg. Airport Auth., 593 So. 2d 1219 (Fla. 1st DCA 1992).

The following examples of Florida court rulings are helpful in determining whether the former and current matters at issue are "substantially related" for purposes of disqualifying RSB from representing Skyland. Florida courts have held that lawyer disqualification is warranted where information disclosed by a former client to the attorney during the course of attorney-client relationship could be used by the attorney in representing the current client to prove the former client's negligence<sup>3</sup> and where a lawyer drafted a document for the former client which served as an underlying basis of the current client's lawsuit,<sup>4</sup> and that conflict concerns arise when an attorney must prepare a case against and cross-examine or impeach a former client on a subject matter so closely connected to the earlier representation that confidentiality might be

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<sup>2</sup> Rules Regulating the Florida Bar, Chapter 4, Rule of Professional Conduct, Rule 4-1.7, Conflict of Interest; Current Clients, states:

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer shall not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or  
(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceedings before a tribunal; and

(4) each affected client gives informed consent. . . .

<sup>3</sup> State Farm Mut. Auto. Ins. Co. v. KAW, 575 So. 2d at 633.

<sup>4</sup> Estright v. Bay Point Improvement Association, 921 So. 2d at 811.

involved.<sup>5</sup> Florida courts have held that attorneys should not be disqualified for conflict reasons where the lawsuits involve entirely different facts, even though the underlying document governing the relationship is the same,<sup>6</sup> and where the current case was wholly distinct from prior suits and involved different set of facts.<sup>7</sup>

In this docket, the first prong of the test which must be met in order to disqualify RSB for conflict reasons has been met: an attorney-client relationship existed between Hernando and RSB, thereby giving rise to an irrefutable presumption that confidences were disclosed during the relationship. RSB is incorrect to the extent it argues that Hernando is required to show that RSB possesses specific information which it could use to Hernando's disadvantage in this docket.

The second prong of the test which must be met in order to disqualify RSB for conflict reasons requires a finding that the Application for original certificates is the same or substantially related to the Florida Water asset acquisition/financing matter in which RSB previously represented Hernando. The facts do not support such a finding. Rather, the facts support a finding that those two matters are separate and distinct.

The essence of Hernando's argument is that RSB represented Hernando in expanding the Hernando County Water and Sewer District's territory and eliminating the sole private water and sewer utility in the County. Hernando states that the County's primary goal in acquiring Florida Water's assets was to ensure that all central water and sewer utility services within unincorporated Hernando County were publically provided, locally operated, and overseen by an elected board of county commissioners, as opposed to the Commission. However, there is no mention in either the RSB retainer agreement (Motion Exhibit "A") or the RSB bond opinion letter (Motion "Exhibit "B"), and no other factual support, that the scope of RSB's legal representation of the County included any matters related to the District's service territory, a County goal of providing exclusive service within the District's boundaries to the exclusion of private water and wastewater companies, or issues concerning Hernando County versus Commission utility jurisdiction. Instead, the retainer agreement specifies that RSB's services in representing Hernando concerned the Florida Water asset acquisition and consisted of services "typical of acquisition counsel." Likewise, the bond opinion letter, relating to the Florida Water asset acquisition, specifies that: "Our opinions deal only with the specific legal issues explicitly addressed herein and do not address any other matters."

RSB's prior representation of Hernando involved the acquisition and financing of the acquisition of assets of Florida Water. RSB in this docket represents Skyland in its Application to the Commission for original water and wastewater certificates of authority. Hernando opposes certification. There has been no showing that confidential information disclosed by Hernando to RSB during the course of the attorney-client relationship in the Florida Water asset acquisition

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<sup>5</sup> See Balda v. Sorchych, 616 So. 2d 1114 (Fla. 5th DCA 1993), cited in Metcalf v. Metcalf, 785 So. 2d 747 (Fla. 5th DCA 2001).

<sup>6</sup> Frank, Weinberg & Black, P.A. v. Effman, 916 So 2d 971 (Fla. 4th DCA 2005).

<sup>7</sup> Health Care and Retirement Corp of America, Inc. v. Bradley, 961, So. 2d 1071 (Fla. 4th DCA 2007), review accepted 980 So. 2d 489 (Fla. 2008), review dismissed 997 So. 2d 400 (Fla. 2008).

and financing matter could be used by RSB to support the Commission granting Skyland's Application. Neither has it been shown that in the course of this docket that RSB might prepare a case against and cross-examine or impeach Hernando on a subject matter so closely connected to the earlier representation that confidentiality might be involved. There has been no showing that RSB's former representation of Hernando in the Florida Water asset acquisition and its current representation of Skyland in the Commission certification docket involve the same transaction or legal dispute, or that the current matter would involve RSB attacking work that it had performed for Hernando during the course of the Florida Water asset acquisition/financing matter. Based on the facts presented the former and current matters appear to be wholly distinct from one another.

As acknowledged by Hernando, the Florida Supreme Court has made clear that disqualification of a party's chosen counsel is an extraordinary remedy and should be granted sparingly. The facts do not support a finding that RSB's representation of Skyland Utilities in this original certification docket is the same or substantially related to its prior representation of Hernando in Hernando's acquisition and financing of Florida Water's assets. Therefore, Hernando County's Motion to Disqualify Applicant's Counsel with Incorporated Memorandum of Law in Support Thereof is hereby denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Hernando County's Motion to Disqualify Applicant's Counsel with Incorporated Memorandum of Law in Support Thereof is hereby denied.

By ORDER of Commissioner Nathan A. Skop, as Prehearing Officer, this 7th day of April, 2010.



NATHAN A. SKOP

Commissioner and Prehearing Officer

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.