**Recent Disqualification Decisions:**
**Concurrent Representation in Closely Held Corporate Context**
**and Paralegal Movement Between Adverse Firms**

By Gilda T. Russell[1]

Two recent disqualification decisions are of interest in the area of risk management because of their subject matter as well as their highlighting of differences among jurisdictions on important ethics issues. The cases concern disqualification based on concurrent representation conflicts of interest in the closely held corporate context and imputed disqualification on account of paralegal movement between firms adverse in litigation in spite of the use of screening measures. Each case is discussed below.

I. *Bryan Corp. v. Abrano*, 574 Mass. 504 (2016) -- Disqualification Based on Concurrent Representation Conflicts of Interest in the Closely Held Corporate Context.

In June, 2016, in *Bryan Corp. v. Abrano*, 574 Mass. 504 (2016), the Massachusetts Supreme Judicial Court upheld the disqualification of a law firm based on concurrent representation conflicts of interest in a closely held corporate context. In the case, the law firm, "YSR," represented Bryan Corp., a closely held corporation, in defense of a suit brought against it by a former consultant for claimed unpaid fees. While that matter was pending, YSR simultaneously took on the representation of Abrano, who was a shareholder in and officer of Bryan Corp., his sister Bridget, also a shareholder and officer, and his sister's husband, Dennon, a corporate officer, concerning certain corporate compensation issues involving Abrano and Bridget. *Bryan Corp.,* 574 Mass. at 505-06.

In the initial telephone call concerning the representation of the individuals, a YSR law partner advised Dennon that "should" a conflict of interest arise between YSR's representation of Abrano and Bridget on the one hand and YSR's representation of Bryan Corp. in the consultant fees lawsuit, YSR would withdraw from its representation of Bryan Corp. in the consultant fees case. Shortly thereafter, YSR sent a demand letter to Bryan Corp. on behalf of Abrano and Bridget alleging Wage Act and other violations and noting that claims existed against Bryan Corp. and other of its shareholders and officers. Two days later, YSR sent another letter to Bryan Corp. in which YSR said it was resigning from representation of the company in the consultant fees case because a conflict had developed. Just over a

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week later, YSR withdrew from the representation of Bryan Corp. in the consultant fees case. *Bryan Corp.*, 574 Mass. at 506-07.

Subsequently, YSR represented Abrano in a suit against individual shareholders of Bryan Corp. Bridget also was a plaintiff in the suit, although represented by separate counsel. Bryan Corp. itself was not named as a party to that action. However, the complaint referred to Bryan Corp. as "[d]efendant Bryan Corporation" and also stated that the company was obligated to pay wages to Abrano and Bridget. *Bryan Corp.,* 574 Mass. at 507-08.

Bryan Corp. countersued Abrano, Bridget, *and* Dennon for breach of fiduciary duties. On Abrano's motion, the two cases were consolidated. Bryan Corp. moved to disqualify YSR from representing Abrano, claiming that YSR's representation of Abrano, Bridget, and Dennon while representing the company in the consultant fees case had constituted an impermissible conflict of interest under Massachusetts Rule of Professional Conduct 1.7, governing concurrent conflicts of interest, or, in the alternative, Rule 1.9, governing duties to former clients. The motion judge granted the disqualification motion on the basis of "the reasons set forth in the motion." Abrano appealed and the Massachusetts Supreme Judicial Court granted direct appellate review. *Bryan Corp.,* 574 Mass. at 508-09.

Applying a reasonable lawyer standard, the Massachusetts Supreme Judicial Court held that YSR should have known at the time that it agreed to represent Abrano, Bridget, and Dennon that "their interests were adverse to, or were likely soon to become adverse to, those of the company." As such, both "the duty of loyalty" and Rule 1.7 "required [YSR] to decline representation, or at least seek the informed consent of the company." The Court also held it improper for YSR to have sent a demand letter to the company while YSR still represented the company in the consultant fees suit. *Bryan Corp.,* 574 Mass. at 510.

The Massachusetts Supreme Judicial Court further explained that the "duty of loyalty" is a "bedrock of the attorney-client relationship" and is furthered by Rule 1.7. The Court stated: "By prohibiting the simultaneous representation of clients with adverse interests absent informed consent, [R]ule 1.7 fosters a sense of trust between the lawyer and client that promotes the lawyer's ability to competently represent the client's interests." *Bryan Corp.,* 574 Mass. at 510. And, with regard to corporate clients, the Court cited Massachusetts Rule of Professional Conduct 1.13 (f), and noted that "the rules are clear that where a lawyer represents an organizational client his or her loyalty is owed to the organization, and not the constituents through whom the organization acts." *Bryan Corp,* 574 Mass. at 512.

In addition to the concurrent representation conflict of interest, the Massachusetts Supreme Judicial Court also stated that the manner in which YSR terminated its relationship with Bryan Corp. was "largely improper." YSR only communicated to Dennon, rather than the company, the law firm's intention to withdraw from the consultant fees case. Yet, Dennon had no authority to consent to

such withdrawal. Further, YSR's withdrawal from the representation of Bryan Corp. prior to the completion of the case was improper. The Court pointed out that nothing in the engagement letter with Bryan Corp. allowed YSR to represent adverse clients or permitted withdrawal if a conflict arose. The Court held: "[A] firm may not undertake representation of a new client where the firm can reasonably anticipate that a conflict will develop with an existing client, and then choose between the two clients when the conflict materializes. Both the duty of loyalty and the rules clearly forbid such conduct." *Bryan Corp.*, 574 Mass. at 515-16.

The Supreme Judicial Court did not find it necessary to explicitly adopt the hot potato rule in Massachusetts. Rather, the Court determined that state ethics rules and prior case law provided an "adequate framework for resolving the issues." *Bryan Corp.*, 574 Mass. at 510. However, at least two Massachusetts commentators have declared that the result of the case is the hot potato doctrine "now applies with full force in Massachusetts" and lawyers are not free to withdraw from a representation "in order to take on a new client that is, or may become, adverse to the current client." Thomas F. Maffei and Jessica Gray Kelly, Vol. 45 *Massachusetts Lawyers Weekly*, Issue No. 27, "Is 'Hot Potato' Doctrine Now Applicable in Massachusetts?" (July 4, 2016).

Finally, the Massachusetts Supreme Judicial Court reasoned that disqualification was the appropriate remedy in the case because it furthered "the policy rationale underlying the rules of professional conduct by upholding the principle that a client is entitled to the undivided loyalty of his or her lawyer." *Bryan Corp.*, 574 Mass. at 516.

In sum, the recent Massachusetts Supreme Judicial Court decision in *Bryan Corp. v. Abrano* stands for the proposition that the duty of loyalty and Rule 1.7 apply in the closely held corporate context. Such provisions disallow direct adversity on behalf of shareholders and/or officers to a current corporate client without first obtaining company consent. These provisions also prohibit dropping a current client to take on a new adverse or potentially adverse client unless the engagement letter with the current client specifically allows for such withdrawal. In this regard, a law firm could include in the engagement letter -- or in a separate advance conflict of interest waiver letter -- specific and detailed future conflict waiver language allowing the firm to withdraw from the client's representation and to represent certain other clients, even adverse to the client, should the described future conflicts arise.

II. *Raffaeli v. Raffaeli,* 2016 WL 3070042, No. 2089/2013 (N.Y. Sup. Ct. June 1, 2016) (Unpublished) -- Imputed Disqualification on Account of Paralegal Movement Between Firms Adverse in Litigation In Spite of Screening Measures.

In June, 2016, in *Raffaeli v. Raffaeli*, 2016 WL 3070042, No. 2089/2013 (N.Y. Sup. Ct. June 1, 2016), the New York Supreme Court (Westchester County)

disqualified a law firm in matrimonial litigation due to the firm's hiring of a paralegal who had previously worked for the adverse law firm and performed substantial work for the adverse party on the matter. The New York Supreme Court ordered disqualification *in spite of several screening measures that the hiring firm had employed.*

The facts in *Raffaeli* were as follows: The divorce litigation had been ongoing for 3 years. The paralegal previously was employed at the firm that represented plaintiff and had worked approximately 18 months and 536 hours on the representation. She had participated in conversations involving evaluation strategies and case theories. The paralegal also had exchanged and/or was copied on numerous emails involving plaintiff, plaintiff's attorneys, and an office manager. She had communicated with forensic accountants as part of litigation strategy, worked closely with attorneys on relevant financials matters, and participated in a "substantial amount of privileged and confidential communications and conversations." She also had received, reviewed, and categorized plaintiff's financial documents, and compiled for service those documents sent to defendant's counsel or supervised their compilation. *Raffaeli,* 2016 WL 3070042.

The paralegal left plaintiff 's firm and took the position of administrative assistant/paralegal in the firm representing defendant, which firm consisted of only two lawyer partners and the paralegal. The new firm employed a number of measures to screen the paralegal from the divorce litigation. These included moving pertinent files out of the office, removing computer files relating to the litigation from the paralegal's computer, changing the email address for matters the paralegal worked on from the email address used for the litigation, changing the password on the computer used by the lawyer handling the litigation, communicating with the defendant only by cell phone and the new email address, directing defendant's out of state lawyers to call the lawyer handling the litigation only on her cell phone, directing the paralegal not to open any of the mail of the lawyer handling the litigation, telling plaintiff's lawyer about all of the screening measures and agreeing to hold all meetings including conclusion of plaintiff's deposition at a different location or at plaintiff's lawyer's office, barring contact between the paralegal and defendant, and not discussing the litigation at defendant's counsel's office. *Raffaeli*, 2016 WL 3070042, at *2.

Notwithstanding these screening efforts, plaintiff's counsel moved to disqualify defendant's law firm due to the hire of the paralegal and the New York Supreme Court granted the motion. The Court began its discussion by citing New York law on imputed disqualification regarding *attorneys* who change firms : "'A party seeking to disqualify an attorney or law firm for an opposing party on the ground of conflict of interest has the burden of demonstrating (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse.'"

*Raffaeli,* 2016 WL 3070042, at *3, quoting *Mediaceja v. Davidov*, 119 AD3d 911, 911-12 (2d Dept. 2014). *Raffaeli,* 2016 WL 3070042,at *3.

Yet, the New York Supreme Court noted precedent that "'[a] party's entitlement to be represented in ongoing litigation by counsel of [its] own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted.'" *Raffaeli,* 2016 WL 3070042, at *3, quoting *Matter of Town of Oyster Bay v. 55 Motor Ave. Co., LLC*, 109 AD3d 549 (2d Dept. 2013), and *Matter of Dream Weaver Realty, Inc.* (Poritzky-DeName), 70 AD3d 941, 943 (2d Dept. 2010). However, the Court -- again applying a standard applicable to lawyers -- cited precedent providing that "doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety." *Raffaeli,* 2016 WL 3070042, at *3, quoting *Cohen v. Cohen*, 125 AD3d 589, 590 (2d Dept. 2015), and that "'[d]isqualification of the attorney will be granted where the party seeking disqualification establishes either a substantial relationship between the issues in the litigation and the subject matter of the prior representation, or where the party's former counsel had access to confidential material substantially related to the litigation.'" *Raffaeli,* 2016 WL 3070042, at *3, quoting Avigdor v. Rosenstock, 47 Misc 3d 1220(A) at footnote 11 (Sup. Ct. Kings Cty. 2005).

The New York Supreme Court held that plaintiff had met her burden of proof establishing that disqualification of defendant's firm was warranted. The Court reasoned that plaintiff's firm had represented plaintiff for almost two years in substantially related, indeed the same litigation, and the interests of plaintiff and defendant were materially adverse. *Raffaeli,* 2016 WL 3070042, at *3. While the Court acknowledged that the Rules of Professional Conduct do not apply to non-attorneys, the Court held that the Rules "place a burden on attorneys to ensure that their employees conduct themselves in accordance" with the Rules. *Raffaeli,* 2016 WL 3070042, at *4.

In support of its decision, the New York Supreme Court cited only one case involving the imputed disqualification of a law firm due to a paralegal changing firms: *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc*., 514 N.Y.S.2d 440 (N.Y. App. 1987). In that almost 30-year-old case, the disqualified law firm had hired a paralegal who had previously worked for the adverse party's counsel and had interviewed the adverse party's manager about the facts of the case. In a very brief decision in *Glover Bottled Gas Corp.,* the Appellate Division of the New York Supreme Court implied that the hire of the paralegal in such circumstances violated the then applicable New York Code of Professional Responsibility. *Glover Bottled Gas Corp*., 514 N.Y.S. 2d at 441. It should be emphasized that the Court in *Glover Bottled Gas Corp*. did not make reference to any attempt at screening of the paralegal by the disqualified firm.

After discussing *Glover Bottled Gas Corp.,* the New York Supreme Court in *Raffaeli* differentiated and did not follow a more recent New York case *upholding*

paralegal screening: *Mulhern v. Calder*, 763 N.Y.S.2d 741 (N.Y. Sup. 2003). In *Mulhern*, the New York Supreme Court in a different County (Albany County), denied a motion to disqualify a firm based on the hire of a paralegal who had worked on an adverse matter at her prior firm when the paralegal had been screened from the matter at the new firm. *Raffaeli,* 2016 WL 3070042, at *4.

It is useful to discuss the *Mulhern* decision in some detail -- although the New York Supreme Court did not do so in *Raffaeli* -- as it was well-reasoned and a seemingly relevant case. *Mulhern* involved a former secretary/paralegal who was hired by the new firm to be a secretary. At the prior firm, the secretary/paralegal had worked on several matters including a case for defendant. She then moved to the new firm, which represented plaintiff in the same adverse matter. *Mulhern,* 763 N.Y.S.2d 741.

In *Mulhern*, the New York Supreme Court considered "whether the same disqualification rules applicable to 'lawyers' are or should be applicable to 'paralegals' and 'secretaries.'" The Court determined that the same rules regarding disqualification of lawyers *should not apply to nonlawyers*. In its reasoning, the Court cited federal and state law addressing the issue and concluded that the "approach by which the hiring firm can avoid disqualification by taking steps to ensure that nonlawyer employees with confidential information are kept from divulging or using confidences obtained at the prior firm" is the approach that "should be adopted in New York." *Mulhern,* 763 N.Y.S.2d 741 at 745.

Further, in *Mulhern*, the New York Supreme Court found that the screening measures the new firm had used -- prohibiting the secretary from having contact with those at the new firm working on the matter and the secretary agreeing to follow the procedures -- were effective. *Mulhern,* 763 N.Y.S.2d 741 at 745. The Court did stress, however, that former employers should be promptly notified of the "reemployment" of their prior employees in these types of situations. *Mulhern,* 763 N.Y.S.2d 741 at 746.

Notwithstanding these 2003 pronouncements in *Mulhern* of what the law in New York *should be* with regard to the movement of nonlawyer employees and the allowance of screening measures, the New York Supreme Court in *Raffaeli* found *Mulhern to be limited* to a type of "administrative staff member, with fleeting and minimal contact to a pending matter," as opposed to the situation of the paralegal in *Raffaeli*, whom the Court described as having had "deep historical involvement" with the other side in the litigation matter there at issue. *Raffaeli,* 2016 WL 3070042, at *4.

In addition to not following *Mulhern*, the New York Supreme Court in *Raffaeli* did not cite *any* of the large body of federal and state law supporting screening of nonlawyer employees, other than the *Mulhern* case which decision the Court found

inapplicable.[2] Indeed, "[i]n most jurisdictions, a paralegal who, when previously employed elsewhere, worked on a matter adverse to interests of a client of the

[2] The American Bar Association supported screening of paralegals as far back as 1988 in *ABA Informal Opinion* 88-1526 (1988) which provided:

> "A law firm that employs a nonlawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer on whose matters the nonlawyer has worked, as long as the employing firm screens the nonlawyer from information about or participating in matters involving those clients … and as long as no information relating to the representation of the clients of the former employee is revealed by the nonlawyer to any person in the employing law firm."

In recent years, Comment 4 to ABA Model Rule 1.10 was added which provides that imputed disqualification of a firm should not result from the personal disqualification of a nonlawyer such as a paralegal or secretary, although "[s]uch persons … ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect." ABA Model Rule 1.10, Comment 4. *See also* discussion below concerning recent revisions to ABA Model Rule 1.10 (a) (2) which now allows screening of personally disqualified *attorneys*, even if they have confidential information.

For an exhaustive collection of federal and state cases, ethics opinions, law review articles, and other secondary sources on screening of nonlawyer employees avoiding imputed disqualification, *see* William Freivogel, "Freivogel on Conflicts, A Guide to Conflicts of Interest for Lawyers. Changing Firms – Screening, Parts I and II, www.freivogelonconflicts.com/changingfirmsscreeningparti.html

It should be mentioned that the *Raffaeli* Court also did not cite *New York State Bar Ethics Opinion* 774 (2004). In *Opinion 774*, the New York Committee on Professional Ethics stated that screening of nonlawyer employees should be used to protect against disclosure of confidential information. Yet, the Committee also noted: "Occasionally, however, a law firm will conclude that screening the nonlawyer will not adequately protect an opposing party's confidences and secrets. For example, if the nonlawyer had substantial exposure to relevant confidential information at the old firm and will now be working closely with the lawyers who are handling the opposite side of the same matter, or where the structure and practices of the firm make it difficult to isolate a nonlawyer from confidential conversations or documents pertaining to a given matter, a law firm may be obliged to adopt measures more radical than screening. Those measures may include the following: (a) Obtaining consent from the opposing law firm's client; (b) Terminating the nonlawyer…; or (c) Withdrawing from the matter in question."

paralegal's new firm, can be screened from the matter in order to avoid imputed disqualification of the new firm."[3] As the American Bar Association Standing Committee on Paralegals has noted in a publication entitled: "*Information for Lawyers: How Paralegals Can Improve Your Practice*," courts and bar associations that have addressed the issue of screening paralegals to avoid imputed disqualification "generally agree with [the] principle."[4]

In sum, the *Raffaeli* decision differs from the approach articulated in *Mulhern* and the law in most jurisdictions permitting screening to avoid imputed disqualification where a nonlawyer employee who worked on an adverse matter when at a prior firm moves to the adverse firm handling the matter. However, *Raffael*i is precedent in New York in at least one county, and, as such, firms in New York, or with offices or litigation in New York, should take serious note of the case.

It is hoped, of course, that, in the future a fresh and unifying look will be given this subject in New York. This is especially true not only because of the development of law with regard to screening of nonlawyer employees, but also in light of the recent revisions to the American Bar Association Model Rules, and the ethics rules of many states, allowing screening of personally disqualified *attorneys* who move to an adverse firm even if the attorneys have confidential information about the adverse matter. *See* American Bar Association Model Rule 1.10 (a) (2).[5]

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It is possible that *New York Ethics Opinion* 774 could be read as supporting the outcome in *Raffaeli* due to the small size and structure of the employing law firm. However, in Raffaeli, notwithstanding the employing firm's size, the firm undertook numerous screening measures, which seemingly could have effectively isolated the "nonlawyer from confidential conversations or documents pertaining to [the] matter."

[3] Gilda T. Russell, "Legal Ethics Concerns for Paralegals," Paragon Newsletter, March 21, 2016.

[4] ABA Standing Committee on Paralegals, http://www.americanbar.org/groups/paralegals/resources/information_for_lawyers_how_paralegals_can_improve_your_practice.html

[5] New York Rule of Professional Conduct 1.10 has not incorporated the revisions contained in ABA Model Rule 1,10(a) (2). However, at least 30 states currently have rules substantially similar to Model Rule 1.10 (a) (2). *See* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.authcheckdam.pdf