

STATE OF MICHIGAN  
IN THE 20<sup>TH</sup> CIRCUIT COURT FOR THE COUNTY OF OTTAWA  
SPECIALIZED BUSINESS DOCKET

414 Washington Street  
Grand Haven, Michigan 49417  
(616) 846-8320  
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**NETWERKS, LLC,**

Plaintiff/Counter-Defendant,

v

**KYLE SCHOLTEN,**

Defendant/Counter-Plaintiff.

**OPINION AND ORDER ON  
MOTION TO DISQUALIFY**

Case No.: 15-04177-CZ

Hon. Jon A. Van Allsburg

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At a session of said Court, held in the Ottawa County  
Courthouse in the City of Grand Haven, Michigan,  
on the 22<sup>nd</sup> day of July, 2015.

This action was filed by plaintiff Netwerks, LLC, on May 1, 2015, against its former employee, Kyle Scholten, alleging breach of a 2013 non-competition and non-disclosure agreement between the parties. Netwerks requested and received a Temporary Restraining Order (TRO) on May 1, 2015, and a preliminary injunction was entered on May 27, 2015.

Scholten subsequently moved to disqualify Netwerks' attorney. For the reasons stated below, Scholten's motion is denied.

**BACKGROUND INFORMATION**

The factual background of this case is recounted in detail in the May 27 Opinion and Order Granting Preliminary Injunction and Awarding Costs and Fees. Scholten raises two issues in his motion to disqualify. The first is that attorney Jenna M. Nelson and the firm of Sheridan Haddock, PLLC, represented Scholten in a drinking and driving offence. Scholten claims that he "bared his soul" to attorney Nelson and that, as a result, she has knowledge relevant to his



credibility that could be used against him in this action. Secondly, he argues that Attorney Nelson may be called as a witness at trial because she signed an affidavit in support of Networks' motion for sanctions for violation of the TRO.

## LEGAL ANALYSIS

### 1. Disqualification for Conflict of Interest

Scholten is seeking disqualification under MRPC 1.9, Conflict of Interest: Former Client, which provides, in pertinent part:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known.

He argued that information he shared with attorney Nelson provided her with information she could use to impeach his credibility.

Attorney Nelson denies that she is in violation of MRCP 1.9. At oral argument, she stated that she did not gain any information in the prior representation that was relevant to or could be used to Scholten's disadvantage in this action. She also argued that the court does not have jurisdiction to determine whether a conflict exists under MRPC 1.9 because the Michigan Supreme Court and its disciplinary agencies have exclusive jurisdiction over enforcement of the Rules of Professional Conduct. MRPC 1.0(b) provides:

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. **The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule.** In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law. (Emphasis added).

The Comment section of MRPC 1.0 expands on the use of the rule in civil litigation under the heading "Scope":

As also indicated earlier in this comment, **a violation of a rule does not give rise to a cause of action, nor does it create any presumption that a legal duty has**

**been breached.** The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, **the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule.** (Emphasis added).

Michigan courts have, however, decided motions to disqualify attorneys and exercised jurisdiction over issues of conflict of interest under MRPC 1.9.<sup>1</sup> “The party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result.”<sup>2</sup> The Michigan Supreme Court cautioned that attorneys should not be disqualified merely because an “arguable question can be raised regarding the propriety of a lawyer continuing to appear in a case.”<sup>3</sup> The Court commented that it would be dangerous to put “in the hands of an adversary the ability to force an opponent to change counsel if the adversary can advance any arguable grounds in support of disqualification.”<sup>4</sup>

Scholten has not met his burden to prove a conflict of interest. Nelson is not representing him in any matter at this time and was his attorney on a single, unrelated criminal matter. Scholten claims, without any specifics, that she gained knowledge that would enable her to impeach his credibility in this action. He does not claim that she has used the alleged knowledge. Nelson denies that she gained such knowledge and argues that nothing she learned in the earlier representation is relevant to this action. It should also be noted that Scholten’s concerns regarding impeachment are addressed by the restrictions on impeachment provided in MRE 608.

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<sup>1</sup> See, e.g., *Avink v SMG*, 282 Mich App 110; 761 NW2d 826 (2009); *Lamont Cmty Church v Lamont Christian Reformed Church*, 285 Mich App 602; 777 NW2d 15 (2009); *Rymal v Baergen*, 262 Mich App 274; 686 NW2d 241 (2004).

<sup>2</sup> *Rymal v Baergen*, 262 Mich App 274, 320; 686 NW2d 241 (2004), quoting *Kubiak v Hurr*, 143 Mich App 465, 471; 372 NW2d 341 (1985).

<sup>3</sup> *Smith v Arc-Mation, Inc*, 402 Mich 115, 118; 261 NW2d 713 (1978).

<sup>4</sup> *Id.*

## 2. Attorney as Witness

Scholten also argues that attorney Nelson should be disqualified from representing Netwerks under MCR 3.7, which provides:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
- (1) the testimony relates to an uncontested issue;
  - (2) the testimony relates to the nature and value of legal services rendered in the case; or
  - (3) disqualification of the lawyer would work substantial hardship on the client.

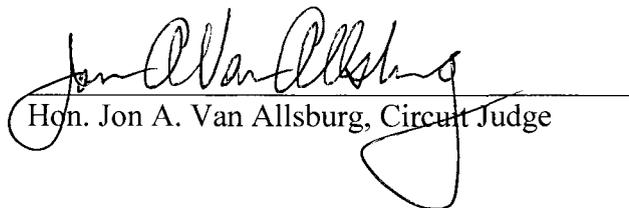
Scholten bases his argument under this rule on the affidavit attorney Nelson submitted in support of Netwerks' motion for sanctions arising from Scholten's violation of the TRO. Sanctions were granted following a hearing in which Nelson was not called at a witness. At oral argument on the motion to disqualify, when questioned as to whether this argument was moot, Scholten responded that Nelson was potentially a witness with respect to his counterclaims for abuse of process and tortious interference with business relationship. Those claims have subsequently been dismissed on summary disposition.<sup>5</sup> Scholten thus has no support for a claim that attorney Nelson is likely to be called as a necessary witness at trial.

## 3. Conclusion

Scholten's motion to disqualify attorney Jenna M. Nelson is DENIED for the reasons stated above.

*IT IS SO ORDERED.*

Dated: July 22, 2015

  
Hon. Jon A. Van Allsburg, Circuit Judge

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<sup>5</sup> Opinion and Order Granting Summary Disposition, entered July 21, 2015.