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**Issue Date: 15 October 2019**

CASE NOs.: 2015-LHC-00614  
2019-LHC-00900

OWCP NO.: 13-107706

*In the Matter of:*

**SHIRLEY BATTS (WIDOW),**  
Claimant,

v.

**BAY AREA CONTROLS, INC.,**  
**ARGONAUT INSURANCE COMPANY,**  
Employer/Carrier,

and

**DIRECTOR, OFFICE OF WORKERS'**  
**COMPENSATION PROGRAMS,**  
Party-in-Interest.

**ORDER DISQUALIFYING JOSHUA T. GILLELAN II**

These consolidated cases arise under the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* ("Longshore Act"). Attorney Joshua T. Gillelan II has appeared as co-counsel with John R. Wallace (of Brayton Purcell) for Claimant Shirley Batts and as counsel for Brayton Purcell on a fee petition the firm has pending. Mr. Gillelan's representation of these two clients raises a potential conflict of interest for him that he has failed to disclose to the clients and for which he has failed to obtain the consent of each. This violates applicable ethical requirements. Of greater concern for the present purpose is that Mr. Gillelan failed to disclose to the administrative law judge that he is not an attorney in good standing in any State, Commonwealth, or Territory of the United States, or of the District of Columbia. I therefore disqualify him from representing any client in this matter.

**Background and Procedural History**

This case initially was transmitted to this Office for adjudication of Claimant Shirley Batts' claim for death benefits under the Longshore Act, 33 U.S.C. § 909. Claimant alleged that workplace exposure to asbestos caused, contributed to, or hastened her late husband's death. She

named Bay Area Controls, Inc. as the responsible employer, and Argonaut Insurance Company was joined as Bay Area Controls' insurance carrier. The case was assigned to Judge William King under OALJ Case No. 2015-LHC-00614.

Judge King conducted a hearing, closed the record, and took the case under submission for decision. Before deciding the case on the merits, however, Judge King observed an appearance that Messrs. Brayton and Wallace and the Brayton Purcell law firm's representation of Claimant was affected by a conflict of interest. The conflict arose because, in addition to the death benefits claim under the Longshore Act, Claimant—and other clients of Brayton Purcell—had a colorable state law claim for wrongful death against various defendants other than the decedent's former employer.

Under California law, the wrongful death action would be tried with all potential heirs joined into a single action, and the state court would divide the proceeds among the various plaintiffs. After receiving advice from Brayton Purcell, Claimant did not pursue the state wrongful death claim. This had the effect of depriving her of any benefit she might receive in that litigation while increasing the recovery of the other wrongful death plaintiffs who would not have to share the proceeds of the litigation with the decedent's widow, Shirley Batts. Brayton Purcell's advice thus appears to disfavor Claimant and to favor the other clients, which would reflect a conflict of interest. Judge King required Brayton Purcell to submit certain documents related to the third-party state court wrongful death cases.

With the conflict issue pending, Judge King decided the case on the merits and awarded benefits to Claimant on February 24, 2017. Judge King, however, held in abeyance any consideration of an award to Brayton Purcell under the statute's fee shifting provision, 33 U.S.C. § 928. He held that, before awarding fees, he must determine whether Claimant's counsel's representation of Claimant was under a conflict of interest that counsel failed to disclose and to which Claimant never gave fully informed (or any) consent. Judge King left OALJ without deciding the conflict issue.

After the case was reassigned to me, I required Brayton Purcell to submit further documentation and information relevant to the conflict of interest. I also allowed briefing. My plan was to decide the conflict question and then determine the fees owed Brayton Purcell in the light of any established conflict of interest.

The fee litigation took a turn, however, when Employer/Carrier filed a petition for modification of Judge King's February 24, 2017, decision and order under section 22 of the Longshore Act, 33 U.S.C. § 922. Employer/Carrier alleged a mistake in a determination of fact in Judge King's compensation order. As Employer/Carrier was still paying benefits to Claimant, the request for modification was timely.

Employer/Carrier asserts in the section 22 modification proceeding that, when all relevant facts are considered, under the applicable statutory regime, the settlement of the third-party wrongful death claims without notice to or the approval of the Employer and the Carrier bars Claimant from receiving any benefits under the Longshore Act, citing 33 U.S.C. § 933(g)(2). The

modification was docketed as OALJ No. 2019-LHC-00900, and the two cases were consolidated for all purposes.

Employer/Carrier moved to defer any decision on Brayton Purcell's fee petition until the conclusion of the section 22 proceeding. Were Employer/Carrier to prevail on the section 22 petition, I would vacate Judge King's compensation order and find that Claimant was entitled to no benefits. In my view, that could—and likely would—have a significant impact on the amount of fees I would award irrespective of any conflict of interest. I therefore denied Brayton Purcell's fee petition without prejudice until I could decide the section 22 petition.

At this point, attorney Joshua T. Gillelan, II filed an appearance as co-counsel in the section 22 modification proceeding as a counsel for Brayton Purcell on its fee petition.<sup>1</sup> It appeared to me that Mr. Gillelan had a potential conflict of interest in the representation of these two clients. If I find on the fee petition that Brayton Purcell was representing Claimant under an undisclosed conflict of interest, Mr. Gillelan would have to advise Claimant whether to file a malpractice action against Brayton Purcell and its involved attorneys based on any greater recovery she might have achieved had she pursued both the Longshore Act claim and the state wrongful death claims. Mr. Gillelan would have to advise Claimant whether to file a state bar charge against these same attorneys. Finally, under California law, the other plaintiffs in the wrongful death claim had a fiduciary duty to all other known eligible heirs to make efforts to join them in the litigation.<sup>2</sup> Mr. Gillelan would have to advise Claimant whether to sue these other wrongful death plaintiffs for breach of fiduciary duty. The conflict would arise because, under California law, those plaintiffs likely have a malpractice action against Brayton Purcell for not advising them of their obligation as a fiduciary to join the widow, Shirley Batts, in the wrongful death case.<sup>3</sup> Each of these involves advising one client on possible claims against another client or interests adverse to the other. They each pose a potential conflict of interest.

OALJ's Rules of Practice and Procedure require attorney representatives to "adhere to the applicable rules of conduct for the jurisdiction(s) in which the attorney is admitted to practice." 29 C.F.R. § 18.22(c). Hence, it became necessary to determine where Mr. Gillelan was admitted to practice. OALJ's rules also require an attorney to identify his or her "license registration number(s)" when filing a notice of appearance. 29 C.F.R. § 18.22(a). Mr. Gillelan had not done that; he thereby also did not disclose where he was licensed.

Mr. Gillelan's office address is in the District of Columbia, but the DC bar does not list Mr. Gillelan as admitted in that jurisdiction. Mr. Gillelan is, however, listed as an attorney admitted in Maryland. The online public records of the Maryland State Bar<sup>4</sup> list Mr. Gillelan as being

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<sup>1</sup> Mr. Gillelan's characterization of his appearance as somehow limited neglects that the entire matter is consolidated into a single action because the fees depend on the result of the modification. See 29 C.F.R. § 18.43 (ALJ may consolidate separate proceedings that involve a common question of law or fact). Moreover, Mr. Gillelan has listed all of the pending issues on both cases as the matters on which he is representing one client or the other.

<sup>2</sup> This would include joining them as a defendant if the other heirs were not willing to join voluntarily. The state court would then treat these other heirs as plaintiffs. See *Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 807-08 (1997).

<sup>3</sup> *Hall v. Superior Court*, 108 Cal. App. 4th 706, 715 (2003);

<sup>4</sup> It can be found here: <https://mdcourts.gov/lawyers/attylist>

admitted on December 13, 1973, with attorney number 7312010111. His status is listed as “Suspended – Administrative.” A printed copy of this listing, current as of October 15, 2019, is attached to this order.<sup>5</sup>

In an order issued on September 18, 2019, I recited the facts concerning both the potential conflict of interest and the status of Mr. Gillelan’s standing as an attorney. I ordered Mr. Gillelan to state whether he had disclosed the potential conflict to both clients, whether he did so in writing, whether each client waived or consented to the conflict, whether that was in writing, and the date each occurred. I also required Mr. Gillelan to identify the state(s) in which he is admitted and in good standing, the states where he has been admitted but is not in good standing, and the relevant dates.

On October 1, 2019, Mr. Gillelan requested a 1-day extension of time to answer the order to show cause and assured me that he would comply with the order. I granted the extension, and Mr. Gillelan timely filed an answer on October 2, 2019. His answer, however, was unsatisfactory.

First, while admitting that he had not disclosed the potential conflict of interest, Mr. Gillelan argued that there is no conflict because the third-party wrongful death cases no longer were in litigation. He added that he has not taken any action in drafting or revising pleadings since his notice of appearance. Neither of these cures the conflicts described above.

As to his standing as an attorney, Mr. Gillelan represents that “so far as he is aware” he is in good standing in Maryland and “is not aware of the circumstances underlying” the records reflecting his suspension, but will have to look further into the problem. That, of course, does not respond fully to the question I asked in the order to show cause. Mr. Gillelan does not represent that he reviewed the online record, called the appropriate Maryland authorities, or took any other action to determine whether the online record was correct. He does not expressly deny that he was administratively suspended in Maryland, nor does he assert that he recalls the Court of Appeals of Maryland restoring his good standing.

Finally, Mr. Gillelan stated essentially that none of this matters because he will move to withdraw from the representation of both Brayton Purcell and of Claimant in this matter “within one week of this Response.” He stated that both clients had consented orally to the withdrawal and that he was waiting to receive written confirmation. The one week that Mr. Gillelan set to file the withdrawal ended on October 9, 2019. But, as I write this on October 15, 2019, Mr. Gillelan has not moved to withdraw. Nor has he provided any additional information about his licensing status.

To confirm the accuracy of the Maryland Bar’s public online records, my staff contacted the clerk’s office of the Court of Appeals of Maryland (the highest court of Maryland). That Court administers state bar admission, licensure, and discipline. The clerk’s office confirmed that, according to its records, Mr. Gillelan was suspended from the practice of law in Maryland in

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<sup>5</sup> It can also be found here: <https://mdcourts.gov/cgi-bin/cstf.pl?inputname=Gillelan&firstname=&submit=Submit>

1990—29 years ago. At my request, the clerk provided a copy of its order, dated May 1, 1990. A copy of that order is attached.

In the order, the Court finds that a number of listed attorneys failed to pay the annual assessments to the Clients' Security Trust Fund, that they had been given notice of their default and their potential suspension, and that no sufficient cause had been shown why they should not be suspended. The Court orders "that in accordance with Maryland Rule 1228 g 2, the following attorneys be, and they are hereby, prohibited from the further practice of law in the State of Maryland." Mr. Gillelan is listed on page 4 of the order.<sup>6</sup>

### Discussion

*Conflict of Interest.* The Maryland Attorneys' Rules of Professional Conduct provide that "an attorney shall not represent a client if the representation involves a conflict of interest." Conflicts of interest exist where "the representation of one client will be directly adverse to another client" or where "there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the attorney." Md. Attorneys' Rules of Prof. Conduct 19-301.7(a) (Gen'l Rule 1.7(a)). An attorney may represent a client despite a conflict of interest when the attorney believes he or she can provide competent and diligent representation to each, the representation is not otherwise prohibited by law, there is no assertion of a claim of one client against another, and "each affected client gives informed consent, confirmed in writing." *Id.* 19-301.7(b) (Gen'l Rule 1.7(b)).

Mr. Gillelan is mistaken about the potential conflict presented in this matter. For the reasons recited above, there is a significant risk that the representation of Claimant will be materially limited by Mr. Gillelan's responsibilities to Brayton Purcell or vice-versa. Mr. Gillelan has a potential conflict of interest and, if he is to represent these clients, he must disclose the conflict and receive "informed consent, confirmed in writing." *Id.*

Mr. Gillelan admits that he has not disclosed any conflicts or received any consents. His representation therefore has been and is unethical because he has an undisclosed conflict to which none of the clients has agreed. *See* Maryland Attorneys' Rules of Prof. Conduct 19-301.7 (Gen'l Rule 1.7). This could be a basis, standing alone, to disqualify Mr. Gillelan.<sup>7</sup> But the more pressing concern is Mr. Gillelan's lack of good standing in the Maryland bar.

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<sup>6</sup> Although page 2 of the order was unavailable in the Court of Appeals of Maryland's records, that page contains nothing other than the names of some of the attorneys being prohibited to practice law. The entire substance of the order is found on pages 1, 7, and 8. Mr. Gillelan is included on page 4 among the attorneys being suspended.

<sup>7</sup> Mr. Gillelan's assertion that he has had not been substantively involved in the case is (1) irrelevant, and (2) seemingly incorrect. Mr. Gillelan has the conflict of interest regardless of whether he has yet given any of the clients substantive advice or submitted any papers. The ethical duties apply when undertaking the simultaneous representation, which, as reflected in his appearance, Mr. Gillelan has done. Second, Mr. Gillelan's name appeared on the signature page along with Mr. Wallace's on both a motion for summary decision in the modification proceeding and a motion for reconsideration of an order denying Brayton Purcell's fee petition without prejudice, both filed on August 2, 2019. This indicates involvement in the case.

*Lack of good standing.* Under the applicable procedural regulations, an attorney<sup>8</sup> in good standing may represent a party before OALJ. 29 C.F.R. § 18.22(b)(1)(i).

[Filing a notice of appearance] constitutes an attestation that: (A) The attorney is a member of a bar in good standing of the highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia where the attorney has been licensed to practice law; and (B) No disciplinary proceeding is pending against the attorney in any jurisdiction where the attorney is licensed to practice law.

*Id.* An attorney who is not in good standing may not represent a party at OALJ absent approval from the presiding judge, and an attorney must “promptly disclose to the judge any action suspending, enjoining, restraining, disbaring, or otherwise currently restricting the attorney in the practice of law in any jurisdiction where the attorney is licensed to practice law.” 29 C.F.R. § 18.22(b)(1)(ii)-(iii).

Apart from his admission in Maryland, Mr. Gillelan did not state or suggest that he was admitted in any state, territory, or commonwealth of the United States or the District of Columbia. Whatever Mr. Gillelan might believe, the records of the Court of Appeals of Maryland show that the Court prohibited Mr. Gillelan from practicing law in that State on May 1, 1990. The Court has no record of any later action affecting Mr. Gillelan’s suspension. The Court’s online record is consistent with this; it too shows Mr. Gillelan’s status as “suspended.” Mr. Gillelan’s statement that “so far as [he is] aware,” he is a member of the Maryland bar does not refute the Court records as the Court clerk has confirmed them. I issued the order to show cause on September 18, 2019. That order should have prompted Mr. Gillelan to look into any error in the Court’s records. The order to show cause was served by email and thus was readily accessible on the day it issued. Mr. Gillelan has had a month to correct any error and has submitted nothing. He has not even met the deadline that he set for withdrawing from the case voluntarily.

*Disqualification.* An ALJ has a duty and responsibility to ensure that representatives appearing before this Office adhere to the applicable rules of conduct. *See* 29 C.F.R. §§ 18.12(b), 18.22(c). An ALJ has the authority to disqualify counsel for unethical conduct. *Baroumes v. Eagle Marine Servs.*, 23 BRBS 80, 83 (1989). When an ALJ receives an indication that there may be a conflict of interest for an attorney appearing on a case, there is an affirmative duty to inquire and take appropriate action. *Smiley v. Dir., OWCP*, 984 F.2d 278, 283 (9th Cir. 1993). An attorney who is not in good standing may not appear before OALJ unless he files a written statement establishing why the failure to maintain good standing is not disqualifying and the ALJ approves of the representation. 29 C.F.R. § 18.22(b)(1)(ii).

Mr. Gillelan’s concurrent representation of Claimant and Brayton Purcell represents a conflict of interest under the applicable rules of conduct. Mr. Gillelan acknowledges that he did not disclose any conflict to his clients or receive written waivers. But I need not address whether

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<sup>8</sup> An “attorney” is a person “admitted to the bar of the highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia.” 29 C.F.R. § 18.22(b)(1).

disqualification is the correct remedy to address the conflict of interest because I disqualify Mr. Gillelan based solely on his lack of good standing as an attorney.

By filing a notice of appearance, Mr. Gillelan attested that he was in good standing. 29 C.F.R. § 18.22(b)(1)(i). The attestation was without foundation. To the contrary, I can only conclude that Mr. Gillelan is not in good standing in any State, Territory, or Commonwealth of the United States or in the District of Columbia. The Court of Appeals of Maryland states that Mr. Gillelan is suspended from the practice of law and has been suspended since May 1, 1990. It has supplied a confirming copy of its order. Mr. Gillelan has provided no clarification and has made no showing of an error. He has not filed a written statement establishing why his lack of good standing is not disqualifying. For these reasons, Mr. Gillelan must be disqualified from further representation of any party in this proceeding.

*Notice to Courts and Adjudicative Agencies.* Mr. Gillelan states that he is a member of the bar of “the United States Supreme Court and of the United States Court of Appeals for all Circuits except the Tenth and Federal Circuits and either the Fifth or Eleventh Circuit.”<sup>9</sup> Membership in the bars of these Courts is contingent on maintaining good standing as a licensed attorney in the bar of a State, Commonwealth, Territory, or the District of Columbia. *See* Sup. Ct. R. 5; Fed. R. App. P. 46(a)(1). Attorneys who are suspended or disbarred from practice in one jurisdiction are subject to suspension and disbarment in these Courts. Sup. Ct. R. 8; Fed. R. App. P. 46(b)(1); *see also, e.g.*, 9th Cir. R. 46-2(c). Practice before the Benefits Review Board also turns on and is impacted by maintaining good standing as a member of the bar in a State, Commonwealth, Territory, or the District of Columbia (or the federal courts, which in turn are premised on such membership). *See* 20 C.F.R. § 802.202(d)(1), (e)(1). I will notify these Courts and the Department of Labor’s Benefits Review Board.

I will also provide a copy of this order, with attachments and appropriate cover to: 1) the Chief Administrative Law Judge for consideration of whether to institute proceedings for disqualification from all practice before the Office of Administrative Law Judges under 29 C.F.R. § 18.23(a) on the basis of 29 C.F.R. § 18.23(a)(1)(i); the Maryland Court of Appeals; and ethics counsel at the Office of the Solicitor of Labor, U.S. Department of Labor (where Mr.

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<sup>9</sup> Membership in the bar of these Courts, absent membership in the bar of a State, Commonwealth, Territory, or the District of Columbia, does not permit an attorney to practice before OALJ.

Gillelan was in active practice for many years after May 1, 1990, when he was suspended from practice).

Order

1. Joshua T. Gillelan II is disqualified from further representation of any party in this proceeding.
2. A copy of this order will be provided to the Courts and agencies specified above.

This Order will be served on Mr. Gillelan, Claimant's counsel, and Employer/Carrier's counsel by email or facsimile (and by U.S. mail). All other service is by U.S. mail.

SO ORDERED.

STEVEN B. BERLIN  
Administrative Law Judge



## SERVICE SHEET

Case Name: **BATTS\_JAMES\_W\_v\_BAY\_AREA\_CONTROLS\_IN\_**

Case Numbers: **2015LHC00614, 2019LHC00900**

Document Title: **ORDER DISQUALIFYING JOSHUA T. GILLELAN II**

I hereby certify that a copy of the above-referenced document was sent to the following this 15th day of October, 2019:

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IN THE MATTER OF THE  
CLIENTS' SECURITY TRUST  
FUND OF MARYLAND

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In the  
Court of Appeals  
of Maryland

O R D E R

The Trustees of the Clients' Security Trust Fund of the Bar of Maryland having certified to the Clerk of the Court of Appeals of Maryland that the attorneys listed in this Order are in default in payment of annual assessments, and notice having been given by the Clerk pursuant to Maryland Rule 1228 g 1 that the Court of Appeals of Maryland will pass an Order prohibiting the said attorneys from the further practice of law in the State of Maryland unless cause to the contrary be shown, and no sufficient cause to the contrary having been shown, it is this 1st day of May, 1990

ORDERED, by the Court of Appeals of Maryland, that in accordance with Maryland Rule 1228 g 2, the following attorneys be, and they are hereby, prohibited from the further practice of law in the State of Maryland:

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and it is further

ORDERED that the Clerk of this Court shall notify  
the clerks of the Court of Special Appeals, the several Circuit



Courts of the counties and Baltimore City and the Chief Clerk  
of the District Court.

/s/ Robert C. Murphy

/s/ John C. Eldridge

/s/ Harry A. Cole

/s/ Lawrence F. Rodowsky

/s/ John F. McAuliffe

/s/ William H. Adkins II

/s/ Howard S. Chasanow

Filed: May 1, 1990

/s/ Alexander L. Cummings  
Clerk  
Court of Appeals of Maryland



# Maryland Attorney Listing

Last Name starts with : **GILLELAN**

Tue Oct 15 16:06:29 EDT 2019

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ATTY#/ACCT#	NAME	ADDRESS	CITY	ST	ZIP	PHONE	ADMIT	STATUS
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