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RESEARCH FINDINGS

To: Client

From: LegalEase Solutions, LLC

Date: --/--/----

Re: Research on MRPC 3.7

INTRODUCTION

Plaintiff [redacted] had filed a claim against [redacted] seeking to rescind a redemption transaction, under which [redacted] sold his 50% interest back to [redacted] in exchange for a promissory note, cash, and ownership of a subsidiary LLC with real estate rights. [redacted] challenged the redemption agreement on the grounds of fraud and misrepresentation. [redacted] has filed a motion to remove Defendant's attorney("DA") from representing [redacted] because DA drafted the redemption agreement under challenge, and therefore would have to be a material witness at the trial.

QUESTION PRESENTED

- Should a Motion to Remove an Attorney, based on the fact that the attorney drafted the document being contested, be granted where the motion was not filed at the initial stage of the litigation?

SHORT ANSWER

- No, the Motion should be rejected because Plaintiff has failed to show that DA ought to be called as a witness, that any potential testimony would not be barred by the attorney-client privilege, and that the facts they hope to elicit from DA's testimony could not be obtained elsewhere.

DISCUSSION

The general rule in Michigan is that no lawyer shall act as a party's attorney in a trial, if there is likelihood of the representing attorney being called as a witness in that case. MRPC 3.7 (a). The rule provides for three exceptions: (1) where the attorney's testimony relates to an uncontested issue; (2) where the attorney's testimony relates to the nature and value of legal services rendered in the case; or (3) where the attorney's disqualification would cause a substantial hardship on the client. MRPC 3.7 (a). The party seeking disqualification bears the burden of showing specifically how and as to what issues in the case prejudice will result from the representation. *Kubiak v. Hurr*, 143 Mich. App. 465 (Mich. Ct. App. 1985).

Michigan Courts have firmly rejected the notion that an attorney who drafted a document must be disqualified from advocating in later litigation over the document, simply because the other side asks to call the attorney as a witness. See *Smith v. Arc-Mation, Inc.*, 402 Mich. 115 (Mich. 1978). In *Smith*, Attorney Sugar drafted a memorandum of understanding, on behalf of Defendant corporation, that provided for takeover of the corporation for the purpose of revitalization. Because the takeover resulted in the destruction of the company, the minority shareholders filed suit, and Sugar represented the shareholders in the action. *Id* at 116. The corporation moved to disqualify Sugar on grounds that the meaning and interpretation of the memorandum of understanding were material issues, that as draftsman of the document, Sugar

was a necessary witness, and that therefore he must be removed as attorney under the predecessor to MRPC 3.7, DR 5-101(B). *Id.* at 117-18. In rejecting the argument, the Court held that:

> "[The lower courts] appear to be saying that if any arguable question can be raised regarding the propriety of a lawyer continuing to appear in a case, an order can be obtained disqualifying that lawyer. That constitutes, in our opinion, a dangerous doctrine. It puts in the hands of an adversary the ability to force an opponent to change counsel if the adversary can advance any arguable grounds in support of disqualification. Under this doctrine, no lawyer or firm that participates in drafting an instrument will be able to represent the client if litigation results." [*Id.* at 118.]

The Court reasoned that Sugar did not know, and it was not obvious that, he "ought to be called as a witness" because Sugar stated under oath that he had no intention of being a witness and that all of the shareholders' allegations would be proved by testimony from other sources. *Id.* at 119. Furthermore the Rule was "not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel." *Id.* As in *Smith*, in the instant case, there is no reason DA ought to be called as a witness, because the issues are readily proven from other sources. Plaintiffs have admitted that the representations and inducements they contest were "memorialized in the Redemption Agreement." Motion to Recuse at para. 7. It is therefore not obvious that DA ought to be called as a witness, and Plaintiffs should not be allowed to misuse the Rule as a litigation tactic—the dangerous doctrine the Supreme Court rejected in *Smith*.

Where the lawyer's testimony would be protected by privilege or where the testimony could be obtained elsewhere, disqualification is not appropriate. *Kubiak v. Hurr*, 143 Mich. App.

465 (Mich. Ct. App. 1985). In *Kubiak*, Attorney Wax represented Defendants in a harassment and defamation suit. Prior to the litigation, Wax published letters and statements that formed the basis of a newspaper article, so Plaintiff added a defamation claim against Wax. *Id.* at 469. The Court held that the defamation claim against Wax should be severed from the claim against Wax' clients. *Id.* at 478. Furthermore, although Wax was a necessary witness in the claim against himself, he was not a necessary witness in the claim against his clients, and therefore did not need to be disqualified as their advocate. The Court rejected Plaintiff's assertion that Wax was a necessary witness to the crucial element of libel involving Defendants' state of mind and intent in publishing the letters, because any testimony regarding such intent and state of mind was protected by the attorney-client privilege. *Id.* at 472-73. Moreover, even if the privilege was waived, Wax was not a necessary witness because the same evidence could have been presented from other sources. *Id.* at 474. Since it was Defendant's state of mind and intent that was at issue, Defendant would be the best witness on the issue, and Wax' testimony would be cumulative and inadmissible as more prejudicial than probative because of the confusion of an attorney acting as both witness and advocate. *Id.* The Court questioned Plaintiff's motives for filing the motion, finding that "the circumstances under which Wax "ought" to be called as a witness are so remote and intangible as to lead to a suspicion that the motion to disqualify might in reality be a tactical device to disadvantage [Defendants]." *Id.* at 475.

As in *Kubiak*, [redacted] has made no showing that DA can present evidence that is not protected by the attorney-client privilege. Furthermore, the proffered evidence is clearly available from another source, as [redacted] is a better witness to his own representations, and [redacted] admits that these representations are memorialized in the Redemption Agreement. Since the

Redemption agreement specifically states in paragraph 7.9 that it represents the entire agreement of the parties, that it supercedes any prior negotiations or agreements, and that no parol evidence shall be allowed in construing or modifying the agreement, there is simply no basis for the drafting attorney to be deemed a necessary witness. As in *Kubiak*, the motion is nothing more than a litigation tactic that must be rejected.

Similarly, in *Saari v. Susser (In re Estate of Susser)*, 254 Mich. App. 232 (Mich. Ct. App. 2002), the Court rejected the argument that an attorney should have been disqualified because he was a necessary witness as to the contents of a disputed will that he drafted. The Court held that Respondents never evinced an intent to call the attorney as a witness, but more importantly never showed that the attorney's testimony was "necessary," because they were able to elicit testimony regarding the circumstances surrounding the will from other competent sources. *Id.* at 238.

The one case that runs contrary to these others is distinguishable. In *Auseon v. Reading Brass Co.*, 22 Mich. App. 505 (Mich. Ct. App. 1970, the attorney, Prettie, had represented Defendant corporation, acted as trustee of the company's employee retirement fund, negotiated their employment contracts (including the ones in dispute in the litigation), and served as director of the bank from which the corporation's funds were garnished by Plaintiffs. *Id.* at 507-09. Later, Prettie switched sides and represented the former employees in a suit claiming fraud. The Court held that Prettie and his partner had to be removed because they were active in the contract negotiations and their own conduct was implicated in the Corporation's answer, making them necessary witnesses. *Id*. at 512-513. The Court held that "While the mere allegation or assertion by a party that a counsel may be called upon to testify as a witness in the litigation cannot

automatically invoke Cannon 19, in this case there are indications that the testimony of both of these attorneys will be necessary in order to litigate the allegations of fraud made in Defendant's responsive pleadings. These allegations go to the very circumstances surrounding the negotiations which led to the contract now at issue." *Id.* However, the *Auseon*, Court made clear that its holding was based on the fact that the attorney's own misconduct was put in issue in Defendant's pleading. In the instant case, no misconduct on the part of DA has been alleged. Furthermore, unlike in *Auseon*, there is no question of dual allegiance as DA never represented [redacted]. Most importantly, *Auseon* was decided prior to the Supreme Court decision in *Smith*, which comes to a contrary result under facts much more similar to our case. Thus, because [redacted] has failed to show that DA is a necessary witness, that the proffered testimony is beyond the scope of attorney-client privilege, and that the evidence cannot be obtained from other sources, the motion to disqualify should be denied.

An additional ground for denial is that removal at this juncture will cause substantial hardship. See MRPC 3.7(a)(3). Although we have seen no case denying a motion to remove counsel on this basis, the Court of Appeals upheld a drug conviction, despite the fact that an attorney from the prosecutor's office testified against the Defendant at trial, on the basis of the substantial hardship the prosecutors would have incurred by removing themselves. *People v. Lemble*, 103 Mich. App. 220, 224 (Mich. Ct. App. 1981). The Court held that, "[i]n light of the particular nature of the prosecutor's offices, the trial court was justified in refusing the request for dismissal of the People's counsel where the grant of such a request and the securing of independent prosecutorial counsel would cause time and money expenditures without an accompanying increase in the 'fairness' provided to the defendant." *Id.* Similarly, it can be

argued in the instant case that the time and expense of securing replacement counsel for DA at this late stage of litigation, especially in light of the delay of [redacted] in raising the issue, inflicts a hardship on [redacted] that far exceeds any fairness interest in disqualifying DA.

Because [redacted] has made no showing that DA is a necessary witness, and the Motion to Recuse is obviously nothing more than a litigation tactic, a request for sanctions may be appropriate. In Michigan, when a lawyer or a party files a pleading after applying his signature, it is understood that the filing is not for any "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D)(3). And, if the pleading is filed in violation of the Rule 2.114(D), MCR 2.114(E) imposes sanction upon the person who signed the pleading, whether it is the lawyer or the party. At one time there was confusion over whether this rule applied only to filing of pleadings and not to motion, affidavits, etc. However, the Supreme Court, in *Bechtold v. Morris*, 443 Mich. 105 (Mich. 1993) cleared the fog by observing that the "the rules on the signing of pleadings apply to all motions, affidavits, and other papers provided for by the court rules. *MCR 2.113(A)*." *Id.* at 106.

Thus, DA can rely on MCR 2.114(E) to move for sanctions on the grounds that [redacted]'s motion to disqualify DA was filed merely to harass or to cause unnecessary delay, or to needlessly increase the cost of litigation.

CONCLUSION

Because [redacted] has failed to show that DA is a necessary witness, that he can offer testimony that is beyond the scope of the attorney-client privilege, and that such testimony is not available from other competent sources, the motion to disqualify DA has no merit.