COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL NO. 05-0602

ROMAN CATHOLIC BISHOP OF SPRINGFIELD,
A CORPORATION SOLE

v.

TRAVELERS PROPERTY CASUALTY COMPANY & others[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO STRIKE APPEARANCE OF NIXON PEABODY, LLP ATTORNEYS AND PRECLUDE THEIR REPRESENTATION OF DEFENDANT MASSACHUSETTS INSURERS INSOLVENCY FUND

The plaintiff, the Roman Catholic Bishop of Springfield, a Corporation Sole, brought this action against its insurers and the Massachusetts Insurers Insolvency Fund (MIIF) seeking a declaration of the defendants' obligation to provide coverage for claims relating to demands for damages as a result of sexual abuse by clergy or others said to be employed, appointed, controlled or selected by the plaintiff. The plaintiff now moves for the disqualification of the MIIF's counsel, Nixon Peabody, LLP (Nixon Peabody), on the grounds that its representation of

[1]Massachusetts Insurers Insolvency Fund, North Star Reinsurance Corporation, Underwriters at Lloyd's, London, Centennial Insurance Company, Interstate Fire & Casualty Company, and Colonial Penn Insurance Company

the MIIF violates Rules 1.7(a), 1.9(a) and 1.10(a) of the Massachusetts Rules of Professional Conduct (the MRPC). The plaintiff argues that the firm's representation of the MIIF here, in advocating for the denial of insurance coverage for sex abuse claims brought against the plaintiff, is adverse to the interests of the other Roman Catholic dioceses and/or archdioceses[2] it represents or has represented. For the following reasons, the plaintiff's motion is DENIED.

BACKGROUND

Nixon Peabody is one of the largest firms in the country, with hundreds of attorneys practicing in many states. Since 1985, some Nixon Peabody attorneys have represented nine dioceses, including three dioceses in connection with sex abuse claims. In those sexual abuse cases, David Vicananzo of the firm's Manchester, New Hampshire, office represents the Manchester Diocese; Michael Cooney of the firm's Rochester, New York, office represents the Diocese of Rockville Centre; and other Nixon Peabody attorneys have represented the Boston Diocese.

Cooney and Vicananzo are the only two Nixon Peabody attorneys who are currently members of the National Diocesan Attorneys Association (NDAA), an organization comprised of attorneys representing dioceses in the United States. The plaintiff's counsel, John Egan, is also a member of the NDAA. At its regional and national meetings, the NDAA hosts presentations by legal experts regarding issues facing dioceses, followed by question and answer sessions in which confidential client information is sometimes disclosed. In the past ten years, there have presentations at NDAA meetings about insurers' bases for denying coverage and what legal responses were available to the dioceses. However, no Nixon Peabody attorneys have attended NDAA meetings or events at which problems faced by a diocese in connection with sexual abuse or diocesan insurance coverage for such claims have been discussed.[3]

[2]For the sake of convenience only the Court will refer to Roman Catholic dioceses and archdioceses herein collectively as dioceses, and to bishops and archbishops collectively as bishops.

[3]Nixon Peabody's response to plaintiff's interrogatory 7.

The NDAA has established an email-based information exchange system in which members can ask and answer questions involving insurance issues, common defenses, expert witnesses, and other matters. Both Cooney and Vicananzo have received or sent communications through this email service.

Attorneys Joseph Tanski and Robert Kirby work out of Nixon Peabody's Boston office. In this action, they represent the MIIF, which, *inter alia*, handles holds monies for insurance coverage claims under policies issued by insolvent insurers,[4] including Home Indemnity Company, which had issued a policy to the plaintiff. Other Nixon Peabody attorneys have represented, at some unspecified time, the Guarantee Fund Management Services (GFMS), an unincorporated association that provides management and claims supervisory services to the MIIF and other insolvency funds, including the New Hampshire Insurers Insolvency Fund (NHIIF). Nixon Peabody has not represented GFMS in connection with any claims relating to alleged sexual abuse by clergy or others for whose acts a diocese may be held liable.

According to Nixon Peabody, since 1985, a total of nine of its attorneys have at some point represented insurances companies, state insolvency funds or their claims handling agents in connection with sex abuse claims against dioceses. Of those nine attorneys, two are currently separated from the firm, two undertook such representation out of the firm's San Francisco office, and the remaining five attorneys work out of its Boston office.

There is no evidence that Nixon Peabody has represented any insolvency fund with respect to claims by any of its diocesan clients, or that it has represented any diocese with respect to claims asserted against an insolvency fund. Nixon Peabody has at some unspecified time since 1985 represented one insurance company, Zurich's Maine Bonding & Casualty Company, in connection with demands by one or more unidentified dioceses for defense, compensation, indemnity, or coverage of claims that the diocese is legally liable for damages or criminal penalties arising out of sex abuse for which the diocese may be liable.[5]

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[4] See G.L. c. 175, § 5.

[5] See Nixon Peabody's answer to interrogatory 9.

In January of 2005, Egan voiced his concern to Tanski that Nixon Peabody's representation of the MIIF in this action and its representation of the Manchester Diocese presented a possible conflict of interest. The following month, one of Tanski's partners informed Egan that Nixon Peabody would set up an "ethical screen" to bar any information sharing between attorneys working for the Manchester Diocese and attorneys working on this action.

In February of 2005, Egan learned that Vicananzo is a member of the NDAA. Also in February of 2005, Egan informed the general counsel of the Manchester Diocese, the Hartford Diocese, and the United States Conference of Catholic Bishops (the USCCB)[6] about what he viewed as a possible conflict of interest involving Nixon Peabody. There is nothing in the record showing that the dioceses represented by Nixon Peabody have consented to the firm's representation of the MIIF.

DISCUSSION

Attorney disqualification, "as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary." *Adoption of Erica*, 426 Mass. 55, 58 (1997) (quotations and citations omitted). "Motions to disqualify must be considered in light of the principle that court 'should not lightly interrupt the relationship between a lawyer and her client.'" *G.D. Mathews & Sons Corp. v. MSN Corp.* 54 Mass.App.Ct. 18, 20 (2002), quoting *Adoption of Erica*, 426 Mass. at 58.

The plaintiff argues that Nixon Peabody should not be allowed to represent the MIIF or any other defendants in this case because: (1) the interests of the MIIF are adverse to those of the dioceses which Nixon Peabody represents or has previously represented; (2) Nixon Peabody attorneys who are members of the NDAA have access to confidential information, including the legal strategies of other dioceses with respect to the sex abuse cases, and Nixon Peabody's ethical screen is inadequate to protect the interests of the dioceses, and (3) the plaintiff is directly affected by this perceived conflict of interest because it is now hesitant to avail itself of the

[6]The USCCB is comprised of bishops but not dioceses or archdioceses.

NDAA's services. For these arguments, the plaintiff relies upon Rules 1.7(a), 1.9(a) and 1.10(a)[7] of the MRPC.

A. Rule 1.7 (a)

Rule 1.7 (a) provides that

> "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation."

At issue is whether Nixon Peabody's representation of the MIIF in this action is directly adverse to its current diocesan clients in violation of Rule 1.7(a). Representation is directly adverse when the attorney "acts as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." Comment 3 to Rule 1.7(a).

In this case, Nixon Peabody is advocating against the plaintiff, but not against the Manchester Diocese or any other diocese it has as a client. None of Nixon Peabody's diocesan clients are a party to this action. The plaintiff has not established that the dioceses are owned by the same legal entity or organization. That the bishops governing each diocese in this country are members of the USCCB does not alter the fact that each diocese is a separate corporation. Contrast *McCourt Co., Inc.* v. *FPC Properties, Inc.*, 386 Mass. 145, 152 (1982) (law firm could not represent plaintiff in action against corporation's subsidiary while law firm was representing corporation in other matters). Consequently, the plaintiff has not shown that Nixon Peabody's representation of the MIIF amounts to representation which is directly adverse to its current diocesan clients in violation of Rule 1.7. See Comment 3 to Rule 1.7(a).[8]

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[7]Rule 1.10 of the Massachusetts Rules of Professional Conduct mandates that "(a) while lawyers are associated in the firm, none of them shall knowingly represent a client when anyone of them practicing alone would be prohibited from doing so by Rule 1.7 . . . or 1.9."

[8]The plaintiff misplaces reliance upon *Glueck* v. *Jonathan Logan, Inc.*, in which the court conducted a two stage inquiry into: (1) whether the law firm is participating in a lawsuit against its own client (the adverse representation test); and (2) whether the law firm has demonstrated that there will be no actual or apparent conflict in loyalties or diminution in the vigor of its representation. 512 F. Supp. 223, 226-227 (S.D.N.Y. 1981). In *Glueck*, the court disqualified a law firm from representing the plaintiff in a wrongful termination suit against an apparel producer

B. Rule 1.9

The plaintiff argues that, to the extent that Nixon Peabody no longer represents some dioceses, its attorneys should be disqualified under Rule 1.9 (a), which 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 consents after consultation."

"The conflict of interest in representing a current client with interests adverse to those of a former client arises from the attorney's duty . . . to preserve his client's confidences and secrets." *Adoption of Erica*, 426 Mass. at 60. The Supreme Judicial Court has interpreted Rule 1.9 (a) to encompass the adverse effect on the interests of both a former and the present client. See *id.* at 61 n.7.

> "The former client is not required to prove that the attorney actually misused the information, but only need show that the tempting situation existed because of an attorney-client relationship that was established in the former representations, and that the "former and current representations are both adverse and substantially related.'"

Rodriquez v. Montalvo, 337 F. Supp.2d 212, 218 (D. Mass. 2004).

The plaintiff fails under each aspect of this test. Most importantly, as explained above, the plaintiff has not shown that Nixon Peabody ever had an attorney-client relationship with the

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which was, in turn, a member of a corporate trade association represented in other matters by the plaintiff's counsel. The court concluded that, as a practical matter, the firm represented the interests of the association's members, and therefore the defendant was a *de facto* client of the firm for purposes of evaluating potential conflicts of interest. *Id.* at 227. The facts of *Glueck* are distinguishable from those before me. Nixon Peabody does not represent an entity comprised of members such as the dioceses, and its representation of some dioceses does not mean that it *de facto* is representing all other dioceses.

The other case relied upon by the plaintiff is similarly unavailing. In *Stratagem Development Corp.* v. *Heron International N.V.*, 756 F.Supp. 789, 792, 794 (S.D.N.Y. 1991), a law firm was disqualified from undertaking representation adverse to the parent company of the law firm's existing client, even though its representation of the subsidiary was in an action unrelated to the action involving the parent company. Nothing in the record supports an inference that the dioceses stand in an organizational relationship to each other such that one diocese's liabilities directly affect those of other dioceses, in contrast to the relationship between parent and subsidiary companies.

plaintiff or that the plaintiff ever divulged confidential information to any Nixon Peabody attorney. Therefore, the plaintiff has not demonstrated the existence of a "tempting situation" by reason of Nixon Peabody's acquisition of confidential information about a prior matter involving the plaintiff. See *Rodriquiz v. Montalvo*, 337 F. Supp.2d at 218.

Even assuming for the sake of argument, without deciding, that the plaintiff has standing to claim a violation of Rule 1.9 on behalf of other dioceses, the plaintiff nonetheless has not met its burden. First, the plaintiff has not specified a single diocese which was, but no longer is, represented by Nixon Peabody with respect to the sex abuse cases. Moreover, the plaintiff has not demonstrated that Nixon Peabody's representation of the MIIF is in the same matter or in a matter substantially related to the matter in which it formerly represented any dioceses, or that the MIIF's interests in this action are materially adverse to the interests of those dioceses. See Rule 1.9 (a). See also *ebix.com, Inc. v. McCracken*, 312 F. Supp.2d 82,90-91 (D. Mass. 2004)("it appears that [the moving party for disqualification of counsel] bears the burden of satisfying the substantial relationship test".). As this is plainly not the *same* matter as that in which Nixon Peabody has represented any of the dioceses, the substantial relationship test applies.

> "Under the 'substantial relationship' test, a subsequent representation is proscribed on the sole ground that the later suit, simply because of its substantial relation to the former one, exposes the attorney to an intolerably strong temptation to breach his duty of confidentiality to the former client. The [former] client need never prove that the attorney *actually* misused the confidences to the client's disadvantage. Instead he must prove only the existence of a tempting *situation* by showing (1) that an attorney-client relationship existed in the former legal representation, and (2) that the former and current representations are both adverse and substantially related."

Bays v. *Theran*, 418 Mass. 685, 691 (1994)(emphasis in original). In deciding whether matters are substantially related, some courts focus on the subject or factual contexts of the two matters,

while others have adopted a stricter standard, requiring evidence of a relationship between the issues of the two matters. See *Adoption of Erica*, 426 Mass. at 61 (citing cases from other jurisdictions concluding that the substantial relationship between issues will only be found if the relationship is patently clear or if the issues involved were identical or essentially the same).

Although the plaintiff argues that it must make a showing of a substantial relationship between this matter and Nixon Peabody's prior representation of dioceses, it does nothing more than advance conclusory assertions to that effect. The plaintiff fails to identify specific matters in which Nixon Peabody has represented diocesan clients in the past or to describe their substance through more than generalizations about sex abuse claims and common insurance defenses. The plaintiff has not demonstrated the existence of the requisite substantial relationship by showing that this action involves the same common insurance coverage provisions or issues previously raised in claims by unidentified former diocesan clients seeking coverage under their liability insurance policies for demands made in connection with sex abuse claims.[9] Contrast *G.D. Mathews & Sons Corp. v. MSN Corp.* 54 Mass.App.Ct. at 21-22 (affirming disqualification of defendant's counsel which previously represented plaintiff, where the1987 distribution agreement was central to both matters, and the firm's representation of defendant presented a strong temptation that could compromise the firm's duty to preserve confidentiality of information provided by plaintiff in earlier action).

The exhibits to the plaintiff's motion also fail to demonstrate the existence of a substantial relationship between the matters. Nixon Peabody's responses to the plaintiff's interrogatories reveal that the firm has represented dioceses in connection with claims that the dioceses are legally liable for damages or criminal penalties arising out of alleged sexual abuse,

[9]The plaintiff lists the following affirmative defenses advanced by the MIIF in this action: the failure to mitigate damages; the known loss doctrine; the absence of a duty to defend because third-party claims do not constitute suits; the injuries were not caused by an occurrence; there is no coverage for costs and expenses that do not constitute damages, or for damages the plaintiff was legally obligated to pay; and the occurrences were not fortuitous.

but they do not even establish that Nixon Peabody's representation of those dioceses involved insurance coverage issues or that such representation terminated.[10]

On this record, the plaintiff has not shown that Nixon Peabody's representation of the MIIF is in violation of Rule 1.7(a), 1.9(a) or 1.10 or, therefore, that the ethical screen established by Nixon Peabody is insufficient to protect the confidential information of the firm's current or former clients.

C. The NDAA Communications

The plaintiff's unsupported concerns regarding Cooney's and Vicananzo's access to confidential NDAA materials also miss the mark. While the NDAA may make representations regarding the confidentiality of some communications on its email service or conferences, nothing in the MRPC expressly governs those communications beyond what the MRPC already and generally requires of attorneys, nor do the rules entitle the plaintiff to avail itself, without hesitancy, of the NDAA's benefits and services. Moreover, the plaintiff has not produced any evidence that Cooney and Vicananzo have ever had access to confidential information relating to nonclient dioceses' litigation involving sexual abuse claims. The record indicates that no Nixon Peabody attorney has attended or participated in any NDAA meetings at which there have been discussions about problems faced by a diocese in connection with sexual abuse claims and/or diocesan insurance coverage for such claims. There is no evidence that Nixon Peabody attorneys have received, through the NDAA email system, confidential information about non-client dioceses' legal strategies in dealing with sexual abuse cases.[11]

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[10]The plaintiff did not specifically ask for this information in its interrogatories to Nixon Peabody.

[11]Cooney has just joined the NDAA. In the sole NDAA email communication submitted by the plaintiff, Vicananzo gave a one-sentence response to a question bearing no apparent relation to the issues in this case.

ORDER

For all the foregoing reasons, it is hereby **ORDERED** that the plaintiff's Motion to Strike Appearance of Nixon, Peabody, LLP Attorneys and Preclude Their Representation of Defendant Massachusetts Insurers Insolvency Fund is **DENIED**.

SO ORDERED

7/19/06
Dated

John A. Agostini
Associate Justice, Superior Court