COURT OF CHANCERY
OF THE
STATE OF DELAWARE

J. TRAVIS LASTER
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

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RE: *In the Matter of the Rehabilitation of Indemnity Insurance Corporation, RRG*, C.A. No. 8601-VCL

Dear Counsel:

Non-parties Jeffrey B. Cohen, IDG Companies, LLC, and RB Entertainment Ventures, LLC ("RB Entertainment") have moved to disqualify James D. Nutter and the law firm of Parkowski, Guerke & Swayze, P.A. on the grounds that their representation of respondent Indemnity Insurance Corporation, RRG ("Indemnity") violates Rule 1.9 of the Delaware Lawyers' Rules of Professional Conduct (the "Rules"). Because the movants have not met their burden of showing that the claimed Rules violation taints the fairness of the proceeding, the court lacks jurisdiction to address it. The motion is therefore denied.

FACTUAL BACKGROUND

This action began on May 30, 2013, when the Insurance Commissioner of the State of Delaware (the "Commissioner") filed a Verified Petition for Entry of Confidential Seizure and Injunction Order (the "Seizure Petition"). The Seizure Petition sought an order permitting the Commissioner to take possession and control of Indemnity. The court granted the relief sought in the Seizure Petition and placed Indemnity under the Commissioner's supervision.

On October 18, 2013, Alex Brown, a Maryland attorney, filed a lawsuit in Maryland against Indemnity on behalf of various entities affiliated with Cohen. Brown previously represented Indemnity in this proceeding. The Maryland lawsuit related directly to this proceeding. As a result, Brown was adverse to his former client in a substantially related proceeding. Michael Teichman of the Parkowski firm sent a letter to Theodore Kittila, Cohen's Delaware counsel and counsel for the movants, informing him that Indemnity considered Brown to be in violation of Rule 1.9. Teichman told Kittila that Indemnity would seek to disqualify Brown if he did not withdraw.

While investigating Brown's alleged conflict, Kittila discovered an Agreement for Professional Services pursuant to which Nutter provided "strategic representation" to RB Entertainment while at his former law firm. Nutter later joined the Parkowski firm. On October 29, 2013, Kittila sent a letter to Nutter in which he asserted that Nutter and the Parkowski firm were adverse to a former client and violating Rule 1.9 because of Nutter's prior dealings with RB Entertainment.

The next day, the Parkowski firm moved to disqualify Brown. The day after that, Kittila moved to disqualify Nutter and the Parkowski firm. Brown took steps to moot his alleged conflict. Nutter and the Parkowski firm opposed the motion to disqualify them. On December 5, 2013, the court held a hearing on the motion.

LEGAL ANALYSIS

"Absent misconduct which taints the proceeding, thereby obstructing the orderly administration of justice, there is no independent right of counsel to challenge another lawyer's alleged breach of the Rules outside of a disciplinary proceeding." *In re Infotechnology, Inc.*, 582 A.2d 215, 221 (Del. 1990). "[T]he trial courts have no jurisdiction to entertain such applications except as noted above." *Id.* "[F]or disqualification to be appropriate, the litigant must show that the conflict prejudiced the fairness of the proceeding, not merely that a violation of the Rules had occurred." *Crumplar v. Super. Ct. ex rel. New Castle Cty.*, 56 A.3d 1000, 1009 (Del. 2012). As a threshold matter, therefore, the court must consider whether the alleged violation of the Rules is sufficiently serious to "prejudice[] the fairness of the proceeding." If not, then the alleged violation falls within the jurisdiction of the Delaware Office of Disciplinary Conduct, not this court.

"A motion to disqualify must contain clear and convincing evidence establishing a violation of the Delaware Rules of Professional Conduct so extreme that it calls into question the fairness or the efficiency of the administration of justice." *Dunlap v. State Farm Fire & Cas. Co.*, 2008 WL 2415043, at *1 (Del. 2008) (TABLE). "Vague and

unsupported allegations are not sufficient to meet this [disqualification] standard." *Id.* (quoting *Unanue v. Unanue*, 2004 WL 602096, at *2 n.17 (Del. Ch. Mar. 25, 2004)). The movants' briefs do not address the issue of prejudice to the fairness or the efficiency of the administration of justice. In fact, they do not acknowledge that this is the operative standard in Delaware state courts, instead citing cases from the District of Delaware that contradict Delaware Supreme Court precedent. Not surprisingly, the movants' briefs do not identify any way that the alleged violation will prejudice these proceedings.

During the hearing on the motion, the movants' counsel admitted that the only justification for disqualifying Nutter and the Parkowski firm is Nutter's former relationship with RB Entertainment. As such, any prejudice to the proceeding must flow from that representation, not from the Parkowski firm's subsequent representation of Indemnity. This makes sense, because Cohen himself caused Indemnity to hire the Parkowski firm, and Cohen owns 100% of RB Entertainment, which purports to own 99% of Indemnity. Cohen cannot claim prejudice from his own decision to cause Indemnity to hire the Parkowski firm. Cohen did not become adverse to Indemnity until weeks later, after he resigned from the board and was terminated from his officer positions.

The question is therefore whether Nutter learned anything from his representation of RB Entertainment that the Parkowski firm did not learn after Cohen hired them to represent Indemnity. During the hearing, the movants' counsel identified two pieces of information that he said fit the bill. Nutter allegedly had learned (i) that Cohen had

control of RB Entertainment and (ii) how RB Entertainment packaged campaign contributions to the Commissioner's opponent in the most recent election so as not to raise regulatory red flags. The movants' counsel also asserted that, "Mr. Nutter knows more than he thinks or is willing to admit today."

As to the first claim, Cohen's control of RB Entertainment is clearly knowledge that the Parkowski firm would have acquired regardless through its representation of Indemnity. The Seizure Petition – the very first filing in this case – alleged that "Cohen owns 100% of RB [Entertainment]." As to the second claim, RB Entertainment's packaging of campaign contributions has not been an issue in this proceeding, and it is not a substantial enough issue to call into question the fairness of the proceeding. Finally, the movants' counsel's assertion that Nutter knows "more than he thinks or is willing to admit" embodies the very definition of a "vague and unsupported allegation." None of these claimed issues is sufficient to justify disqualification.

The movants' counsel also argued that the Parkowski firm, because of Nutter's relationship with RB Entertainment, knew how to get a "rise" out of Cohen. He pointed specifically to Indemnity's insistence that Cohen return luxury vehicles that were in his possession, but which belonged to Indemnity. Assuming for the sake of argument that such knowledge is sufficient to meet the standard set forth in *Dunlap*, which is doubtful, the Parkowski firm would have obtained a similar level of knowledge about Cohen after he hired the firm, either from Cohen himself or from other Indemnity employees. In raising this concern, the movants' counsel recognized that Teichman, a different attorney

at the Parkowski firm, knew firsthand how much Cohen loved his cars. The Parkowski firm gained as much or more knowledge about Cohen and his soft spots during their representation of Indemnity as Nutter did from his relationship with RB Entertainment. As such, the alleged harm from Nutter's prior "strategic representation" of RB Entertainment is insufficient to justify the disqualification of Nutter and the Parkowski firm.

Absent prejudice to the fairness of the proceeding, the court lacks jurisdiction to address whether the Rules have been violated. The Delaware Supreme Court has made clear that those matters fall within the domain of the disciplinary authorities, not this court. *See, e.g.*, *Crumplar*, 56 A.3d at 1009; *Infotechnology*, 582 A.2d at 221.

CONCLUSION

The movants have failed to establish that the Parkowski firm's alleged violation of the Rules will "prejudice the fairness of the proceeding." The motion to disqualify Nutter and the Parkowski firm is therefore **DENIED**.

Very truly yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor