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Memorandum

To: Eddie Roth
From: Paul Merrell
CC: Gerson Smoger
Date: December 14, 1993
Subject: Notes on Coburn Croft's disqualification response

Bottom page one: C&C admit helping to assist Dr. Gaffey to retain substitute counsel. That's improper. When they learned they had a conflict of interest, their obligation was to stop assisting the plaintiff whatsoever.

Page 2, two-thirds way down. They say we have to have a "proven" conflict of interest, not a supposition. So, isn't that what we've got? And my affidavit quotes the MPC standard. Wolfram has a good discussion of why the appearance of conflict standard was dropped, cites an 8th Cir. decision.

Over-all: Their argument is constructed on rules that apply to former client/different matter, rather than present client/same matter. See their argument on withdrawal of Evans & Dixon.

Pg. 3: Would be good to have a case saying that adversariness can be demonstrated even if the present client is a non-party. I suspect this has come up on subpoena matters before. Even without, analogize to their disqualification of Evans & Dixon. If it's adverse there, it's adverse

here. As authority you can cite "what's sauce for the goose is sauce for the gander." See also discussion below, pointing out that conflict is more severe for C&C than for Evans & Dixon.

Pg. 4: The quote from Medicine Shoppe seems to support us, not them: "an adversary of the movant party in the pendent suit." Exactly who are they seeking relief against, if not against the defendants.

Pg. 5: Note statement that "different ethical considerations apply to conflicts of interest involving current clients than those applicable to conflicts involving former clients." Peter has never relieved Mr. Wray of his obligation to represent him. The Court signed an order allowing Mr. Wray to withdraw, but there was no motion requesting that relief for Peter to respond to and no hearing was set for him to contest it, as I believe is required for attorney withdrawals without the consent of the client. At least arguably, we're in a current client situation.

Pg. 6: The amazing last sentence before heading III. "Lawyers can unilaterally withdraw from representing clients even if there's no conflict of interest if someone else will pay them more money," is what the sentence really says.

Pg. 6, second word under heading III. They concede that representing Monsanto on a subpoena constitutes a "matter" for purposes of the disqualification rules. The statement begs the question of who is their "adversary" in that "matter."

Pp. 7-9: They are avoiding the point: Mr. Wray learned of Peter's litigation budget, not his net worth. Litigation budgets are not necessarily related, and depend on things like insurance coverage, availability of pro bono legal services, contributions from others, etc. Coburn

& Croft have that information through hiring Mr. Wray, and their concession that Monsanto frequently does not charge for copying discovery documents raises the spectre that Mr. Wray's knowledge is being used offensively against his client Mr. Montague.

Pg. 9: Note the date of the Ken Heineman memo (November 17) in relation to the subpoena and when we advised Heineman of our concerns over conflict (Nov. 12) (I could do affidavit to that effect). The "Chinese wall" was not built until well after we raised objections. Also, note that Wray's affidavit mentions conversations about this case with C&C lawyers now working on this case dating back to April of 1992. Specifically, he mentions that the subject matter of the conflicts was discussed as early as spring, 1992. Whatever the C&C lawyers presently working on this case learned from Mr. Wray in 1992 was sufficient to cause them to recognize a conflict of interest then. The knowledge Mr. Wray imparted to those same lawyers then is still with them today. This is an amazing admission of sharing client confidences creating a conflict. Presumably, C&C has known since they brought this suit on behalf of Mr. Gaffey that Monsanto would have to be a target of discovery by both plaintiff and defendants, and that C&C would likely be selected by Monsanto to defend against that discovery.¹ Certainly, where a firm waits over a year and a half to build its "Chinese wall," it has waited too long:

"Plainly, even if screening were otherwise acceptable, a screen thrown up late, and only after a motion to disqualify is filed

1. See Heineman memo at pg. 7, para. 7 ("Monsanto Company is a very important client for us and . . . over the years we have built up a mutual respect for and reliance on each other. Monsanto depends on us to represent it in matters such as this") (emphases added).

against the firm, evidences a serious lack of resolve and hardly assures properly skeptical courts that contaminating influences and communications have not already occurred. The very few decisions that have recognized screens as exceptions to the imputed-disqualification rule have done so only if the screen surrounded the primarily disqualified lawyer from a very early point in his or her contact with the firm and if the screen contained rather elaborate checks designed to ensure against impermissible contacts between the disqualified lawyer and lawyers in the firm working on the matter."

C. Wolfram, Modern Legal Ethics (1986), Sect. 7.6, pg. 402, citing Armstrong v. McAlpin, 625 F.2d 433 (2nd Cir. 1980 (en banc), vacated for lack of jurisdiction 449 U.S. 1106, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981); Keselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977) (per curiam).

Professor Wolfram also makes the point that an integral part of the Chinese Wall ignored in our case is that the firm erecting the wall must convince the court that the disqualified lawyer will not share in the firm profits from the conflicting representation and that the "Chinese wall" exception to the imputed disqualification rule is strictly for the benefit of former government lawyers entering private practice who have a conflict with the interests of their former government employers. *Id.*, pp. 401-403. Defendants have a right to insist on loyalty from Mr. Wray and those in the firm with which he is associated. Certainly they have a right to expect him not to profit from switching sides.

Pg. 10: Mention of Donald Wray's affidavit saying he has not divulged any of defendants' confidences. What is a "confidence" is an ultimate legal conclusion that the affiant is not competent to testify to. What was needed, even were we to concede their legal theory, was forthright disclosure of precisely what was said. Instead, we have only a conclusory claim.

Pp. 10-11: I doubt if Laker Airways applies to same matter-

present client conflicts.

Heineman memo, pg. 2, para. 1: He admits that Wray is "disqualified from working on this matter." Why, if they are not representing an adversary of the defendants? Rule on same matter-present client conflicts is that if any attorney in the firm is disqualified, so are they all.

Heineman memo, pg. 2, para. 2: Compare list of names of lawyers who will be working on this case to: [i] Wray's list of names of lawyers he discussed "conflict" with in 1992 and 1993, and [ii] list of attorneys who worked for Mr. Gaffey. Need we go any further?

Wray affidavit, pg. 1: Note statement in para. 5, "I have had several discussions with members of the firm concerning my prior representation of Peter Montague . . ." Never says he discussed all such conversations in his affidavit. Certainly doesn't disclose their substance, but only makes conclusory claims.

Wray affidavit, pg. 2, para. 7: Note description of conversations and admission that it included "the existence of a conflict of interest." Presumably, the existence of a conflict of interest is determined by discussion of specific facts, which would include client confidences.

We should do some screaming about all the expense to our clients caused by withdrawal of Evans & Dixon, delay of discovery and trial, briefing of frivolous objections to disqualification. This would help offset their claims about how much expense their present clients will have if they withdraw, and who's really to blame? Presumably, they will bill present clients for work already done and their clients will have to pay another law firm to reinvent the wheel.

Gerson disagrees, but I don't think Evans & Dixon was necessarily

required to withdraw. The preamble of Rule 1.7(b) states that the rule is triggered only "if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . ." There is no showing that Evans & Dixon's concurrent representation of Monsanto on worker comp defense cases would limit their representation of defendants at all. Monsanto raises only the issue of undivided loyalty. One might better ask how it happens that Monsanto came to throw Evans & Dixon, a large St. Louis law firm, the pittance of defending a few worker comp cases.

"Concern has been expressed that a strict unrelated-suit conflict rule might permit a large corporate enterprise to spread its legal business among several of the best firms in a community and thus prevent any of them from suing the corporation. One response might be a rule that makes an exception for such anticipatory defensive behavior if it is shown."

C. Wolfram. Modern Legal Ethics (1986), Sect. 7.3.2, pg. 352, citing McCourt Co. v. FPC Properties, Inc., 386 Mass. 145, 434 N.E.2d 1234, 1238 (1982). It's probably an upstream swim to win, and I'd agree it's not worth it; it might, however, be authority worth citing to bolster our argument that Monsanto was stretching the limits to insist on Evans and Dixon's withdrawal. Certainly it strengthens our argument that Evans and Dixon was in a better position to continue representing defendants than Coburn & Croft is to continue representing Monsanto. There can be no claim that Peter Montague and E.R.F. are a large corporate interest that has spread its legal business around in order to preemptively disqualify anyone who sues them locally, which is what it would take to allow Coburn & Croft to stay on the case even if it were a "different matter" conflict. (It assuredly is not.) Furthermore, the situation certainly demonstrates the questionable nature of Coburn & Croft's concern that relative expense to

clients should be the governing issue. The relative expense to the defendants has been far greater. Defendants have lost the law firm that defended them in this case for some two years. They've been forced to hire new attorneys to start from scratch. From a firm trial date with a discovery schedule, they've been plummeted into a procedural limbo. And, last but not least, they've been forced into the unjustifiable expense of motion practice to disqualify a law firm presently employing defendants' lawyer who worked on this case, not on unrelated worker comp. defense, a law firm doing its level best to deny defendants needed discovery and to charge them fees and costs for documents Monsanto admits it would not charge another multinational corporation in litigation.
