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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1426**

Kristen Glaros Hanson, et al.,
Respondents,

Midwest Investment Services, LLC,
Respondent,

vs.

CBS Construction Services, Inc., et al.,
Appellants,

Brandon M. Schwartz, et al.,
Appellants.

**Filed July 18, 2022
Affirmed
Cochran, Judge**

Hennepin County District Court
File No. 27-CV-19-15999

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Construction Services, Inc., et al.)

Considered and decided by Cochran, Presiding Judge; Bryan, Judge; and
Gaïtas, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

This appeal concerns respondent-employee's motion to disqualify appellant-attorney from representing appellant-company and its president in an underlying legal dispute. In a prior decision, we reviewed the district court's decision granting the motion. *See Hanson v. CBS Constr. Servs., Inc.*, No. A20-0157, 2021 WL 79795 (Minn. App. Jan. 11, 2021), *rev. denied* (Minn. Mar. 30, 2021). We affirmed the district court's disqualification of appellant-attorney from representing appellant-company's president based on a conflict of interest. *Id.* at *6-7. But we remanded for additional factual findings regarding the district court's conclusion that appellant-attorney must also be disqualified from representing appellant-company. *Id.* at *1.

On remand, the district court issued supplemental findings of fact, conclusions of law, and an order reaffirming its decision to disqualify appellant-attorney from representing appellant-company. Appellants now challenge that order. Because we conclude that the district court did not abuse its discretion by disqualifying appellant-attorney from representing appellant-company in the lawsuit, we affirm.

FACTS

The lawsuit underlying this appeal was brought by respondent Kristen Glaros Hanson against appellant CBS Construction Services, Inc. and its founder, Stuart Bestul. Bestul is the president and majority shareholder of CBS.

In 2016, Bestul hired Hanson to work for CBS as a director of business development. Hanson's employment contract established that CBS would pay her

commissions in addition to a salary for bringing development work to the company. After Hanson started working for CBS, Hanson and Bestul agreed to form another company, respondent Midwest Investment Services, LLC (MIS), to invest in the construction of a Richfield senior-living complex (the RSH project). Under their proposed arrangement, CBS would be the general contractor for the RSH project, while Hanson and Bestul would receive a development fee for their work on the project that would “pass through” CBS. CBS would receive the development fee and then write a check for the same amount to MIS, which would invest those funds in exchange for an equity interest in the RSH project.

In May 2017, Bestul, Hanson, and appellant-attorney Brandon M. Schwartz had a phone conversation about forming MIS. According to Hanson, the conversation involved a detailed discussion of confidential information about the future operations of MIS, corporate opportunities, deal financing, and participants. Schwartz was tasked with drafting the operating agreement and other formation documents for MIS. The day after the phone call, Schwartz sent an email to Bestul and Hanson with advice on completing a subscription agreement for MIS to purchase equity in the RSH project. In July 2017, Schwartz emailed Hanson the operating agreement for MIS at her request. Because the operating agreement included a provision stating that Schwartz represented only Bestul and disclaiming any attorney-client relationship between Schwartz and Hanson, Hanson refused to sign the agreement.

In October 2017, Hanson asked Bestul about another senior-living development, Minnetonka Senior Housing (the MSH project), that they had previously discussed as an investment opportunity for MIS. Bestul said that he would not agree to MIS investing in

it, but that Hanson could do so on her own. According to Hanson, Bestul then formed a different company to invest in the MSH project and other senior-living investment opportunities without her. Bestul set up this new company with Schwartz's help.

In January 2018, Hanson resigned from CBS. In her resignation letter, she alleged that CBS had breached her employment contract, and she requested payment owed for commissions, bonuses, and profit distributions for her work on the RSH project, among other projects. Later in 2019, after failing to resolve these claims through mediation, Hanson filed an 11-count civil complaint against CBS and Bestul, with some claims made derivatively on behalf of MIS. In her amended complaint, Hanson alleged that CBS failed to pay her wages and commissions, violated the Minnesota Whistleblower Act, and discriminated against her. The complaint also made two joint claims against CBS and Bestul for promissory estoppel and unjust enrichment. Schwartz initially represented both CBS and Bestul in the lawsuit.

In October 2019, Hanson filed a motion to disqualify Schwartz and his law firm from representing CBS and Bestul based on a conflict of interest, citing Minnesota Rules of Professional Conduct 1.7, 1.9, and 1.10. The motion asserted that Schwartz had created an implied attorney-client relationship with Hanson and that Schwartz and Hanson subsequently exchanged legal advice and confidential information that disqualified Schwartz from representing CBS and Bestul in the current lawsuit.

The district court granted Hanson's motion. The district court concluded that Schwartz was disqualified under rule 1.9(a) because (1) an attorney-client relationship existed between Schwartz and Hanson, and (2) "[t]he factual issues between the formation

of MIS and the present dispute are substantially related.” Specifically, the district court noted that Schwartz drafted the incorporation documents for MIS, reviewed a draft of a subscription agreement for Hanson and Bestul, heard confidential information that Hanson disclosed, and drafted the operating agreement that established the scope of MIS’s future business. The district court then explained that Schwartz’s assistance in determining the scope of MIS was related to the charges against Bestul. In closing, the district court stated that it “[did] not believe anyone acted unprofessionally or improperly; however, close cases such as this one require resolution in favor of the client.”

On appeal, we affirmed the district court’s decision that Schwartz and his firm must be disqualified from representing Bestul. Specifically, we held that the district court did not clearly err in finding that an implied attorney-client relationship existed between Schwartz and Hanson in connection with the formation of MIS and finding that Schwartz’s prior representation of Hanson was substantially related to the current lawsuit. *Hanson*, 2021 WL 79795, at *1. Based on these findings, we concluded that the district court did not abuse its discretion by disqualifying Schwartz and his firm from representing Bestul. *Id.* But we remanded for additional factual findings and analysis to support the district court’s decision to disqualify Schwartz and his firm from representing CBS as well because the district court’s order focused primarily on Schwartz’s representation of Bestul. *Id.*

On remand, the district court heard oral argument before issuing supplemental findings and a written order reaffirming its decision to disqualify Schwartz and his firm from representing CBS. In addressing the “substantially related” prong of the conflict-of-interest analysis, the district court analyzed whether Schwartz’s prior

representation of Hanson involved the same transaction or legal dispute as the current lawsuit. It noted that Schwartz had already been disqualified from representing Bestul and explained that “the factual basis for the allegations against Bestul and CBS [are] closely connected.” The district court also determined that because Schwartz represented Hanson in setting up a business—MIS—that transacted with CBS, Schwartz is a “potential witness” in the current litigation. Based on these findings, the district court concluded that the current lawsuit is substantially related to Schwartz’s prior representation of Hanson in forming MIS and that Schwartz and his firm must therefore be disqualified from representing CBS.

Schwartz and CBS appeal.

DECISION

We review a district court’s decision to disqualify legal counsel for an abuse of discretion. *State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 816 (Minn. 2014). “A district court abuses its discretion when it bases its decision on an erroneous view of the law or when it renders a decision that is contrary to the facts in the record.” *Id.* We review the factual findings underlying a district court’s disqualification of counsel for clear error. *Prod. Credit Ass’n of Mankato v. Buckentin*, 410 N.W.2d 820, 822 (Minn. 1987).

In its order on remand (and its initial order), the district court relied on Minnesota Rule of Professional Conduct 1.9(a) to determine whether Schwartz had a conflict of interest requiring disqualification. Rule 1.9(a) provides:

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 gives informed consent, confirmed in writing.

Minn. R. Prof. Conduct 1.9(a). The supreme court has held that a party seeking to disqualify opposing counsel under rule 1.9(a) must establish the following:

(1) the moving party and opposing counsel had a prior attorney-client relationship, (2) the interests of opposing counsel's current client are materially adverse to the interests of the moving party, and (3) the present lawsuit is substantially related to a matter in which opposing counsel previously represented the moving party.

Swanson, 845 N.W.2d at 816 (citing Minn. R. Prof. Conduct 1.9(a)).

Here, appellants dispute only the district court's determination on the third disqualification requirement—whether the current lawsuit is “substantially related” to a matter in which opposing counsel previously represented the moving party.¹ Matters are substantially related for purposes of rule 1.9(a) “[1] if they involve the same transaction or legal dispute or [2] if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.” *Id.* (quoting Minn. R. Prof. Conduct 1.9 cmt. 3). In determining whether two matters are substantially related,

¹ The district court already determined, and this court affirmed, that an attorney-client relationship existed between Schwartz and Hanson. *See Hanson*, 2021 WL 79795, at *6. Because the existence of an attorney-client relationship is therefore the law of the case, CBS and Schwartz concede the issue on appeal. *See Sigurdson v. Isanti Cnty.*, 448 N.W.2d 62, 66 (Minn. 1989) (stating that after an appellate court rules on a legal issue and remands for further proceedings on other matters, the issue becomes “law of the case” and may not be reexamined in a second appeal). And because Hanson is suing CBS, the parties have materially adverse interests in the litigation.

courts consider “the extent to which the factual and legal issues in the two representations overlap and examine any other relevant circumstances.” *Id.*

On remand, the district court made additional factual findings and concluded that “[t]he present lawsuit as a whole, as well as the counts alleged against CBS only, involve matters substantially related to Schwartz’s prior representation of [Hanson].” To reach this conclusion, the district court followed the supreme court’s direction in *Swanson*. The district court considered the scope of Schwartz’s prior representation of Hanson in relation to MIS. It noted that Schwartz had already been disqualified from representing Bestul based on that prior representation. The district court then considered the extent to which Schwartz’s prior representation of Hanson is also substantially related to the current claims against CBS. The district court determined that “the factual basis for the allegations against Bestul and CBS [are] closely connected, as they are close in time, involve the same parties, and involve similar conduct.” The district court also emphasized CBS’s connection to MIS (which is owned by both Bestul and Hanson) through its role as the general contractor for the RSH project. The district court specifically found that “CBS, as general contractor, was part of the transaction between Mr. Bestul, Glaros Hanson, and MIS with respect to MIS’s investment in the RSH project.” Relying on these facts as well as Hanson’s statement that she divulged confidential information about MIS to Schwartz, the district court determined that Schwartz’s prior representation of Hanson is substantially related to the current matter. In its analysis, the district court also noted that Schwartz is a “potential witness” in the current matter.

Based on our independent review of the record, we conclude that the record supports the district court's determination that Schwartz's prior representation of Hanson is substantially related to the lawsuit as a whole and Hanson's allegations against CBS in particular. The record reflects that the current lawsuit involves the same transaction or legal dispute as Schwartz's prior representation of Hanson. *See* Minn. R. Prof. Conduct 1.9(a) cmt. 3 (noting that matters are considered substantially related "if they involve the same transaction or legal dispute"). Schwartz represented Hanson in forming a company, MIS, to invest in development opportunities with financing from CBS. And the allegations in Hanson's current lawsuit against CBS and Bestul stem from that same transaction. Specifically, Hanson's promissory-estoppel and unjust-enrichment claims, which she brought against both CBS and Bestul, involve Bestul's actions on behalf of CBS as its president and majority shareholder and relate to the formation of MIS. We therefore agree with the district court that CBS's role as the general contractor on the RSH project and as the pass-through entity for development fees intended for MIS made CBS an integral part of Schwartz's former representation of Hanson in forming MIS. The district court did not abuse its discretion by determining that Schwartz's prior representation of Hanson is substantially related to the current matter, and that Schwartz and his firm must therefore be disqualified from representing CBS.

We are not persuaded otherwise by CBS and Schwartz's arguments to the contrary. They argue that the district court abused its discretion when it determined that the matters are substantially related because the record does not show a substantial relationship between Schwartz's advice in the formation of MIS and Hanson's claims against CBS.

Schwartz and CBS frame the issue as “whether Schwartz provided any legal advice to Hanson that has a substantial relationship to her . . . pending claims against CBS.”² But Schwartz interprets the relevant standard too narrowly. Rule 1.9(a) announces a broader standard. It provides that “[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.” Minn. R. Prof. Conduct 1.9(a). And, as discussed above, matters are substantially related “[1] if they involve the same transaction or legal dispute *or* [2] if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” *Id.* cmt. 3 (emphasis added); *Swanson*, 845 N.W.2d at 816. Under this standard, it is enough that the matters involve the same transaction. The rule does not require that Hanson have previously received legal advice relating to her specific claims against CBS in order for the matters to be substantially related under rule 1.9(a). In its analysis, the district court relied on the standard set forth in rule 1.9(a), the comment to the rule, and the guidance provided by *Swanson*. We discern no abuse of discretion by the district court in its application of rule 1.9(a).

CBS and Schwartz also argue that the district court abused its discretion when it based its decision to disqualify Schwartz in part on its determination that Schwartz may be

² CBS and Schwartz also assert that “[a]ll of Hanson’s claims against CBS are employment-based claims which stem from her short-lived employment tenure with CBS” and that Schwartz did not offer Hanson any legal advice related to her employment with CBS. But this characterization glosses over Hanson’s promissory-estoppel and unjust-enrichment claims, which tie the current lawsuit to Schwartz’s prior representation of Hanson in the formation of MIS.

a “potential witness.” They argue that, under Minnesota Rule of Professional Conduct 3.7(a), an attorney’s testimony must be “necessary” and not just “potential” before an attorney can be disqualified under that rule. Rule 3.7(a) provides that “[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a *necessary* witness” with some limited exceptions. Minn. R. Prof. Conduct 3.7(a) (emphasis added). A witness is not “necessary” unless the evidence sought through their testimony cannot be produced in some other effective way and the testimony is not cumulative, peripheral, or already included in an admissible document. *Humphrey ex rel. State v. McLaren*, 402 N.W.2d 535, 541 (Minn. 1987). CBS and Schwartz contend that the record fails to identify a basis for concluding that Schwartz is a necessary witness. And because Schwartz is not a necessary witness, they argue that the district court abused its discretion by disqualifying him.

This argument misses the mark. The district court did not disqualify Schwartz from representing CBS under a rule 3.7(a) analysis. Rather, the district court disqualified Schwartz based on rule 1.9(a) alone. And, in analyzing whether the current lawsuit is substantially related to Schwartz’s prior representation of Hanson under rule 1.9(a), the district court properly considered whether Schwartz may be a potential witness. The district court’s finding that Schwartz is a “potential witness” simply illustrates the overlap between the factual and legal issues in Schwartz’s prior representation of Hanson and the current lawsuit, following the standard set forth in *Swanson* to help courts determine whether two matters are substantially related. *See Swanson*, 845 N.W.2d at 816 (stating that courts consider “the extent to which the factual and legal issues in the two representations overlap and examine any other relevant circumstances” in that analysis).

And, to the extent that CBS and Schwartz dispute the district court's factual finding that Schwartz is a potential witness, that finding is not clearly erroneous. Schwartz participated in the May 2017 phone call in which Bestul and Hanson discussed the formation of MIS, its future investment opportunities, and the role CBS would play in MIS operations. Schwartz also drafted the formation documents and operating agreement for MIS. This involvement makes Schwartz a potential witness to facts relevant to Hanson's promissory-estoppel and unjust-enrichment claims against CBS, which demonstrates the overlap between Schwartz's prior representation of Hanson and those current claims. Accordingly, we conclude that the district court did not abuse its discretion in considering whether Schwartz is a potential fact witness in its rule 1.9(a) analysis.

In sum, because the record supports the district court's determination that Schwartz's prior representation of Hanson in forming MIS is substantially related to the current lawsuit involving CBS, we conclude that the district court did not abuse its discretion when it granted Hanson's motion to disqualify Schwartz and his firm from representing CBS under rule 1.9(a).³

Affirmed.

³ In affirming the district court, we do not suggest that we believe Schwartz acted unethically; rather, we agree with the district court that rule 1.9(a) and case law interpreting the rule require this result.