IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEBAMOFF ENTERPRISES, INC., et al. Plaintiffs, v. DONALD G. O'CONNELL, et al. Defendants, - and - WINE AND SPIRITS DISTRIBUTORS OF ILLINOIS Intervenor-Defendant.	)	Case No. 16-cv-08607 Hon. William T. Hart

DEFENDANTS' MEMORANDUM IN SUPPORT
OF THEIR MOTION TO STRIKE THE EXPERT REPORT
OF SEAN O'LEARY AND TO BAR HIM FROM TESTIFYING AT TRIAL

I. Introduction.

In September of 2016, plaintiffs filed this lawsuit against the Chairperson and Executive Director of the Illinois Liquor Control Commission ("ILCC"), named in their official capacities ("ILCC Defendants").[1] After spending the first eighteen months of this litigation acting as the Chief Legal Counsel of the ILCC, Sean O'Leary switched his allegiances and submitted an expert report on behalf of the plaintiffs. Mr. O'Leary's attempt to serve as an expert witness against his former client creates a conflict of interest that is prohibited by law. As set forth more fully herein, he is not permitted to serve as counsel for the ILCC, obtain the ILCC's confidential information related to its defense strategies, and then switch-sides *in the same litigation* by submitting an expert report on behalf of the plaintiffs. Mr. O'Leary's representation of the ILCC during the course of this litigation creates actual and apparent conflicts of interest, which mandates his disqualification as an expert witness for the plaintiffs.

The conflict of interest created by Mr. O'Leary's services as an expert witness for the plaintiffs is egregious. He directly participated in the legal defense of the ILCC Defendants throughout much of this litigation, during which time he personally:

- Served as the primary point of contact between the ILCC and the assistant attorney general representing the ILCC Defendants, whereby Mr. O'Leary was provided with information regarding the defense strategy of the ILCC Defendants in this litigation;

- Attended multiple meetings with the assistant attorney general representing the ILCC Defendants, wherein the parties discussed their mental impressions of this case and exchanged highly privileged and confidential information regarding the defense strategy of the ILCC Defendants;

- Received and reviewed confidential drafts of motions filed on behalf of the ILCC Defendants, including the ILCC Defendants' motion to dismiss and the reply in support of their motion to dismiss;

[1] A suit against a state official in his or her official capacity is considered a suit against the governmental entity. *See Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985).

- Received and reviewed confidential drafts of the ILCC Defendants' appellate briefs, which contained the ILCC Defendants' proposed legal strategy and legal arguments before the Seventh Circuit Court of Appeals; and

- Attended a private moot court argument held by counsel for the ILCC Defendants, wherein Mr. O'Leary received and provided feedback regarding the confidential strategies and mental impressions of the ILCC Defendants' counsel.

In his role as the ILCC's Chief Legal Counsel, Mr. O'Leary's involvement in this litigation was substantial. He was privy to confidential communications with counsel for the ILCC Defendants, including communications regarding their defense strategy and their thoughts and impressions of this case. Pursuant to controlling law of this Court, Mr. O'Leary is not permitted to switch teams and testify as an expert witness against the ILCC. Mr. O'Leary's exposure to eighteen months of confidential communications with counsel for the ILCC Defendants disqualifies him from any further participation in this litigation, as the plaintiffs' expert witness or otherwise.

II. Factual Background.

Plaintiffs filed the instant litigation against the ILCC Defendants, as well as other named defendants, on September 1, 2016. At the time this litigation was commenced, Mr. O'Leary served as the Chief Legal Counsel of the ILCC. As the highest ranking legal officer at the ILCC, Mr. O'Leary was in charge of overseeing its day-to-day legal affairs, including, but not limited to, assisting with the defense of litigation brought against the ILCC's Executive Director and Chairperson. By virtue of these obligations, Mr. O'Leary maintained an attorney-client relationship with the ILCC, its Executive Director, and its Chairperson at all relevant times of his employment at the ILCC.

On September 20, 2016, attorney Michael T. Dierkes from the Office of the Illinois Attorney General filed a general appearance as the attorney for ILCC Chairperson Constance Beard. Mr. Dierkes appeared for ILCC Executive Director U-Jung Choe on January 20, 2017.

As counsel for the ILCC Defendants, Mr. Dierkes has kept the ILCC reasonably informed about the status of this litigation and consulted with the ILCC regarding the defense strategy of this case. As Chief Legal Counsel of the ILCC, Mr. O'Leary served as Mr. Dierkes' primary contact at the ILCC regarding all aspects of the instant litigation. Dierkes Aff. ¶ 3. Thus, during the course of Mr. O'Leary's employment at the ILCC, Mr. Dierkes provided Mr. O'Leary with updates regarding the status of the case and consulted with Mr. O'Leary regarding the defense strategies of the ILCC Defendants. *Id*. ¶ 4.

Mr. O'Leary and Mr. Dierkes met on at least two occasions to discuss this litigation. In a meeting on November 2, 2016, Mr. O'Leary and Mr. Dierkes discussed their impressions of this case and formulated a defense strategy on behalf of the ILCC Defendants. *Id*. ¶¶ 5-6. On December 6, 2016, Mr. Dierkes and Mr. O'Leary met for roughly an hour and a half to discuss their defense strategy. *Id*. ¶ 6. At this meeting, Mr. Dierkes and Mr. O'Leary specifically discussed certain legal arguments that could be raised in the ILCC Defendants' forthcoming motion to dismiss. *Id*. ¶ 7. Mr. Dierkes and Mr. O'Leary shared their mental impressions regarding the strength of various legal arguments and discussed the best strategy for obtaining a dismissal order on behalf of the ILCC Defendants. *Id*. ¶ 8.

Mr. O'Leary continued to be personally involved in the defense of the ILCC Defendants. Mr. Dierkes sent Mr. O'Leary confidential drafts of both the ILCC Defendants' motion to dismiss and the ILCC Defendants' reply in support of the motion to dismiss. *Id*. ¶ 9. Mr. O'Leary provided input on these draft motions. *Id*.

Defendants' motion to dismiss was granted on June 19, 2017. When the plaintiffs appealed that decision to the Seventh Circuit, Mr. O'Leary continued to engage in confidential communications with the ILCC Defendants' counsel. Deputy Solicitor General Sarah A. Hunger,

who oversaw the ILCC Defendants' appeal before the Seventh Circuit, tendered a confidential draft of the ILCC Defendants' appellate brief to Mr. O'Leary for his strategic feedback and review. Hunger Aff. ¶ 3. In preparation for oral argument before the Seventh Circuit, counsel for the ILCC Defendants held a private moot court argument, which Mr. O'Leary attended in his capacity as the ILCC's Chief Legal Counsel. *Id.* ¶ 4. Once again, Mr. O'Leary was not only privy to the confidential thoughts and mental impressions of the ILCC Defendants' counsel, but provided his own advice as to what strategic arguments should be raised and how certain issues should be addressed. *Id.* ¶ 5.

Mr. O'Leary was terminated from his position as Chief Legal Counsel at the ILCC in March of 2018. Following his termination, Mr. O'Leary was retained by the plaintiffs as an expert witness and consultant. On February 6, 2020, Mr. O'Leary submitted an expert report on behalf of the plaintiffs. The report confirms that the plaintiffs are paying Mr. O'Leary "$450 per hour as a consultant."

Mr. O'Leary's report draws heavily on his employment as Chief Legal Counsel for the ILCC, claiming, among other things, that he "*ran the legal function of the Illinois Liquor Control Commission* and ha[s] stayed involved in the process." Mr. O'Leary's report addresses factual and legal issues that he privately discussed with counsel for the ILCC Defendants during the course of this litigation. These topics include, but are not limited to, the health and safety issues surrounding the direct shipment of wine from out-of-state retailers.

At a status hearing on February 13, 2020, counsel for the ILCC Defendants promptly informed this Court of Mr. O'Leary's conflict of interest. This Court entered a briefing schedule on the ILCC Defendants' motion to disqualify Mr. O'Leary that same day.

III. Argument.

Mr. O'Leary's prior representation of the ILCC mandates his disqualification as an expert witness. "[A]n expert may be disqualified on conflict of interest grounds when he switches sides." *Demouchette v. Dart*, 09 C 6016, 2012 WL 472917, at *4 (N.D. Ill. Feb. 10, 2012); *Lifewatch Serv. Inc. v. Braemer, Inc.*, No. 09 C 6001, 2010 WL 3909483 at *1 (N.D. Ill. 2010) (noting that "courts have the inherent power to disqualify expert witnesses"). "When a party contends that an expert should be disqualified because the expert has a conflict of interest, the party seeking disqualification must establish that: 1) a confidential relationship existed between itself and the expert; and 2) it exchanged confidential information that is relevant to the litigation with that expert." *Lifewatch*, 2010 WL 3909483, at *1. Where policy concerns surrounding the integrity and fairness of the adversary process are sufficient, courts in this circuit have found that "those concerns should merit disqualification regardless of the outcome of the two factor test noted previously." *Id.*; *see also American Empire Surplus Lines Ins. Co. v. Care Centers, Inc.*, 484 F. Supp. 2d 855, 857 (N.D. Ill. 2007) (side-switching expert disqualified even though she had no confidences from first engagement). Applying the foregoing legal framework, there is no question that Mr. O'Leary should be disqualified as an expert witness.

A. Mr. O'Leary Had A Confidential Relationship With The ILCC Defendants.

There is no question that Mr. O'Leary had a confidential relationship with the ILCC Defendants. *Lifewatch*, 2010 WL 3909483, at *1 (stating that the first factor to consider when determining a motion to disqualify is whether "a confidential relationship existed between itself and the expert"). Mr. O'Leary's expert report admits that he "was the Chief Legal Counsel for the Illinois Liquor Control Commission from July 2016 to March 2018" and that he "ran the legal function of the Illinois Liquor Control Commission and ha[s] stayed involved in the process." As

set forth above, Mr. O'Leary's duties as Chief Legal Counsel of the ILCC included acting as the primary point of contact between the ILCC and the ILCC Defendants' counsel at the Attorney General's Office for this litigation. Mr. O'Leary engaged in confidential communications with the ILCC Defendants' counsel, assisted with crafting legal arguments on behalf of the ILCC Defendants and, among other things, helped shape legal arguments raised on behalf of the ILCC Defendants before the Seventh Circuit.

As the ILCC's Chief Legal Counsel, there can be no dispute that Mr. O'Leary maintained an attorney-client relationship with the ILCC, the essence of which is rooted in confidentiality. *Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 963 (N.D. Ill. 2010) ("The attorney-client privilege is the oldest of the recognized privileges for confidential communications known to the common law."); *Fisher v. United States*, 425 U.S. 391, 396 (1976) (noting the "confidential nature of the attorney-client relationship"); *Schechter v. Blank*, 254 Ill. App. 3d 560, 564 (1st Dist. 1993) (noting the "highly confidential and fiduciary nature of the attorney-client relationship"). The Seventh Circuit recognizes the importance of this relationship between government attorneys and their state agency clients; the "privilege 'unquestionably' applies to conversations between government lawyers and administrative agencies." *Green v. I.R.S.*, 556 F.Supp. 79, 85 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984); see also *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 291 (7th Cir. 2002) ("the government is entitled to the same attorney-client privilege as any other client"). Given Mr. O'Leary's representation of the ILCC during the course of this litigation, the existence of a confidential relationship cannot be seriously disputed. The first factor of the disqualification analysis is easily satisfied.

B. Mr. O'Leary Received Confidential Information From The ILCC Defendants.

The second factor for disqualification – whether the ILCC Defendants "exchanged confidential information that is relevant to the litigation with that expert" – is likewise satisfied. *Lifewatch*, 2010 WL 3909483, at *1. "In determining whether the party disclosed confidential information to the expert, a court should look to whether the party and the expert discussed trial strategies and the weaknesses on each side of pertinent issues, the role of the expert witness in the litigation, and anticipated defenses." *Pease v. Prod. Workers of Chicago & Vicinity Local 707*, 02 C 6756, 2003 WL 22012678, at *6 (N.D. Ill. Aug. 25, 2003).

Here, Mr. O'Leary was provided with an abundance of privileged and confidential information during the course of this litigation. In addition to participating in general confidential communications regarding the ILCC Defendants' legal strategies, Mr. O'Leary was provided with preliminary drafts of briefs and attended a confidential moot court in preparation for oral argument on appeal. Dierkes Aff. ¶ 9; Hunger Aff. ¶ 4. All of these communications were confidential in nature, which is expressly recognized by both the Federal Rules of Civil Procedure and the controlling case law of this circuit. Fed. R. Civ. P. 26(b)(3)(B) (protecting "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation"); *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) (noting that "the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 94 C 897, 1995 WL 557412, at *2 (N.D. Ill. Sept. 19, 1995) ("Preliminary drafts of documents which were not distributed, and which reflect confidential communications regarding legal advice are privileged."). Because Mr. O'Leary received various

confidential materials in connection to his role as the ILCC's Chief Legal Counsel, the second factor of the disqualification analysis is easily met.

To be clear, the controlling law of this circuit does not require a party to establish that the confidential information was actually utilized to the detriment of the party seeking disqualification. *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 196 (7th Cir. 1979) ("it is not necessary that an attorney or party divulge any confidences in order to prove they were revealed"). Instead, the movant must only show that the expert was provided confidential information. *Simons v. Freeport Mem'l Hosp.*, 06 C 50134, 2008 WL 5111157, at *2 (N.D. Ill. Dec. 4, 2008) ("the movant must show it exchanged confidential information with the expert"); *Dyson, Inc. v. Bissell Homecare, Inc.*, 951 F. Supp. 2d 1009, 1022 (N.D. Ill. 2013) (the movant must show "that the proposed expert was exposed to confidential information that is relevant to the instant action"); *Chamberlain Group, Inc. v. Interlogix, Inc.*, 01 C 6157, 2002 WL 653893, at *2 (N.D. Ill. Apr. 19, 2002) (stating that the second factor is "whether confidential information was exchanged"); *Lifewatch Serv. Inc. v. Braemer Inc.*, 09 C 6001, 2010 WL 3909483, at *1 (N.D. Ill. Sept. 28, 2010) (the second factor is whether the movant "exchanged confidential information that is relevant to the litigation with that expert"). Thus, to the extent that the plaintiffs attempt to argue that Mr. O'Leary did not rely on confidential information when formulating his report – which he unquestionably did – such an argument is immaterial to the disqualification analysis. In any event, the facts confirm that Mr. O'Leary was provided with confidential information directly pertaining to defense counsel's strategy in this litigation, which disqualifies him as an expert witness.

C. Policy Considerations Strongly Favor Disqualification.

Even if this Court finds that the two-factor test has not been met – which it undoubtedly has been – policy considerations regarding fairness and integrity of this litigation strongly favor disqualification. *Allstate Ins. Co. v. Electrolux Home Products, Inc.*, 840 F. Supp. 2d 1072, 1078 (N.D. Ill. 2012) (noting that policy concerns "may warrant disqualification of an expert even when the two factor test is not met."). "The policy objectives favoring disqualification include preventing conflicts of interest and maintaining the integrity of the judicial process." *Simons v. Freeport Mem'l Hosp.*, 06 C 50134, 2008 WL 5111157, at *5 (N.D. Ill. Dec. 4, 2008), at *5 quoting *Koch Ref. Co. v. Jennifer L. Boudreau M/V*, 85 F.3d 1178, 1182 (5th Cir. 1996). "Courts have most readily disqualified experts where, as here, the expert switched sides in the same litigation. In fact, several courts have acknowledged that the prospect of an expert switching sides in the midst of litigation is unfair and challenges the integrity of the judicial process." *Id*. (internal citations omitted); *Wang Laboratories, Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991) ("To be sure, no one would seriously contend that a court should permit a consultant to serve as one party's expert where it is undisputed that the consultant was previously retained as an expert by the adverse party in the same litigation and had received confidential information from the adverse party pursuant to the earlier retention."); *Thompson, I.G., L.L.C. v. Edgetech I.G., Inc.*, 11-12839, 2012 WL 3870563, at *5 (E.D. Mich. Sept. 6, 2012) ("In cases where an expert was a former employee and learned of technical information that relates to the lawsuit, most courts have disqualified the expert."). Here, allowing Mr. O'Leary to represent the ILCC and then testify against its interests in the same litigation violates several policy interests of this Court.

The *Simons* case is instructive on this point. In *Simons*, the court held that even if the two-factor test for disqualification was not satisfied, "this case is one that requires expert

disqualification in order to preserve the integrity of both the litigation at hand and the entire judicial process." *Simons*, 2008 WL 5111157, at *5. The *Simons* court reasoned:

> Defendants' attorneys established an ongoing relationship with [the expert] in which she shared her thoughts and opinions about the case at bar. This was not merely an initial interview, but an extended consultation in which she spoke with defense counsel about the case for approximately two hours. In addition, although [defense counsel's] affidavit does not indicate exactly what [she] shared with [the expert], it is apparent from [defense counsel's] statements that, at the very least, [the expert] shared her opinions about the strength and weaknesses of the current litigation and aided [defense counsel] in constructing her views on the defense of the case and the weaknesses of the plaintiff's case. This information in itself could potentially cause plaintiff to have a tremendous advantage.

Id.; *see also Am. Empire Surplus Lines Ins. Co. v. Care Centers, Inc.,* 484 F. Supp. 2d 855, 857 (N.D. Ill. 2007) (holding that even where no confidential information is exchanged disqualification is necessary where dual involvement of the expert "appears unfair and unseemly"); *Lifewatch*, 2010 WL 3909483, at *7 (holding that it would disqualify the expert even if the plaintiff did not share confidential information with him because his actions came perilously close to "switching sides" mid-litigation).

The facts of this case are significantly more egregious than the facts in *Simons*. The *Simons* court determined that a two-hour consultation with a potential expert - where no confidential information was exchanged - constituted an "ongoing relationship" that "could potentially cause plaintiff to have a tremendous advantage." *Id*., at *5. Here, Mr. O'Leary maintained an attorney-client relationship with the ILCC for eighteen months of this litigation, during which time he communicated with defense counsel, reviewed defense counsels' briefs and commented on defense counsel's oral argument strategies before the Seventh Circuit. Allowing Mr. O'Leary to switch sides in the middle of this litigation to testify against his former client would certainly undermine the "integrity of the judicial process." *Id*.

Furthermore, permitting Mr. O'Leary to testify as an expert witness would have a chilling effect on the sanctity of the attorney-client relationship. An attorney could: (1) represent a client for the majority of litigation; (2) obtain all of his client's confidential information during the course of that representation; and (3) then withdraw his representation on the eve of trial in order to serve as an expert witness for his client's adversary. As the Seventh Circuit instructed, "lawyers are obliged not to oppose or otherwise undermine their ex-client's legal position, and they must not reveal confidences they may have received during the course of the representation." *County, Mun. Employees' Supervisors' & Foremen's Union Local 1001 (Chicago Illinois) v. Laborers' Int'l Union of N. Am.*, 365 F.3d 576, 579 (7th Cir. 2004). Clients should not have to fear that their counsel will serve as an expert witness against their interests. Nor should attorneys be permitted to discharge their duty of loyalty to former clients so flippantly. As a matter of public policy, Mr. O'Leary's past and present conflicts require his report to be stricken and his testimony to be barred.

IV. Conclusion.

WHEREFORE, Defendants respectfully request that this Court grant their motion to strike the expert report of Sean O'Leary and to bar him from testifying at trial or working on this matter any further.

Respectfully submitted,

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/s/ Michael T. Dierkes

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