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 BRIEF IN SUPPORT OF HER MOTION TO RECONSIDER, OR TO CERTIFY FOR INTERLOCUTORY APPEAL, THE ORDER DISQUALIFYING ATTORNEY JOHN MARKHAM

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I. INTRODUCTION

We will not here reiterate the arguments previously submitted. We do, however, advance and discuss the specific basis on which we seek reconsideration. As to timing, "an interlocutory order is subject to reconsideration at any time prior to the entry of a final judgment." *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991), citing Rule 54(b) *Fed. R. Civ. Pro.*

Alternatively, we seek certification of the disqualification question for interlocutory appeal.

II. RECONSIDERATION

The wording of Rule 1.11(c) of the *Virginia Rules of Professional Conduct* (the "Rule") is quite specific and quite clearly worded in the present tense. Molly Kronberg should suffer the substantial hardship of Markham's disqualification only if he is a lawyer "*having knowledge that* . . . [he] *knows* is confidential government information" and that "could be used to the material disadvantage of" defendant LaRouche. Markham has no such knowledge.

Based upon the arguments of defendants, this Court disqualified Markham because "Markham's *access* to confidential government information could materially disadvantage one or more of the defendants." Opinion, p. 10. (Emphasis supplied) Yet the Rule disqualifies only an attorney "having knowledge that he knows is confidential," not one "having had access to" information, particularly when that access to information occurred over two decades ago. The substitution of "access to" for actual knowledge requires acceptance of the argument that the attorney *may* remember information again someday, and requires that, as remembered, it *may* be useful to Kronberg, it *may* be something the defense does not also know, and it *may* be

materially disadvantageous to the defense. This heaps speculation upon speculation in a fashion that is nowhere found in or suggested by the Rule's wording.

In our post-argument submission to this Court (Doc. No. 37), we addressed the cases submitted by defendants in their post-argument submission (Doc. No. 36). These cases really tell the tale here. With one exception, they involved private attorneys switching side, where the prohibition is not at all dependent on what is known at the time of the second representation:

> 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.* [1]

This wording, applicable to switching sides but not to post-government employment, does not depend on still "having knowledge" which the attorney "knows is confidential."

Moreover, in the one case cited post-argument involving the Wisconsin Rule 1.11(c), which is like our Rule, the Wisconsin Court explicitly found actual knowledge on the part of the government attorneys:

> I am satisfied that from Mean's letter and the objections to the subpoena that Lautenschlauger and Bach [who had been government attorneys just one year earlier] *have confidential information about George that could be used to his disadvantage in this lawsuit.*

Tucker v. George, 569 F.Supp 2d 834. 839 (W.D. Wis. 2008). This Court observed that we cited no cases where "lack of memory and passage of time negate one's possession of confidential government information," Opinion, p. 8. Yet, as the wording quoted from *Tucker, supra,* states

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[1] *See*, In *Smith & Nephew, Inc. v. Ethicon*, Inc. 98 F.Supp.2d 106, 109 (D.Mass. 2000); *Schwed v. General Elec. Co.*, 990 F.Supp. 113, 115, 116 (N.D.N.Y. 1998); *Fierro v. Gallucci*, 2007 WL 4287707, 5 (E.D.N.Y. 2007); *Arifi v. de Transport du Cocher, Inc.*, 290 F.Supp.2d 344, 348 -349 (E.D.N.Y. 2003). As this Court noted, these cases "do not involve government attorneys, but rather involve private attorneys and the . . . state conflict of interest rules." Opinion, pp. 7 and 8. The language does not make disqualification dependent on "having knowledge known to be confidential" which is "materially disadvantageous." Switching sides alone disqualifies the attorney.

(just as does the Virginia Rule), the requirement for disqualification is current knowledge, not prior access. This argument is obviously aided by the passage of two full decades.

Nor, we submit, can the tense used in the Rule be changed by the generalized need to guard against the appearance of impropriety. Opinion, p. 11. The Rule simply should not have its tenses changed by what we submit to be an overbroad use of the "appearance of impropriety" to guard against an undemonstrated, potential but unlikely, future recollection of things now 22 years old that may, if someday remembered by Markham, not be known to defendants *and* may be materially disadvantageous to them. That sweeps too broad. It is too speculative. *See*, *Shaffer v. Farm Fresh, Inc.* 966 F.2d 142, 145-46 (4th Cir. 1992) (disqualification order reversed, post-dismissal, because the likelihood of a conflict was "too speculative").

This is not a case of Markham switching sides—not a case in which, having once been trusted by LaRouche with confidential details that he thought would always be protected from adverse use or disclosure, Markham now sues LaRouche. There is, in that situation, a manifest appearance of impropriety against which the cases (and these were the ones cited to this Court by defendants)[2] protect with a flat prohibition, regardless of memory or passage of time, because of the appearance attaching to it. But in the case before this Court, the alignment stays the same. No sides are switched. None of LaRouche's attorney-client confidences is at risk. And the other client involved in the previous case, the United States, had no objection when it was invited to present any it had.

III. IN THE ALTERNATIVE, CERTIFICATION OF THE QUESTION OUGHT TO BE CONSIDERED

Kronberg can seek interlocutory review of the disqualification order

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[2] Switching sides was also the issue in both of the cases cited by this Court, Opinion page 11, on the generalized need to avoid the appearance of impropriety. See *Sanford v. Virginia*, ___F.Supp. 2d ___, 2009 WL 4430295 (E.D. Va. Dec. 2, 2009); and *United States v. Clarkson*, 567 F.2d 270 (4th Cir. 1977).

> (a) if the district court certifies under 28 U.S.C. s 1292(b) that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . .

President and Directors of Georgetown College v. Madden, 660 F.2d 91 (4th Cir. 1981).[3]

Here are the factual reasons that we believe this circumstance has been met:

(1) There is no case interpreting the language used to disqualify Markham, and the cases cited "do not involve government attorneys," Opinion, p 7;

(2) This Court itself noted that two of the three issues that had to be decided[4] here were "less clear cut";

(3) Based upon the discussion on the motion to reconsider set forth above in Part I, and on what the Court itself has noted as quoted in paragraphs (1) and (2) just above, there is a substantial ground for difference of opinion;

(4) This issue, if not resolved by the Court of Appeals now, will remain open. It would be a basis for appeal after trial. See *Richardson-Merrell, Inc. v. Koller* (105 S.Ct. 2757 (1985). Thus, if Kronberg loses this case—which, in the event of Markham's disqualification, she will likely be forced to litigate *pro se* (see her declaration)—she may gain a reversal on the basis of this issue, thus substantially prolonging this litigation.

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[3] Although "the kind of question best adapted to discretionary interlocutory review is a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes." *Difelice v. U.S. Airways, Inc.*, 404 F.Supp.2d 907(E.D.Va. 2005)(Ellis, J.) *citing Fannin v. CSX Transp., Inc.*, 873 F.2d 1438, 1989 WL 42583, at *5 (4th Cir.1989) (unpublished); *see also KPMG Peat Marwick, LLP v. Estate of Nelco, Ltd.*, 250 B.R. 74, 78 (E.D.Va. 2000), this is not the only kind of question that may be reviewed. Cases have allowed interlocutory appeals of disqualification orders. See text, page 5.

[4] The two issues are whether Markham "has confidential information" and whether, if he does have such information, it "could be used in this matter to the material disadvantage to one or more of the defendants." Opinion, p. 5.

(5) *Koller, supra,* 472 U.S. at 435, itself suggests that interlocutory appeals may be appropriate:

> Moreover, a rule precluding appeal pursuant to § 1291 would not necessarily leave the client or the disqualified attorney without a remedy. As we noted in *Firestone,* "a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b), ... and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available."

In *Rogers v. Pittston Co.,* 800 F. Supp. 350 (W.D. Va. 1992), the magistrate judge granted the motion to disqualify plaintiff's counsel and the district court subsequently affirmed. Upon plaintiff's motion, the district court certified an interlocutory appeal on the question, and the Court of Appeals permitted the appeal pursuant to 28 U.S.C.A. § 1292(b). *Rogers v. Pittston Coal Co.*, 996 F.2d 1212, 1993 WL 239001, 1 (4th Cir. 1993)(*per curiam*) (Unpublished) (The Court of Appeals carefully reviewed the record and the applicable Va. Code Prof. Resp. DR 5-105(D), and affirmed the disqualification, thus settling the matter for that case.) *See also, F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1308-1310 (5th Cir. 1995) (The Court of Appeals reviewed the lower court's order of disqualification for an abuse of discretion and found that the individual attorney should be disqualified but not the entire law firm, based on plaintiff's right to counsel of its choice. This case involved two separate certifications of the question in protracted litigation.)

(6) The hardship this order imposes upon plaintiff further justifies the stay pending any interlocutory appeal, if this Court allows one. The hardship to this plaintiff is worse than the normal hardship accompanying the loss of counsel, a generalized hardship noted by this Court, there being "no question" but that it would "impact Kronberg

adversely." Opinion, p. 10. She now finds herself without lead counsel in a situation in which she has had much difficulty obtaining one, despite attempts. See, her declaration where she describes how difficult it was to find counsel to begin with, and how difficult it will be to locate new counsel now. She now may have to go it alone and, because of the unique circumstances of this case, she will have arrayed against her a team of quite capable lawyers, including the lead counsel for Lyndon LaRouche in the 1988 Boston and Alexandria cases, who was also advising counsel in the 1989 New York prosecution in which Kronberg was a defendant. Indeed, the lead counsel for Mr. LaRouche, Odin Anderson, attended portions of the New York trial as a part of the joint defense, and consulted with defendants there. One of the occasions on which he attended the New York trial was the occasion of Lyndon LaRouche's appearance on the witness stand, in August 1989, as a witness for the defense. In fact, on the eve of the New York trial, in March 1989, Odin Anderson expressed his desire to be Molly Kronberg's lawyer in the New York prosecution. When Kronberg demurred, he became a consultant in the joint defense.

The present defense team also includes defendant Barbara Boyd, who was a paralegal in all three of those cases (Boston, Alexandria, and New York); who roomed with Molly Kronberg during the six months of the New York trial; and who, unlike either plaintiff Molly Kronberg or attorney Markham, has continuing access to many documents generated by those 22-year-old cases—access which Kronberg does not have, including Kronberg's Alexandria grand jury testimony.

(7) In a case such as this where important public rights are implicated,[5] as well as the rights of a woman who has presented a substantial claim that she has been vilified for doing her public duty from a federal witness stand, we submit that the playing field should not be so tilted against her where there is no precedent on point, unless the likely final arbiter of this issue, the Fourth Circuit Court of Appeals, has decided the issue.

CONCLUSION

The motion to reconsider should be vacated and the order disqualifying Markham should be vacated, or this Court should certify the interlocutory appeal thereof.

Respectfully Submitted,

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[5] 42 U.S.C. 1985 is one of the civil rights statutes.

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 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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