

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF MICHIGAN
 SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
 PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
 Corporation,

Defendant,

And

PROTECT THE PENINSULA,
 Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
 Honorable Paul L. Maloney
 Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEF.
 PENINSULA TOWNSHIP'S MOTION
 TO STAY PROCEEDINGS**

****ORAL ARGUMENT REQUESTED****

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BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO STAY PROCEEDINGS TO ALLOW NON-PARTY MICHIGAN TOWNSHIP PARTICIPATING PLAN SUFFICIENT TIME TO INVESTIGATE CONFLICT OF INTEREST AND/OR MOVE TO DISQUALIFY PLAINTIFFS' COUNSEL

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 B - January 23, 2023 email
 C - January 24, 2023 email
 D - January 27, 2023 email
 E - February 3, 2023 email
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I. INTRODUCTION

Through July 21, 2014, Defendant, Peninsula Township, was a member of the Michigan Township Participating Plan (the “Par Plan”), a membership organization comprised of over 1,000 municipal members, primarily townships. Par Plan members, among other membership benefits, obtain their insurance, risk management training, and participate in a dividend program depending on yearly profitability. For more than 30 years, Plaintiffs’ counsel, Miller, Canfield, Paddock & Stone (“Miller Canfield”), served as the general counsel of the Par Plan. That decades-long representation came to an abrupt end when Miller Canfield terminated the attorney-client relationship in February, 2023. Miller Canfield terminated the Par Plan as a client after a conflict of interest was uncovered in Miller Canfield’s ongoing representation of the Plaintiffs in this case – a representation directly adverse to Miller Canfield’s now former client.

Counsel for Peninsula Township raised this issue with Miller Canfield and advised that its representation in this matter may constitute a conflict of interest. Miller Canfield initially replied that, while it did not believe a conflict of interest exists, it would investigate the matter. However, since that initial contact, Miller Canfield has advised the Par Plan it is now operating under the assumption that a conflict of interest exists and has terminated its decades-long representation of the Par Plan.

Peninsula Township moves this Court to stay the proceedings in this case for forty-five (45) days to allow the Par Plan sufficient time to examine the conflict of interest between Miller Canfield and the Par Plan and, if necessary, move for disqualification of Miller Canfield. The first opportunity the Par Plan will have to review this issue will be at its quarterly in-person Board meeting on April 17, 2023. Depending on how the Par Plan proceeds, Peninsula Township may need to consider its options regarding this conflict.

II. FACTUAL BACKGROUND AND DISCUSSION OF DOCUMENTS

The Par Plan is a membership organization comprised of well over 1,000 municipal members, mostly Townships. Through the Par Plan, members obtain insurance, risk management training, participate in a dividend program depending on yearly profitability, and obtain a number of other member-related benefits. Peninsula Township was a member of the Par Plan and obtained its insurance through the Par Plan for time periods relevant to the current lawsuit. Miller Canfield served as general counsel for the Par Plan for well over 30 years.

As of April, 2023, the current litigation has been pending against Peninsula Township for nearly two years. In January, 2023, new counsel was retained to represent and defend Peninsula Township in this case. Counsel for Peninsula Township has a three-decade history of working alongside the Par Plan, representing townships throughout the state. As such, he was aware that Miller Canfield had served as general counsel to the Par Plan during this time.

Counsel for Peninsula Township contacted Ashley Higginson, the Miller Canfield attorney assigned as counsel to the Par Plan, to advise her of the potential conflict. On January 20, 2023, after speaking with Ms. Higginson, counsel sent a letter to Ms. Higginson and Joe Infante, lead counsel for the Plaintiffs, conveying the details of a telephone conversation with Mr. Infante. (Exhibit A). Quickly thereafter, Mr. Infante responded via e-mail demanding production of documents from Miller Canfield's own client, the Par Plan. (Exhibit B). Counsel for Peninsula Township responded, reiterating the points discussed during the telephone call. (Exhibit C).

On January 27, 2023, Soni Mithani, Miller Canfield's general counsel, sent an email to Linda Preston, the Par Plan's Board President. (Exhibit D). In this email, Ms. Mithani disclaims any knowledge that the Par Plan could be implicated in the litigation, primarily asserting that: (1) Miller Canfield has not seen a policy of insurance from Peninsula Township that suggested it fell

under a master policy obtained by the Par Plan; and (2) the damages sought by Plaintiffs allegedly begin in 2016, while Peninsula Township last obtained coverage through the Par Plan in 2014. (Exhibit D). Ms. Mithani noted “we want to make sure we have no conflicts of interest in our handling of the litigation against Peninsula Township. We do not believe there is any conflict of interest because we do not see how MTPP could be involved in or responsible for this matter in any way.” (*Id.*). Ms. Mithani claimed that no conflict could exist because the Par Plan was not directly adverse to the Plaintiffs. (*Id.*).

The following Friday, February 3, 2023, Ms. Mithani followed up with Ms. Preston. (Exhibit E). Ms. Mithani noted that Ms. Preston had exchanged voicemails with Ashley Higginson, the Par Plan’s General Counsel and Miller Canfield associate, indicating the Par Plan was “in the process of verifying the information below.” Despite an obligation to complete a thorough conflict check prior to commencing litigation, Ms. Mithani implored the Par Plan confirm that no conflict of interest existed: “If you could please confirm that MTPP is not involved in and is not responsible for any alleged conduct on the part of Peninsula Township as soon as you are able, I would very much appreciate it.” (*Id.*). Ms. Preston responded later that day, advising that the Par Plan was reviewing the matter. (*Id.*).

Less than two business days later, on February 7, 2023 at 2:36pm, Ms. Mithani followed up with Ms. Preston. (Exhibit F). Ms. Mithani recognized the apparent conflict and wrote:

I do require a response from MTPP. At this point, if you are unable to provide me with a response, I will have to analyze this matter as if MTPP believes there is a conflict and go from there. If this is the case, then we will need to discuss whether MTPP is willing to waive the conflict and if not, then we will need to discuss how to resolve the conflict and whether continued representation of MTPP and/or the parties in our other matter is appropriate under the ethical rules and applicable law. [*Id.* (emphasis added)].

Less than thirty minutes later, Ms. Mithani wrote Ms. Preston again: “Following-up on this, I do want to clarify again – that based on what we know – we do not believe there is a conflict. So – we would appreciate being made aware of any additional information that we do not have.” (*Id.*).

On Thursday, February 9, 2023, Jennifer Venema, the MTPP Administrator at Tokio Marine, sent an email to Ms. Mithani and Ms. Higginson, clearly marked as “Sent on the (sic) behalf of Linda Preston”, the MTPP Board Chairman. (Exhibit G). The email, a call for help from client to lawyer, expressed the need for further information and explanation by Miller Canfield in order to respond to Miller Canfield’s demands that the MTPP waive the conflict. Ms. Preston wrote:

Soni,

I don’t think I fully understand the situation. Miller Canfield has a case and did a conflicts check way back when and it was not a conflict? Or it just wasn’t done? Maybe it doesn’t matter, but the board may want to know how we got into this.

When Miller Canfield drafted the Par-Plan By-Laws, they recommended the following language: Rule 3. Scope of Protection. The Par-Plan chose to adopt the forms and endorsements of conventional insurance protection and to reinsure/insure these coverages 100% as opposed to utilizing a risk pool of members funds to pay individual and collective losses up to a given retention and then to have retention and then to have reinsurance/insurance above that retention amount. Miller Canfield worked on the By-law language generally and the structure of the Par-Plan. And Ashley Higginson is our general counsel. When someone asks for a legal analysis or to give a legal opinion we rely on Ashley and Miller Canfield to provide it. And that is really what you are asking. Something like, does Miller Canfield have a conflict of interest with the Par-Plan, which is like a legal opinion, isn’t it? And I am not our lawyer Ashley is, or you guys are.

So would you please give us a formal legal opinion, as our lawyers, from Miller Canfield that we will we never be responsible for any money, damages or anything associated with your -litigation matter against Peninsula Township- which you have been working on -for the past couple years. Because this conflict or lack of a conflict looks like it’s for the benefit of Miller Canfield we wouldn’t expect to be charged for the opinion.

If you can get that to me before our next March 3rd exec committee meeting, I can get that in front of them and then we can have the full board review at its next meeting in April. And if you want something signed you should include what you want signed too.

Thank you,

Linda [*Id.*].

On Monday, February 13, 2023 at 5:06pm, Ms. Mithani (not Ms. Higginson, MTPP's General Counsel) responded without answering any of Ms. Preston's questions: "Ms. Venema – Tokio Marine is not a client of the firm and thus, I cannot correspond with you regarding this matter even if your email below is purportedly on behalf of a client representatives. We will be sending follow-up correspondence to Ms. Preston directly in her role as Chair of the MTPP Board." (Exhibit H).¹

Ms. Mithani's apparent "follow-up correspondence to Ms. Preston" was not an answer to Ms. Preston's questions. Rather, later the same day on February 13, 2023, Miller Canfield, through Ms. Mithani, terminated its representation of the Par Plan. (Exhibit I). Ms. Mithani wrote:

As you know, over the past two weeks, the firm has attempted to obtain additional information from you regarding a claim made in late January 2023 by an attorney for Peninsula Township. Specifically, that attorney has vaguely alluded to a possible conflict of interest as it relates to our work for MTPP and litigation we have been handling since 2020 for plaintiffs who are suing Peninsula Township. None of our work for MTPP is related in any way to this litigation. MTPP is not a party to that action and has never been mentioned in the context of the litigation until, for the first time, late last month. We believe there is no conflict of interest. Nonetheless, on January 27, 2023, we specifically asked you to confirm certain facts, which, as we understand them, support our conclusion that no such conflict of interest exists. We never received a response from MTPP, and you have not contacted me to arrange a time to discuss this matter further.

¹ It is surprising Miller Canfield, the Par Plan's general counsel, would disclaim knowledge of Jennifer Venema's involvement in the Par Plan. Ms. Venema is the Par Plan Administrator employed by Tokio Marine HCC. She is present at all Par Plan Board Meetings, along with Ms. Higginson. Even if Ms. Mithani was unsure (and Ms. Higginson perhaps did not answer her phone) a simple Google search quickly yields results showing Ms. Venema's name all over Par Plan Board Meeting Minutes.

On Thursday, February 9, 2023, possibly in response to our request for verification of facts, we received an email from an employee of Tokio Marine, which is not a client of the firm, asking our firm (on your behalf) to provide a legal opinion regarding MTPP's liability, if any, to Peninsula Township. This correspondence, which inaccurately characterizes the scope of our MTPP engagement, does not address our request to verify certain facts.

MTPP's continued failure to respond to our request to verify certain facts as we understand them leaves us unable to confirm our analysis that there is no conflict between MTPP and our clients in the litigation against Peninsula Township. Again, we believe there never was and there currently is no conflict of interest, especially since MTPP is not a party to that litigation and is not an insurer. But, because MTPP cannot (or will not) verify our understanding of the facts, out of an abundance of caution, we have no choice but to now proceed as if there is *now* a conflict of interest, again, due solely to our inability to obtain MTPP's verification of the facts that we believe demonstrate that no conflict of interest exists.

Under the Michigan Rules of Professional Conduct, when a conflict arises after a representation has already been undertaken (as is the case here), a lawyer should withdraw from the representation of one or more of the parties. We have unfortunately determined that given MTPP's non-response to our inquiry, we need to withdraw from serving as legal counsel to MTPP to safely ensure continued compliance with the Michigan Rules of Professional Conduct. We have reviewed our files and we have no outstanding matters that we are handling for MTPP. We understand that MTPP may require the review of by-law amendments prior to its upcoming April 2023 Board Meeting. Unfortunately, we will not be able to assist with that task or to provide MTPP with any other legal assistance at this time. [*Id.*].

As such, effective February 13, 2023, Miller Canfield fired its thirty-year client based on an apparent conflict between the Par Plan and the Plaintiffs in this litigation.

The Par Plan sought counsel to review the conflict. Attorney Thomas Basil of Shinnars & Cook wrote to Ms. Mithani on February 15, 2023. (Exhibit J). Mr. Basil noted that Miller Canfield represented the Par Plan "for years." He continued: "Miller Canfield as General Counsel provided advise on all manner of subjects ranging from liability for specific matters to more foundational issues like how the MTPP is organized, how it is insured, and how the MTPP may or may not be liable for the activities of its constituent members." (*Id.*).

Mr. Basil noted that Miller Canfield has been involved in litigation against Peninsula Township for a “couple years” and that Miller Canfield may or may not have done a conflict check at the time the litigation commenced in relation to the Par Plan. (*Id.*). Mr. Basil aptly notes that Ms. Mithani’s communication on January 27, 2023 contains several contradictory comments regarding Miller Canfield’s efforts to conduct a conflict check. First, Ms. Mithani notes the potential conflict was “more than surprising to us,” implying a conflict check was not performed originally. (*Id.*). Second, Ms. Mithani stated, “it is our understanding that any certificate of coverage under the Master Policy would have been issued directly to the member as insured and would reflect the coverage specifically requested by the individual member.” (*Id.*). This reflects that Miller Canfield looked into the matter after having been made aware of the potential conflict and again underscores Miller Canfield’s “intimate working knowledge of the MTPP obtained by virtue of your firms’ representation.” (*Id.*). Finally, Mr. Basil notes that Miller Canfield reviewed the audited financial statements of the Par Plan, which it already had access to by virtue of its position as the Par Plan’s general counsel, demonstrating a further after-the-fact conflict review. (*Id.*).

On February 20, 2023, Ms. Mithani responded to Mr. Basil. (Exhibit K). Ms. Mithani finally admitted Miller Canfield performed a conflict analysis at the start of the litigation, but that this analysis “revealed no conflict of interest.” (*Id.*). Based on the Par Plan’s surprise, it appears that the Par Plan was never apprised of the potential conflict. Ms. Mithani then claimed a further conflict analysis was performed after they were made aware of the potential conflict. (*Id.*). Miller Canfield concluded there was no conflict on the basis that the Par Plan was not directly or indirectly involved in the litigation. (*Id.*).

Ms. Mithani further complained that the Par Plan did not provide information to Miller Canfield, despite the client reaching out for further information and advice, “Although the Board Chair had suggested that MTPP was in the process of verifying certain information, instead of providing use with any verification of this information . . . MTPP directed a third party, non-client of the firm to respond on its behalf with an email that did not address our original request.” (*Id.*). Ms. Mithani concluded that Miller Canfield’s decision to withdraw was “based on MTPP’s failure to confirm our understanding of the facts.” (*Id.*). She closed, again blaming the Par Plan, “when a client does not respond to our requests for information in connection with a conflict analysis, the safest course of action is for us to assume that the client does not want to confirm our analysis that no conflict exists and may instead believe that there is a conflict (which, in this case, would be a thrust-upon conflict). (*Id.*).

As such, Miller Canfield acted under the presumption that a conflict of interest existed between a former client, the Par Plan, and current clients, the Plaintiffs in this litigation. To date, Miller Canfield continues to represent the Plaintiffs in this case, despite the existence of this apparent conflict.

Counsel for Peninsula Township has been advised that the Par Plan is considering what action to take regarding this conflict at its next Board meeting on April 17, 2023. This leads Peninsula Township to move for a stay of the case so the Par Plan has time determine what actions it can and/or will take regarding this conflict.

III. LEGAL PRINCIPLES

The Supreme Court has concluded that this Court’s “power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299

U.S. 248, 254 (1936); *Clinton v. Jones*, 520 U.S. 681, 706 (1997). “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy of time and effort for itself, for counsel and for litigants, and the entry of such an order ordinarily rests with the sound discretion of the District Court.” *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 626-627 (6th Cir. 2014) (quoting *Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977)). At the same time, however, the District Court must “tread carefully in granting a stay of proceedings, since a party has a right to a determination of its rights and liabilities without undue delay.” *Ohio Envtl. Council*, 565 F.2d at 396.

“There is no precise test in this Circuit for when a stay is appropriate.” *Ferrell v. Wyeth-Ayerst Labs., Inc.*, No. 1:01-cv-447, 2005 WL 2709623, at *1 (S.D. Ohio Oct. 21, 2005). In addressing whether to grant a stay, courts commonly consider several factors, including: (1) the need for a stay; (2) the stage of litigation; (3) whether the non-moving party will be unduly prejudiced or tactically disadvantaged; (4) whether a stay will simplify the issues; and (5) whether a stay would lessen the burden of litigation for the parties and the court. *See, e.g., Int'l Watchman Inc. v. Barton Watchbands Holdco, LLC*, No. 1:19-cv-2310, 2021 WL 855119, at *3 (N.D. Ohio Mar. 8, 2021).

The need for a stay is strong, given the stakes of the ethical considerations involved. “The Court retains inherent authority to police the ethical conduct of the lawyers who appear before it and to uphold the ethical norms embodied in the Code of Professional Conduct.” *United States v. Miller*, 624 F.2d 1198, 1201 (3rd Cir. 1980). “Ethical rules involving attorneys practicing in federal courts are ultimately questions of federal law.” *El Camino Res., Ltd. v. Huntington Nat'l Bank*, 623 F. Supp. 2d 863, 876 (W.D. Mich. 2007) (citing *In re Snyder*, 472 U.S. 634, 645 n. 6, 105 S. Ct.

2874 (1985)) (additional citations omitted). But, federal courts “are entitled to look to the state rules of professional conduct for guidance.” *Id.*

MRPC 1.7(a) sets forth the general prohibition against direct conflicts of interest:

- (a) A lawyer shall not represent a client if the representation 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.

MRCP 1.7(a) is “founded upon an attorney’s fundamental duty of undivided loyalty to clients.” *El Camino Resources, Ltd. v. Huntington Nat. Bank*, 623 F. Supp. 2d 863, 876 (W.D. Mich. 2007). “It is a well established ethical principle that ‘an attorney owes undivided allegiance to a client and usually may not represent parties on both sides of a dispute.’” *Id.* (quoting *Evans & Luptak, PLC v. Lizza*, 251 Mich. App. 187; 650 N.W.2d 364, 370 (2002) (internal citation omitted)). MRCP 1.7(a) provides a lawyer ordinarily may not “act as an advocate against the person the lawyer represents in some other matter, even it is wholly unrelated.” *El Camino Resources*, 623 F. Supp. 2d at 876 (quoting Mich. R. Prof. Cond. 1.7 (comments)).

Whether Miller Canfield has a conflict of interest is an issue of substantial import. There is no doubt the Par Plan was an active client of Miller Canfield when it took on the Plaintiffs’ claims, which ultimately resulted in the commencement of this litigation in 2020. Further, based on Ms. Mithani’s correspondence dated February 7, 2023, at 2:36 pm, if the Par Plan was unable to provide a response, Miller Canfield would “have to analyze this matter as if MTPP believes there is a conflict.” Ms. Mithani’s letter of February 13, 2023 terminating the attorney-client relationship noted that the Par Plan failed to provide a response to Miller Canfield’s inquiries. Based on Ms. Mithani’s February 7, 2023 email, if that was the case, Miller Canfield would “need

to discuss whether MTPP is willing to waive the conflict and if not, then we will need to discuss how to resolve the conflict and whether continued representation of MTPP and/or the parties in our other matter is appropriate under the ethical rules and applicable law.” That has not occurred. Miller Canfield simply fired the Par Plan and now continues to represent the Plaintiffs in this case.

Even if Miller Canfield indicated it was going to treat this as a conflict and respond accordingly (which it has not), a conflict remains nonetheless. The Plaintiffs’ interests in this case are directly adverse to the Par Plan. First, while Miller Canfield asserts this case does not involve a claim of damages from before 2016, it is unclear whether the Plaintiffs have agreed to such a limitation. Rather, in Plaintiffs’ First Amended Complaint and throughout the briefing in this matter, Plaintiffs aver their damages predate 2016, and actually go back decades. Finally, the nature of Plaintiffs as-applied and facial challenges to Peninsula Township’s zoning statutes are adverse not only to Peninsula Township, but every other township in the state of Michigan. In essence, Plaintiffs assert that the Michigan Zoning Enabling Act is preempted by the Michigan Liquor Control Code. The Par Plan, as discussed above, is a membership organization that represents the interest of municipalities across the state. The Par Plan is certainly adverse to the position the Plaintiffs – by and through Miller Canfield – have taken in this case that the MZEA is preempted by the MLCC.

As it relates to the other factors, while this case has been pending for over two years, the parties have returned to the beginning on several claims. Now that PTP is involved, the Court is conducting a further Rule 16 conference and discovery will begin anew on many of Plaintiffs’ claims. As to the simplification of issues, granting a stay will allow the Par Plan to seek disqualification before the parties engage in renewed discovery and dispositive motion practice, allowing the Court to determine whether Miller Canfield should be permitted to continue as

Plaintiffs' counsel prior to continued litigation. Finally, as to prejudice, Miller Canfield created the need for a stay by taking on a case with clients that are directly adverse to the Par Plan.

IV. CONCLUSION AND RELIEF REQUESTED

For the reasons summarized above, Peninsula Township respectfully requests that this Honorable Court enter a stay of proceedings for forty-five (45) days to allow the Par Plan to determine what actions are necessary regarding the conflict of interest. The first opportunity the Par Plan will have to review this issue will be at its quarterly in-person Board meeting on April 17, 2023.

Respectfully Submitted,

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Dated: April 13, 2023

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