

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,

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

**NON- PARTY MICHIGAN TOWNSHIP  
PARTICIPATING PLAN'S MOTION  
TO INTERVENE FOR THE LIMITED  
PURPOSE OF DISQUALIFYING  
COUNSEL FOR PLAINTIFFS**

And

**\*\*ORAL ARGUMENT REQUESTED\*\***

PROTECT THE PENINSULA,

Intervenor-Defendant.

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**NON-PARTY MICHIGAN TOWNSHIP PARTICIPATING PLAN’S MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF DISQUALIFYING COUNSEL FOR PLAINTIFFS**

Non-Party, the Michigan Township Participating Plan, by counsel, moves to intervene for the limited purpose of disqualifying Miller Canfield as Plaintiffs’ counsel. Pursuant to Local Rule 7.1(a) and (b), a supporting brief and documentation are attached.

Respectfully Submitted,

SHINNERS & COOK, P.C.

/s/ David R. Schambach

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Dated: May 23, 2023

**CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2023, I filed the foregoing via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ David R. Schambach

David R. Schambach

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PARTICIPATING PLAN'S BRIEF IN  
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**BRIEF IN SUPPORT OF MICHIGAN TOWNSHIP PARTICIPATING PLAN’S  
MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF DISQUALIFYING  
COUNSEL FOR PLAINTIFFS**

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**EXHIBITS**

- Exhibit A - Affidavit of Rick Donaldson
- Exhibit B - MTPP Ledger of Premiums Received from Peninsula Township
- Exhibit C - Affidavit of Jennifer Venema
- Exhibit D – Unpublished Cases

**I. INTRODUCTION**

The Court recently denied Defendant Peninsula Township’s Motion to Stay Proceedings to Allow Non-Party Michigan Township Participating Plan Sufficient Time to Investigate of Conflict of Interest and/or Move to Disqualify Plaintiffs’ Counsel. (ECF 342, PageID.12537-12545). This motion to intervene for a limited purpose by Michigan Township Participating Plan (“MTPP”) follows, and should be granted. Courts routinely allow former clients to intervene for the limited purpose of asserting an attorney’s conflict of interest, even if the standard in Federal Rule of Civil Procedure 24 is not met. *See United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013). If a former client cannot be heard on the issue of disqualification, that party has no

ability in real time to stop an attorney from participating in a case in which the former client is not a party but has a significant interest.

## II. FACTUAL BACKGROUND

Plaintiffs' counsel, Miller, Canfield, Paddock & Stone ("Miller Canfield") has served as general counsel to MTPP for thirty-eight (38) years. (ECF 340-1, PageID.12518; *see also* Affidavit of David Kensler attached hereto as Exhibit A at page 2; *see also* Affidavit of Jennifer Venema attached hereto as Exhibit C at page 2). In fact, Miller Canfield was legal counsel to MTPP until February 13, 2023, when Miller Canfield fired MTPP as a client in response to the MTPP's request for more information about a conflict of interest. This conflict of interest is the sole reason for which MTPP now seeks to intervene. (ECF 329-9, PageID.11997, 11998).

Defendant Peninsula Township obtained its insurance coverage through MTPP from April 1, 1986, to July 21, 2014. (MTPP Ledger of Premiums Received from Peninsula Township attached hereto as Exhibit B). Plaintiffs' claims for damages in this matter appear to date back to June 5, 1972, when Peninsula Township adopted its original zoning ordinance. (ECF 29, PageID.1092). As such, Miller Canfield acted as general counsel to MTPP for thirty-eight (38) of the fifty-one (51) year damages period which Plaintiffs now claim. If Plaintiffs are awarded damages for these overlapping periods, MTPP will be responsible to pay a portion of such damages on Peninsula Township's behalf. MTPP's interests are directly in conflict with Plaintiffs' (and therefore Miller Canfield's) and Miller Canfield has then engaged in representation of Plaintiffs in direct conflict within the Michigan Rules of Professional Conduct ("MRPC") Rule 1.7 and Rule 1.9.

Accordingly, counsel for MTPP contacted Miller Canfield and requested confirmation that Plaintiffs' damages in this matter are limited to a period of time not beginning until July 22, 2014.



(See ECF 336-13, PageID.12432, 12433). However, Plaintiffs and/or Miller Canfield have wholly refused, and Miller Canfield has continued to engage in representation of Plaintiffs in direct conflict with the MTPP and therefore with MRPC Rule 1.7 and Rule 1.9. As such, during MTPP's most recent monthly board meeting held on April 17, 2023<sup>1</sup>, the MTPP board voted to authorize this Motion to intervene for the limited purpose of disqualifying Miller Canfield as Plaintiffs' counsel and to strike all filings made by Miller Canfield on Plaintiffs' behalf. (ECF 340-4, PageID.12534). Had MTPP been notified of this conflict of interest at an earlier time, it would have taken appropriate action at that time. (Affidavit of Jennifer Venema attached hereto as Exhibit C at page 3). This Motion, while late in the stages of litigation, is being made at the earliest possible moment that it could be presented to this Honorable Court once the MTPP was made aware of the conflict of interest. *See id.*

### III. ARGUMENT

Where, as here, a former client seeks to intervene for the limited purpose of raising an attorney's conflict of interest, courts permit intervention as a matter of course. In fact, intervention is allowed regardless of whether Rule 24 is satisfied. *See City of Detroit*, 712 F.3d at 932 (6th Cir. 2013). This is because "a strict application of the intervention rules, in light of a colorable assertion that ethical considerations may warrant disqualification of counsel, should not prevent the Court from examining the merits of [a former client's conflict-of-interest] claim." *Med. Diagnostic Imaging, PLLC v. CareCore Nat'l, LLC*, 542 F. Supp. 2d 296, 305 (S.D.N.Y. 2008). Stated differently, Rule 24 intervention is "better suited to addressing whether outside parties may

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<sup>1</sup> Notably, this board meeting was the first MTPP board meeting held without an attorney from Miller Canfield present in its thirty-eight (38) year history, that we are aware of.

intervene to assert substantive claims, rather than allegations which implicate the integrity of the adversarial process—a process the Court has an obligation to protect.” *Id.*

Consistent with this holding, the Supreme Court has underscored that district courts have an obligation to “take prompt and affirmative action to stop professional misconduct.” *Arizona v. Washington*, 434 U.S. 497, 513 (1978) (citation and ellipsis omitted). Indeed, Federal Courts have the inherent authority to oversee attorneys practicing before them and to set standards for their conduct. *See Berger v. Cuyahoga County Bar Ass’n*, 983 F.2d 718, 724 (6th Cir. 1993). It follows from this holding that the Court should permit MTPP to intervene to protect its attorney-client relationship with Miller Canfield, regardless of whether Rule 24 is satisfied. To hold otherwise would permit “the integrity of the adversarial process” to be undermined if, for some reason, a former client cannot satisfy Rule 24’s multi-faceted standard. *See CareCore Nat’l*, 542 F. Supp. 2d at 305 (permitting intervention even though former client could not satisfy Rule 24).

It should come as no surprise, then, that courts routinely allow a former client to intervene and raise a conflict of interest. *See, e.g., id.* (allowing former client to intervene); *Enzo Biochem, Inc. v. Applera Corp.*, 468 F. Supp. 2d 359, 360 (D. Conn. 2007) (same); *Snapping Shoals Elec. Membership Corp. v. RLI Ins. Corp.*, 2005 U.S. Dist. LEXIS 36776, at \*19–22 (N.D. Ga. Dec. 14, 2005) (same); *Cole Mech. Corp. v. Nat’l Grange Mut. Ins. Co.*, 2007 U.S. Dist. LEXIS 66584, at \*9–10 (S.D.N.Y. Sept. 7, 2007) (same). Although MTPP does not seek to intervene pursuant to Rule 24 in this matter, at least one federal court of appeals has even indicated that a former client automatically satisfies the standard for intervention of right under Rule 24. *In re Yarn Processing Patent Validity Litig. v. Leesona Corp.*, 530 F.2d 83, 88 (5th Cir. 1976) (“If [the former client] viewed its interests as threatened by the continued representation of [a party litigant] by [the former

client’s attorney], [the former client] could have intervened as of right under Rule 24(a) of the Federal Rules of Civil Procedure . . .”).

The regularity with which courts permit former clients to intervene is consistent with the overriding importance of a former client’s ongoing interest in conflict-free counsel. One court put it this way: a former client has a “demonstrated interest in ensuring that [an attorney’s] representation [of a party] . . . does not compromise [an] attorney-client relationship.” *Applera Corp.*, 468 F. Supp. 2d at 360. Another court concluded that a former client has a “substantial” interest in “conflict-free counsel.” *CareCore Nat’l*, 542 F. Supp. 2d at 305. These commonsense holdings underscore that if a former client cannot intervene, the client lacks the ability in real time to safeguard an attorney-client relationship.

This case acutely illustrates this danger. Defendant Peninsula Township previously sought a stay of proceedings to allow MTPP sufficient time to investigate this conflict of interest and/or move to disqualify Miller Canfield. While the Court declined to grant a stay in this matter<sup>2</sup>, were the Court now to refuse intervention by MTPP for the limited purpose of moving to disqualify Plaintiffs’ counsel, it would be virtually impossible for MTPP to protect its attorney-client relationship with Miller Canfield while this case is pending. MTPP would be relegated to collateral efforts to enforce the Michigan Rules of Professional Conduct—for example, by filing a bar complaint or pursuing separate litigation. More to the point, if MTPP cannot be heard here, Miller Canfield’s ongoing ethical duties owed to its former client will be rendered hollow for purposes of this litigation.

Should the Court decline to permit MTPP to intervene for the limited purpose of disqualifying Miller Canfield as Plaintiffs’ counsel, this court must address Miller Canfield’s

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<sup>2</sup> (ECF 342, PageID.12537-12545).

conflict *sua sponte*. Indeed, the Court need not wait for one of the parties to raise the conflict or move to disqualify. *Lamson & Sessions Co. v. Munding*, 2009 U.S. Dist. LEXIS 37197, at \*9 (N.D. Ohio May 1, 2009). "In cases where counsel is in violation of professional ethics, the court...may act *sua sponte* to disqualify." *O'Connor v. Jones*, 946 F.2d 1395, 1399 (8th Cir. 1991); accord *United States v. Coleman*, 997 F.2d 1101, 1104 (5th Cir. 1993) ("district court had the authority and duty to inquire *sua sponte* into whether counsel should not serve because of a conflict with another client"); *Preston v. Atlas Casting & Techn.*, 2008 U.S. Dist. LEXIS 97345, at \*1 (W.D. Wash. Nov. 21, 2008) ("once the Court is on notice of a potential conflict of interest, it may disqualify an attorney *sua sponte*"); *United States v. Benacquista*, 2008 U.S. Dist. LEXIS 45298, at \*3 (W.D.N.Y. June 9, 2008) (mandatory nature of ethical rule "requires that the court be able to disqualify counsel *sua sponte* when the need arises"); *Yates v. Applied Performance Techs., Inc.*, 209 F.R.D. 143, 152, 154 (S.D. Ohio 2002) (*sua sponte* disqualifying attorney due to conflict of interest); *Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1346 n.2 (S.D. Fla. 1999) (noting that plaintiff's previous counsel was disqualified by the court *sua sponte*); *In re Mount Vernon Plaza Cmty. Urban Redevelopment Corp. I*, 85 B.R. 762, 765 (Bankr. S.D. Ohio 1988) (court has "not only the right, but also the duty to insure [sic]" ethical practice as part of its "inherent power to supervise its own affairs"); *Wheat v. United States*, 486 U.S. 153, 160-161, (1988) ("Federal courts have an independent interest in ensuring that ... trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them"); *Gen. Mill Supply Co. v. SCA Servs., Inc.*, 697 F.2d 704, 712 (6th Cir. 1982) (in determining whether attorney should be disqualified "the court should *sua sponte* raise ethical problems involving danger to a just, speedy, and inexpensive remedy, even if the parties do not").

The weight of authority throughout the nation is clear; courts have an independent power and duty to root out unethical practices and may disqualify attorneys from representation to prevent ethical violations, regardless of the wishes of the parties. *Lamson*, 2009 U.S. Dist. LEXIS 37197, at \*11. Indeed, disqualification of attorneys is a power "incidental to all courts, and is necessary for the preservation of decorum, and for the respectability of the profession." *Ex Parte Burr*, 22 U.S. 529, 531, (1824). Accordingly, should this Court refuse to allow MTPP to assert Miller Canfield's conflict of interest in this matter, the Court MUST investigate and address the conflict *sua sponte*. Concurrently with the filing of this Motion, Non-Party the Michigan Township Participating Plan has outlined the extent of the conflict of interest in its Brief in Support of its Motion to Disqualify Miller Canfield as Plaintiffs' Counsel.

#### IV. CONCLUSION

MTPP's motion to intervene to assert Miller Canfield's conflict of interest should be granted. In the event that the Court should deny MTPP's Motion to Intervene for the limited purpose of disqualifying Miller Canfield as Plaintiffs' counsel, this court must address Miller Canfield's conflict *sua sponte*.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.3(B)(I)**

This Brief complies with the type-volume limitation of L. Civ. R. 7.3(b)(i) because this Brief contains 1,924 words.

/s/ David R. Schambach  
David R. Schambach

**CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2023, I filed the foregoing via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

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**CERTIFICATE OF ATTEMPT TO OBTAIN CONCURRENCE REGARDING  
MICHIGAN TOWNSHIP PARTICIPATING PLAN'S MOTION TO INTERVENE FOR  
THE LIMITED PURPOSE OF DISQUALIFYING COUNSEL FOR PLAINTIFFS**

Pursuant to Local Rule 7.1(d), undersigned counsel for the Michigan Township Participating Plan contacted Attorney Joseph Infante with Miller Canfield for the Plaintiff on Tuesday, May 16, 2023, regarding its Motion to Intervene for the Limited Purpose of Disqualifying Counsel for Plaintiffs in a good-faith effort to resolve the dispute or obtain concurrence, and was informed that this Motion is OPPOSED.



Respectfully Submitted,

/s/ David R. Schambach

David R. Schambach (P85690)

Thomas A. Basil, Jr. (P45120)

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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 23, 2023, I filed the foregoing via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ David R. Schambach

David R. Schambach