ORAL ARGUMENT - 11/29/95
95-0401
NATIONAL MEDICAL ENT. V. GODBEY

McNEIL: The principal of law at stake in this proceeding today is whether a law firm that obtains the most sensitive and confidential information imaginable from both a client and that a client's employer in the midst of a joint defense agreement whether that law firm may later forsake that client and that employer and that party to that joint defense agreement and prosecute a lawsuit that necessarily imperils the civil and the criminal rights of a client, and the civil rights of the confident? And the answer to that is no for two reasons. The first reason is that under Rule 109(a) of our Disciplinary Rules a lawyer may not handle a substantially similar representation that's adverse to a former client. And in this instance it was absolutely clear that the two representations are substantially similar and indeed they're identical. Where the TC erred with respect to adversity with respect to Ron Cronen is in finding that there was no adversity and that's wrong as a matter of law. The second reason why disqualification is proper as a matter of law is that in any joint defense arrangement when confidences are shared a fiduciary duty arises and that duty goes further than simply having a resuscitation on the part of the party that received those confidences that they will hold those confidences and not share those with other members of their law firm who are taking actions adverse.

In short, the rule of law that we are proposing today and we think is well formulated, is that once a lawyer undertakes the defense specified conduct he cannot later turn around and prosecute that that very same conduct armed with the confidences received during the original representation. And that's particularly true we believe whereas here the criminal proceeding that surrounds Ron Cronen is overwhelming.

OWEN: What criminal proceeding specifically is Mr. Cronen likely or possibly to be subjected to?

McNEIL: Mr. Cronen is in the middle of one of the largest criminal investigations. The Department of Justice, US Attorney's Office for the Northern District of Texas, a variety of other US attorneys throughout the country are investigating the conduct of managers, and officers and independent contractors of the psychiatric division of NME, Inc. That investigation started as best we know back around 1992 and from that time until the very moment that I speak, Mr. Ron Cronen is right in the middle of that.

OWEN: You say he's in the middle, what objective indicia are there that indicate that he might be a target of a criminal investigation?

McNEIL: His lawyer, Mike Carnes has so testified. He himself, Mr. Cronen in his testimony in this matter said that when he and Mr. Tompko, the lawyer of course with Baker & Botts, met with federal agents and lawyers it was made clear to him that he would be prosecuted for criminal conduct. So I don't think there is any question but that Ron Cronen faces a spector of criminal conduct. Whether he has been nominated the target or not is absolutely meaningless if one understand the criminal law process. His position alone as head of the Texas Region of PIA as evidenced by that chart puts him right in the middle of criminal proceedings.

If I may add one point to that, Peter Alexis, his predecessor as the individual in charge of the Texas region, has been indicted and has pled and has been sentenced to federal criminal charges with respect to his role as the administrator of the Texas region.

ENOCH: I am a little bit confused here. Are you saying that to get where you want to go, which is the disqualification of the lawyers that the plaintiffs have chosen to represent them, your opponent, to get there do we have to give a broad reading to adverse to Mr. Cronen the language adverse or does adverse literally mean that any issue that could possibly be considered in the realm of thinking be adverse to a former client that that former client can argue that this lawyer cannot get involved in some other litigation in which he's not involved? In other words does adverse include the whole panoply of possibilities, or does adverse...how does it affect you?

McNEIL: The answer to your question is absolutely not. Adversity does not involve a large spectrum. Adversity under the circumstances of this case are very narrow and tightly conformed(?). There can be no question in our view and the rule of law that we are promoting is not a rule of law that would define adverse broadly. The rule of law that we are promoting, and we think is _____ with _____ is that in any instance where a law firm takes a position that is directly, immediately, probably harmful to its client, then that law firm under any state adverse to its client.

ENOCH: Cronen is not their client?

McNEIL: Well the former client under 109.

ENOCH: Okay your former client?

McNEIL: Yes. Under 109 of course the former client has the right to seek disqualifications if the matter is substantially related and if the law firm is now adverse. And as you know adversity is not defined under 109. Adversity is defined under 106.

HECHT: What has it done that is presently threatening to Mr. Cronen as opposed to potentially?

McNEIL: Your honor the mere filing of this lawsuit and the beginning of the discovery process places Mr. Cronen's rights in peril. Mr. Cronen has been named in other lawsuits. Mr. Cronen has been named in other lawsuits since this lawsuit was filed.

HECHT: It seems like in the former matter in which Baker & Botts was attained, they might well have taken the position that NME was guilty or liable for all it was accused of, and Mr. Cronen was not. And that's really not any different from I take it the position they're taking now.

McNEIL: Well to the extent that they are suggesting because Mr. Cronen earlier proclaimed his innocence and because Mr. Tompko on his behalf proclaimed his innocence somehow excuses them from taking this action.

HECHT: But the point of getting outside counsel is so that that can come up.

McNEIL: The point of getting outside counsel is to ensure that the Cronens of the world are adequately and completely represented. And when that lawyer chooses to forsake that representation and move on and file a lawsuit such as the lawsuit that's been filed here, which accuses and names NME, all of the entities to which Mr. Cronen reported, all of the entities that reported to Mr. Cronen and a lawsuit on behalf of patients designated in yellow. The yellow designates those patients that were patients in the facilities at the time Mr. Cronen was regional director. In other words the CEO of the Texas region. This lawsuit and let's make no mistake about it, this lawsuit is not narrowly confined. This lawsuit is not narrowly confined. This lawsuit charges top to bottom fraud on the part of NME. It says that over a period of time NME through its psychiatric division through its various hospitals that treated patients, that organization

through its managers and through its officers defrauded patients. They defrauded them in the admission process, in the treatment process, and in the discharge process. They say that Mr. Alexis was a part of that, the immediate predecessor to Mr. Cronen. They named every one around Mr. Cronen. They say that the conduct was broad and corrupt again from top to bottom. Their lawsuit is an indictment if you will your honor of that institution.

HECHT: But wouldn't they have taken the same position if they had to when they were representing him earlier when NME first got him outside counsel if it looked like to them that the best way to represent him was to tell what everybody else was doing, then that's what they would have done?

McNEIL: Absolutely, and they had every right to do that. But they chose not to do that. They chose to proclaim his innocence. And I suppose that the concern I have about the position that they are taking now and to get back to that question is that because Mr. Cronen through his lawyer, Mr. Tompko, proclaimed his innocence at an earlier point, does that somehow free this lawsuit to now attempt to impeach that, to discredit that, to make him out to be a liar. And that's what this lawsuit does.

HECHT: But can't they prosecute this whole case and insist that Cronen is the one angel in the _____?

McNEIL: Could they do that? I suppose they could do that if they wished to do that. But how in the world could you ever prove wrongdoing with respect to the policies and practices of hospitals at this level if the person in charge of it was pure as the driven snow, and if the person that preceded him was dirty.

ENOCH: Well isn't that an argument that they may be breaching some sort of duty to their plaintiff clients as opposed to breaching some sort of duty to Cronen? I mean isn't that an argument for saying well they can't prove it without Cronen, so wouldn't the person who ought to be coming forward is the plaintiffs who hired him saying how come you are not suing Cronen as opposed to the defendants saying how come you aren't suing your former client?

McNEIL: Well it certainly might. I'm privity to the relationship of course with their current client, and I don't know what their current clients think about any of this. I can tell you that their current clients did not chose the law firm of Baker Botts. The current client chose a lawyer who associated Baker Botts at some later point. I don't say that disparagingly. I'm saying that is a fact so we should not be concerned about whether these plaintiffs had their choice of counsel because these plaintiffs chose a law firm that then associated Baker & Botts.

OWEN: You said a moment ago in your argument that your client was being _____ harmed. Can you give us more specifics on how you believe that your client is being _____ harmed today?

McNEIL: My client now is NME.

OWEN: Mr. Cronen.

McNEIL: Mr. Cronen has just recently been named in additional civil action by patients throughout the state of Texas. Those lawsuits presumably will continue. There are numerous lawsuits in which Mr. Cronen has been named as a defendant as well as many other NME entities. But if you really want to focus on the harm to Mr. Cronen you simply can't overlook the criminal proceeding. And I would urge the court to look closely at Mr. Cronen's affidavit and Mr. Carnes' affidavit with respect to that criminal proceeding because this is not Mr. McNeil standing up and saying there is some possibility that

his rights are being implicated. This is his lawyer and this is he who have spoken directly with federal agents and who know full well the imminence if you will of that proceeding.

ENOCH: Your point is that if they continue to prosecute all these entities without even suing Mr. Cronen, that they might stumble across some sort of evidence that would...their investigation of this case will lead to the uncovering of evidence that could be used in a criminal prosecution against Cronen. That's the sum total of your position on the harm to Cronen. Their continued prosecution of the case might uncover something that will hurt Cronen?

McNEIL: That can't be all of my position, because if it's not they it may be some other firm. My position is really slight...

ENOCH: If they don't they've done nothing adverse to Cronen?

McNEIL; Let me answer that in two parts. First, the answer is yes. The prosecution of this lawsuit it seems to me necessarily is detrimental to Ron Cronen. Because this lawsuit is going to be...it's a lawsuit. You are going to be calling people, and you're going to be asking them questions, and you're going to be trying to show that this organization, particularly within Texas was corrupt.

ENOCH: And that assumes that by doing that they uncover evidence that is detrimental to Mr. Cronen?

McNEIL: It assume that that will be their intent. And that goes into my second point. What business does a law firm have attempting to discredit a client? And I recognize it's a former client. But is that really where we want our legal profession to win.

ENOCH: When you're talking about one party being able to disqualify the lawyers picked by the other party, when you're talking about that kind of step where in the middle of hot litigation in a complex litigation case big law firms fighting each other, should we read adverse so broadly to encompass supposed thoughtful maybe type harm to be a basis for saying I have the power to disqualify your lawyer?

McNEIL: First, these are large law firms, both of ours. This is important litigation. This motion was made at the outset of the litigation. This was not a motion that was made at some later point. But secondly and perhaps more importantly your honor, we had never seen that this is a broad reading of adversity. This is not the law firm of Baker & Botts filing some lawsuit in the psychiatric industry suggesting that the industry is somehow corrupt. This is not Baker Botts going to a legislator or to an administrative position taking some position with respect to mental illness. This is a law firm that represented an individual who is now filing the civil equivalent to an indictment. And yes they have chosen not to name Ron Cronen, but yes they have chosen to name everyone around Ron Cronen, and how then could you possibly choose to discover and prove your lawsuit without proving that the CEO of the organization was somehow clean when everyone else was corrupt.

CORNYN: Your contention is then that Baker & Botts cannot do anything to avoid adversity of Mr. Cronen as long as they remain in the case?

McNEIL: Absolutely.

CORNYN: And so a lawyer and a client can never agree confidentially among themselves to avoid litigation strategy which would avoid the disqualification of that client's lawyer if they chose to do that?

McNEIL: A lawyer and a client could not agree to do what your honor?

CORNYN: To chose a litigation strategy. In other words not to sue Mr. Cronen if that was their decision that would ultimately result in their disqualification if they pursued that suit. A client and a lawyer cannot agree to avoid litigation strategy which would result in disqualification; is that your position?

McNEIL: The client in that instance being Mr. Cronen, and Baker & Botts as opposed to the current client?

CORNYN: No the patients who are suing NME and Baker & Botts cannot agree among themselves to avoid a litigation strategy which would clearly perhaps more clearly than as you're arguing here would result in their disqualification?

McNEIL: No, I think they could take that position. I mean I think that agreement could be struck whether it's affective agreement, whether it could be carried out _____, but they can agree on anything they want. That to me your honor is beside the point because whatever agreement they struck, the harm's done, and the harm was done when they filed this lawsuit and the harm continues to be seen by again the filing of additional lawsuits against these entities including Mr. Cronen, and the ongoing criminal investigation. Can we imagine what federal agents and what federal prosecutors think today and thought then when Mr. Tompko was going into their offices and making representations with respect to Mr. Cronen and presumably making representations with respect to his innocence, and then finding that law firm that made those representations and now is out of that engagement filing this lawsuit against NME saying the very same thing that the prosecutors presumably would say if they were to file a criminal action. What are they to say.

SPECTOR: If Mr. Cronen consented to the law firm representing the plaintiffs in this lawsuit, would NME have any grounds at all for a motion to disqualify?

McNEIL: Yes.

SPECTOR: And what would that be?

McNEIL: They would and I would love to take the time to go into that. Your honor NME's rights in this are in some respects along side Mr. Cronen's. But in some respects independent. As we have tried to set out in our brief there is not one court in the country that we have found that has allowed a law firm in circumstances such as this to sue the NMEs. Every circuit court that we have been able to locate has said that in instances where there is a joint defense agreement, where there is a sharing of confidences one law firm to that joint defense agreement cannot later attack a co-party to that agreement.

PHILLIPS: Does those joint defense agreements have the same type of language? I mean is it clear from the face of the opinion they have the same type of language this one does in terms of the rights of each individual party?

McNEIL: One does not know the answer to that because it is not clear from the face of the opinions whether there was a written joint defense agreement. And I'm generalizing there may be a few cases, but as I remember reading the second and the 5th and the 7th and 8th and the 9th circuit opinions they didn't focus on a joint defense agreement as such. They didn't focus on whether it was written or whether it was oral. What they focused on was the fiduciary obligations that arise as a result of the sharing of information. And so whether they had before them...for example in the Abraham case, the 5th circuit case, we don't know what the court had in front of it; whether it was a written joint defense agreement respecting Mr. Sussman, or whether it was an oral defense agreement.

If I may just button that point down. It doesn't matter whether they have provisions like this or not because these provisions that the law firm of Baker & Botts is relying on, that provision that suggest that Mr. Tompko never became the lawyer for NME, that provision that suggests that Mr. Tompko has no duty of loyalty to NME, to suggest that now the firm of Baker & Botts can somehow take those provisions of that agreement that were intended to benefit their client Cronen and not a law firm in some separate independent action is a total corruption of that agreement.

OWEN: How do you get around the express waiver in conflict of interest in paragraph 6?

McNEIL: It's not an express wavier of a conflict of interest with respect to this circumstance. What that paragraph does and the purpose of paragraph 6 in the joint defense agreement is to ensure that Mr. Cronen and whomever else is a party to that agreement can always be assured that their attorney, in this instance Mr. Tompko, will not somehow be conflicted out as a result of the information the confidences that are shared. The concept of the joint defense agreement is that people are coming together in connection with a common purpose. It's 503(b)(3) of the Texas Rules of Evidence. They're coming together to share information and that information that's shared among them is confidential. And the situation that paragraph 6 is addressing is a situation where Mr. Cronen at some later point let's say hypothetically is indicted, and his attorney Mr. Tompko is along side of him. And Mr. Tompko on his behalf is looking to cross-examine someone who's confidences he obtained in the course of that joint defense arrangement. Let's say NME is on trial along with Mr. Tompko. The purpose of that provision of the joint defense agreement is to ensure that though Mr. Tompko received assurances and confidences he is nevertheless able on behalf of Mr. Cronen to cross-examine NME. He can't use the confidences but he can cross-examine. That conflict provision neither by its terms, the concepts, case law could ever be expanded to get a law firm some rights independent of the client, Cronen in this instance.

HECHT: The TC stated in connection with NME's motion to disqualify "second and most striking NME is not trying to protect against misuse of confidential information disclosed during the joint defense"; is that true?

McNEIL: That is not true.

HECHT: So you're not merely relying on a presumption that would attend if there were attorney/client relationship, but also on the actual misuse of confidential information?

McNEIL: Let me make sure the court understands me. I have no evidence of misuse. And in fact in this proceeding I have so stipulated, or I think I answered by way of interrogatory. Your honor if I can try to button down that point, NME in that situation should be seen as no different than any client. And go back to the Henderson case decided by this court in the early part of 1995 when the question was asked of the complainant: can you show that those confidences were used by a new law firm?" "Of course I can't." And where this court said very clearly in a per curiam opinion you don't have that burden. Never in Texas have we thought that you had the burden of showing the confidences are used because it's impossible to show. And my point is that NME, though not a client of course, we are not suggesting that that is the case, but we are suggesting that the sharing of confidences and I haven't had the opportunity but those confidences aren't just routine confidences. Those confidences went to how you defend lawsuits such as this lawsuit. Mr. Tompko was made a part of our joint defense effort in the most comprehensive way imaginable. We talked with him about how you defend patient lawsuits. We shared our work product. We shared communications.

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RESPONDENT

PALMER: There are two separate motions to disqualify Baker Botts here in this case. The first motion is by NME, which is not a client and admits they never have been a client. And the second motion is by Mr. Cronen a reluctant intervenor in this action. And each of these motions turn on a single basic issue I think that is different. Let me first address Mr. Cronen's motion. And the court should note because it is both curious and relevant how Mr. Cronen came to be in this lawsuit. They describe Mr. Cronen as the CEO of a company. In truth and in fact he moved from Texas and worked for 11 months as a mid-level executive in one of their subsidiaries. Shortly after getting here, got into a fight with NME, was fired after 11 months. And in connection with that firing he represented, and this was at a time in 1991 when the investigations of NME were just beginning, he represented under oath to them at that time, that in that 11 months that he was with them, he knew of no illegal conduct, he participated in no illegal conduct, and he had no information about any illegal conduct. And he signed that under penalties of perjury, and he also said in connection with the dispute it had, which they made a settlement with him, that if I'm in error, if I'm lying I give back the settlement.

GONZALEZ: When did this mid-level employee become the CEO or the regional director?

PALMER: He was in this position for 11 months.

GONZALEZ: He was promoted: Higher salary, higher responsibilities, a step-up the ladder?

PALMER: You know I don't know the answer to that because in the hearing before Judge Godbey, to paraphrase Judge Godbey he says: You say this man is in the middle of this and he's involved, do you even have a job description for his responsibility? And there was never one brought forth. All we know from the record is that he came from the East Coast, and he had the title of Regional Director for 11 months, and during that time he got into a disagreement, he was fired, he made a claim against them, he threatened to sue them, they made a settlement with him, and as a part of that settlement as he walked out the door, he said: I swear I don't know anything about any wrongdoing. And that's the first piece of evidence that Judge Godbey had before him. And the reason that I want to touch the highlights of the evidence that Judge Godbey had on this adversity issue is because it is totally different than has been represented and it is compelling that we are not acting adverse.

ENOCH: Do you consider this to be even a closed case?

PALMER: No I do not. I don't consider this _____ adversity. Is that what you're referring to? I don't consider this to be a closed case and the reason for that is I think that the authorities in this state and other states who have addressed that has suggested that on the issue of adversity in a rule such as 1.09 what is the best rule to have is a bright line rule which suggests an adversity is judged by whether you're actually suing or bringing some sort of a judicial or qua si judicial action against your client that has actual allegations directed against your former client. The only case that I know that is similar to the situation we have here is McCarthy v. Henderson in New Jersey, which has a rule very similar to 1.09. And they had the argument made that a lawyer represents 1 closely held corporation. He later leaves that representation, represents a client suing a secondly closely held corporation that has the same officers and directors as the first. An effort was made to disqualify him saying you're actually acting adverse to the first company. And New Jersey after considering that said we need a bright line rule here and the first company is not a party. And therefore they're not adverse.

The other reason that I don't think this is a closed question is the argument that was made to Judge Godbey has been paraphrased somewhat here was that there ought to be a rule promoted as they say that any time a client's interest might be disadvantaged, potentially be disadvantaged then the lawyer should be disqualified. First of all there's no way that a lawyer such as I can know and monitor what my former client's interest are as they've changed through the years. I mean for all we know, there

was a lot of information provided to you outside the record, for all we know the investigation has ceased.

OWEN: How can you assure us that Mr. Cronen is not subject to potential criminal liability of prosecution?

PALMER: The reason that I feel that the odds are that he is not is...there are a number of reasons. First of all he has always said, not just when Mr. Tompko represented him, but long before Mr. Tompko represented him, he has always said: I was there 11 months and I don't know anything about what went on. This lawsuit is really far down the line in a group of civil suits that have been filed against NME making the type of claims that we file. There have been over 100 of these types of suits filed against NME in Texas. In those lawsuits there have been more than 1000 depositions taken by aggressive lawyers like Baker & Botts and others representing the plaintiffs. One of the big thrusts of those efforts in those lawsuits was to identify who in the NME organization is responsible for this conspiracy and this fraud. There is not one single deposition, not one single lawyer in those civil suits, that has ever turned over any information that indicates that Cronen has any responsibility at all for the allegations that we made and that they made which were similar. And in fact in Tarrant County there were a group of NME employee suits sort of a drag net in some of these suits including Mr. Cronen. Mr. Cronen was in every single one of them non-suited or dismissed. And it is stipulated in this case that Mr. Cronen has never had any judgment in any of these hundred suits taken against him, and he has yet to pay and has never paid a penny in settlement. The fact is that in all the lawsuits that are similar to ours with the discovery going on there is not one set of lawyers has ever been able to pinpoint Mr. Cronen as being involved in the conspiracy.

OWEN: Let's assume that there was some information that was conveyed from Mr. Cronen's lawyer, Mr. Tompko, and that it was potentially incriminating either on civil or criminal information. You're really putting aren't you Mr. Cronen in a box because he would have to come in and say: Mr. Tompko is in possession of information that if revealed could subject me to criminal liability or civil liability. And the only way that he could demonstrate that to the court and demonstrate the problem would be to reveal that information. Aren't we putting him a very _____ position? You are saying no harm, no _____, and he's got to show there's harm. Aren't we putting him in a real box?

PALMER: I don't think the rule requires that showing. But 1.09 requires the showing that my lawsuit is adverse somehow to Mr. Cronen.

OWEN: For him to demonstrate adversity, aren't we requiring him to come in and say: Mr. Tompko is in possession of confidential information, which if disclosed, would subject me to potential criminal or civil liability?

PALMER: I do not think we are. I think that there are many ways to get evidence of adversity rather than breaching as you're suggesting some client relationship. And in fact Judge Godbey found and it was true that whatever confidences were ever exchanged between Cronen and Mr. Tompko, they are sacrosanct and there has been no use and there is in all probability never will be any use of those.

OWEN: Getting back to the Henderson case. We held this year that if you have confidential information you are not required to prove that there might be a disclosure. There is a presumption. How do you get around that presumption?

PALMER: Well that presumption is a presumption that applies in connection with establishing the substantial relationship. There are 2 requirements to disqualify the lawyer if a former client seeks to do it. And the first thing he has to prove is a substantially related matter. And the presumption that you're referring to and the cases say that in order to show that the matters were substantially related you don't necessarily and you shouldn't have to come forward and give forth the confidences. There is no suggest

in judging the requirement of adversity that there is some presumption that matters are adverse and you don't have to prove it.

OWEN: Is Mr. Cronen currently a defendant in any litigation involving these issue?

PALMER: As far as I know it's not in the record. Mr. McNeil represented that some new cases have been filed some place, but the record before Judge Godbey indicated that Mr. Cronen had never been a defendant in a criminal matter, he had never received a target letter from any investigative agency. And that in all the civil matters in which at one time he was named as a defendant, he was then non-suited or dismissed and he has never paid a penny on settlement.

OWEN: Has anyone paid money or his behalf in a settlement?

PALMER: As far as I know they have not paid any money. He had a falling out with NME back in 1991 when they fired him. And he has had separate counsel since then. NME stipulated on behalf of both themselves and Mr. Cronen that no money had been paid in settlement.

OWEN: Getting back to the adversity issue. My point is that he might be able to demonstrate that Baker Botts was in possession of information that would be adverse to his client, but in order for him to prove that adversity he would have to reveal it. How do you get around that _____?

PALMER: I think the way you get around it is...first of all I don't think this court or any court has ever imposed some presumption in connection with adversity, or said is a matter of subject to proof, and I think that the way you get around it is that there are many ways to determine whether I'm acting adverse to Mr. Cronen or not without breaching that privilege. I want to emphasize that the State of Texas investigated in and the purpose of their investigation was to find out who the principals were that were responsible for this fraud. There was 800 to 900 pages of testimony taken. Mr. Cronen has never been identified. There have been investigative articles written in some 2 to 300 newspapers about this fraud including every major newspaper in Texas, and there have been News Week, Wall Street Journal, New York Times, the thrust of almost all of these articles has been to identify who the principals, the ex-employees of NME were that were responsible for this fraud. Not one of those articles, not one ever mentions this former mid-level executive who worked 11 months and got fired. He just doesn't appear. There's been a book written on the fraud that names more than 100 NME employees that were involved. Mr. Cronen's name never appears one time.

HECHT: Yet the TC found that there was some risk.

PALMER: The TC found that the risk was minimal. The TC said that it's wrong to assume the prosecution of plaintiffs against NME, and NME personnel other than Mr. Cronen inherently poses a significant risk to Cronen.

HECHT: And yet if it materialized it would be quite consequential. That's what the TC found.

PALMER: You know you can speculate. But the facts are these. There is no indication that he is a target. Every indication is that everyone who has investigated the culpability have found that he has no culpability. And I was convinced he has no culpability. We could speculate that tomorrow we might go and he would be indicted. We could speculate that tomorrow he might be indicted. We could speculate that tomorrow we might read in the Dallas Morning News that the investigation ceased months ago. The other thing is that the court should take into account in trying to judge this potential criminal risk is the statute of limitations on the matters that NME was indicted and pled guilty to was expiring in 1994. Mr.

Cronen never even worked at NME after 1991. There is no evidence that there is any investigation involving Cronen. And there wasn't any presented to Judge Godbey. We can speculate that even if there was such, the statute has expired or is about to expire.

They made the argument: Gosh this is a big massive investigation. And Judge Godbey says: I see your chart, can you tell me where the investigation is? when did it start? who's involved in it? who's already been caught in the net if there is a big investigation? The truth of the matter is there is not evidence that there's any ongoing investigation at all. And there certainly is not any evidence there's an ongoing investigation that would affect Mr. Cronen.

Another piece of evidence that I know Judge Godbey found persuasive on whether Cronen had any jeopardy at all was there were in connection with this scheme that NME had, of course they bilked the insurance companies. A group of insurance companies filed suit against NME, and the lawsuit papers are in the court's record. And those insurance companies pleaded after a considerable investigation they pleaded specifically who was involved and how this scheme worked. And they set forth, I could give you names of the 30 NME employees that have been identified, but the point is in some 100 pages of pleadings where they detailed the scheme as part of their lawsuit Ron Cronen's name never appears once.

ENOCH: One of my concerns, it could be argued that the disciplinary rules are really absolute minimum conduct for which an attorney could be disciplined. In the context of disqualification that maybe the court ought to give a broader reading saying that minimum conduct is not sufficient, that there ought to be a higher standard in the disqualification area. In that regard adversity ought to be read more broadly than simply very narrowly did you sue your former client? Arguably in that context you could say: the lawsuit begins, we don't know what is transpiring over the years while all of this is going on, we just now begin with the lawsuit; and what has happened is a former client was also a former partner in a partnership that's now being sued. And the former client comes in and says that's potentially adverse to me because I was a partner with them during some portion of the time that's involved in the lawsuit. So here's my former law firm that's suing a partnership that I was formerly a partner. Without knowing we don't have the benefit of discovery to find out whether or not this former client had some sort of participation in what the wrongdoing is that's alleged. All we know is that the former client was a former partner with this partnership. You're bright line test would say well there's no adversity because they have not sued him, they've sued this partnership of which he's not a partner anymore. But the argument that adversity ought to be read more broadly than that wouldn't that encompass that circumstance and say that...

PALMER: I think that there are some ways to read adversity more broadly than the bright line test that I said I think is the one that ought to be followed. And as far as I know every jurisdiction that has been faced with this, and it's been previous few I will admit, have followed. In Judge Godbey's analysis he said if you don't look at the bright line test there may be circumstances where a former client who is not a party but you could still be acting adverse. And Judge Godbey I think it is on page 8 of his order he actually says: Here are 5 factual inquiries that I will make. Because as they did here they urged: You ought to come up with something that covers a situation where you aren't suing a former client. And I think he said you look at the likelihood of detriment to the former client and he analyzed each of these and at the conclusion he reached he said: under the evidence that was presented to me applying this test, this is on page 8 of his order, he said: Baker Botts is not acting adversely. So Judge Godbey didn't apply the bright line test. I would just suggest to the court that I think that's the proper rule to be articulated. Judge Godbey challenged the lawyers. He said: Suppose you wanted to come up with a single line test and this is one that we propose. Mr. Cronen's lawyer, he was represented by counsel in front of Judge Godbey, never was able to propose to anything. If this court is interested in in trying to articulate a rule that's other than: if you're not suing the former client, there is some reason it could be applied to still determine the adversity in that circumstance. I think this rule here is based on present facts does the representation currently create

substantial risk of _____ being asserted against the former client, that otherwise would not be asserted. And Judge Godbey made a finding with regard to that test.

The reason I think the bright line rule is the rule is because it's already clear under our bar rules that you can act to the disadvantage of a former client. If you look at rule 1.05, which is the rule that governs the lawyer's obligation to maintain former client confidences; 1.05(b)(3) says that: a lawyer shall not knowingly use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known. This rule suggests to me that a lawyer is ethically free to act to the "disadvantage" of his former client, and that doesn't rise to the level of being adverse under rule 1.09. And in fact the rule says you can actually use the confidential information that you've gotten from this former client to his "disadvantage" if that confidential information has since become generally known.

So if you apply the rule that I guess they're espousing that somehow you've got to look at the interest and you've got to sort of speculate as to what the interest might be, you really emasculate 1.05. And I think it's clear that whatever the definition of adversity is, it's got to be something more than the disadvantage which is permitted by 1.05.

OWEN: Is there any dispute that Baker Botts or Mr. Tompko was in possession of confidential information that came from NME that is not general knowledge or common knowledge?

PALMER: For the purposes of this motion we conceded and told Judge Godbey he could assume that NME did share confidential information pursuant to the joint defense agreement with Mr. Tompko.

OWEN: And the date of motion is not now general knowledge or public knowledge?

PALMER: Yes.

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REBUTTAL

CORNYN: Mr. McNeil if adversity is a fact question do you lose?

PALMER: No we don't your honor. Adversity is a mixed question of law and fact.

CORNYN: Well earlier you said there was adversity as a matter of law.

PALMER: There is.

CORNYN: In this case?

PALMER: Under the facts of this case.

CORNYN: If we conclude it's a fact question or a mixed question, or whatever you want to call it, under which circumstances we would might otherwise defer to the TC on an abuse of discretion standard, do you lose? If it's a factual matter.

PALMER: No, I don't think I do. Like any other proposition of law has to have certain factual underpinnings. Those factual underpinnings here simply can't be disputed.

CORNYN: Well if Judge Godbey decided those factual matters against you should we defer to his discretion?

PALMER: But he decided them on irrelevant factors your honor. He comprised the 5 point formulation and it makes no sense with all respect. It looks to prejudice where the law of Texas is clear that there can be no prejudice. It looks to whether confidences were shared where the law of Texas is clear, that they will not ask that question. It looked to whether information that was within the attorney/client relationship was now within the public's spectrum. That's irrelevant your honor. Just because the public might somehow learn of information doesn't forgive a law firm from taking an action that again is adverse to their client.

So the answer is that I certainly have to concede that there are certain facts but those facts are not in dispute, and the facts that he referred to are irrelevant to any proper rendition.

CORNYN: So Judge Godbey simply applied an incorrect legal standard is what you're saying, and thereby abused his discretion under Walker v. Packer?

McNEIL: I would say that, and I would say that he also in arriving at the ultimate conclusion of law looked to irrelevant facts and did not properly consider the only relevant and uncontroversial facts.

HECHT: Regards the joint defense agreement, you're position is there is no evidence of misuse, but you don't have to prove misuse?

McNEIL: That is correct your honor. And I get there for two reasons. The cases that I have seen throughout the circuits would suggest, I'm talking about Wilson, the Abraham case, and so on would suggest...

HECHT: It seems to suggest that you would have to prove misuse. That's what they remanded it for.

McNEIL: No. In Abraham what they remanded it on, and this is an important issue your honor, because NME in this setting and because Mr. Sussman in that other setting did not have an attorney/client relationship with the party sharing the information, that first presumption in Texas law doesn't kick in. There cannot be a presumption that confidences were shared in a joint defense agreement. But once it's shown that confidences were shared, and that's clearly the case here, then that second presumption kicks in, which is that there need not be any showing...you ought not put that complainant to the burden of showing that those confidences were misused.

BAKER: You made a statement in response to Judge Cornyn's question that the court improperly used the facts to reach the legal conclusion. And I thought you said that he looked to only facts that were not controversial in reaching his decision. Is that what you said?

McNEIL: I meant to say that there are certain facts that one would have to find in order to reach an ultimate conclusion of law. I think he found those facts. There was an attorney-client relationship; there was a substantial not identicality of issues; there was a sharing of confidences. I think though that when he went on to formulate his test of adversity he looked to irrelevant facts.

BAKER: Would you agree that there were controverted facts before the TC vis-a-vis, the adverse issue?

McNEIL: Not with respect to the only important issues. The only important issues I think the

law would permit you to consider would be whether there was a substantial relationship between the 2 proceedings; whether there was a sharing of confidences; and then finally of course the ultimate question of whether this action can be seen as adverse.

BAKER: Well were there are controverted facts about whether there was an adverse relationship in the record?

McNEIL: Your honor to me, and I guess I've always felt this, the only important fact in that regard, and there are others undoubtedly pertinent, is the nature of that lawsuit. The nature of the lawsuit, the scope of the lawsuit, the position of Mr. Cronen, all of which is uncontroverted, there can't be any question about that.

BAKER: What about on the other side of Mr. Cronen's termination agreement which he says under oath that I did not participate in, did not know of, and did not conceal any unlawful or fraudulent conduct. So isn't that a permissible inference that he has nothing to do with this litigation, and therefore, that's why he is not a defendant?

McNEIL: Even if one could infer that, your honor my position on that is that this law firm has no business setting out to make him out to be a liar. And that's what exactly this lawsuit does.

BAKER: But there answer to that is we haven't done anything vis-a-vis to Mr. Cronen yet?

McNEIL: Well they haven't done anything at all because this lawsuit will show. But if you look currently at the discovery requests that were outstanding and if you...I don't know how else to say this other than if we apply collectively our common sense of how a law firm would go about prosecuting a lawsuit that has the contours, that has the allegations of that lawsuit, there simply couldn't be any mistake that at some point in time that lawsuit whether purposefully or not, that lawsuit necessarily affects the rights of Mr. Cronen.

CORNYN: So there's nothing that Baker & Botts could do to avoid the adversity?

McNEIL: Correct.

CORNYN: I thought you told me earlier that a client and a lawyer could engage upon a purposeful litigation strategy that would avoid the necessity for that law firm's ultimate disqualification by choosing who to sue and who not to sue, what kinds of claims to bring, and not?

McNEIL: What I meant to say to your question was that certainly a law firm and a client can agree on anything they want. But that that agreement is irrelevant in this context because that lawsuit has already been filed and those allegations have already been made. And whether or not it really doesn't matter whether in the course of this lawsuit Baker & Botts goes out of its way to avoid discrediting and impeaching Mr. Cronen. The harm is done by the filing of the lawsuit. The harm is done by alleging that there was wholesale corruption within this organization. It's impossible, and this isn't speculation, it's impossible to think that in the course of the discovery in the deposition program that they are not going to be obtaining information that bears on Mr. Cronen's conduct.

CORNYN: So your answer is that it's theoretically possible but here they've already made the allegations, they've gone too far?

McNEIL: Exactly.