IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MARIELLE ("MOLLY") KRONBERG, Plaintiff, -v- LYNDON LAROUCHE, BARBARA BOYD, EIR NEWS SERVICE, INC., and LYNDON LAROUCHE POLITICAL ACTION COMMITTEE, Defendants.	Civil No. 1:09-cv-00947-AJT-TRJ

PLAINTIFF MOLLY KRONBERG'S RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF RE THE DISQUALIFICATION MOTION

The post-hearing supplemental brief ("Supp Br") submitted by defendants (Docket No. 36) is not persuasive, even though it morphed to a discussion of five cases from its initial billing as concerning only the case of *Tucker v. George*, 569 F.Supp 2d 834 (W.D. Wis. 2008). We start with *Tucker* and highlight the facts wherein *Tucker* differs from the present case, which involve (1) a specific finding that the previous public attorneys (there were two) had learned facts while public officials that could be used in the subsequent case; (2) a distinct closeness of time between the public and private service involved, as compared to the 21 years separating public service from the present matter in attorney Markham's case; (3) the fact that in *Tucker* the public entity objected to the former public attorneys' private law firm participating; and (4) the fact that in *Tucker*, the parties being sued by the firm of the former public employees were actually being represented by the State government from whence had come the former public attorneys. The

issues thus presented also involved the successive representation rule where, after once representing a client, an attorney goes on to represent another either against that first client, or in a substantially related matter – an issue and test not involved in Markham's case.

Plaintiff Delilah Tucker was a women who had worked starting in 2002 for defendant and former State Representative George (and his co-defendant, chief of staff Rossmiller), and while working for the two state officials, had complained about "various workplace practices that she perceived as illegal, such as being required to handle personal, campaign, and family related business for [defendant] George during state paid time." *Tucker*, *supra*, 569 F.Supp.2d at 836. Thereafter, in November 2003, a state investigation was ordered of George on the same charges and State Attorney General Lautenschlager and her Deputy, attorney Bach, both "participated" in that investigation "and were privy to privileged information about George." *Id.* at 836.

While it is unclear how long that investigation continued after being commenced in late 2003, the two States' Attorneys involved with it left the Attorney General's Office in 2007 and joined the private law firm which, as it happened, that same year filed a civil suit on behalf of the former state employee, Tucker, who claimed that George and Rossmiller, as state officials, had "retaliated against plaintiff after she had complained about" (*Id.*) the very workplace practices that were the subject of the Attorney General's investigation. Another attorney was involved in Tucker's case, not the two former States' Attorneys. However, the law firm failed to set up at the firm a screening device as was specifically required in these circumstances by Wisconsin's ethics rules.

In *Tucker*, the district judge noted that the Attorney General's Office, representing one of the defendants and responding by letter to a subpoena issued in the case by the law firm representing the plaintiff (that law firm being the one employing the two just-transferred States'

Attorneys), had noted the involvement of the two former States' Attorneys in the prior public investigation. *Id.* at 836. We attach that letter (which is found in the file of the case) in which the Attorney General tells the offending law firm:

> You [the lawyer from the law firm handling the case] have apparently concluded that the current Attorney General and/or the Department of Justice are potential third-party witnesses in your civil case, which means that a certain level of adversity exists between your client [plaintiff Tucker] and mine [the state]. It also suggests that the former prosecutorial activities of this office are a "substantially related matter" to your civil action. As such, SCR 20:1.9 would not permit Mr. Bach or Ms. Lautenschlager to represent Tucker in this case and, under SCR 20.1.10, the disqualification is imputed to all members of your firm.

Letter Attached hereto. The letter also mentions the public-to-private rule.

Defendant George moved to disqualify the law firm under the Wisconsin equivalent of both Virginia's 1.11(b) (appearing in the same matter without the consent of the government), *Tucker*, *supra*, at 838, and Virginia's 1.11(c) (appearing when attorney has confidential information that could be used to the material disadvantage of the moving party). (*Id.*) Without deciding whether Wisconsin's version of section (b) (the same matter) was violated, the district judge considered the record, including the discovery relating to the subpoena triggering the disqualification issue, the objections, and the responses, and found substantively that Wisconsin's version of section (c) was violated because "I am satisfied that from [Attorney General] Mean's letter and the objections to the subpoena that Lautenschlauger and Bach *have confidential information about George that could be used to his disadvantage in this lawsuit*." *Id.*, at 839.

The court then found that the law firm of the two disqualified lawyers had not followed the screening requirements applicable under Wisconsin's Ethics Rules under these circumstances and thus, even if no knowledge had been shown to have passed from the two former prosecutors to the lawyer at the firm actually handling the case, there was

nonetheless a screening violation warranting disqualification. It mattered not, the court reasoned, whether any information had leached through the failed screening requirements mandated by the ethics rule. *Per se* disqualification was required because "allowing [the firm] to remain would be to effectively write the screening requirements out of Rule 20.1.11 and send a message to attorney's (sic) practicing in this court that the court does not take the Rules of Professional Conduct seriously." *Tucker*, *supra*, 569 F.Supp.2d at 841.

Tucker is plainly not our case. Our case involves no screening requirement like the one violated in *Tucker*, the violation causing the disqualification. There was also not, in *Tucker*, the 21 years separating the cases. Instead, there was a much lesser separation in time and a specific finding by the district judge that confidential information was known by the former prosecutors that would in fact disadvantage the defendant. Moreover, the State Attorney General had asserted independently why that disqualification was appropriate.

The applicable wording under Rule 1.11(c) disqualifies a lawyer "having confidential information that the lawyer knows is confidential government information about a person . . . in a matter in which the information could be used to the material disadvantage of that person." This does not operate as some sort of *per se* rule, such as the screening requirement violated in *Tucker*. No case cited by defendants so holds. Try as they might, defendants, with their extensive knowledge of the 1988 case—even down to having retained in the present case the lead defense counsel from that 1988 case—cannot come up with any specific matter or information, which, 21 years later, is still both confidential and known to Markham and which they can credibly argue Markham

could use to their material disadvantage. This is a far cry from the finding of fact in *Tucker,* "that Lautenschlauger and Bach *have* confidential information about George that could be used to his disadvantage in this lawsuit." *Id.* at 839 (emphasis added); *see also,* Comment 8 to Rule 1.11, which states "Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer."

The other four cases cited by defendants in their Supplemental Brief are not about former government employees. Rather, they concern the ethics rule prohibiting representation of a subsequent client in a matter substantially related to a matter in which that same lawyer (or firm) had previously represented another client, without first obtaining the client's permission. The rules on successive representation are worded quite differently than those at issue in our case.

In *Smith & Nephew, Inc. v. Ethicon,* Inc. 98 F.Supp.2d 106, 109 (D.Mass. 2000) (Supp Br, p. 3), disqualification was based on Rule 1.7, the general conflict-of-interest rule, and on Rule 1.9, Conflict of Interest: Former Client, the latter of which provides:

> (a) 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 consents after consultation.*

In *Smith,* the lawyer's firm was disqualified from representing the plaintiff because 15 years earlier he had drafted the very contract for defendants at issue in the present case where his firm represented plaintiff suing on the contract. The former representation of defendants (drafting the contracts being sued on) barred the attorney's law firm in order to protect client confidences, despite the attorney's *claim* that he had no memory of any relevant confidential information. The district court specifically pointed out quite particular knowledge that the attorney still possessed that would prove damaging to his former client (involving the meaning of a "self-activated

surgical staple," a term not fully integrated in the contract and the meaning of which the court termed "hotly contested" between the parties), among other matters, and indeed found that he might have to be a witness, although his knowledge of his former client's intent in using the term rather than his testimony was the damning point. *Id.*, at 110.

In *Schwed v. General Elec. Co.*, 990 F.Supp. 113, 115, 116 (N.D.N.Y. 1998) (Supp Br, p. 4), the court disqualified a firm from representing plaintiffs (in a class action) suing General Electric ("GE") on discrimination claims since that firm had, three times previously, represented GE, defending similar claims, some from the same production unit, and at least one other class action. Under New York's successive representation rule, the switching of sides was obviously barred. The rules are not those involved in this case and *Schwed* is of no assistance.

The successive representation issue was likewise presented in *Fierro v. Gallucci*, 2007 WL 4287707, 5 (E.D.N.Y. 2007) (Supp. Br, p. 4), the court discussed NY DR 5-108:

> The Second Circuit has held that an attorney may be disqualified under Disciplinary Rule 5-108 if:
>
> (1) the moving party is a former client of the adverse party's counsel;
>
> (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and
>
> (3) the attorney whose disqualification is sought *had access to, or was likely to have had access to*, relevant privileged information in the course of his prior representation of the client.

(Emphasis added) Applying the rule, the court disqualified defendant's counsel even though all accepted that he could not remember any information he had learned from his former client – he had access to information from their conversations and that alone sufficed. *Accord, Arifi v. de Transport du Cocher, Inc.*, 290 F.Supp.2d 344, 348 -349 (E.D.N.Y. 2003) (Supp Br., p. 4), applying the same, three-pronged test. The underscored portion of the New York DR 5-108

requires *no* showing that (1) the lawyer remembered information that remained confidential and (2) that could be used it to the material disadvantage of the other party, as does Virginia's Rule 1.11(c).

CONCLUSION

The motion to disqualify should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing (NEF) to the following:

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