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ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Case No. 2002-0179

Continental Resources, Inc.,	)
	)
Petitioner,	)
	)
vs.	)
	)
The Honorable Allan Schmalenberger, Judge of the Bowman County District Court, Southwest Judicial District; McKennett Stenehjem Reierson Forsberg Hermanson, P.C.; Kent Reierson, Individually; James H. Bragg; J. Michael Gleason, d/b/a Gleason Land Co.; and Julie K. McKinley a/k/a Julie K. King,	)
	)
Respondents.	)

SUPPLEMENTAL BRIEF OF PETITIONER, CONTINENTAL RESOURCES, INC.

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INTRODUCTION

Pursuant to this Court's Order, received on August 29, 2002, Continental,[1] hereby submits this supplemental brief in further support of its Petition for Writ of Mandamus or Supervisory Order. As directed by this Court, Continental's supplemental brief is limited to addressing the issue of the district court's conclusion that the legal work performed by Reierson's Firm on behalf of Continental "was not the same matter or substantially related to the issue before the trial court in this litigation." Order of the North Dakota Supreme Court ("Order") at 2.

ARGUMENT

A. The District Court's Determination Cannot be Sustained.

1. Standard of Review.

Whether Reierson's Firm should be precluded from representing Bragg, Gleason, and McKinley under Rule 1.9 of the North Dakota Rules of Professional Conduct is a question of law. This Court reviews questions of law *de novo*. *Botner v. Botner*, 545 N.W.2d 188, 190 (N.D. 1996).

It is anticipated that Respondents will argue in their supplemental brief that this Court cannot overturn the district court's determination denying Continental's motion to disqualify unless Continental demonstrates that the determination was an abuse of discretion. *See* Respondent's Brief at 1-2. The abuse of discretion standard to which Respondents will no

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[1] Continental utilizes the same abbreviations here as it does in its Opening Brief and Reply Brief.

doubt point is inappropriate to the generally accepted standards of review adopted by other courts in analogous proceedings — *i.e.*, a determination of the applicability of relevant Rules of Professional Conduct is a question of law. *State v. Early*, 852 P.2d 964, 969 (Wash. App. 1993) (cited as authority by this Court on other grounds, *Heringer v. Haskel*, 536 N.W.2d 362, 366 (N.D. 1995)). In disqualification cases such as this, where the operative facts are not substantially in dispute, the district court does not have any particular advantage over this Court in making determinations as to the applicability of ethical rules of conduct governing conflicts of interest. Nor does the district court possess some sort of superior insight into these matters so that this Court should give special weight or defer to the district court's determinations. Rather, insofar as the district court's ruling is similar to that of a disciplinary proceeding where this Court reviews the record *de novo*, *Disciplinary Bd. v. Jones*, 487 N.W.2d 599 (N.D. 1992), it is important for this Court to be the final arbiter. To hold otherwise would be contrary to the generally accepted principal that questions of law are fully reviewable by this Court. *J.M. Capital Corp. v. James & Moody, Inc.*, 2000 ND 136 ¶6, 613 N.W.2d 503.

2. The Conflict Disclosed by the Record Requires Reierson's Firm to Be Disqualified.

While the proprietary of applying an abuse of discretion standard in reviewing the district court's order will no doubt be in dispute (*see* Section 1, *supra*), the trial court's action in denying Continental's disqualification motion cannot be sustained as a proper exercise of the district court's discretion. The facts central to the issue of disqualification are essentially undisputed. Based upon these facts, the district court itself recognized and questioned the proprietary of Reierson's Firm continuing as counsel for Bragg, Gleason and McKinley.

Transcript at 49. Unfortunately, in concluding that the legal work Reierson's Firm performed was not the same matter or substantially related to the issues currently being litigated, the district court erroneously concluded that short of Reierson's Firm being named as a co-conspirator with Bragg, Gleason and McKinley, there was no basis for disqualification. *Id.* at 60.

That error by the district court cannot plausibly be viewed as an exercise of discretion. Actually, it represents a misapplication of Rule 1.9 which the court presumably applied. Had the district court recognized that a conflict of interest can exist without evidence of conspiracy, Continental's motion for disqualification would most likely have been granted. The conflict, however, with which we are concerned here does not depend upon whether Reierson's Firm shared confidential information with Bragg, Gleason and McKinley to further their scheme to acquire oil and gas exploration rights in Bowman and Slope Counties, North Dakota, in competition with Continental. Accordingly, Continental is not required to prove dishonestly by counsel to have Reierson's Firm disqualified. All that is necessary is for Continental to demonstrate that the prior legal work Reierson's Firm did for Continental is the same matter or substantially related to the issues involved in this lawsuit. N.D.R. Prof. Conduct 1.9.

Turning to the record, it undisputedly reflects that on March 23, 1995, Continental, by and through its agent, Diamond Resources, Inc. ("Diamond") contacted Reierson's Firm to engage the firm to assist in the acquisition of oil and gas exploration rights by performing title work for Continental on certain properties in Bowman County. Reierson's Firm was engaged as part of a significant effort by Continental to obtain oil and gas exploration rights

in Bowman and Slope Counties. The effort was initiated in late 1993 and covered more than forty square miles. Apx. at 139-40 (Luttrell Aff. at 2). The specific work Reierson's Firm was requested to perform in March of 1995 was to examine title on six tracts of land and to confirm the net revenue interests and working interests of Baloco Petroleum Corporation ("Baloco") in these properties (hereinafter the "Baloco Properties"). *Id.* at 130-32. To complete this work, Diamond provided Reierson's Firm with thousands of pages of documents secured from various private and public sources. Apx. at 130-31. Based upon this information and his conversations with representatives of Diamond and Continental (*id.* at 129-33), Reierson's Firm prepared six separate title opinions covering the interests claimed by Baloco in the Baloco Properties. Apx. at 238-67.

In July of 1995, Reierson's Firm was again contacted by Diamond and requested to prepare a drilling title opinion for one of the Baloco Properties and lands within the same section on which the Wallman #1-32 well was located (hereinafter the "Wallman Property"). Respondent's Brief at 5. After determining that the title was so complex that he was unable to complete the opinion by himself, Reierson enlisted the assistance of his former partner, Mr. William D. Walters, Jr., another Williston attorney, to assist in completing the title opinion. Apx. at 162-3 (Reierson Aff. at 2-3). Once again, Diamond provided Reierson's Firm with documents and other confidential information necessary to assist in preparing the drilling title opinion for the Wallman Property. A preliminary draft opinion was prepared and forwarded to Continental in November of 1995. Respondent's Brief at 5. All during the time Reierson's Firm was conducting this title work for Continental, representatives of Continental and Diamond, including Diamond's contract landmen, were available to

Reierson's Firm to respond to inquires relative to the title documents being examined. Apx. at 241-42. Gleason was the primary contract landman who was working for Diamond and Continental on the specific tracts where Reierson's Firm was preparing title opinions for the Wallman Property. In fact, the two were working on such tracts at precisely the same time. Continental's Supplemental Appendix at 1-5. In addition, as a result of correspondence from Reierson's Firm, we know Reierson was having direct contact with Diamond's field landman about the title work on these tracts. Apx. at 241-42.

Subsequent thereto, Reierson's Firm took on the representation of Bragg, Gleason and McKinley in the suit which is currently pending before the district court.[2] Now, Reierson's Firm is assisting admitted competitors of Continental to acquire these same oil and gas exploration rights in Bowman and Slope Counties.

The district court's perception of these facts was summed up in its conclusion that the title work completed by Reierson's Firm "was not the same matter or substantially related to the issue before the trial court in this litigation" (Order at 2) and concern that disqualification would result in delay to a case already in violation of docket currency standards. Transcript at 28 and 61.

Turning to the arguments advanced by Reierson's Firm both here and before the district court substantiate how closely related the legal work performed for Continental in 1995 is to the matters involved in this litigation. Initially, we invite the Court's attention to the statement contained in Respondent's Brief admitting that if Reierson's Firm were to share

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[2] The specific issues of the lawsuit currently pending before the district court have been previously outlined in Continental's Opening Brief at 5-6.

the contents of Continental's file with Bragg, Gleason and McKinley, that would be unethical. Respondent's Brief at 15. In an apparent effort to protect itself from Continental's motion to disqualify before the district court, that is precisely what Reierson's Firm did when it deposited portions of Continental's confidential file with the Clerk of the Bowman County District Court and then notified Bragg, Gleason and McKinley that the file was available for public inspection just a few blocks from where Bragg and Gleason reside. Apx. at 161-297.

Nor does Continental take comfort in Reierson's self serving affidavit that he has never shared any portions of Continental's file with his new clients. That statement is fully inconsistent with the unexplained discovery of documents in Gleason's file which were provided to Reierson's Firm in preparation of title opinions for the Baloco Properties and the Wallman Property. It likewise provides no assurances that the information Reierson's Firm gained in working for Continental will not be used in the future as a sword against Continental in this litigation. One needs only to take a cursory look at the various motions which have been filed with the district court to realize the contempt Reierson has for Continental. *See generally* Apx. at 8-10. The temptation Reierson's Firm has, and will inevitably continue to confront, is to use the information it gained while engaged to work for Continental in developing its strategy against Continental in this case. Rule 1.9 does not require Continental to show that Reierson's Firm has shared confidential information with Bragg, Gleason and McKinley. It is enough that Reierson's Firm has the powers to do so. N.D.R. Prof. Conduct 1.9.

Second, according to Respondents, there is no conflict because most of the documents provided by Diamond to Reierson's Firm were derived from public records

retained by the county recorder's office. Respondent's Brief at 2. Apart from the fact that this argument ignores the fact that Reierson's' Firm was provided with confidential documents not a part of the public record (Apx. at 167-99, 200-21) and that Reierson's Firm was privy to information received directly from representatives of Diamond and Continental (*id.* at 200-03); it suggests that title is easily ascertainable from the public records and that any analysis landmen and attorneys might provide is of little or no significance in determining the state of title to oil and gas leasehold and mineral interests. To dispute this argument, this Court need only look to the fact that Reierson himself found the title to the Wallman Property so complex that he could not render an opinion himself and needed to enlist the services of a more experienced title attorney. Apx. at 162-63 (Reierson Aff. at 1-2).

Next, Respondents argue that the work Reierson's Firm performed for Continental was too remote to create a conflict. Apx. at 284-85. As Respondents readily acknowledge, Reierson's Firm performed title work for Continental on the Wallman Property. Interests in and under the Wallman Property are common to numerous other tracts of land. Apx. at 132. (Luttrell Aff. at 4). Continental has determined that Bragg, Gleason and McKinley have acquired interests in and under at least eight separate tracts common to the Wallman Property and as a result now claim interests under six producing wells, four of which are operated by Continental. Apx. at 76-78 (Amended and Consolidated Answer at 12-15). All these interests were acquired as a result of obtaining title information from the Wallman Property, the same property Reierson's Firm assisted Continental in acquiring oil and gas exploration rights by preparing title opinions. In addition, Bragg, Gleason and McKinley have acquired

interests in three other wells offsetting the Baloco Properties. *Id.* There can be no doubt that the information and knowledge Reierson's Firm acquired in working for Continental in its acquisition of the Baloco Properties and the preparation of the drilling title opinion for the Wallman Property has assisted Reierson's Firm in defending Bragg, Gleason and McKinley against Continental's counterclaim concerning these same properties.

The adverse effect of Reierson's Firm assisting Continental in the acquisition of oil and gas exploration rights by preparing title opinions and then representing Bragg, Gleason and McKinley in the acquisition of these same rights, is further demonstrated by the manner in which the title opinions were used to attempt to justify a motion to add a punitive damages claim against Continental. Apx. at 8 (Register of Actions #119). Reierson's Firm filed discovery requests and then a motion to compel seeking production of all title opinions on properties involved in the lawsuit which would obviously include his own title opinions on the Wallman Property. *Id.* Reierson asserted in his motion and brief that the title opinions were relevant and necessary to establish various elements of his clients' claims, including their claims for punitive damages. *Id.* The term "relevant" is derived from the same root as "related" and carries the same meaning. Webster's Dictionary includes "related" as one of the definitions of "relevant". For Reierson to place his signature on previous district court filings verifying that the title opinions are relevant (related) to the case and now assert that his work on the Wallman Property title opinions is not related is a reflection of the extent to which his judgment has been clouded by the conflict.

Viewing the issue in terms of the district court's conclusion, how can the same title opinions that are not "the same matter or substantially related" form the basis for a punitive

damages claim? Certainly Justice Meschke recognized that the test of Rule 1.9 had been met when he opined that defending Bragg, Gleason and McKinley against Continental's counterclaim as it relates to the Wallman Property concerns the same matter as the 1995 title work Reierson's Firm did for Continental and the firm should therefore be disqualified. Apx. at 298-99.

In terms of an "appearance of improprietary," the district court's conclusion that these matters are not the same or substantially related is equally unsound. While the concerns set forth above justify the relief sought by Continental, these concerns are reinforced by what appears to be a dominant theme in these proceedings since Continental filed its motion to disqualify — *i.e.*, Reierson's Firm will attempt to avoid disqualification at any cost. The conflict in which Reierson's Firm has become so inextricably intertwined has so consumed Reierson that it will undoubtedly taint these proceedings. The very fact that experienced trial counsel would refuse to return a former client's file and then deposit large portions of the same file with the district court without requesting that it be placed under seal illustrates the adverse effect on Reierson's independent judgment this conflict has created. Most recently, it has resulted in Reierson making imagined accusations of conspiratory communications between the Clerk of this Court and counsel for Continental. While the acquisitions are groundless, questioning the integrity of this Court's staff threatens the public's perception of the process by which justice is administered and the public's confidence in the Bar. Consistent with this Court's ruling that the Rules of Professional Conduct have not abrogated the "appearance of improprietary standard" (*Heringer*, 536 N.W.2d at 366), a conflict which threatens to taint the entire proceedings and the integrity

of the judicial system is deserving of prompt attention by this Court and an order disqualifying the firm with the conflict. Reierson's Firm should therefore be disqualified from the case pending before the district court.

CONCLUSION

For all the foregoing reasons. as well as those set forth in Continental's Opening and Reply Briefs, Continental's Petition for Writ of Mandamus or Supervisory Order should be granted.

Dated this 9th day of September, 2002.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the following document:

SUPPLEMENTAL BRIEF OF PETITIONER, CONTINENTAL RESOURCES, INC.

was on the 9th day of September, 2002 served by placing the same in the United States mail, postage prepaid, properly addressed to the following:

The Honorable Allan Schmalenberger
Judge of the District Court
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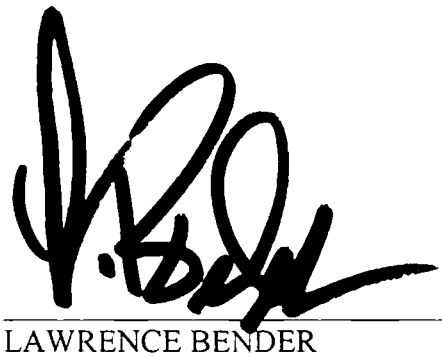

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