IN THE APPELLATE TRIBAL COURT
FOR THE
GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

ALEXANDER G. CHOLWEKA, *et. al.*,
Plaintiff's/Appellees,

v.

2013-000016-AP
(Tribal Court File No. 2007-737-CV-CV)

GRAND TRAVERSE BAND TRIBAL COUNCIL and
The GTH MEMBERSHIP DEPARTMENT,
Defendant's/Appellants.

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ORDER DISMISSING OBJECTION TO APPEARANCE OF WILLIAM RASTETTER AS ATTORNEY

On October 15, 2013, Appellants Alexander G. Cholewka et al. filed a pleading captioned "APPELLANTS OBJECTION TO APPEARANCE OF WILLIAM RASTETTER AS ATTORNEY AND ANSWER TO MOTION TO DISMISS APPEAL" (hereafter "Objection"). This order addresses the objection to the appearance of William Rastetter. We have already denied the motion to dismiss appeal in an order dated *October 21, 2013*.

On November 21, 2013, Appellees Grand Traverse Band of Ottawa and Chippewa Indians Tribal Council et al. filed a response (hereafter "Response").

We hereby dismiss the objection raised by Appellants.

DISCUSSION

The crux of the objection to the appearance of William Rastetter in this matter appears to be that "Mr. Rastetter was a witness at the trial in this matter, and his testimony at trial is at issue in this appeal." Objection at 1.

The court rules address this question here:

> Rule 2.006 Advocate.
>
> ***
>
> (G) Lawyer as Witness.
>
> (1) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (a) the testimony relates to an uncontested issue;
>
> (b) the testimony related to the nature and value of legal services rendered in the case; or
>
> (2) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by subrules 2.004(G) and (I).

Rule 2.006 tracks the American Bar Association's model rule of professional conduct. See ABA Model Rule 3.7. The comment to Model Rule 3.7 suggests two major public policy reasons for precluding counsel from acting as witnesses: (1) protection of the tribunal from being confused or misled, thereby prejudicing a party; and (2) prevention of the creation of a conflict of interest and undermining the attorney-client relationship. ABA Model Rule 3.7, *comment* [1] ("Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.").

Appellants assert that that Mr. Rastetter's participation as a witness at trial is alone sufficient to foreclose his participation as counsel for Appellees on appeal. Objection at 1-2. Paragraph 2 of Appellants' Notice of Appeal states as its second issue on appeal "[w]hether or

not the court erred in allowing William Rastetter to be called as a witness and testify." Appellants offer nothing more than the mere allegation to justify the objection.

Appellees argue, with extensive documentation about the substance of Mr. Rastetter's testimony, as well as extensive documentation about the substance of affidavits filed by both Mr. Rastetter and GTB General Counsel John Petoskey, that the testimony fits within the (G)(1)(a) exception to the general bar on lawyer testimony.

Though Appellants' motion is characterized as an "objection," we will treat the motion as a motion to disqualify opposing counsel. We hold, as other tribal courts have, that "a motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated and that the evidence is unobtainable elsewhere." *Laban v. Yu Weh Loo Pah Ki Community*, 4 Am. Tribal Law 455, 461 (Hopi Appellate Court 2003). *See also Mann v. Brownell*, 1 Am. Tribal Law 239, 240 (Ho-Chunk Nation Trial Court 1998) (denying motion to disqualify opposing counsel for failure to "diligently offer persuasive law to resolve this issue"). In sum, appellees argue, in comportment with the ABA model rule comment, that the "purpose of the rule primarily is to prevent unfair influence upon a jury acting as trier of fact." Response at 10.

We further note that disqualifying tribal counsel on the eve of an appeal should be disfavored. As one tribal court noted in a context with many similarities to this one, tribal governments have limited resources to employ counsel and parties may be impacted by the additional delay in this appeal:

> Requiring the Housing Authority to retain a special counsel to adjudicate this dispute would entail greater expense and considerable delay. Already these proceedings have been delayed by months. The Housing Authority, as a quasi-governmental agency, has limited funding to retain counsel. A special counsel would require additional time to be brought up to speed on the issues in the case. The Housing Authority would have to find a lawyer it trusted. Substantial delay would result in seeking, retaining and training a special counsel for this litigation.

Cole v. Kaw Housing Authority, 4 Okla. Trib. 281, 296 (Kaw Nation District Court 1995).

Finally to grant the motion and disqualify Mr. Rastetter here would encourage litigants to game the system and seek disqualifications of opposing counsel not for ethical reasons but for strategic reasons, a concern raised by federal judges:

> We have reached a difficult and unpleasant stage in our legal-ethical development. We are now in a time when ethics has ceased to be a common guide to virtuous behavior. It is now a sword in hand, to be used to slay a colleague. This kind of ethics does not reflect a heightened awareness of moral responsibility or a means to temper one's zeal for his or her client. It is instead a means to hobble the opposition by driving a spurious wedge between a client and chosen counsel.

Federal Deposit Insurance Corp. v. Amundson, 682 F. Supp. 981, 988-89 (D. Minn. 1988).

Appellants may still pursue this issue during the merits stage of this appeal.

IT IS SO ORDERED

Mary Roberts
Mary Roberts Dec. 11, 2013

Quinton Walker (MR)
Quinton Walker by permission Dec. 11, 2013

Matthew Fletcher (MR)
Matthew L.M. Fletcher by permission Dec. 11, 2013