

Magistrate Judge J. Kelley Arnold

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANKIE GONZALES *et al.*,

Defendants.

No. CR07-5656JKA-3

**DEFENDANT NOEL'S
MEMORANDUM IN OPPOSITION TO
MAKAH TRIBE'S MOTION FOR
LEAVE TO FILE AMICUS BRIEF**

INTRODUCTION

The Makah Tribe, through its counsel has moved the court for leave to file a brief as *amicus curiae* herein. For the following reasons, leave should not be granted.

ARGUMENT

There are numerous reasons why the movant's motion should be denied. Most importantly, the filing of such a brief may result in mistrial.

1. There is no authority in the Federal Rules of Criminal Procedure or the Local Rules for filing an amicus brief in a criminal case.

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First of all, nothing in the Federal Rules of Criminal Procedure provides for the filing of an *amicus curiae* brief in a criminal case at the trial court level. An *amicus curiae* brief is ordinarily filed in support of one of the parties. The movant certainly is not submitting it on behalf of the defendants. The United States has its own prosecutors fully capable of submitting briefs and arguments. If the movant believes the information it possesses is helpful, that information should be presented to the Government and allow the Government's prosecutors to decide, in the exercise of their prosecutorial discretion whether the information is helpful to the Government's case. Ordinarily, the purpose of an *amicus* is that he or she is able to bring a perspective to the case which is unique from the parties. However, it is apparent that in this case, the assistant Makah tribal prosecutor who seeks to file an *amicus* brief is just that, another prosecutor, who has an ardent desire to see the defendants convicted. Counsel and officials of the Makah tribe have already expressed their opinions on the conduct of the defendants in numerous releases to the media. The movant's filing of a brief and request for oral argument appear to be just one more step in a long line of moves designed to promote views adversary to the defendants among the public from whom the jury pool will be drawn. At the very least, the Court should refrain from providing movant another opportunity to taint the defendants before the media by allowing oral argument of the motion. Movant's motion is for leave to file a written brief. Such a document speaks for itself. Oral argument should not be allowed.

2. Acceptance of movant's brief raises fundamental fairness concerns, as one or more of the defendants reasonably believed they had an attorney-client relationship with movant's counsel in a substantially related matter.

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1 The movant is designated as “special assistant tribal prosecutor” in the Makah Tribal
 2 court (*see* Exhibit A, Notice of Appearance). His position is not subjective. Rather, counsel for
 3 movant represents a party in a related matter *directly adverse* to defendant Noel’s—and more
 4 importantly defendant Parker’s—interests. This is demonstrated by numerous statements made
 5 to the media by movant expressing opinions on the lawfulness of the conduct of the defendants.
 6 *See, e.g.,* Seattle Post Intelligencer articles dated September 10, October 4, and November 26,
 7 2007.

8
 9 Counsel’s participation may also result in a mistrial because allowing a lawyer with
 10 whom a defendant previously had an attorney-client relationship to appear and present argument
 11 adverse to his former client’s interests in a substantially related or similar matter implicates
 12 defendant’s due process right to receive a fair trial. Counsel for movant has previously had a *de*
 13 *facto* attorney-client relationship with one of the defendants and, consequently, should be
 14 disqualified from submission of documents and arguments which are adversary to his interests.
 15 *Anderson v. Evans* involved whether the Government complied with the National Environmental
 16 Policy Act in approving the harvest of a whale by the Makah Tribe. The counsel was the same
 17 counsel now seeking leave to file a brief herein.

- 18
 19
 20
 21 3. Movant’s counsel previously obtained confidential
 22 ceremonial/religious information from one of the defendants in
 23 a related matter which implicates defendants’ potential
 24 defenses.

25 In *Anderson v. Evans*, a case in which the Makah Tribe was represented by the Ziontz
 26 firm, defendant Theron Parker was a witness for the Makah Tribe. An affidavit was obtained
 27

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1 from him and submitted to the Court on the firm's pleading paper (Exhibit B). Regardless of
2 whether there is any formal agreement, if a person was submitting testimony in a legal
3 proceeding at the request of an attorney or law firm, and such attorney or firm requests an
4 affidavit from them which is submitted to the court, an attorney-client relationship is established.
5 In the absence of a written waiver of the conflict of interest, the Rules of Professional Conduct
6 preclude an attorney from appearing against the former client. See also Exhibit C, Declaration of
7 Paul Parker.
8

9
10 In connection with the Anderson case, counsel filed a lengthy affidavit containing
11 information obtained from Theron Parker on behalf of the Makah tribe which was a party to the
12 case. For purposes of Rules of Professional Conduct sections 1.6, 1.7 and 1.9, an attorney-client
13 relationship exists when a reasonable person in the "client's" position would have reasonably
14 believed there was such a relationship. According to RPC 1.9:
15

16 A lawyer who has formerly represented a client in a matter shall
17 not thereafter represent another person in the same or a
18 substantially related matter in which that person's interests are
19 materially adverse to the interests of the former client unless the
former client gives informed consent, confirmed in writing.

20 In this case, it appears that counsel who represents the Makah Tribal Council, which appears to
21 have initiated the decision to prosecute the same defendants in this case in their Tribal Court—
22 contrary to established principles of separation of powers and perhaps contrary to the defendant's
23 civil rights, 25 U.S.C. 1302—is the same counsel who is a prosecutor in the tribal court case. He
24 was counsel for the Tribe in previous litigation in this court involving similar issues (Anderson v.
25 Evans), and in connection therewith, obtained an affidavit from a person who appears to be one
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1 of the defendants in this case. At least three of the defendants were members of either the
2 whaling or whale retrieval crew arising from a whaling permit obtained from the Department of
3 Commerce which movant's counsel was instrumental in obtaining. Considering all of the above
4 factors, but perhaps most particularly the fact that counsel conferred at least twice with the
5 defendants since October (October 9 and November 27, 2007) and previously obtained an
6 affidavit regarding sensitive and confidential ceremonial Makah whaling practices from
7 defendant Parker for use in litigation, the defendant's reliance and belief that counsel was
8 advising and assisting them, regardless of whether there was a formal agreement, was sufficient
9 for a reasonable person to think they had an attorney-client relationship. Disqualification is
10 appropriate when counsel in present litigation had access to confidential information from a
11 person who reasonably believes themselves to be a client in a substantially related matter.
12

13 Kurbitz v. Kurbitz, 77 Wash. 2d 943, 947 (1970).
14

15
16 Because attorneys appearing in federal court remain subject to State rules and regulations
17 regarding their conduct and transactions, it has been held that litigants may seek disqualification
18 of opposing counsel for violation of the conflict of interest provisions of such rules applicable to
19 appearing contrary to the interests of former clients. United States v. Mett, 65 F. 3d 1531, 1537
20 (9th Cir. 1995).
21

22 Counsel, and officials of the Makah Tribal Council have made numerous media
23 statements implicating the guilt of the defendants. The law firm's Facsimile legend plainly
24 remains printed across the top of the resolution (adopted after defendants' conduct) wherein the
25 Tribe purportedly was merely "reaffirming" its previous adoption of the Gray Whale
26 Management Plan.
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4. Counsel for movant who wrote and seeks leave to file the amicus motion met with defendants at least twice since their indictment, offered to negotiate a settlement of the case with the Government, and failed to disclose that he would be serving as a tribal prosecutor against them in tribal court.

Additionally, counsel has previously met with the defendants and their counsel, following the pretrial conference held in this court on November 27, 2007. Counsel offered advice to defendant Noel's counsel as to what arguments ought best to be made and not made ("the Religious Freedom Restoration Act" but not the Treaty), and requested permission to negotiate a plea agreement on behalf of all defendants with the United States. It does not appear that this was the first such meeting attended by counsel for movant with the defendants. According to the Affidavit of Paul Parker, Jr., a "settlement conference" was held with the defendants on October 9, 2007 at which it was the defendant's belief that counsel in his capacity as their tribal attorney was attempting to assist them. Counsel now desires to submit a brief directly *adverse* to the defendants' interests. Consequently, counsel's conflicts appear so great and his and his client's position so adversary to the defendant's interests that leave to file the brief should not be accepted.

From the foregoing, it does not appear that the “arguments” proposed to be submitted to the Court will either be helpful to the Court, nor come from a neutral scholarly source of information which amicus status is ordinarily intended for. Such denial should not prejudice this tribal prosecutor’s ability to prosecute his case in Tribal Court, as that court, as an arm of a separate sovereign is capable of making its own determinations.

5. The arguments sought to be presented by movant regarding the Management Plan are either not relevant or can be made by the government.

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1 At this point, it is not even apparent that there is any need or intent by the Government to
2 rely upon the Makah Tribe Gray Whale Management Plan in its case. Its provisions are not
3 among the elements of any of the charges in the Indictment which the Government must prove in
4 order to obtain a conviction. Consequently, the issue may be immaterial to the case anyway.

6 Finally, it does not appear that the brief sought to be submitted by movant regarding its
7 intent in adopting, and re-adopting, its plan necessarily cure's the plan's fatal flaws anyway since
8 it appears that it was not reviewed and approved by the Secretary of Interior consistent with the
9 Constitution of the Makah Tribe, which is a requirement for it to even be effective as a tribal law
10 or ordinance.

12 CONCLUSION

14 For the foregoing reasons, the Court should deny the motion, and whether the information
15 sought to be presented by amicus brief is helpful should be left up to the government as a party
16 to this case, in its discretion, to decide whether it is either necessary or useful. Acceptance of
17 the *amicus* brief--which by its terms plainly is adverse to the defendant(s)—which is proposed
18 for submission by counsel with whom one or more of the defendants previously had what
19 appears to be a counselor-client, or advisor-advisee, relationship in related litigation, who
20 obtained a supporting affidavit from one of the defendants, who attended meetings with the
21 defendants and offered to negotiate their plea agreement, and who now serves as a tribal
22 prosecutor in related litigation (without ever having disclosed this until recently), raises
23 concerns of fundamental fairness to the defendants which make it prudent for the court to
24 decline receipt of the proffered *amicus curiae* brief. This should not prejudice either the movant

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1 nor the Government, as the movant still can—and already has—offered the same arguments to
2 the Tribal court in that prosecution, and movant can seek to persuade the Government to present
3 the arguments it desires to see raised.

4 Respectfully submitted, this 16th day of January, 2008,
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6
7

8 /s/ Jack W. Fiander
9 Jack W. Fiander, WSBA # 13116
10 Counsel for Defendant Andrew Noel
11 1703 Creekside Loop, Suite 110
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14 Certificate of Service

15 The foregoing was filed electronically on the above date and served upon counsel as follows:

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21 /s/ Jack W. Fiander
22
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