

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

BOBBI DARNELL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 17-CV-03063-EFM-TJJ
	)	
JOHN MERCHANT, SHERIFF, BROWN	)	
COUNTY, KANSAS and KICKAPOO TRIBE	)	
IN KANSAS, KICKAPOO RESERVATION,	)	
HORTON, KANSAS,	)	
	)	
Respondents.	)	
_____	)	

**RESPONSE TO MOTION TO DISQUALIFY COUNSEL AND LAW FIRM**

Comes now Respondent, Kickapoo Tribe in Kansas, by and through its attorneys, Thomas G. Lemon and Vincent M. Cox of Cavanaugh, Biggs & Lemon, P.A. and submits this Response to Motion to Disqualify Counsel and Law Firm [Doc. 12] and Memorandum in Support [Doc. 12-1]. For the reasons stated below, Petitioner's Motion to Disqualify Counsel and Law Firm should be denied.

**I. APPLICABLE FACTS**

Attorneys Thomas G. Lemon and Vincent M. Cox of Cavanaugh, Biggs & Lemon, P.A. have entered their appearances as counsel of record for Respondent, Kickapoo Tribe in Kansas. *See*, [Doc. 9] and [Doc. 11]. Mr. Lemon served as the Special Prosecutor for the Kickapoo Tribe in Kansas in prosecuting the Petitioner and tried her jury trial that is the subject of this habeas corpus action.

Petitioner seeks to disqualify Mr. Lemon as she alleges that he will be a "material witness" at trial or in any evidentiary hearings in this matter and, as a result, must be disqualified

pursuant to Kansas Rule of Professional Conduct (K.R.P.C.) 3.7. However, Petitioner's argument in this regard fails.

## **II. ARGUMENTS AND AUTHORITIES**

### **A. Mr. Lemon Should Not Be Disqualified Under K.R.P.C. 3.7.**

K.R.P.C. 3.7(a) provides the following: "A lawyer shall not act as an advocate at a trial in which the lawyer is *likely to be a necessary witness* except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." (Emphasis added). K.R.P.C. 3.7 "disqualifies a lawyer when there is a likelihood that the lawyer will be a 'necessary' witness. This standard requires the opposing party to bear a higher burden on a disqualification motion, permits the court to delay ruling until it can be determined that no other witness could testify, and obviates disqualification if the lawyer's testimony is merely cumulative." *National Bank of Andover, N.A. v. Aero Standard Tooling, Inc.*, 30 Kan.App.2d 784, 792, 49 P.3d 547 (2002). To support disqualification pursuant to K.R.P.C. 307, "an attorney's testimony must not only be possible or likely but necessary." *Venters v. Sellers*, 293 Kan. 87, 105, 261 P.3d 538 (2011).

"The burden of proof on showing if an attorney is 'likely to be a necessary witness' in a motion to disqualify under K.R.P.C. 3.7 is generally on the moving party." *Id.* at 102; *see also, Field v. Freeman*, 527 F. Supp. 935, 941 (D. Kan. 1981). "The proof must be more than mere speculation and must sustain a reasonable inference of a violation." *Koch v. Koch Industries*, 798 F. Supp. 1525, 1530-31 (D. Kan. 1992). Petitioner cannot meet this burden thus her motion must be denied.

In addressing a motion to disqualify, the court must give the motion "serious, conscientious, and conservative treatment." *Id.* at 1530. In deciding a motion to disqualify pursuant to K.R.P.C. 3.7, "a judge should apply a balancing test rather than automatically disqualify." *Venters*, 293 Kan. at 105. The Kansas Court of Appeals has adopted the following factors that must be considered when weighing a motion to disqualify an attorney based upon the opposing party asserting the attorney is a material witness: "(1) Whether it had been shown that the attorney would give evidence material to the determination of the issues being litigated; (2) whether the evidence could not have been obtained elsewhere; and (3) whether the testimony would have been prejudicial or potentially prejudicial to the testifying attorney's client." *National Bank of Andover, N.A.*, 30 Kan.App.2d at 792. The Kansas Supreme Court holds that generally "a court should consider 'the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes on the parties and the entire judicial process' when deciding a motion to disqualify an attorney pursuant to K.R.P.C. 3.7." *Venters*, 293 Kan. at 103.

Petitioner asserts that Mr. Lemon is a "material witness" because he was either a witness to or participated in the commission of a number of alleged "errors" in her prosecution. However, each of those alleged "errors" either did not happen or are entirely irrelevant to this habeas corpus proceeding. (*See*, Trial Transcript, [Doc. 15-1 and Doc. 15-2]). Accordingly, Petitioner's baseless allegations are speculative at best and do not make Mr. Lemon a "necessary witness" requiring him to be disqualified under K.R.P.C. 3.7. Respondent responds to the alleged "errors" stated by Petitioner as follows:

1. Petitioner alleges that Mr. Lemon is a witness in this matter, because the Pre-Sentence Investigation Report "was touted by him as 'well written' even though it recommended an illegal prison sentence, and recommended a non-existent BIA prison." This claim has no merit. First, the prison sentence that was recommended in the Pre-Sentence Investigation Report is irrelevant as it was not adopted by the Kickapoo District Court Judge. Secondly, BIA prisons do exist and Petitioner has no basis for alleging that they do not. Accordingly, there are no errors in this regard and Mr. Lemon is not a witness.

2. Petitioner alleges that Mr. Lemon is a witness because he "computed and presented an 18-year prison sentence for Petitioner, knowing that the sentence was wrong and based on a typo in the tribal ordinance." However, this issue is moot and irrelevant, as the Kickapoo District Court Judge sentenced Petitioner to 18 months in prison not 18 years. Any reference made during sentencing to an 18-year prison sentence was the result of a typographical error in the Kickapoo Tribal Code. (*See*, [Doc. 15-4]).

3. Petitioner alleges that Mr. Lemon is a witness because he "heard the tribal judge ask the court clerk if he should find one of [Petitioner's] character witnesses in contempt of court." This issue is also totally irrelevant and does not make Mr. Lemon a witness. If such a statement was made, it was made in open Court and recorded. Any such statements will be contained in the transcript of the sentencing hearing. This issue does not support any claim that Petitioner's rights were violated and does not make Mr. Lemon a witness.

4. Petitioner alleges that Mr. Lemon is a witness because he "observed the trial judge sorting through the names of prospective jurors during the jury selection process, rather than having the court clerk make a random selection. . . ." This accusation just is not true.

As demonstrated in the trial transcript, the Kickapoo District Court Judge used proper procedure in selecting the jury. (*See*, Trial Transcript, [Doc. 15-1 and 15-2]). The Kickapoo District Court Judge's actions in selecting prospective jurors were performed in open court. Nothing with regard to this allegation by Petitioner makes Mr. Lemon a witness.

5. Petitioner alleges that Mr. Lemon saw or should have seen Kickapoo's General Counsel mouthing an answer to a prosecution witness who was under cross-examination. However, there is absolutely no evidence that this occurred and this issue does not make Mr. Lemon a witness. (*See*, Trial Transcript, [Doc. 15-1 and 15-2]).

Accordingly, Mr. Lemon is not "likely to be a necessary witness." Any testimony he could provide with regard to the Petitioner's allegations is not material to the determination of the issues being litigated in this case. All of the alleged "errors" that the Petitioner relies upon in support of her Motion to Disqualify occurred in open Court. Thus, there are numerous other witnesses that could provide testimony, if any, with regard to those issues. Any testimony Mr. Lemon could provide could be obtained elsewhere and would be cumulative. Finally, no testimony that Mr. Lemon could provide on these issues would be prejudicial to the Kickapoo Tribe in Kansas.

Petitioner's factual basis for the Motion to Disqualify consists of nothing more than mere speculation and baseless allegations. As a result, Petitioner has not met her burden of proof and her Motion to Disqualify Mr. Lemon should be denied. At the very least, any decision on the Motion to Disqualify should be delayed until it is shown, at any evidentiary hearing or at trial, that Mr. Lemon is actually a "necessary witness."

**B. K.R.P.C. 3.7 Does Not Require An Attorney To Be Entirely Disqualified From Representing A Party.**

Even if this Court finds that Mr. Lemon is disqualified pursuant to K.R.P.C 3.7, he is only disqualified as an "advocate" for the Kickapoo Tribe in Kansas. If an attorney is disqualified pursuant to K.R.P.C. 3.7, the attorney is not to be disqualified as an attorney for the party, but only disqualified from acting as an "advocate at a trial." *Venters*, 293 Kan. at 106. Petitioner's Motion to Disqualify acknowledges that if Mr. Lemon is disqualified, it is limited to him acting as an advocate for the Kickapoo Tribe at trial or any evidentiary hearing. In fact, this was the exact conclusion that was reached in *Lowe v. Experian*, 328 F. Supp. 2d 1122, 1126-28 (D. Kan. 2004), which was cited by Petitioner in her Motion to Disqualify. While Mr. Lemon should not be disqualified pursuant to K.R.P.C. 3.7, if he is disqualified, he should be allowed to continue as an attorney for the Kickapoo Tribe in this case.

**C. Even If Mr. Lemon Is Disqualified Under K.R.P.C. 3.7, Mr. Cox Can Continue To Represent The Kickapoo Tribe in Kansas At Trial And Evidentiary Hearings.**

As Petitioner acknowledges in her Motion to Disqualify, that if Mr. Lemon is disqualified, Vincent Cox from Mr. Lemon's firm, who has also entered his appearance in this matter on behalf of the Kickapoo Tribe, can continue to represent and act as an advocate for the Kickapoo Tribe at trial or any evidentiary hearings. K.R.P.C. 3.7(b) provides that a "lawyer may act as an 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 Rule 1.7 [Conflict of Interest: Current Clients] or Rule 1.9 [Duties to Former Clients]." There are no conflict of interest issues that would prevent Mr. Cox from continuing as advocate for the Kickapoo Tribe at trial and any evidentiary hearings.

WHEREFORE, for the reasons stated above, Petitioner's Motion to Disqualify Counsel and Law Firm [Doc. 12] should be denied.

/s/ Thomas G. Lemon

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CERTIFICATE OF SERVICE

I hereby certify that on the 11<sup>th</sup> day of May, 2017, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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