

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.

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

**DEFENDANTS' REPLY
BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO
DISQUALIFY PLAINTIFF'S
COUNSEL (DOC. 7)**

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CONCISE STATEMENT OF ISSUE PRESENTED

1. The Michigan Rules of Professional Conduct require this Court to disqualify Plaintiffs' counsel because there is an unexcused conflict of interest.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Mich. R. Prof. Conduct R. 1.9, R. 1.10 and R. 1.11

Manning v. Warring, Cox, James, Skylar, & Allen,
849 F.2d 222, 225-26 (6th Cir. 1988)

REPLY ARGUMENT

Undoubtedly, the decision to disqualify counsel should not be taken lightly, but neither can ethical obligations be ignored. A few months ago, John Bursch, a Vice President of the law firm now representing Plaintiff, served as a Special Assistant Attorney General (SAAG) representing MDHHS Officials in *Dumont v. Lyon*, Case No. 2:17-cv-13080 (E.D. Mich. 2017). He did not notify his former clients, or the Michigan Department of Attorney General (DAG) or MDHHS that he accepted employment with the Alliance Defending Freedom law firm (ADF) while carrying out this representation. Now, he presents a signed Declaration to this Court that contradicts and misapprehends the position of his former client in *Dumont*, and unnecessarily voices opinions that contradict his former clients' position(s) in this litigation. This seemingly casts doubt on Bursch and ADF's purported commitment to separate him from this case.

Rule 1.9 of the Michigan Rules of Professional Conduct prohibits Bursch from representing Plaintiff. The attorneys associated with him at ADF, during the time he represented the MDHHS Officials, must be disqualified as well. However, even if Bursch's conflict is not imputed

to the ADF law firm under MRPC 1.10(a), ADF failed to comply with MRPC 1.10(b) or MRPC 1.11, mandating disqualification.

I. Disqualification of ADF as Plaintiff's Counsel is Warranted.

This Court has the authority and, even an obligation, to disqualify a law firm when impermissible conflicts of interest are present. *Ex Parte Burr*, 22 U.S. 9 (9 Wheat) 529 (1824); *Manning v. Warring, Cox, James, Skylar, & Allen*, 849 F.2d 222, 225-26 (6th Cir. 1988).

Allowing ADF to continue representing Plaintiff undermines the prudential concerns on which such authority is based. This is not a situation where the conflicted attorney played a nominal role in a prior representation. To the contrary, Bursch was the lead attorney representing the MDHHS Officials in *Dumont*. He entered into a contract with the DAG and MDHHS *specifically* to serve in this capacity, counseling and defending them through more than a year of litigation. (Doc. 7-2.) Defendants' concern in protecting the client confidences shared with Bursch is legitimate and substantial.

II. Disqualification Cannot be Avoided by Claiming MDHHS Officials were Represented by Bursch Law PLLC.

The allegation that Bursch represented MDHHS Officials through Bursch Law PLLC is of little relevance. The Michigan Rules of Professional Conduct consider the lawyer's representation, not his firm's, and impute any conflicts created by such representation on other lawyers within his firm. *See, e.g.*, Mich. R. Prof. Conduct 1.9(a), 1.10(a), 1.11(a). An attorney cannot circumvent this by representing clients through multiple law firms. His duty, and the duties of the attorneys with whom he associates, remains the same regardless of the number of legal organizations of which he is a part.

This is especially true here, where Bursch Law PLLC is composed of one attorney: Bursch. (Bursch Aff., Ex. 1 to Pl.'s Resp., Doc. 10-2, Pg.ID#550.) Bursch (the attorney) was employed by the ADF law firm during the time Bursch (the attorney) was representing MDHHS Officials in *Dumont*. Had ADF or Bursch disclosed to MDHHS Officials or the DAG that ADF hired Bursch, the contract would have been amended to expressly include ADF. But he did not disclose his co-employer. Nor did ADF or Bursch seek the MDHHS Officials' consent to the ADF law firm's representation of Plaintiff, which could have

alleviated the conflict imputed on ADF in this case. *See* Mich. R. Prof. Conduct 1.9(a), 1.10(a).

III. Disqualification is warranted under the Michigan Rules of Professional Conduct.

Plaintiff's attorneys are lawyers associated with Bursch at the ADF law firm while he represented the MDHHS Officials in *Dumont*, and neither Bursch nor ADF obtained his client's consent prior to representation of Plaintiff in this substantially related litigation. Mich. R. Prof. Conduct 1.10(a) mandates disqualification. However, even if the situation is evaluated under Mich. R. Prof. Conduct 1.10(b) or 1.11(a), ADF did not provide the notice required by these rules in a time frame that satisfies any reasonable interpretation of "prompt."

Neither the express language of Rule 1.10(a) nor the comments thereto exempt lawyers associated with colleagues who work for the state. While Rule 1.11 addresses government employment, it relates to "successive" employment. The comment to Rule 1.10 explains that Rules 1.11(a) and (b) apply when a lawyer joins a "private firm after having represented the government." Mich. R. Prof. Conduct. 1.10 official cmt. Here, Bursch joined ADF *while* representing the MDHHS

Officials. The availability of screening and notice to alleviate the prohibition against representation by his ADF colleagues does not apply. The ADF lawyers representing Plaintiff should be disqualified pursuant to Mich. R. Prof. Conduct 1.10(a).

Even if Rule 1.10(a) does not control, disqualification is still warranted under Rules 1.10(b) or 1.11(a). Both rules require “prompt” notice be given either to the “appropriate tribunal” or to “the appropriate government agency,” and such notice must be sufficient to enable the tribunal or the agency to “ascertain compliance with the provisions of [the] rule.” Mich. R. Prof. Conduct 1.10(b)(2), 1.11(a)(2).

To Defendants’ knowledge, the first notice to any “appropriate tribunal,” was Plaintiff’s Response to Defendants’ Motion to Disqualify Counsel filed more than four months after ADF apparently undertook representation in this case. (Doc. 10.) This does not constitute compliance with Rule 1.10(b)(2).

Plaintiff’s Response also served as the first time in which Plaintiff provided sufficient information to allow the “appropriate government agency” to ascertain compliance with Rule 1.11(a). Almost two weeks after the complaint was filed, Plaintiff sent a letter to MDHHS Director

Gordon, and other named Defendants, notifying them that ADF had “taken steps to screen one of its attorneys, John Bursch, from this matter.” (Doc. 7-4, Pg.ID#326.) The letter provides no details, such as the date the screen was implemented or what the screen entailed.¹ (*Id.*) This May 6, 2019 letter was untimely and insufficient.

Contrary to Plaintiff’s assertion, Rule 1.11(b) does not apply. This Rule prohibits an attorney who acquired “confidential governmental information about a **person**” through government service from representing a private client whose interests are adverse to that **person.**” Mich. R. Prof. Conduct 1.11(b) (Emphasis added.) There is no indication that applies here. The MDHHS Officials sued in *Dumont* and in this present lawsuit were sued in their official capacity. If

¹ADF’s assertion that providing notice earlier would have injured its client lacks merit. Rules 1.10(b) and 1.11(a) both require “prompt” notice and sufficient information to enable the tribunal or the agency to “ascertain compliance” with the applicable rule. It does not require an attorney identify the new client or provide details as to the scope of representation. For example, ADF could have provided a letter notifying the agency that ADF had been approached by a private entity seeking representation on a matter that may place ADF in a position adverse Bursch’s former clients in *Dumont*, providing a description of the procedures taken to prevent the disclosure of client confidences. This is not onerous or injurious to the new client. Instead, ADF did nothing until two weeks after it filed this lawsuit.

Bursch acquired confidential government information regarding any defendant of a personal nature through the *Dumont* litigation, Defendants have no reason to believe it would be used against him/her in this litigation.

CONCLUSION AND RELIEF REQUESTED

For the reasons explained above, the ADF Law Firm should be disqualified from representing Plaintiff in this litigation.

Respectfully submitted,

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Dated: July 3, 2019

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on July 3, 2019, I electronically filed Defendants' Reply Brief in Support of Defendants' Motion to Disqualify Plaintiff's Counsel with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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