

**THE STATE OF NEW HAMPSHIRE**

**Belknap Superior Court**

64 Court Street  
Laconia, NH 03246  
603 524-3570

**NOTICE OF DECISION**

KRISTIN M YASENKA ESQ  
NIXON PEABODY LLP  
900 ELM STREET  
MANCHESTER NH 03101

09-E-0148 Georgia Tuttle MD, et al v. NH Medical Malpractice, et al

Enclosed please find a copy of the Court's Order dated 6/25/2009  
relative to:

**Order-Plf's Motion to Disqualify  
Order-Def's Motion to Disqualify**

06/25/2009

Dana Zucker  
Clerk of Court

cc: KEVIN M FITZGERALD ESQUIRE  
GORDON J. MACDONALD ESQ  
W. SCOTT O'CONNELL ESQ  
ANNE M EDWARDS, ESQ.

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

Georgia Tuttle, M.D., et al.

v.

The New Hampshire Medical Malpractice Joint Underwriting Association, et al.

Docket No. 09-E-148

**ORDER ON RESPONDENTS' MOTION TO DISQUALIFY THE LAW FIRM  
OF NIXON PEABODY**

The petitioners, Georgia Tuttle, M.D., LRGHealthcare, and Derry Medical Center, on behalf of themselves and those similarly situated, brought this suit against the respondents, the New Hampshire Medical Malpractice Joint Underwriting Association ("JUA"), the JUA's Board of Directors, the New Hampshire Insurance Department and its Commissioner, Roger A. Sevigny, and the New Hampshire State Treasurer, seeking writs of mandamus and prohibition. The respondents move to disqualify petitioners' counsel, Nixon Peabody, LLP. Because the commissioner is not a client of Nixon Peabody, the motion is DENIED.

Nixon Peabody's San Francisco office has represented the Home Insurance Company for more than 25 years. On June 13, 2003, the Superior Court (McGuire, J.) entered an order declaring the Home Insurance Company ("Home") insolvent and appointing then commissioner of the Insurance Department, Paula Rogers, as liquidator of Home's estate. In The Matter of Liquidation of Home Ins. Co., 154 N.H. 472, 475 (2006). The order directed the liquidator to take possession of Home's assets and to administer them under the orders of the Court. RSA 402-C:21. Presently, Mr. Sevigny is the commissioner of the Insurance Department and thus the liquidator of Home.

On June 18, 2009, the petitioners, represented by Nixon Peabody, filed an emergency petition for writs of mandamus and prohibition. On June 23, 2009, the respondents filed a motion to disqualify Nixon Peabody as petitioners' counsel pursuant to New Hampshire Rule of Professional Conduct 1.7, arguing that Mr. Sevigny as the liquidator of Home is a current client of Nixon Peabody. The petitioners object. They argue that Nixon Peabody represents Home, not the liquidator or the commissioner.

On a motion to disqualify, the moving party has the burden to prove the necessity of disqualification by clear and convincing evidence. See Coffey's Case, 152 N.H. 503, 504 (2005); Kelley's Case, 137 N.H. 314, 315 (1993) ("We agree that the respondents violated Rules 1.7(b) and 8.4(a), but hold that a violation of Rule 1.5(a) was not proven by clear and convincing evidence.")

Roger Sevigny, as commissioner of the Insurance Department, is not a current client of Nixon Peabody. Under Rule 1.7(a), "[a] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . . or by a personal interest of the lawyer." N.H. R. Prof. Conduct 1.7(a). Assuming for the purposes of this analysis that Mr. Sevigny, as liquidator, is a current client of Nixon Peabody, the Court has found only one case concerning whether a private law firm which had represented an insurance department commissioner as liquidator would be disqualified from representing other clients in unrelated matters before the

commissioner. Health Maintenance Org. Assoc. of Ky., Inc. v. Nichols, 964 F. Supp. 230 (E.D. Ky. 1997).

In Health Maintenance, the commissioner of the Kentucky Insurance Department, as liquidator of the National Business Association Trust (“NBAT”), retained a private law firm to bring an action against the directors and officers of an organization, which acted as NBAT’s administrator. Id. at 233. After the firm ceased representing the liquidator, it filed an action on behalf of a group of HMOs challenging an insurance department opinion. Id. The commissioner moved to disqualify the firm from representing the HMOs under Kentucky’s former client conflict of interest rule, claiming that he was a former client of the firm. Id. The Court rejected this argument, holding that the law firm was not disqualified because the commissioner was not a former client of the firm. Id. at 234-35. Regardless of whether an attorney-client relationship existed between the law firm and the liquidator, no such relationship existed between the law firm and the commissioner because the liquidator and the commissioner are two separate and distinct entities. Id.

The genesis of statutory schemes that appoint insurance department commissioners to act as liquidators has been articulated as follows:

Historically, insolvent insurers, as with other insolvents, were placed into receivership by order of the court and private receivers were appointed to administer the insolvent's estate. Finding the system of private receiverships to be wasteful, if not subject to corruption, the Legislature in 1909 designated the Superintendent of Insurance to be the receiver in all cases involving insolvent insurers.

Consolidated Edison Co. v. Ins. Dept. of N.Y., 140 Misc. 2d 969, 974 (N.Y. Sup. Ct. 1988). Based on this history and the nature of the statutes, Kentucky and New York

treat the liquidator as a private court-appointed trustee who occupies “a legal personality separate and distinct from the [commissioner] of Insurance as the public official charged with regulating the industry generally.” In the Matter of the Liquidation of Ideal Mut. Ins. Co., 532 N.Y.S.2d 371, 374 (N.Y. Sup. Ct. 1988); see Kentucky Central, 913 S.W.2d at 335; Health Maintenance, 964 F. Supp. at 234-35.

Similarly, in New Hampshire, the Court appoints the liquidator to carry out the liquidation process. RSA 402-C:21. The liquidator’s primary duty is to protect “the interests of the insureds, creditors, and the public generally.” RSA 402-C:2. The liquidator accounts to and is responsible to the Court, which oversees the liquidation process. RSA 402-C:21. All of the liquidator’s powers are subject to the Court’s control. Id.

In contrast, the commissioner of the New Hampshire Insurance Department is appointed by the Governor with the advice and consent of the Council to enforce and execute the insurance laws of the State, a traditionally executive branch function. RSA 400-A:3. When the commissioner acts, he acts as an agent of the State, not of the Court. Furthermore, the Court has no supervisory authority over Mr. Sevigny in his role as commissioner.

Additionally, during the liquidation of Home, Mr. Sevigny has consistently made his role clear by identifying himself as “liquidator” and not “commissioner.” See, e.g., Liquidator’s Mot. for Approval of Reinsurance Commutation Agreement with Ancon, No. 03-E-106, at 4 (January 8, 2009) (identifying himself as “Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, Solely as Liquidator of the Home Insurance Company”); Liquidator’s Thirty Third Report, No. 03-E-106, at 7

(June 16, 2009) (signing as “Roger A. Sevigny, Liquidator”). These pleadings indicate that Mr. Sevigny and his attorneys view Mr. Sevigny’s role as liquidator as separate and distinct from his role as commissioner of the Insurance Department.

Based on the above-cited authorities and the role of the liquidator under RSA chapter 402-C, the Court finds that the liquidator and the commissioner of the Insurance Department are separate and distinct entities. Thus, even if Nixon Peabody’s continued representation of the Home after the liquidation process began, constituted representation of the liquidator, a conflict of interest would not thereby exist.

However, even if the roles of the commissioner and the liquidator were not distinct, the actions and relationships of the parties indicate that Nixon Peabody does not represent the liquidator. Throughout the liquidation, Rackemann, Sawyer & Brewster PC, Steptoe & Johnson, LLP, and the Attorney General’s office—not Nixon Peabody—have filed pleadings on behalf of the liquidator. See, e.g., (Liquidator’s Obj. to VIAD Corp.’s Mot. for Evidentiary Hearing and Oral Argument, No. 03-E-106, at 3 (May 29, 2009); Liquidator’s Mot. for Approval of Reinsurance Commutation Agreement with Ancon, No. 03-E-106, at 4 (January 8, 2009); Liquidator’s Obj. to Inspiration Consolidated Copper Company, Et Al. Petition to Intervene, No. 03-E-106, at 6 (June 27, 2003).) In the three Home Insurance Liquidation cases that have reached the Supreme Court, Rackemann, Sawyer & Brewster PC and the Attorney General’s office represented the liquidator. In The Matter of Liquidation of Home Ins. Co., \_\_\_ N.H. \_\_\_, slip op., at 1 (May 7, 2009); In The Matter of Liquidation of Home Ins. Co., 157 N.H. 543, 544 (2008); In The Matter of Liquidation of Home Ins. Co., 154 N.H. at 473.

Nixon Peabody has not represented the liquidator in any proceeding or even filed a pleading on his behalf. Nixon Peabody does not have a contract with the liquidator to provide legal services. Moreover, the liquidator has not communicated with Nixon Peabody about the Home's liquidation. While the respondents have suggested that some communication may have occurred between special deputy liquidator Peter Bengelsdorf<sup>1</sup> and Nixon Peabody, "a mere cooperative working relationship . . . does not create an attorney-client relationship." Health Maintenance, 964 F. Supp. at 235.

Nor is there any evidence that Nixon Peabody has an attorney-client relationship with Mr. Sevigny as the commissioner. Nixon Peabody does not have a contract with the commissioner to perform legal services. It has never done legal work for the commissioner. Nixon Peabody has never spoken directly with Mr. Sevigny in his capacity as commissioner or liquidator. Moreover, Nixon Peabody has represented other clients adverse to Commissioner Sevigny in matters unrelated to the rehabilitation/liquidation process since its inception in 2003. Thus, because no evidence exists indicating that the commissioner of the Insurance Department is a current client of Nixon Peabody, the respondents have not met their burden of proof, even by a preponderance of the evidence.

The respondents primarily argue that the petitioners' pleadings contain language that calls into question Mr. Sevigny's character which undermines his ability to act as liquidator of Home. The Court is not persuaded by this argument. In order to show a conflict of interest under Rule 1.7(a), the respondents must show that the commissioner


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<sup>1</sup> As special deputy liquidator, Mr. Bengelsdorf has the same powers as the liquidator. RSA 402-C:25, I. In the matter of Home, he performs the hands-on work associated with the liquidation in the New York offices of the Home in liquidation.

is a current client of Nixon Peabody, which, as discussed above, they have not done. Furthermore, the petitioners allege that a number of officials, on behalf of the State, have acted together to improperly take money from the excess funds of the JUA at a time of fiscal crisis “for the purpose of supporting programs that promote access to needed healthcare for underserved persons.” HB 2, Part 1, Section I. The Court fails to see how such allegations involving a number of reputable state officials could reflect poorly on Mr. Sevigny as a liquidator. Accordingly, the respondents’ motion to disqualify is DENIED.

So ORDERED

6/25/09  
Date

  
Kathleen A. McGuire  
Presiding Justice