UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan.

Defendants.

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2:19-CV-11661-DPH-DRG

Hon. Denise Page Hood

Hon. David R. Grand

PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S RESPONSE IN OPPOSITION TO MOTION TO DISQUALIFY

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PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S RESPONSE IN OPPOSITION TO MOTION TO DISQUALIFY

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CONCISE STATEMENT OF ISSUES PRESENTED

Whether Catholic Charities West Michigan should be denied its choice of legal counsel.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Mich. R. Prof'l Conduct 1.11

Manning v. Waring, Cox, James, Sklar, & Allen,
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Smith v. City of Inkster,
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INTRODUCTION

In April 2019, Defendants implemented a new policy demanding that faith-based foster care and adoption providers such as Catholic Charities West Michigan start recommending child placements with same-sex couples or lose the ability to serve Michigan's foster children. Forced to choose between violating its religious beliefs about marriage and shutting down a 70-plus-year-old religious ministry to foster children, Catholic Charities turned to Alliance Defending Freedom for help. ADF ultimately agreed to represent Catholic Charities, and filed a state court lawsuit in Grand Rapids, Michigan, seeking to vindicate Catholic Charities' statutory and constitutional right to operate consistently with its conscience and faith. ADF and local counsel in this case are representing Catholic Charities *pro bono*.

After improperly removing Catholic Charities' lawsuit to this Court (*see* Motion to Change Venue, ECF No. 9.), Defendants now seek a court order disqualifying Catholic Charities' choice of legal counsel. But denying an opponent its choice of counsel is a "drastic measure" that must be "viewed with disfavor" and imposed only when "absolutely necessary." *Valley-Vulcan Mold Co. v. Ampco-Pittsburgh Corp.*, 237 B.R. 322, 337 (B.A.P. 6th Cir. 1999), *aff'd*, 5 F. App'x 396 (6th Cir. 2001). Disqualification is neither necessary nor proper here.

Relying on the *wrong* ethical rule, Defendants contend that ADF and local counsel should be disqualified because the State previously

retained Bursch Law PLLC and its sole member, former Michigan Solicitor General John Bursch, to defend its prior practice of accommodating faith-based providers, and because Bursch now serves in a part-time role with ADF. But the applicable rule establishes that ADF's immediate and effective screening of Bursch from its representation of Catholic Charities precludes the imputation of any potential conflict of interest. Indeed, disqualification would be improper because ADF has complied with its ethical obligations under Michigan Rule of Professional Conduct 1.11, and Bursch has been diligent to ensure that confidential client information obtained by his law firm, Bursch Law PLLC, is not shared with any third party, including ADF.

Because Defendants have utterly failed to carry the "heavy burden" and satisfy the "high standard of proof" required for the extreme sanction of disqualification, *McCool v. Operative Plasterers' & Cement Masons' Int'l Ass'n of the U.S. & Canada, AFL-CIO*, No. 13-13614, 2014 WL 635797, at *3 (E.D. Mich. Feb. 18, 2014), their motion should be denied.

BACKGROUND

A. The State retains Bursch Law PLLC to defend it against the ACLU's lawsuit in *Dumont*.

In September 2017, the ACLU, on behalf of two same-sex couples, filed a lawsuit against the Michigan Department of Health and Human Services (DHHS), alleging that DHHS's practice of contracting with

faith-based foster care and adoption providers violated the Establishment and Equal Protection Clauses of the U.S. Constitution. *See Dumont v. Lyon*, No. 2:17-cv-13080 (E.D. Mich.).

In November 2017, the Michigan Department of Attorney General retained former Michigan Solicitor General John Bursch to defend DHHS in *Dumont*. (Bursch Decl. ¶ 2, attached as Ex. 1.) Bursch was specially retained to defend the State's longstanding practice of working with faith-based agencies that provide adoption and foster care services to children in Michigan's child welfare system. (*Id.*) Bursch signed the legal-services contract solely in his capacity as owner of Bursch Law PLLC. (*Id.* ¶ 5.) Bursch Law PLLC has no other employees or members. (*Id.* ¶ 6.) Bursch later signed an amendment to that contract in August 2018, extending the term of the contract from December 31, 2018, to December 31, 2019. (ECF No. 7-3 at 2.) That too was executed solely in Bursch's capacity as owner of Bursch Law PLLC. (*Id.*; *accord* Bursch Decl. ¶ 19.)

By agreeing to represent DHHS, Bursch Law PLLC committed to "keep[ing] confidential all services and information" and promised that it would "not divulge any information to any person other than to authorized representatives of the Department." (ECF No. 7-2 at 5.) Bursch has complied, and continues to comply, with these confidentiality provisions. (Bursch Decl. ¶¶ 36–37.)

B. Bursch takes a part-time position at ADF to work on unrelated matters.

On July 30, 2018, Bursch took a part-time position at ADF to work on matters separate from his Bursch Law PLLC matters. (Bursch Decl. ¶ 8.) Since that date, Bursch has generally spent about two thirds of his time on ADF matters and one third on Bursch Law PLLC matters. (*Id.*)

Bursch Law PLLC and ADF remain completely separate and distinct entities. (*Id.* ¶ 9.) To ensure the confidentiality of Bursch Law PLLC matters, Bursch maintains separate laptops, emails, files, credit cards, expenses, and matter-management software, among other things, for his work on Bursch PLLC and ADF matters. (*Id.* ¶¶ 10–15.) Bursch also maintains a website for Bursch Law PLLC that is separate from the ADF website; ADF does not have access to or control over the Bursch Law PLLC website. (*Id.* ¶ 12.) Further, there are no other ADF employees, full-time or part-time, in the geographic vicinity of Bursch Law PLLC, or even in the State of Michigan. (*Id.* ¶ 16.)

C. Attorney General Nessel is elected, terminates Bursch Law PLLC's contract, and instructs DHHS to settle with the ACLU.

In September 2018, Michigan Attorney General candidate Dana Nessel publicly announced that she likely would not defend Mich. Comp. Laws §§ 722.124e, 722.124f, 710.23g, and 400.5a, laws that were at issue in the *Dumont* litigation and that expressly guarantee the religious liberty rights of faith-based foster care and adoption

providers.[1] During her campaign, Nessel asserted that there is "no viable defense" to those laws and that their purpose is "to discriminate against people."[2] Although the Michigan Attorney General's office was actively defending the validity of those laws in *Dumont*, Nessel indicated that, if she were elected, she "would probably be telling the Legislature they would have to defend that with private counsel" because she would not "defend[ ] a law whose only purpose is discriminatory animus."[3]

Nessel was elected in November 2018, and took her oath of office in January 2019. Shortly thereafter, on January 8, 2019, the Attorney General's office notified Bursch that the Bursch Law PLLC legal-services contract for the *Dumont* litigation had been terminated. (Bursch Decl. ¶ 26.) The Attorney General's office did not consult with Bursch before terminating the contract. (*Id.* ¶ 28.)

Then, instead of recusing herself or giving the Legislature the chance to hire private counsel in *Dumont*, Attorney General Nessel entered into settlement discussions with the ACLU in late January 2019. The resulting settlement agreement—in which DHHS committed to violate Michigan law by excluding faith-based providers from serving

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[1] Ed White, *Dem AG candidate: Adoption law discriminates against gays*, Associated Press (Sept. 27, 2018), https://bit.ly/2Fq3YgU.

[2] *Id.*

[3] *Id.*

Michigan's foster children unless they agreed to recommend same-sex couples as foster and adoptive parents—was finalized in March 2019. (*See* ECF No. 1-2 at 180–89.)

D. Defendants implement a new policy that targets faith-based providers like Catholic Charities.

In April 2019, Defendants sent a directive to Michigan's child placing agencies, including Catholic Charities, purporting to implement the *Dumont* settlement agreement. (ECF No. 1-2 at 191–92.) The directive says that Catholic Charities can no longer refer a same-sex couple to another agency, nor may it decline to recruit, train, evaluate, or recommend same-sex couples as prospective foster or adoptive parents. (*Id.*) The directive further states that Defendants will terminate Catholic Charities' contracts with the State, and thereby prohibit it from serving foster children through foster and adoption placements, if it "refuses to comply" with this new directive. (*Id.* at 192.)

E. Catholic Charities selects ADF to defend it *pro bono*, and ADF screens Bursch from the representation.

Catholic Charities first spoke to ADF about possible legal representation in February 2019. (Galus Decl. ¶ 4, attached as Ex. 2.) Aware that Attorney General Nessel had publicly expressed her intention *not* to defend Michigan's statutory protections for faith-based foster care and adoption providers, and in fact was planning to settle

the ACLU's lawsuit in *Dumont*,[4] Catholic Charities was rightfully concerned about whether the State would soon punish it for operating its over 70-year-old foster care and adoption ministry consistently with its faith. (*Id.*)

The ADF attorney involved in that initial phone call with Catholic Charities knew that Bursch Law PLLC had previously represented DHHS in *Dumont*. (*Id.* ¶ 5.) He therefore immediately consulted with firm leadership about screening Bursch from any representation of Catholic Charities. (*Id.*) Leadership agreed that Bursch should be screened and promptly erected a conflict wall. (Cortman Decl. ¶ 5, attached as Ex. 3.)[5]

ARGUMENT

I. Defendants' motion to disqualify should be denied because ADF has complied with its ethical obligations.

The drastic measure of disqualification is allowed only "when there is a reasonable possibility that some specifically identifiable impropriety actually occurred." *Smith v. City of Inkster*, No. 12-cv-15440, 2013 WL 1703898, at *1 (E.D. Mich. Apr. 19, 2013) (quoting *Moses v. Sterling Commerce (Am.), Inc.*, 122 F. App'x 177, 183–84 (6th

[4] The settlement discussions were widely reported by the media. *E.g.*, Beth LeBlanc, *Nessel plans settlement talks in lawsuit targeting same-sex adoption refusals*, The Detroit News (Jan. 24, 2019, 1:11 PM), https://bit.ly/2x9SucX.

[5] Additional details about the ethical screen are contained in the relevant argument sections below.

Cir. 2005)). In making that determination, Michigan's "ethics rules" may serve as "appropriate standards." *McCool*, 2014 WL 635797, at *4. Here, ADF complied with its ethical obligations when it immediately screened Bursch from its representation of Catholic Charities. Because no "specifically identifiable impropriety actually occurred," Defendants' motion should be denied. *City of Inkster*, 2013 WL 1703898, at *1.

A. ADF immediately screened Bursch from its representation of Catholic Charities, complying with ethical rule 1.11.

Defendants contend that any conflict arising from Bursch's prior representation of the government in *Dumont* should be automatically "imputed to all attorneys at ADF," regardless of whether Bursch has been screened or disclosed confidential information. (ECF No. 7 at 27.) But Michigan's ethical rules teach otherwise; ADF's immediate screening of Bursch precludes the imputation of any conflict.

Under Michigan Rule of Professional Conduct 1.11, any potential conflict arising from an attorney's representation of the government will not be imputed to an associated firm if the disqualified attorney is "screened from any participation in the matter" and "apportioned no part of the fee therefrom." Mich. R. Prof'l Conduct 1.11(a) & (b). This provision applies not just to conflict situations involving former in-house government attorneys, but also to situations involving outside

attorneys, like Bursch, who were "specially retained by the government." Mich. R. Prof'l Conduct 1.11, cmt.

ADF undeniably complied with Rule 1.11's screening provision. As detailed above, ADF immediately took steps to ensure that Bursch was screened when Catholic Charities first presented itself as a potential client in February 2019. (Galus Decl. ¶ 5; Cortman Decl. ¶ 5.) Specifically, ADF attorneys and staff were told, and continue to be reminded, that Bursch is screened from ADF's representation of Catholic Charities and that they are forbidden from communicating with him about it. (Cortman Decl. ¶¶ 6–7; Galus Decl. ¶¶ 6–7.) The three ADF attorneys assigned to the case were likewise notified at the outset of their involvement about the potential conflict and that Bursch is screened. (Cortman Decl. ¶ 5; Galus Decl. ¶ 5; Brooks Decl. ¶ 4, attached as Ex. 4.) All three of these attorneys aver that they have not communicated with Bursch about their representation of Catholic Charities. (Cortman Decl. ¶ 8; Brooks Decl. ¶ 5; Galus Decl. ¶ 6.) Nor have they asked for or received any confidential information from Bursch related to Bursch Law PLLC's prior representation of the State in *Dumont*. (Cortman Decl. ¶ 9; Brooks Decl. ¶ 7; Galus Decl. ¶ 9.) In fact, they do not work in the same *state* as Bursch, so they do not even see him on a regular basis. (Bursch ¶ 16; Cortman Decl. ¶ 8; Brooks Decl. ¶ 6; Galus Decl. ¶ 6.) Additionally, to ensure that Bursch cannot inadvertently access confidential information and work product related

to ADF's representation of Catholic Charities, the attorney primarily responsible for handling that information and work product keeps it all on a private drive that he alone can access. (Galus Decl. ¶ 8.)

Given these facts, it is no surprise that Defendants do not dispute that ADF has screened Bursch. They instead argue that ADF violated its ethical obligations under Rule 1.11 by allowing Bursch to participate in ADF's filing of a September 2018 amicus brief in *Fulton v. City of Philadelphia*—an entirely separate Third Circuit case in which Defendants did not participate. (ECF No. 7 at 30–31.) This argument fails for three independent reasons.

First, Defendants are seeking to disqualify ADF from *this case*, not *Fulton*.

Second, the *Fulton* litigation was not the "same" as or "nearly identical" to *Dumont*, as Defendants remarkably claim. (*Id.*) Those two cases involved different parties, different facts, and different laws. The *Fulton* amicus brief thus says nothing about DHHS or how it administers its adoption and foster care systems.

Third, the position advocated by the *Fulton* amicus brief—that faith-based agencies play an important role in providing critical foster care and adoption services to needy children—was wholly consistent with, and not adverse to, DHHS's position in *Dumont* at the time. Because Bursch himself was not even arguably conflicted from filing a consistent brief in the unrelated case of *Fulton*, no conflict could be

imputed to ADF in that case, let alone this one. *See* Mich. R. Prof'l Conduct 1.11(b) (adversity of interests a condition to disqualification).

Perhaps realizing the futility of their argument under Rule 1.11, Defendants primarily cite to Rule 1.10. But as explained above, Rule 1.11 expressly applies to situations involving potential conflicts arising from an attorney's representation of the government. Indeed, the comment to Rule 1.10 itself plainly states that, "[w]here a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b)," not Rule 1.10. Likewise, ABA Model Rule of Professional Conduct 1.10(d) states that "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." Simply put, Rule 1.10 has no applicability here.

That there is a separate rule for situations like this one makes good sense. "[T]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government." Mich. R. Prof'l Conduct 1.11, cmt. Recognizing that "[t]he government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards," Michigan's rules allow for screening "to prevent the disqualification rule from imposing too severe a deterrent against entering public service." *Id.*

But even under Rule 1.10, any potential conflict arising from Bursch Law PLLC's representation of the government in *Dumont* cannot be imputed to ADF. That is because Rule 1.10(b), like Rule 1.11, allows firms to avoid the imputation of a conflict by screening the disqualified attorney. Mich. R. Prof'l Conduct 1.10(b); *accord* Mich. R. Prof'l Conduct 1.9, cmt. ("Under Rule 1.10(b), screening may be employed to preserve the confidences of a client when a lawyer has moved from one firm to another."). Notably, "Rule 1.10(b) applies not just to cases in which a lawyer's present and former firms are involved on the date the lawyer moves," but also to situations like the one presented here "where the lawyer's present firm [ADF] *later* wishes to enter a case from which the lawyer is barred because of information acquired while associated with the prior firm [the Michigan Attorney General's office]." Mich. R. Prof'l Conduct 1.9, cmt. (emphasis added).

Because ADF complied with its ethical obligations when it immediately screened Bursch from its representation of Catholic Charities, the request for disqualification should be flatly denied.

B. ADF's screen of Bursch was, and continues to be, effective.

In addition to complying with the ethical rules, ADF's conflict wall rebuts any presumption that confidential information has been or will be shared. *See Manning v. Waring, Cox, James, Sklar, & Allen*, 849 F.2d 222, 225 (6th Cir. 1988) (presumption of shared confidences is

rebutted by effective screen). Determining the effectiveness of an attorney screen is a fact-specific inquiry. The Sixth Circuit looks at "the size and structural divisions of the law firm involved, the likelihood of contact between the 'infected' attorney and the specific attorneys responsible for the present representation, the existence of rules which prevent the 'infected' attorney from access to relevant files or other information pertaining to the present litigation, or which prevent him from sharing in the fees derived from such litigation." *Id.* at 225–26. (quoting *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983)).

That Bursch has been effectively screened is beyond dispute. For one thing, Bursch is located in an entirely separate state from *all* ADF employees, including the three ADF attorneys assigned to this case. (Bursch Decl. ¶ 16.) And whenever he does have ADF meetings or even casual conversations with ADF colleagues, if the subject of this litigation comes up, he has been diligent to remind everyone that he is screened from the case and does not discuss the case. (*Id.* ¶ 35.) In fact, Bursch has been so careful and diligent "not to communicate any confidential information or share a single document with anyone at ADF" that he avers he has "not even shared publicly-available pleadings from the *Dumont* litigation." (*Id.* ¶ 36.) Indeed, Bursch is no novice when it comes to conflict screens, having complied with them numerous times during his time as Michigan Solicitor General and while working at Warner Norcross & Judd LLP. (*Id.* ¶¶ 25, 36.)

ADF has been equally diligent. As described above, ADF attorneys and staff have been told—on numerous occasions, verbally and in writing—that Bursch is screened from ADF's representation of Catholic Charities and that they may not communicate with him about it. (Cortman Decl. ¶¶ 6–7; Galus Decl. ¶ 7.) The three ADF attorneys assigned to this case have also been careful not to communicate with Bursch about the representation and have received no confidential information from him. (Cortman Decl. ¶¶ 8–9; Brooks Decl. ¶¶ 5, 7; Galus Decl. ¶¶ 6, 9.) Local counsel attests to the same. (Wierenga Decl. ¶¶ 4–6, attached as Ex. 5.) The State points to absolutely nothing that suggests the contrary.

In sum, ADF's conflict wall is, and will continue to be, effective. ADF and Bursch have both been so diligent about the screen that Bursch has declared that, until he received Defendants' motion to disqualify, he was "not even aware the case was pending in this Court," "had no idea Mr. Wierenga was involved in this case," and had not even reviewed "publicly available documents in this case." (Bursch Decl. ¶¶ 40–41.) In other words, a member of the general public following the case knows more about it than Bursch does.

C. ADF notified Defendants of the screen even though it was not required to do so under the rules.

Having no meaningful challenge to the effectiveness of the conflict wall, Defendants try to argue that ADF's *notice* of it was "ineffective and untimely." (ECF No. 7 at 15.) This argument fares no better.

All that is required for notice under Rule 1.11 is that it "be given as soon as practicable" so that the government agency has "reasonable opportunity to ascertain" whether the rule is being complied with and "to take appropriate action if it believes the lawyer is not complying." Mich. R. Prof'l Conduct 1.11, cmt. The May 6, 2019 letter to the State easily satisfies this requirement. Indeed, ADF sent that letter to the State *before* the complaint was even served. (*See* ECF No. 1 at 3) (noting May 9 and May 15 service dates).[6] And as plainly demonstrated by Defendants' motion to disqualify here—which was filed more than a month after the State was notified and before any court rulings in this case—Defendants had "reasonable opportunity to ascertain" compliance with the rule and "to take appropriate action."[7]

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[6] Notice is not required "at a time when premature disclosure would injure the client." Mich. R. Prof'l Conduct 1.11, cmt. Notifying the State sooner would have injured Catholic Charities by prematurely alerting DHHS of the organization's plans to challenge the new policy.

[7] Defendants complain that ADF's notice did not provide any "emails or other records" to support the fact that ADF immediately screened Bursch. But no such records are required, and Defendants at no point asked for any. Moreover, although they were invited to "discuss this issue further" and to let Plaintiff's counsel "know if there is anything more we can do to answer any lingering questions or concerns you

Finally, Defendants' argument fails to appreciate that Rule 1.11 requires notice only if ADF were representing Catholic Charities in the *same* matter in which Bursch "participated personally and substantially as a public officer or employee." Mich. R. Prof'l Conduct 1.11(a). Bursch never participated in this case in *any* capacity. Rule 1.11 does not require that notice be given to the government agency where, like here, the potential conflict arises from the disqualified attorney having possible "confidential government information" that "could be used to the material disadvantage" of the agency. *Id.*, 1.11(b).

ADF thus not only met its ethical obligations when it screened Bursch and notified DHHS of that screen, it exceeded them. Defendants' motion should be denied.

II. The motion should also be denied because Bursch never shared confidential information obtained through his private law firm, Bursch Law PLLC, with ADF.

Defendants next argue that disqualification is warranted because ADF did not screen Bursch the moment he started part-time work at ADF in late July 2018. (ECF No. 7 at 30.) But screened him from what? There was no potential conflict until Catholic Charities became an ADF client in 2019. And there, the record is clear that ADF immediately screened Bursch from that representation.

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might have," Defendants' counsel declared an "impasse" and filed this motion. (Galus Decl., Ex. A)

Defendants thus seem to be suggesting that this Court should presume Bursch violated his ethical duties and disclosed confidential information to ADF attorneys *before* ADF began representing Catholic Charities—indeed, even before the very election of the Attorney General that precipitated the need for this action in the first place. The Court should presume no such thing, if for no other reason than that it is clearly contradicted by the record.

The truth is that Bursch has never shared confidential information with ADF, either before or after ADF undertook representation of Catholic Charities. (*See* Bursch Decl. ¶ 36; Cortman Decl. ¶ 9; Brooks Decl. ¶ 7; Galus Decl. ¶ 9.) And, as explained in Bursch's declaration, it is not even possible for ADF employees to accidentally access Bursch Law PLLC's client information, including information related to the *Dumont* litigation. (Bursch Decl. ¶ 17.) No ADF employees share an office with Bursch, and Bursch maintains separate laptops, emails, credit cards, expenses, matter-management software, and files for his work on Bursch Law PLLC and ADF matters. (*Id.* ¶¶ 10–15.) In other words, Bursch Law PLLC and ADF are completely separate and distinct entities. (*Id.* ¶ 9.) ADF lawyers are not lawyers of Bursch Law PLLC; ADF lawyers are not bound by Bursch Law PLLC contracts; Bursch Law PLLC clients are not ADF clients; and ADF lawyers are not privy to information that Bursch Law PLLC possesses. (*Id.* ¶ 39.)

Because Bursch has complied with his ethical obligations and has ensured that no confidential information obtained through his private law firm, Bursch Law PLLC, is or has been intentionally or inadvertently disclosed to third parties (including ADF), Defendants' motion should be denied.

III. The motion should also be denied because disqualification cannot be justified in view of all the relevant interests.

The Sixth Circuit has cautioned that a motion to vicariously disqualify a law firm is a "potent weapon" because of its "ability to deny one's opponent the services of capable counsel." *Manning*, 849 F.2d at 224. Thus, when confronted with disqualification motions, "courts must be sensitive to the competing public policy interests of preserving client confidences and of permitting a party to retain counsel of his choice." *Manning*, 849 F.2d at 224. Because of the great prejudice often associated with an enforced change of counsel, disqualification is appropriate only when there is no other solution less burdensome to the client. So even when an ethical violation has occurred—a situation that is not present here—courts strive to avoid the extreme sanction of disqualification "[w]henever possible." *Research Corp. Techs., Inc. v. Hewlett-Packard Co.*, 936 F. Supp. 697, 701 (D. Ariz. 1996); *see also City of Inkster*, 2013 WL 1703898, at *2 ("[E]ven if the Court finds that there is a 'reasonable possibility' that an 'identifiable impropriety' occurred, the Court may decline to disqualify counsel.").

Given the facts here, disqualification would be wholly inappropriate. Indeed, even setting aside ADF's and Bursch's compliance with the ethical rules, this Court should deny Defendants' motion because disqualification would substantially prejudice Catholic Charities without providing any tangible benefit to Defendants.

As Defendants are well aware, Catholic Charities is a nonprofit religious organization that spends all of its time and energy helping children and families in need. Despite having a successful decades-long partnership with DHHS, Defendants are now demanding that Catholic Charities begin recommending foster care and adoption placements with same-sex couples or lose the ability to serve Michigan's foster children. Faced with the impossible choice of violating its Catholic beliefs and convictions or shuttering its 70-plus-year-old ministry to foster children, Catholic Charities was forced to file this lawsuit.

Catholic Charities chose ADF to help defend its statutory and constitutional right to operate consistently with its faith. As a nonprofit legal organization focusing on constitutional litigation and religious liberty matters, ADF is uniquely situated to help Catholic Charities with this important case. Perhaps most important, though, is that both ADF and local counsel are providing their legal services to Catholic Charities *pro bono*. Needless to say, if Defendants succeed in having ADF and David, Wierenga & Lauka, PC, disqualified, then it will

become immensely more difficult and costly for Catholic Charities to vindicate its statutory and constitutional rights.

But perhaps making this litigation more expensive and challenging for Catholic Charities is the whole point of this motion. *See Manning*, 849 F.2d at 224 (disqualification motions are "an increasingly popular litigation technique" as "the ability to deny one's opponent the services of capable counsel[] is a potent weapon"); Mich. R. Prof'l Conduct 1.7, cmt. (disqualification motions "should be viewed with caution … for [they] can be misused as a technique of harassment").

After all, Defendants do not meaningfully contest that ADF has screened Bursch from its representation of Catholic Charities. Nor do they base their motion on any *actual* impropriety, choosing instead to ask this Court to impose the extreme sanction of disqualification merely to avoid "*appearance* of impropriety." (ECF No. 7 at 15, 22) (emphasis added). But there is no appearance of impropriety here. ADF has thoroughly screened Bursch from its representation of Catholic Charities, and Bursch has kept all Bursch Law PLLC matters (old and new) separate from ADF. Moreover, the Michigan rules are clear that "the problem of imputed disqualification cannot readily be resolved … by the very general concept of appearance of impropriety." Mich. R. Prof'l Conduct 1.9, cmt. As the Michigan Supreme Court long ago recognized, it is a "dangerous doctrine" to "put[] 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." *Smith v. Arc-Mation, Inc.*, 261 N.W.2d 713, 716 (Mich. 1978). Yet the State advances that vague and "dangerous doctrine" with its motion here. This Court should once again reject it. *E.g.*, *MJK Family LLC v. Corp. Eagle Mgmt. Servs., Inc.*, 676 F. Supp. 2d 584, 593–94 (E.D. Mich. 2009) (declining to adopt "appearance of impropriety" standard for disqualification); *Grain v. Trinity Health*, No. 03-72486, 2009 WL 3398737, at *26 (E.D. Mich. Apr. 15, 2009) ("[T]he Michigan Supreme Court eliminated the 'appearance of impropriety' standard for imputing a conflict of interest or misdeed of an attorney onto his law firm.").

IV. Being "allied" with ADF and working with Bursch on a separate case are no reasons to disqualify local counsel.

Defendants contend that local counsel in this case, David, Wierenga & Lauka, PC, should also be disqualified because one of its attorneys, James Wierenga, is "allied" with ADF and because he serves as co-counsel with Bursch in an unrelated separate case. (ECF No. 7 at 29.) The argument is without substance.

As an initial matter, any potential conflict arising from Bursch's representation in *Dumont* cannot be imputed to ADF, so such a conflict cannot be imputed to David, Wierenga & Lauka, PC, for the same reasons.

Moreover, the ethical rules allow for imputation of conflicts when the attorneys are working for or have worked at the *same* firm. Wierenga works at *his own firm*. (Wierenga Decl. ¶¶ 2, 3.) He doesn't work at ADF, and he doesn't work at Bursch Law PLLC.

Finally, Defendants cite no support (because there is none) for the proposition that a court may assume shared confidences between two attorneys at separate firms simply because they work on an unrelated case together. Not surprisingly, courts do not just *assume*, without any evidence, that attorneys are violating their duties of loyalty and confidentiality to former clients. There is absolutely no reason to do so here, where Bursch has averred that he did not even know Wierenga was serving as local counsel until Defendants filed this motion. (Bursch Decl. ¶ 41.)

CONCLUSION

For the foregoing reasons, Plaintiff Catholic Charities West Michigan respectfully requests that this Court deny Defendants' motion and allow ADF and David, Wierenga & Lauka, PC, to continue their *pro bono* representation of Catholic Charities in this case.

Dated: June 26, 2019

Respectfully submitted,

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**Admission pending*

Attorneys for Plaintiff Catholic Charities West Michigan

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2019, I caused the foregoing to be filed with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

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