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AUG 4 2004

JEANNE HICKS, Clerk
By: *J. Cunningham*
Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

_____)
_____)
JOHN B. CUNDIFF and BARBARA C. _____)
CUNDIFF, husband and wife, _____)
et ux, et al., _____)
_____)
Plaintiffs, _____)
_____)
vs. _____)
_____)
DONALD COX and CATHERINE COX, _____)
husband and wife, _____)
_____)
Defendants. _____)

CV 2003-0399
DIVISION ONE

BEFORE: THE HONORABLE DAVID L. MACKEY
REPORTER'S TRANSCRIPT OF PROCEEDINGS
ORAL ARGUMENT ON MOTION TO DISQUALIFY

Prescott, Arizona
July 20, 2004

PREPARED FOR:
YAVAPAI COUNTY SUPERIOR COURT

ORIGINAL

PREPARED BY:
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APPEARANCES:

For the Plaintiffs: MR. DAVID WILHELMSSEN,
Attorney at Law,

MS. MARGUERITE KIRK,
Attorney at Law,

For the Defendants: MR. MARK DRUTZ,
Attorney at Law,

MR. JEFFREY ADAMS,
Attorney at Law.

Prescott, Arizona
July 20, 2004

THE COURT: This is CV 2003-0399, John Cundiff, et al., versus Donald Cox and Catherine Cox. Plaintiffs are represented by David Wilhelmsen and Marguerite Kirk. Defendants are represented by Jeffrey Adams and Mark Drutz.

I apologize for the delay in getting this hearing started. My court reporter had a medical emergency in his family and still is at the emergency room, and Judge Hess graciously agreed to loan us his court reporter as soon as they were finished with their matters.

So, counsel, let me hear arguments from the plaintiffs first, then I will hear the defendants' response. I have read both the Motion to Disqualify and Motion for Protective Order, response and objection, have reviewed the relevant rules and authorities though and I'm familiar with the

1 issues.

2 Mr. Wilhelmsen.

3 MR. WILHELMSSEN: Thank you. I -- I will not
4 reiterate everything that's in the written motions because the
5 motion itself is somewhat comprehensive, but I would like to
6 highlight some areas.

7 If the Court deems it appropriate to ask
8 questions, I would invite any question or concern that you
9 might have regarding our position.

10 First of all, by filing this motion we did not
11 intend to imply in any fashion whatsoever that the defendants'
12 law firm has done anything wrong or anything improper.

13 The sequence of events is Bob Launders had
14 represented the plaintiffs that are set forth on the caption
15 before our law firm did. He represented the plaintiffs until
16 approximately August of last year. Michael Bourke was a
17 non-litigating attorney who represented the defendants up until
18 approximately March of this year.

19 There were mediations that I personally attended
20 along with my clients and Mr. Bourke and the defendants in
21 trying to resolve this matter. It was only after the case
22 could not be resolved that caused the defendants to decide to
23 hire the law firm that is now involved, that's Jeff Adams and
24 Mark Drutz, in order to litigate the case.

25 Shortly after they became involved depositions

1 were scheduled. Marguerite Kirk from my law firm handled the
2 depositions as did Jeff Adams. It was during the deposition of
3 the Pages, Ken and Kathy Page, that it was revealed for the
4 first time at these depositions to Marguerite -- and it was
5 news to me, that the law firm, Mark Drutz' and Jeff Adams' law
6 firm, had a prior representative relationship with the Pages
7 that stemmed from 2002 representations which I believe John
8 Mull represented the Pages.

9 He counseled and advised the Pages with respect to
10 construction defects in the construction of the home that's
11 located in Coyote Springs, which is the very home which gives
12 them standing to bring this very lawsuit. As I understand,
13 part and parcel of that representation was regarding --
14 regarding defects in the construction of the home itself.

15 Marguerite Kirk personally, after the deposition,
16 telephoned Jeff Adams, and I believe it's characterized in
17 their motion pages that Jeff acknowledged he didn't know
18 anything about any prior representation, but would speak with
19 members of his firm about it. Jeff and Mark's law firm was of
20 the opinion that confidential information was not shared in the
21 prior representation that would give rise to a responsibility
22 on their part to recuse themselves from this lawsuit under Rule
23 42, E.R. 1.9.

24 We discussed this matter with our clients, the
25 Pages. Contrary to the suggestion that has been made in the

1 response, it is not our law firm's opinion there should be a
2 withdrawal. The matter was presented to the Pages in I will
3 say a succinct, factual manner as to what their rights were, to
4 insist upon either the previous law firm continuing on in this
5 case or not, and this was a right exclusively that they hold.
6 After having discussions with the Pages they said they felt
7 very uncomfortable having Mark and Jeff's law firm participate
8 in the case.

9 Now, I could avow to the Court that it is neither
10 my sentiments about this or Marguerite's that we are trying to
11 request the withdrawal of Jeff and Mark because we're trying to
12 achieve some kind of a tactical advantage. This case isn't set
13 for trial and it's not as though we're trying to boot another
14 lawyer off on the eve of trial in order to leave their clients
15 vulnerable. I realize if it isn't their law firm it will be
16 another law firm that will probably be equally capable of
17 representing -- representing the Coxes.

18 At this point Jeff and Mark's law firm have only
19 been involved since acceptance of service April 11th. There
20 has been only one single series of depositions that have been
21 taken so it's not as though there will be a tremendous cost
22 involved as there would be if you were prepared for trial and
23 on the eve of trial asked to recuse yourself. Nor did we wait.
24 Marguerite filed this motion June 30th, a mere seven days after
25 it was initially revealed to her that this conflict exists.

1 So, I just want to make it crystal clear it is not
2 my law firm's position that we are trying to gain some -- lay a
3 trap and gain some tactical advantage or place the Coxes in a
4 financially vulnerable situation. The decision was exclusively
5 made by the Pages after we counseled them on what their rights
6 were.

7 Now, there are two bases that we point out to the
8 Court as being the basis for our request. The first is in that
9 prior representation our clients -- I'm -- I'm making this
10 characterization upon avowal, appreciating my attorney-client
11 relationship with my clients, but they assured me that
12 financial information had been provided to Mr. Drutz' and Mr.
13 Adams' law firm.

14 Now, I suppose as Judge you will say how does that
15 confidential information bear on any issue in this case, and it
16 bears upon it in two respects, first of which is a laches
17 defense that has been raised by the defendants, by the Coxes.

18 The Coxes claim that the Pages and the Cundiffs
19 and Ms. Nash waited a long period of time before filing this
20 lawsuit. An explanation for that delay by my clients, the
21 Pages, was that they waited because they didn't have the
22 financial resources to fund a lawsuit by themselves and they
23 needed to garner the support of other neighbors in order to
24 file this lawsuit.

25 I suppose if the laches defense is one that

1 becomes a part of the case they are going to feel very
2 uncomfortable knowing they shared financial information with
3 the very law firm that could potentially utilize that
4 information to undermine their defense. That's why they feel
5 uncomfortable.

6 Secondly, should defendants prevail in this case
7 and there is a judgment for attorneys' fees, I think my clients
8 are going to feel as though certain financial information that
9 was supplied to their previous attorneys may be used against
10 them. They feel very uncomfortable and this is the decision
11 they have made and I certainly have not made and Marguerite has
12 not made.

13 The second basis, another factual basis -- and
14 there has been the suggestion in the record that the Pages
15 should be prevented from bringing this lawsuit because their
16 home itself does not comply with the restrictive covenants they
17 are seeking to enforce. The suggestion is -- is that there is
18 above-ground water storage tanks on the property that had been
19 installed by Mr. Fagelman that violated the restrictive
20 covenants, therefore the Nashes -- Pages -- excuse me -- should
21 not be able to enforce the restrictive covenants as against the
22 Coxes for commercial activity.

23 Well, I suppose if that is an argument that is
24 eventually brought before either this Court or a jury by either
25 Marguerite or myself, we will be placed in the position of

1 having to interrogate opposing counsel as a part of the
2 resolution of the Fagelman matter. The issue as to
3 non-compliance of the water storage facilities wasn't
4 addressed. I mean they will -- will be arguing that the
5 restrictive covenants are -- are being violated for a very
6 reason that they had a prior representation, counseling of the
7 Pages, so those are two factual bases.

8 If you have any questions, by the way, just ask.
9 I'm trying to be as clear as possible, but I -- I realize this
10 is a somewhat fact-intensive argument.

11 THE COURT: Did the CC and Rs provide there will
12 be no above-ground storage tanks, or do they -- or is the
13 allegation that they violated, the Pages violated the CC and RS
14 by having these underground storage tanks that are only -- only
15 apparent if you delve into things that aren't readily visible
16 from the outside of the Pages' home?

17 When you're talking about above-ground storage
18 tanks I'm thinking of somebody drives by and everybody can see
19 it and I'm trying to figure out how that is confidential
20 information.

21 MR. WILHELMSSEN: That in and of itself wouldn't be
22 confidential; never make that suggestion. If the argument by
23 the other side is you have storage tanks that violate CC and Rs
24 here, you are complaining my client is violating CC and Rs, I
25 think my response as the Pages' attorney is to say to the

1 opposing counsel, well, you represented them, you should have
2 made sure that those storage facilities did not violate the CC
3 and Rs.

4 Now we're into a situation where I'm arguing that
5 the opposing counsel didn't do something in a prior
6 representation that could have cured the very arguments that --
7 argument they're making in this lawsuit. That's the point I'm
8 making.

9 Then the second -- first basis is the financial
10 wherewithal of the Pages, and the storage tanks, that's a
11 factual issue, and second is the appearance of impropriety. I
12 think the ethical rules also -- also address the fact that if
13 you do have a situation that occurs in which the public
14 confidence in the judicial system is undermined because of the
15 appearance of impropriety that should be taken into
16 consideration for purposes of a representative capacity.

17 Here obviously the Pages are going to feel a very
18 deep sense of concern about opposing counsel representing their
19 clients as against the Pages. I can't help but acknowledge
20 they will feel if there is any decision that occurs as a result
21 of this that is against them or negative or undermining in any
22 fashion, that they will feel that the information that they
23 previously had supplied to their counsel is somehow being used
24 against them. I realize it's a lay perception, but our ethical
25 rules address lay perceptions.

1 I want to make it crystal clear to the Court; this
2 is a decision that the Pages have made, number one, and, number
3 two, this isn't some tactic, attorney tactic, that's been
4 employed by our law firm in order to gain some kind of unfair
5 advantage as a result of this.

6 I believe that, again, the Coxes will be
7 adequately represented in this case if new counsel is
8 substituted, and there isn't any kind of a trial or hearing or
9 proceeding that is looming on the horizon that will somehow,
10 you know, be comprised as a result of substitution, and I don't
11 believe, at least at this stage, enough discovery has occurred
12 where I mean the depositions won't need to be retaken. I think
13 Jeff was very thorough in his interrogation and certainly the
14 information that was obtained will certainly be utilized later
15 on.

16 If you have any questions, again, feel free, but
17 we ask the Court to grant our motion that the law firm withdraw
18 because of prior representation.

19 Thank you.

20 THE COURT: Mr. Drutz or Mr. Adams.

21 MR. DRUTZ: Judge, thank you.

22 If my firm thought we had a conflict of interest
23 we would never have taken this case. We had spoken with the
24 Coxes before we undertook the representation.

25 We in fact did a conflict check. Mr. Mull and

1 myself were aware we had represented the Pages, not as Mr.
2 Wilhelmsen said in 2002, but rather for seven months, January
3 through August of 2001. There was no litigation in that case.
4 What that case pertained to, Your Honor, was a construction
5 dispute with Jay Fagelman; nothing to do with the declaration
6 of covenants that is at issue in this case.

7 I have offered to share the file with Mr.
8 Wilhelmsen or Ms. Kirk for review and I would be happy to give
9 it to the Court for an in-camera inspection for the Court to
10 determine whether there is anything in this file that is the
11 same or substantially related to the declaration of covenants
12 which is the issue in our present lawsuit.

13 Mr. Wilhelmsen and Ms. Kirk argue that Ethical
14 Rule 1.9 controls. I know the Court has reviewed it; Court
15 knows it is not the appearance of impropriety rule that
16 applies, rather it's the rule whether or not the new
17 representation of the Coxes is the same or substantially
18 related to the prior representation.

19 Now, I think when the Court reviews a Motion to
20 Disqualify other counsel it has to look at that motion very
21 critically and maybe a little skeptically. Perhaps we're too
22 skeptical when we get a motion from other counsel and we think
23 perhaps they're trying to get a tactical advantage. I think
24 that an inference from what happened during the depositions is
25 that that's reasonable. Initially Mr. Wilhelmsen and his

1 clients presumably Mr. Wilhelmsen shared the fact that we had
2 advised him on I believe it was March 4th or 5th of this year
3 that we were going to represent the Coxes, then we filed an
4 answer to this lawsuit and we raised an affirmative defense.

5 Of course, the lawsuit isn't just being brought by
6 the Pages, there is two other parties that Mr. Wilhelmsen
7 represents, so the Pages have known several months before the
8 depositions in June that my law firm was representing the
9 Coxes.

10 Notwithstanding their knowledge of that, they
11 didn't raise this issue of this potential conflict of interest
12 until their depositions were concluded by Mr. Adams, and as
13 characterized by Mr. Adams the depositions didn't go all that
14 well, perhaps, for the Pages, and the next day there were going
15 to be more depositions of other parties taken when Ms. Kirk
16 determined now, oh, we had a conflict of interest, and I just
17 lay those facts out for you.

18 I'm not going to argue with Ms. Kirk and Ms.
19 Kirk's representation or avowal through Mr. Wilhelmsen that she
20 didn't know our firm had previously represented the Pages, but
21 I can tell you absolutely the Pages would have known that
22 months ago. If they were so concerned about the fact that we
23 were now representing the Coxes I just ask the question why did
24 they wait until their depositions had been taken and we had
25 another round of depositions scheduled for the next day?

1 Of course Mr. Wilhelmsen argues to the Court that
2 the Pages are upset by our representation of the Coxes and that
3 they furnished financial information to us. There is no
4 affidavit in the record to support that assertion on the part
5 of Mr. Wilhelmsen. That's simply Mr. Wilhelmsen's assertion to
6 the Court.

7 We do have an affidavit from John Mull though and
8 Mr. Mull was the attorney who represented the Pages in the
9 Fagelman matter and Mr. Mull has said quite clearly no
10 financial information was provided to my law firm.

11 Again, I have the file here. You are welcome,
12 assuming the Pages have no objection and Mr. Wilhelmsen has no
13 objection, to review the file and see if there is anything in
14 this file pertaining to financial information.

15 I can tell you the only financial information we
16 know of -- if this is a conflict, so be it -- is they paid
17 their retainer, their bills above their retainer, I presume
18 they paid them, and the case with Mr. Fagelman was settled.

19 I have no idea where they got the money from, no
20 idea of difficulties one way or the other of getting the money.
21 That's the extent of the knowledge my firm has about the Coxes'
22 financial situation -- excuse me -- about the Pages' financial
23 situation. That's it.

24 Probably if you ask me about the Coxes I would say
25 the same thing; I don't know about their financial situation

1 either because it's not relevant to the lawsuit, just like the
2 Pages' financial dispute with Mr. Fagelman which was a
3 construction dispute over this house is not relevant.

4 I can tell you too, Judge, restrictive covenants
5 are nowhere to be found in this file and this argument Mr.
6 Wilhelmsen has now raised about something to do with water
7 storage tanks was never at issue in our case, we never
8 discussed these restrictive covenants and it had absolutely
9 nothing to do with the dispute with Mr. Fagelman which had to
10 do -- we briefed that in our responsive memorandum of what that
11 had to do with this. It's apples and oranges and the standard
12 is substantially related.

13 I know we have cited the Court to the comments. I
14 know the Court can read the comments as well as anybody, and
15 Comment Number 32 is the one that controls. It says: Matters
16 are substantially related for purposes of this Rule if they
17 involve the same transaction -- certainly not -- or legal
18 dispute or if there otherwise is a substantial risk that
19 confidential factual information as would normally have been
20 obtained in the prior representation would materially advance
21 the client's position in subsequent litigation.

22 Judge, there was nothing we learned in the
23 representation of the Pages that would substantially advantage
24 the Coxes' position. If we had thought that there was, we
25 would -- would never have taken the case.

1 And Mr. Wilhelmsen hasn't mentioned it to the
2 Court, but I think it's of some significance; we contacted the
3 State Bar June 24th. We called the ethics line and we set
4 forth the factual scenario. Mr. Adams did so. If the Court
5 wants to hear testimony from him, we will present it. And
6 Nancy Clark, the State Bar rep, said we do not have a conflict
7 of interest and we do not have to recuse ourselves, so, Judge,
8 I think that is of some significance; not determinative, but at
9 least we contacted the State Bar to get their opinion.

10 Mr. Wilhelmsen's argument as to the financial
11 information that was provided somehow being relevant to the
12 defense of laches fails for a couple reasons; one, we never got
13 the information, and, again, they don't have an affidavit
14 indicating we did, and we have an affidavit from Mr. Mull that
15 says otherwise.

16 Further it is alleged -- I'm not even sure what
17 their position is, but -- but -- but in arguing their
18 positions, they didn't file the lawsuit against the Coxes as
19 quickly as they should have and it's because they're contending
20 they had some financial restraints and they had to get some
21 other people to help them.

22 We have some questions as to whether or not some
23 party who is not even named in the lawsuit is really funding
24 this litigation, but putting that aside we don't have any
25 financial information from the Pages, and perhaps even more

1 importantly we have done some legal research on the issue as to
2 whether or not financial condition even impacts on someone's
3 ability to fund it, and I could give the Court a couple cases.

4 THE COURT: Do you have copies?

5 MR. DRUTZ: Yes, I do, Judge. I have got C.J.S.
6 authority, I have got Supreme Court of Alaska authority, and I
7 have District Court authority, case out of Pennsylvania. If I
8 might just touch upon these, because I think they concisely
9 address the point regarding financial information. If the
10 Court looks at C.J.S. on page 378 of the materials I gave you
11 it talks about poverty, and it says the poverty or pecuniary
12 embarrassment of plaintiff does not of itself excuse delay in
13 forcing his rights, although it may be a proper circumstance
14 for consideration in determining the questions of laches,
15 poverty may excuse delay in filing suit if there is a clear
16 showing of poverty and diligent efforts to overcome financial
17 barriers. I hardly think that the Pages are going to contend
18 they're poverty-stricken.

19 If the Court looks at the Supreme Court of Alaska
20 decision on page four, right-hand portion, it says authority
21 exists for the proposition that lack of funds does not
22 constitute a sufficient excuse for delay in asserting one's
23 rights. Then the case goes on to actually hold that the
24 Superior Court was in error in embracing the notion delay
25 resulting from insufficient resources was a valid excuse.

1 Then in the decision of the Middle District of
2 Pennsylvania, if the Court looks at page at 11, top paragraph
3 on the right-hand side, the plaintiffs maintained they did not
4 possess the financial ability to bring their lawsuit in Federal
5 Court before August 10th, '77. A plaintiff cannot justify his
6 lack of diligence in prosecuting litigation simply by declaring
7 he is poor. If lack of funds creates a barrier to litigation
8 in particular cases, the Court applying the equitable doctrine
9 of laches must -- must take into account in determining if the
10 evidence reveals diligence on plaintiff's part in attempting to
11 overcome the barrier. If the plaintiff has been diligent then
12 he has not slept on his rights and laches does not bar his
13 cause of action.

14 Judge, I don't think even if we had any
15 information regarding their financial situation that would be
16 relevant on the basis of case law I have presented to you and
17 the C.J.S. that would be even relevant to the defense of
18 laches, but more importantly, Judge, we don't have it. I mean
19 I have avowed to the Court the information that we have in
20 regards to their financial situation and that's the same
21 information that any lawyer would ever have when they have
22 previously represented another client, that they gave them a
23 retainer, they paid their bill and maybe they paid some money,
24 they settled the case.

25 If that's going to create a conflict of interest,

1 I -- especially with Mr. Wilhelmsen says one of his reasons is
2 we may get attorneys' fees against them and our information
3 regarding their financial affairs might somehow be relevant,
4 then that would justify every law firm in a case where they had
5 previously represented somebody, knew they had paid their bill,
6 they would have to recuse themselves from representing another
7 client in a completely different kind of litigation because the
8 former client could argue you have information on my financial
9 condition; you know I gave you a retainer and subsequently that
10 might somehow be relevant if I lose this case as to paying an
11 award of attorneys' fees.

12 If that was the situation then wouldn't there be
13 just be a black letter ethical opinion that says you can't ever
14 represent a -- you can't represent a new client against a
15 former client if in fact you gained any information regarding
16 their financial situation because they might contend that is
17 somehow relevant to an award of attorneys' fees? That isn't
18 the rule.

19 You have to show that the two cases are the same
20 or substantially related and this case has absolutely nothing
21 to do with the construction of the Pages' home or with their
22 dispute with their contractor, with Mr. Fagelman. That was
23 resolved back in August or July of 2001.

24 This case deals with restrictive covenants that
25 are seeking to be enforced against the Coxes' property and

1 those restrictive covenants apply to the plaintiffs' property
2 and to the defendants' property, and the question is whether or
3 not those restrictive covenants should be enforced.

4 That is completely a different issue than the
5 dispute with Mr. Fagelman. There is just no connection between
6 the two, and I think to determine whether a conflict exists as
7 to the finances, that seems to be their main argument, is the
8 finances, Judge, and the appearance of impropriety, I don't
9 think that -- that is certainly not set forth -- forth in E.R.
10 1.9. That's the standard regarding representation of one
11 client against a former client.

12 We don't want to have the appearance of
13 impropriety. That's why I had Mr. Adams call the State Bar.
14 If the State Bar said, you know, you have got a problem
15 representing the Coxes in this litigation we would have recused
16 ourselves immediately, but that isn't the conclusion the State
17 Bar reached, so I don't feel that we have even risen to the
18 level of the appearance of impropriety and that certainly
19 though isn't the standard.

20 Then you then have to focus on, well, what are
21 they saying? They're saying we gained financial information.
22 What financial information? I still don't know, Judge. We
23 have heard Mr. Wilhelmsen's argument. We have read his
24 memoranda. Do you know what financial information we have
25 supposedly gained? He hasn't told us what that financial

1 information is.

2 You don't have an affidavit from the Pages telling
3 us what that financial information is. Rather you have got Mr.
4 Mull saying no financial information was disclosed to us other
5 than what we have avowed to the Court. And the Court is
6 welcome to review the file and can make its own determination
7 as to whether or not we got any financial information.

8 I don't think the Motion to Disqualify has any
9 merit whatsoever. I don't think it rises to a good faith
10 motion. I think it was filed for tactical reasons. I think
11 Mr. Wilhelmsen has a nicely thought-out argument. I think they
12 have got a brief that is well-written, is full of legal
13 authorities. I think it draws inferences from facts that
14 simply don't exist. That's the key; it draws inferences from
15 facts that don't exist.

16 I consequently would ask the Court to deny the
17 Motion to Disqualify and I would ask the Court to award us our
18 reasonable attorneys' fees for having to respond to this,
19 Judge.

20 Thank you, Judge.

21 THE COURT: Mr. Wilhelmsen.

22 MR. WILHELMSSEN: Thank you, Your Honor. I will
23 try to confine my remarks to five minutes. I don't have a
24 great deal to say in addition to what I have already urged to
25 this Court.

1 I do want to hit some highlights that were
2 essentially questions that had been posed as unanswered
3 questions to Mr. Drutz. First of all as to whether the Pages
4 should have known about the conflict earlier, well, the Pages
5 had dealt with John Mull and had not dealt with anyone else in
6 the firm, and during the depositions a little light bulb went
7 off in Mr. Page's head that John Mull was affiliated with Mr.
8 Adams. That was the first revelation to our firm.

9 The first I became aware of it was on the very day
10 of his deposition that he became aware of it and that was the
11 day we began addressing the issue. We did not wait, although
12 it may be a little bit -- I will state 60-day delay might be a
13 delay in which -- well, they should have known, put it that
14 way. Actually they didn't know given the fact of multiple
15 attorneys in the same law firm.

16 I have encountered people who I have known for
17 years and they ask, oh, are you affiliated with Mark Moore? I
18 think that was purely and simply the -- the explanation for it;
19 they did not realize that the law firm that Jeff is involved
20 with was somehow aligned with John Mull and they're lay people
21 and they would not be expected to know that.

22 As far as my avowal as to financial information,
23 Mark says it's not in the file. Well, the file doesn't contain
24 all the information and confidences that are supplied by the
25 client. I know many attorneys have practiced law in many

1 different ways. For instance, John Favour at our firm would
2 have very thin files that would reflect ongoing litigation for
3 years and he carried the information around in his head.

4 I guess what I'm trying to say is simply because
5 the files doesn't contain information does not mean that the
6 information was not supplied or that particular attorney in the
7 firm does not have knowledge of information that is not in the
8 file. That's why the Rule does not speak in terms of what is
9 in the file; it speaks in terms of what information was passed
10 between client and attorney.

11 Thirdly, the State Bar; I didn't mention anything
12 with respect to the State Bar. What the State Bar may or may
13 not have said with respect to this particular matter, the State
14 Bar does not issue opinions on topics such as this. In fact,
15 if you were to call the State Bar or if I were to call the
16 State Bar, they would give you -- point you in the right
17 direction of the Rule, but they would not begin to tell you you
18 can or cannot do something. That would in the line of an
19 advisory opinion.

20 The reason they don't do that is because their
21 advice to you is only as good as your advice to them.
22 Obviously when Jeff Adams spoke with a member of the State Bar
23 he gave them the information that he feels is his
24 characterization of the case. He possibly said something along
25 the lines all the issues are different, representation is

1 different.

2 Well, of course, they will say, oh, you don't have
3 a problem, but they are not in the business of supplanting
4 their decision-making for yours. You are the arbiter of this
5 issue, you are the decider of this issue, not the State Bar,
6 and that is based on the facts that are presented to you in the
7 motion papers which are far more comprehensive, I would assume,
8 than the supplied to the State Bar.

9 As far as Mr. Drutz' discussion as to financial
10 inability does not excuse the delay in filing or enforcing a
11 right, he is absolutely correct, but that's the statute of
12 limitations. If I wait for the statute of limitations to
13 expire and I do not file until after the statute has expired
14 and I argue that the reason I did not file on time was because
15 I didn't have the money, the law is clear; too bad, so sad.

16 But the Court sitting as a Judge in determining
17 whether poverty is an excusable reason for filing or not
18 filing, it's very clear, and what has been cited to you, say
19 that C.J.S. supplied by Mr. Drutz says poverty or pecuniary
20 embarrassment of plaintiff does itself excuse delay in the
21 enforcement of rights; that's right for the statute of
22 limitations, although it may be a proper circumstance for
23 consideration in determining the question of laches. That's
24 right. That's what we're saying.

25 We're saying that the Pages, if they're asked why

1 they delayed, are going to say financially we did not have the
2 ability to file and enforce. Presumably information that
3 previously had been passed from the Pages to Mr. Adams' and Mr.
4 Drutz' law firm that would or would not support that particular
5 issue. That's what is making them somewhat nervous.

6 Their suggestion of substantial relationship
7 between the issues, just to get the Court on track as far as
8 the ethical rules, there is an irrebuttal presumption of a
9 situation that necessitates a withdrawal where there is a
10 substantial relationship. That is an irrebuttal presumption.

11 But that test does not apply if you are just
12 talking about confidential information that is supplied that
13 may be utilized against a client. We're not talking about the
14 irrebuttal presumption. I'm saying actually information was
15 supplied.

16 Mr. Drutz says, Judge, we would have no way of
17 knowing the Pages' wherewithal as a result of their
18 representation as against Mr. Fagelman. That representation
19 involved the purchase and construction of their home which I
20 would think there would be a construction contract that would
21 be called for and that there would be some kind of financing
22 information that would relate to the construction.

23 Again, I don't know what was actually supplied.
24 All I know is my clients have informed me they did supply
25 financial information and they feel uncomfortable given the

1 fact that they believe the information they previously supplied
2 could be used against them.

3 I think I have covered all the highlights that Mr.
4 Drutz had raised. Again, if the Court has any questions, I
5 will gladly answer them. Otherwise, I'm -- I'm done.

6 THE COURT: I don't have any questions.

7 First of all, there has been a suggestion I should
8 review the prior file of Mr. Drutz' firm in camera. I decline
9 that request as I believe the Rule and case law suggest --
10 suggests that the Pages do not have to reveal confidential
11 information in order to sustain their burden, but it is their
12 burden on this issue. I'm not hearing the Pages are requesting
13 that I review the file. They are the ones that have the right
14 to the confidentiality of that information and it should be
15 maintained.

16 Mr. Wilhelmsen mentioned the State Bar and the
17 process involved in the State Bar. He is correct, I am not
18 involved in that process. While I am the arbiter of their
19 request to remove that law firm, I'm not making any decision
20 that in any way will impact potential complaints to the State
21 Bar or ultimate discipline by the Arizona Supreme Court. There
22 is a process for that and this decision is not meant to
23 circumvent that process. It's meant to resolve the dispute
24 that exists, and I find that there is a good faith dispute and
25 it was appropriately submitted to this Court.

1 With respect to the resolution of this matter, the
2 law is clear and going back even to long before we had the
3 current ethical rules to the 1966 case of Nichols v. Elkins, 2
4 Arizona Appeal 272, that simply representing a client in the
5 past does not mean that you can't represent someone else
6 against that client in the future.

7 From that the Rules now set forth some fairly
8 clear guidelines. I say "fairly clear guidelines." It
9 certainly leaves enough to argue about here in court today.

10 First part is E.R. 1.9, subsection A, talks about
11 what a lawyer shall not do; he shouldn't represent a client in
12 a matter against another client regarding the same issues or
13 same matter. That's not the case. He shouldn't represent a
14 client against another former client when there is a
15 substantial relationship between the matters. I don't find
16 that in this case based upon the information presented that
17 there is a substantial relationship between the prior
18 representation and this current lawsuit.

19 The Rule though goes on to say what a client or
20 what a lawyer can't do in subsection C; if there was
21 confidential information that was obtained during the course of
22 that prior representation, the Musgrove, Drutz and Kack firm
23 cannot use that information to the disadvantage of the Pages
24 except as the Rules permit or require with respect to that
25 client or when the information has become generally known.

1 It's not being presented to me -- to me that prior
2 confidences have been breached to this point. The Rules
3 provide that there are -- there is a remedy before the State
4 Bar and Arizona Supreme Court if the Musgrove, Drutz, Kack firm
5 reveals prior confidences, but it simply does not require in --
6 in subsection A that they be directed to withdraw or recuse
7 themselves, so the Motion to Disqualify defendants' counsel and
8 Motion for Protective Order is denied.

9 As I started out by saying I do find that there is
10 a good faith dispute that was brought appropriately to this
11 Court for its resolution, so the request for sanctions,
12 including attorneys' fees brought by the Coxes is denied.

13 Finally, I note that we have a Pretrial Conference
14 scheduled I believe it's August 16th. Recognizing there was
15 some delay and the number of depositions of all the plaintiffs,
16 did you -- is there an issue either counsel want to give input
17 on whether that August 16th Pretrial Conference is a realistic
18 date, or should we reschedule that? Mr. Wilhelmsen?

19 MR. WILHELMSEN: My feeling is that we could
20 probably proceed ahead with discovery, and even though the
21 Pretrial Conference date is in August I would imagine if the
22 Court were to look at its calendar, the trial is going to be
23 some time far enough in the future that anything that needs to
24 be accomplished prior to trial probably will be.

25 I'm -- I'm assuming you would be looking at a

1 March of '05 trial date as probably one of your earlier trial
2 dates, so my feeling would be we should go ahead and have our
3 Pretrial Conference and continue with discovery, and to the
4 extent we need to tailor our discovery deadlines and cut-offs
5 based on your calendar, we can do so.

6 THE COURT: Mr. Drutz?

7 MR. DRUTZ: Judge, I probably would have taken the
8 opposite position; thought that the Pretrial Conference might
9 be more productive when we have undertaken more discovery and
10 whether we might be filing appropriate motions in the case,
11 that it would perhaps be productive, so, you know, my
12 suggestion might be to bump that Pretrial Conference back 60
13 days from August, then we can probably have a better idea what
14 direction the case is going, really going to go.

15 MR. WILHELMSSEN: Your Honor, I don't have an
16 objection to that. I just -- it's just been my experience when
17 the Court sets trial it's far enough in advance that most
18 anything can be accomplished in advance of trial, but I would
19 have no objection if Mark wishes to have a 60-day postponement.

20 THE COURT: It is ordered granting the request for
21 a 60-day continuance of the Pretrial Conference. That date
22 will be set by further entry. Perhaps if I can convince the
23 Clerk to wait until tomorrow to fill out the minute entry, I
24 will have that new date included in the minute entry.

25 I am going to also order at the newly-set Pretrial

1 Conference, 10 days prior to that, the parties submit a Joint
2 Pretrial Conference Memorandum and see if we can't limit some
3 of the issues.

4 Anything else for today, Mr. Wilhelmsen?

5 MR. WILHELMSSEN: No, Your Honor.

6 THE COURT: Mr. Drutz?

7 MR. DRUTZ: No, sir.

8 THE COURT: That concludes this hearing.

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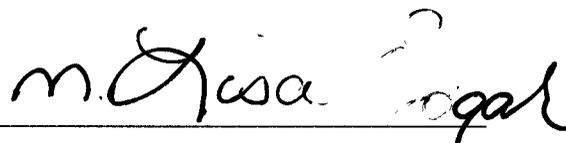
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C E R T I F I C A T E

I, M. LISA EDGAR, Official Court Reporter herein,
hereby certify that the foregoing is a true and accurate
transcript of the proceedings herein all done to the best of my
skill and ability.

DATED at Prescott, Arizona this 4th day of August,
2004.



M. LISA EDGAR, R.P.R., C.P.