

Defendants' own public statements about the Schedule of Fees, and Mr. Tsakalos' own sworn statements about his role in adopting it, amply support Plaintiffs' Motion to Disqualify Mr. Tsakalos. In particular, Defendants have repeatedly and publicly identified the County's purported "survey" of other jurisdictions as the primary justification for its adoption of the Schedule of Fees. Mr. Tsakalos has confirmed under oath that he was the primary (if not sole) County employee involved in formulating and conducting that "survey." Moreover, Mr. Tsakalos' advocacy and presentation of the Schedule of Fees to the County Council, which thereafter approved and adopted the "survey" and Schedule of Fees, is a matter of public record.

In their complaint, Plaintiffs contend that both the "survey" conducted by the County and the Schedule of Fees were and are fundamentally flawed, and that the County's practice of charging discovery fees at all—a policy for which Mr. Tsakalos and District Attorney Lohra Miller were the strongest public proponents¹—is unconstitutional. Given Mr. Tsakalos' unique and extensive role in adopting the "survey" and Schedule of Fees, no other witness will be as able competently and completely to answer questions about, for example, the nature of the "survey" on which the Schedule of Fees is purportedly based, the planning (if any) preceding the "survey" and Schedule of Fees, and how the Schedule of Fees was formulated.

Mr. Tsakalos is a necessary witness, will need to submit to deposition in this matter, and should be disqualified from further participation in this case.

¹ District Attorney Lohra Miller is also a necessary witness. It appears, however, that Ms. Miller's listing as counsel in this case is merely a formal recognition of her position rather than identification of her as opposing counsel who will be engaged in the active defense of the suit. Because Ms. Miller will be leaving office shortly, and will presumably no longer be listed as counsel in this matter, Plaintiffs have deferred filing a motion to disqualify her at this time.

ARGUMENT

In their response in opposition to Plaintiffs' Motion to Disqualify, Defendants do not seriously dispute any of the facts on which Plaintiffs' motion is based. They rely instead on generalities about motions to disqualify, allude to other cases where Mr. Tsakalos has filed unsuccessful motions to intervene, and insinuate bad faith by Plaintiffs and their counsel. Those arguments are irrelevant to whether Mr. Tsakalos is a necessary witness in this case and should be disqualified.

Defendants acknowledge—as they must—that a motion to disqualify opposing counsel must be brought as soon as a party has reason to believe that opposing counsel may be a necessary witness. (Defs.' Resp. in Opp. at 2 (citing *Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc.*, 798 P.2d 478, 480-81 (Utah Ct. App. 1989)). Defendants further acknowledge that, unlike in other jurisdictions, Utah requires that a motion under Rule 3.7 be brought as soon as possible (rather than, as in other jurisdictions, after all other avenues have been exhausted). (*Id.*) Plaintiffs were thus required to bring, and did bring, this Motion to Disqualify as soon as it became clear that opposing counsel is a necessary witness. Defendants' argument that Plaintiffs' motion is “premature” (*id.* at 2) is unfounded.

Similarly unfounded is Defendants' argument that the Motion to Disqualify should be denied as “premature” based on Defendants' decision not to answer the complaint. (*Id.* at 3.) Because Defendants have filed a Motion to Dismiss, they argue, it is possible that the nature or scope of the case will change and Mr. Tsakalos will thereby cease to be a necessary witness. This argument fails for several reasons. First, as noted above, Utah law requires that a motion to disqualify be brought as soon as there is reason to believe opposing counsel is or may be a necessary witness. Second, even if Defendants' Motion to Dismiss were granted in part, that

would not alleviate the necessity for Mr. Tsakalos' testimony. Mr. Tsakalos played an integral role in the "survey" and adoption of the Schedule of Fees challenged by Plaintiffs. The only change in the "scope" or "posture" of this case (*id.* at 3) that relieve Mr. Tsakalos of being a necessary witness is if Defendants stand by their concession that the Schedule of Fees has no legal justification. *Id.* at 6. Only if Defendants concede the merits leaving only the question of remedies, would Mr. Tsakalos' testimony not be required as a necessary witness on those issues.²

Defendants also argue that Mr. Tsakalos has litigated other cases challenging the Schedule of Fees without facing motions to disqualify. (*Id.* at 6.) The absence (or presence) of other motions to disqualify is, of course, irrelevant to whether Plaintiffs' Motion to Disqualify should be granted in this case. Moreover, none of those other cases challenge facially the Schedule of Fees or the process by which it was adopted. What Defendants seem to have in mind are cases involving requests by individual defendants in individual criminal cases to be given discovery without charge. Notably, however, Mr. Tsakalos has not appeared on behalf of a party in those cases, and has instead attempted (unsuccessfully, as we understand it) to intervene.

As Plaintiffs explained in their Motion to Disqualify, disqualification of Mr. Tsakalos at this early juncture would not burden Defendants in any material way. Indeed, in opposition, Defendants do not identify any burdens they would supposedly face if Mr. Tsakalos were disqualified. Nor can they. Defendants have the entire District Attorney's Office at their disposal, and at least two attorneys other than Mr. Tsakalos are already actively involved in

² Defendants suggest an evidentiary hearing be held to determine whether Mr. Tsakalos is, indeed, a necessary witness in this matter. Plaintiffs believe an evidentiary hearing is unnecessary, and would merely delay the case. Utah law requires that this motion be filed as soon as there is reason to believe a lawyer may be a necessary witness. Plaintiffs have good reason to believe that is the case, and Plaintiffs have presented to the Court ample evidence in support of that belief.

defending this case. No discovery has been taken and it appears no particular investment has been made in or by Mr. Tsakalos.

On the flip side, the burdens on Plaintiffs and this Court if Mr. Tsakalos is permitted to remain as counsel to Defendants would be significant. Mr. Tsakalos would be privy to information and strategy discussions to which fact witnesses ordinarily are not. His deposition and trial testimony would therefore likely to be riddled with disputes over the scope of attorney client privilege and work product protections. Moreover, Mr. Tsakalos is likely to testify on factual matters before the Court, in person or by declaration, while also arguing legal issues. This will complicate consideration of the legal arguments, placing Plaintiffs' counsel in the position of having to challenge the credibility of opposing counsel and the Court in the position of having to decide those challenges. All these issues and burdens on both Plaintiffs and the Court will be easily avoided by Mr. Tsakalos' withdrawal or disqualification.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Plaintiffs' Motion to Disqualify Mr. Tsakalos be granted.

DATED this 13th day of December, 2010.

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