UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARIELLLE ("MOLLY") KRONBERG, Petitioner, -v- LYNDON LAROUCHE, BARBARA BOYD, EIR NEWS SERVICE, INC., and LYNDON LAROUCHE POLITICAL ACTION COMMITTEE, Respondents	Misc. Ct. App. No. _____ [District Court Civil No. 1:09-cv-00947-AJT-TRJ]

PETITION FOR PERMISSION TO APPEAL
Pursuant to 28 U.S.C. 1292(b)

Petitioner Marielle ("Molly") Kronberg, plaintiff below, petitions this Court for permission to file an appeal from the Order of the District Court for the Eastern District of Virginia, filed April 9, 2010, [1] disqualifying petitioner Kronberg's lead counsel, John J.E. Markham, II ("attorney Markham") from acting as her counsel in the case below, which she brought in 2009 against Lyndon H. LaRouche, Jr. ("LaRouche") and three other defendants. The District Court disqualified Markham because, 22 years ago in 1988, when he was an Assistant U.S. Attorney, Markham was part of a team that prosecuted LaRouche in a federal criminal case in which Molly Kronberg testified against LaRouche (who was convicted), and because Markham is now representing Kronberg, who is suing LaRouche below because starting in 2007,

[1] The Disqualification Order and related Opinion ("Opinion") are attached, as is the later Order, dated May 3, 2010 (hereinafter "Certification Order"), granting petitioner Kronberg's motion for a certification allowing an interlocutory appeal, and staying the case below pending this petition, and pending the appeal, if allowed by this Court. This petition is filed within ten days of the Certification Order, and is thus timely within the meaning of Rule 5(a), *Fed. R. App. Pro.* and 28 U.S.C. § 1292(b).

LaRouche and the other defendants began harassing Kronberg on account of the testimony she gave 22 years ago in that criminal case against LaRouche. The Disqualification Order we seek to appeal held that Markham's participation in Kronberg's current civil suit would offend Rule 1.11(c), of the Virginia Rules of Professional Conduct (quoted *verbatim* below), which imposes certain restrictions on the activities of prior government attorneys after they leave government service, as Markham did in 1989.

STATEMENT OF THE FACTS NEEDED TO DETERMINE THIS PETITION

(1) Petitioner Molly Kronberg's Claims in the Court Below

Petitioner Kronberg brought her civil claims below for damages allowed under 28 U.S.C. 1985 (injuring a federal witness), and for libel under Commonwealth law. She alleges that starting in 2007, defendants have conspired to injure her in her property on account of her having given testimony against LaRouche in his 1988 criminal trial. Specifically, Kronberg alleges that since 2007:

> . . . because she testified against Lyndon LaRouche in a federal criminal trial in this District at which he was convicted of defrauding elderly citizens of millions of dollars . . . [defendants] repeatedly published knowingly false statements that she had framed LaRouche and perjured herself at LaRouche's trial to falsely cause his conviction, perjury which, defendants also falsely stated, caused the death of her beloved husband, Kenneth Kronberg, to whom she had been married and devoted for 34 years, and who tragically committed suicide in 2007 after being viciously harassed by defendants.

[Amended Complaint, ¶ 1] Kronberg alleges, as one of the many overt acts, that publications circulated containing the following vitriol:

> Marielle 'Molly' Kronberg ... established herself as a willing liar more than twenty years ago when . . . she provided false testimony against LaRouche in the infamous criminal trial * * * When this woman . . . sent a bunch of us to prison directly and deliberately . . . She lied! It was only her lies that got us imprisoned. Now, you've got a situation, where he [Ken Kronberg, Molly Kronberg's husband] kills himself, because he was living with that witch: Who's been evil all along! Her behavior had never been good. She's never been honest. And then, he

> commits suicide. He was driven . . . But there's an understanding of the oppression that he felt by being married to that bitch.

[Amended Complaint, ¶ 14(v)] She alleges these publications have circulated in Leesburg, Virginia "where she worships at her church, has family, friends, neighbors, and, where, in nearby Vienna, Virginia . . . she works and enjoys good relations with her co-workers," [*Id.*, ¶ 5] The District Court has denied defendants' motions challenging Kronberg's legal theories, the court's subject matter jurisdiction, and the statute of limitations. [District Ct. Docket No. 39, 4/9/10]

(ii) The Order Disqualifying Attorney Markham

The Complaint was filed in August 2009. The Department of Justice did not object to Markham's participation. In April 2010, the District Court granted the defendants' motion to disqualify attorney Markham on the ground that, because he had personally and substantially participated as a federal prosecutor in the 1988 criminal prosecution of LaRouche in the Eastern District of Virginia, Markham could not now represent petitioner Kronberg. The District Court based its ruling on Rule 1.11(c) of the Virginia Rules of Professional Conduct, which provides.

> ...a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

The District Court found that the information used to prosecute LaRouche in 1988 "is now largely in the public record," but that "some information constituting confidential government information remains confidential government information today." [Opinion, p. 6] It also noted Markham's lack of access to any such information since 1989, and noted that "Markham recalls very little of the confidential information that he once had access to . . . but cannot segregate what he now remembers based on non-confidential information from *what he*

may know from still-confidential information." *Id.* (emphasis added). The District Court went on to note that there were no "cases that deal precisely with this issue, namely whether passage of time negates actual knowledge of confidential information . . ." [Opinion, 7], and that the cases cited by defendants below all involved a lawyer switching sides, representing one party and later suing that party, thus involving "application of state conflict of interest rules." [Opinion, p. 8]

With no precedent to guide him,[2] the District Court found that in regard to Markham's "lack of memory concerning that information . . . the passage of twenty years does not 'undo' Markham's actual knowledge even if Markham cannot today remember the confidential government information." [*Id.*]

Finally, the Court proceeded to the nub of the matter, what it called the "most difficult" question, namely, whether confidential government information could be used to defendants' material disadvantage." [Opinion, p. 9] It could not hold that this would occur. Instead, it disqualified Markham, although noting the "hardship" this would impose on Kronberg and that it "will impact Kronberg adversely," [Opinion. P. 10]. It did so relying on (1) what it termed "informed conjecture" about what might become relevant and what Markham may remember that defendants do not themselves know about "defendants' credibility" and "the structure of LaRouche's organization generally," and (2) "the appearance of impropriety that might compromise the public perception of the judicial process." [Opinion, p. 11.]

THE QUESTION PRESENTED

> Is a former government attorney barred from representing a private party suing someone who is harassing her because of testimony she gave against that defendant in a criminal case tried 22 years ago, in which the attorney now representing her was one of the prosecutors, but where there is no side-switching, where the government itself is not a party and does not object, and where the attorney lost access to all government confidential information 21 years ago and

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[2] In its letter expressing its non-objection to the representation by Markham, the Justice Department expressed no position on this ethics question, also citing no cases on the matter.

> there is no showing that the attorney now has knowledge of any still-restricted information that could be used to the material disadvantage of the defendant and is not also known by the defendant?

THE RELIEF SOUGHT

Petitioner seeks permission to file an interlocutory appeal, pursuant to 28 U.S.C. §1292(b), of the District Court Order disqualifying attorney Markham.

THE APPEAL SOUGHT HEREIN INVOLVES A CONTROLLING QUESTION OF LAW OVER WHICH THERE ARE SUBSTANTIAL GROUNDS FOR A DIFFERENCE OF OPINION

The Standard

The statute by its terms grants broad discretion to this Court, providing only that this Court "may...in its discretion, permit an appeal to be taken." 28 U.S.C. §1292(b). However, the Court may use the District Court's criteria as a guide, considering (1) whether the lower court's order indeed turned on a "controlling question of law"; (2) whether there is "substantial ground for difference of opinion" with respect to the applicable legal principles; and (3) whether an immediate appeal would "materially advance the ultimate termination of the litigation." *See, Fannin v. CSX Transp., Inc.*, 873 F.2d 1438, 1989 WL 42583, 2 (4th Cir. 1989) citing *President and Directors of Georgetown v. Madden,* 660 F.2d 91, 96-97 (4th Cir.1981).

The Order Involves a Controlling Question

The District Court found [Certification Order, p. 1]:

> The Court also finds that the Court's Disqualification Order involves a controlling question of law and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

In so finding, the District Court cited other cases that certified this question. *See, Rogers v. Pittston Coal Co.*, 996 F.2d 1212, 1993 WL 239001, 1 (4th Cir. 1993)(*per curiam*) (unpublished); *see also, F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1308-1310 (5th Cir. 1995).

Moreover, if this issue is not resolved now by this Court, it will remain open, being a basis for appeal after trial. *See*, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 105 S.Ct. 2757 (1985). Thus, if Kronberg loses this case after trial, but with the lower court's Disqualification Order not yet reviewed by this Court, a reversal on appeal after trial would substantially prolong this case. Indeed, the Supreme Court itself suggests that an interlocutory appeal is an available remedy to seek:

> 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)..."

Koller, supra, 472 U.S. at 435.

An Interlocutory Appeal is Appropriate Where the Issues Raised Are Without Precedent

While deciding that Rule 1.11(c) required Markham's disqualification, the District Court, in its Order certifying an interlocutory appeal, noted that there "is no reported judicial application of Rule 1.11(c) to facts comparable to those presented in this case" [Certification Order, p. 2], that the Court's "construction and application of Rule 1.11(c) is not the only reasonable construction, and . . . there are substantial grounds for a difference of opinion." [*Id.*]

The crux of that disagreement is defendants' analogy below, which the District Court used [Opinion, p. 7], to the switching-side rule, Rule 1.9, that imposes a bright-line prohibition on private attorneys:

> 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* . . . .

This prohibition is not at all dependent upon the elements which are required, in combination, to disqualify a lawyer under Rule 1.11(c), namely, "*having knowledge that* . . . [he] *knows* is

confidential government information" and that "*could be used to the material disadvantage of*" defendants LaRouche et al. As the District 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 and cases there cited.][3] The switching-sides prohibition does not make disqualification dependent on "having knowledge known to be confidential" which is "materially disadvantageous." Switching sides alone disqualifies the attorney.

This is not a case of Markham switching sides—not a case in which, having once been trusted by LaRouche with confidential details that LaRouche thought would always be protected from unauthorized use or disclosure, Markham now represents a client suing LaRouche. Were that the situation, there would be a manifest "appearance of impropriety" (of the kind of which the District Court spoke at Opinion, p. 11) against which the cases[4] protect with a flat prohibition, regardless of memory or passage of time, because of the appearance attaching to it.[5]

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[3] *See, Smith & Nephew, Inc. v. Ethicon*, Inc. 98 F.Supp.2d 106, 109 (D.Mass. 2000); *Arifi v. de Transport du Cocher, Inc.*, 290 F.Supp.2d 344, 348-349 (E.D.N.Y. 2003); *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), cited in Opinion, pp. 7 and 8.

[4] Switching sides, not post-government service, was also the issue in both of the cases cited by the Court, Opinion, p. 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).

[5] Absent a flat prohibition, and the rule involved is not that, we note that the Virginia Rules are based on the ABA Model Rules and thus, it appears that the mere appearance of impropriety alone is insufficient to warrant disqualification under Rule 1.11, or at the very least a suspect basis without more. *See, United States v. Dancy*, WL 2901682, 6-8 (E.D.Va. 2008) (order vacated in part on reconsideration by *United States v. Dancy*, 2008 WL 4329414 (E.D.Va. Sep 16, 2008) on evidentiary grounds). The District Court's first opinion in *Dancy* noted an apparent conflict in recent case law of the district courts regarding the appearance of impropriety standard and left the question unresolved citing *Waters v. Kemp*, 845 F.2d 260, 265 (11th Cir.1988)("Under the Model Rules, the appearance of impropriety is not a ground for disqualifying a lawyer from representing a party to a lawsuit."); *United States v. Washington*, 797 F.2d 1461, 1466 (9th Cir.1986); *accord Bd. of Educ. of New York v. Nyquist*, 590 F.2d 1241, 1247 (2d. Cir.1979) ("[A]ppearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases."). On reconsideration of the disqualification order after an evidentiary hearing in *Dancy*, Magistrate Judge Dohnal acknowledged that the appearance of impropriety standard was not proper to resolve the issue of whether the former government counsel to the

However, 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 Markham's client in the previous case, the United States, had no objection when it was invited to present any it might have. The question thus is very different from a side-switching case and is not resolved by the case law cited. Indeed, what little authority there is on the subject suggests that, as Kronberg urged in the Court below, the test is actual knowledge of something shown to be of the sort that could be materially adverse.

Comment 8 to Rule 1.11 states:

> [8] 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.*

(Emphasis added.)

Moreover, in the one case cited below (initially cited by defendants in their post-argument brief), which involved the identically worded Wisconsin Rule 1.11(c)), the Wisconsin Court disqualified two recently retired government attorneys because it explicitly found actual knowledge on their part.

> 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)(emphasis added). *See also, 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"); *Sanford v. Commonwealth of Virginia*, --- F.Supp.2d ----, 2009 WL 4430295 (E.D.Va. 2009) *citing Sanford, supra* ("Some

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grand jury had an impermissible conflict of interest in her continuing private representation of the defendant investigated by that grand jury. *Dancy, supra*, 2008 WL 4329414.

stronger indicator than judicial intuition or surmise on the part of opposing counsel is necessary to warrant the 'drastic step of disqualification of counsel.' ")

This Appeal Is in the Interests of Justice

The District Court, viewing the entire record before it, including the showing by Kronberg of how this disqualification would affect her, held that disqualification would involve a hardship, have an adverse effect on her [Opinion, p. 10], and that it was "in the interests of justice that this case be stayed pending Kronberg's appeal of the Disqualification Order." [Certification, p. 3] *See, Shaffer, supra,* at 146 (Courts must consider "a party's ability to secure alternative representation, in assessing the propriety of disqualifying counsel on 'likely' conflict grounds [because t]he drastic nature of disqualification requires that courts avoid overly-mechanical adherence to disciplinary canons at the expense of litigants' rights freely to choose their counsel."); *Aetna Casualty & Sur. Co. v. United States*, 570 F.2d 1197, 1202 (4th Cir. 1978), *cert. denied*, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978)(rather than "mechanical" application of disciplinary rules, this Court seeks analysis of the harm to the actual parties before the court.).

CONCLUSION

For the reasons stated herein, we respectfully submit that this Court should allow this interlocutory appeal.

Dated: May 12, 2010.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2010, I will transmit a copy of this pleading by electronic mail and first class mail, postage prepaid to:

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