

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

JIM SISNEY, an individual,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CJ-2008-06173
)	Judge Daman Cantrell
MIKE RAMPEY, an individual;)	
DOUGLAS J. HUDKINS, an individual;)	
MARYANNE FLIPPO, an individual;)	
SHARI WILKINS, an individual;)	
SHARON WHELPLEY, an individual,)	
)	
Defendants.)	

**RESPONSE OF THE BROKEN ARROW SCHOOL DISTRICT IN
OPPOSITION TO PLAINTIFF’S MOTION TO DISQUALIFY COUNSEL**

Independent School District No. 3 of Tulsa County, commonly known as the Broken Arrow School District (the “School District”), respectfully submits this response in opposition to the motion of the Plaintiff, Jim Sisney, to disqualify Rosenstein, Fist & Ringold (“RFR”) as the School District’s attorneys.

Sisney contends that RFR should be disqualified from representing the School District because J. Douglas Mann, a shareholder in RFR, may be called as a witness in this matter. Sisney ignores the fact that Mr. Mann has not entered an appearance in this action and did not enter an appearance in Sisney’s previous federal court lawsuit against the School District. In both cases, the School District has been represented by the undersigned attorney, Kent B. Rainey, rather than Mr. Mann. The Oklahoma Supreme Court has made it clear that an attorney is not disqualified from representing a party at trial merely because another attorney in his firm will testify at the trial. *Crussel v. Kirk*,

1995 OK 41, ¶¶ 11, 12, 894 P.2d 1116, 1120. The court pointed out that Rule 3.7(b) of the Rules of Professional Conduct specifically authorizes an attorney to act as an advocate in a trial in which another lawyer in that lawyer's firm is likely to be called as a witness. *Id.*

Sisney also argues that unnamed attorneys at RFR "have the potential for personal liability" as parties to this action based on their alleged possession and dissemination of "confidential information" for use against Sisney. Sisney bases this outlandish claim on the fact that Mr. Mann was legal counsel for the School District while Sisney was superintendent and "had access to his files, documents, and correspondence" and "participated in confidential conversations" regarding the events that led to Sisney's dismissal as superintendent.

This is utter nonsense. As attorney for the School District, Mr. Mann had access to the School District's records. Any "files, documents, and correspondence" that he saw relating to Sisney had to do solely with Sisney's status as an employee of the School District. *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, 171 P.3d 899, the only case Sisney cites, involved the alleged possession of "confidential information" obtained during the course of an attorney-client relationship. *Id.* at ¶ 4, 171 P.3d at 902. Neither Mr. Mann nor anyone else at RFR ever represented Sisney personally. The information in the School District's employment records regarding Sisney is not in any way comparable to the type of confidential information at issue in *Arkansas Valley State Bank*.

Moreover, as noted above, the undersigned attorney was not in any way involved in the School District's dismissal of Sisney. Mr. Mann, along with John Priddy of the firm, handled that matter. The undersigned attorney began representing the School District after Sisney had been dismissed, specifically, when the School District received a notice of tort claim from Sisney.

The Oklahoma Supreme Court has stated that the disqualification of attorneys is a "drastic measure" that should not be used as a procedural weapon. *Arkansas Valley State Bank*, ¶ 13,171 P.3d at 905. Because of the danger that litigants will try to use motions to disqualify opposing counsel for strategic purposes, the Oklahoma Supreme Court has emphasized that "the barrier a party must surmount to secure the disqualification of his opponent's counsel is high." *Hayes v. Central States Orthopedic Specialists, Inc.*, 2002 OK 30, ¶¶ 9, 10, 51 P.3d 562, 565. Thus, a party's motion to disqualify opposing counsel will be granted only if the moving party establishes that "real harm to the integrity of the judicial process is likely to result if counsel is not disqualified." *Arkansas Valley State Bank*, ¶ 23, 171 P.3d at 910-11.

Sisney presents nothing to justify the "drastic measure" he seeks in this case. The conclusory allegations set forth in his motion are supported by neither facts nor evidence. Because Sisney has not put forward any plausible, let alone evidentiary, basis for seeking to disqualify RFR, his motion should be seen for exactly what it is: a cynical litigation tactic intended to deprive the School District of the law firm of its choice. His motion should be denied.

Argument and Authority

Introduction

The Oklahoma Supreme Court has recognized that a person has a fundamental right to employ the counsel of his choice. *Arkansas Valley State Bank*, ¶ 12, 171 P.3d at 904. The court explained that this right is both “implied from the nature of the attorney-client relationship in our adversarial system of justice” and “grounded in the due process right of an individual to make decisions affecting litigation placing his or her property at risk.” *Id.* The court emphasized that a party’s choice of counsel can significantly impact the outcome of a case:

An individual’s decision to employ a particular attorney can have profound effects on the ultimate outcome of the litigation. Legal practitioners are not interchangeable commodities. Personal qualities and professional abilities differ from one attorney to another, making the choice of a legal practitioner critical both in terms of the quality of the attorney-client relationship and the type and skillfulness of the professional services to be rendered.

Id.

Because courts recognize the importance of a party’s choice of counsel, attempts to deprive a party of that choice are viewed with great skepticism. “Disqualification is such a drastic measure that it should be invoked if, and only if, the Court is satisfied that real harm is likely to result.” *Id.* at ¶ 12, 171 P.3d at 905.

Proposition I

Calling Mann as a Witness Does Not Justify Disqualifying RFR

Sisney argues that RFR should be disqualified from representing the School District in this matter because he intends to call Mr. Mann as a witness. Citing Rule 3.7

of the Rules of Professional Conduct, Sisney claims that the entire RFR law firm should be disqualified “on this basis alone.” Plaintiff’s Combined Response to the Broken Arrow School District’s Objection to Plaintiff’s Motion to Amend and Motion to Disqualify Counsel, p. 7. Yet as the Oklahoma Supreme Court has recognized, Rule 3.7 provides exactly the opposite:

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 or Rule 1.9.¹

Rule 3.7(b) of the Rules of Professional Conduct, OKLA. STAT. tit. 5, Ch. 1, App. 3-A (2009 Supp.).

In *Crussel v. Kirk*, *supra*, the Oklahoma Supreme Court held that the trial court erred in refusing to allow a member of the law firm representing the plaintiff to testify as a rebuttal witness on behalf of the plaintiff. The case was a medical malpractice action filed by Pat Malloy, Jr. who had referred the plaintiff to a plastic surgeon for evaluation of a previous surgery done by the defendant. Malloy, Jr. then spoke to the surgeon, who advised him that although the defendant doctor was “involved in something he did not fully understand,” he would not testify against the defendant. When Malloy, Jr. learned that this surgeon had agreed to testify on behalf of the defendant, he realized that he would likely have to testify at the trial as to the surgeon’s statement to him. Malloy, Jr.’s son, Pat Malloy III, and another member of the law firm then entered appearances in the case and took over the representation of the plaintiff.

¹ Rules 1.7 and 1.9 deal with conflicts of interest between an attorney’s clients or former clients. Neither situation is applicable to this case.

In ruling that the trial court erred in refusing to allow Malloy, Jr. to testify, the Oklahoma Supreme Court emphasized that Rule 3.7 applies only to a party's "advocate at trial":

There is nothing in the record to show that Malloy, Jr., acted as an advocate at trial. He neither presented arguments nor examined witnesses. The record demonstrates that Malloy, Jr., although still counsel in the case, took the necessary prophylactic measures, all consistent with the rationale of Rule 3.7 to insulate himself from the role of trial advocate. The Rule was clearly not an impediment to allowing Malloy, Jr.'s testimony in this case. The exclusion of this proof was patently erroneous.

Crussel, ¶ 12, 894 P.2d at 1120 (emphasis original).

The Oklahoma Supreme Court's decision in *Crussel* establishes that Sisney cannot disqualify RFR merely by the stratagem of calling Mr. Mann as a witness. Indeed, unlike in *Crussel*, Mr. Mann has not even entered an appearance on behalf of the School District in either of the cases brought by Sisney.

This result comes as no surprise to Sisney or his counsel, as they made the same argument – with the same result – in the prior federal court action. There, Sisney filed an emergency motion seeking to prevent the undersigned counsel from taking Sisney's deposition. During the telephone hearing with Magistrate Judge Paul J. Cleary, which was included in the transcript of the deposition, Sisney's counsel argued that Sisney was going to file a motion to disqualify RFR because he intended to call Mr. Mann as a witness in this matter. Magistrate Judge Cleary summarily rejected that argument:

THE COURT: All right. I've looked through the motion that's before me now, which basically is a Rule 26 motion. I don't see any basis in Rule 26 for a disqualification. Now, under the Rules of Professional Conduct, 3.7 deals with a lawyer as a witness, and says a lawyer shall not act as an advocate at trial – a trial in which he is likely to be a necessary witness

unless certain circumstances exist. Mr. Mann has not entered an appearance in this case, and based on what Mr. Rainey has said, Mr. Mann is not going to be trial counsel here, so we do not have that situation. Further, Rule 3.7(b) says that a lawyer may act as an advocate in a trial in which another lawyer in that lawyer's firm is likely to be called as a witness unless precluded under Rules 1.7 and 1.9, which don't really apply here. They are conflicts with former clients. So I'm going to deny the motion to stay the deposition, the motion for a protective order, and direct that the deposition go forward.

Deposition of James David Sisney, p. 12, attached as Exhibit 1.

The foregoing authorities establish that Sisney cannot disqualify RFR from representing the School District in this matter merely by stating that he intends to call Mr. Mann as a witness. Sisney's motion to disqualify should be denied.

Proposition II

Sisney's Claim that RFR Possesses "Confidential Information" Is Facially Inadequate to Disqualify RFR

Sisney asserts that RFR should be disqualified for "improper possession of confidential information." Plaintiff's Combined Response and Motion, p. 8. He claims that because Mr. Mann represented the School District during the time that Sisney was dismissed as superintendent, Mr. Mann "know[s] things relevant to this case that create a conflict of interest." *Id.* Although the undersigned counsel played absolutely no role in Sisney's dismissal and did not undertake representation of the School District until after Sisney was terminated, Sisney also claims the undersigned attorney has knowledge of this purported "confidential information."

Sisney cites *Arkansas Valley State Bank, supra*, as supporting his claim. In that case, the bank sued an investment company with which it had previously contracted to

provide investment services to its customers. During the course of the litigation, the bank terminated an employee, who then retained the investment company's lawyer to file a separate lawsuit against the bank. The bank then sought to disqualify such attorney in the lawsuit against the investment company, claiming that the attorney had received "confidential work product information" about the bank's lawsuit against the investment company by virtue of the attorney's representation of the bank's former employee. *Arkansas Valley State Bank*, ¶ 4, 171 P.3d at 902. The trial court granted the motion to disqualify, although it made no finding that the attorney had acted unethically or improperly. *Id.* at ¶ 5, 171 P.3d at 902.

The Oklahoma Supreme Court reversed. It held that the trial court had erred by granting the motion to disqualify without first holding an evidentiary hearing and making specific findings of fact regarding the attorney's improper knowledge. *Id.* at ¶ 8, 171 P.3d at 903. The court summarized its decision, and the relevant considerations controlling its holding, as follows:

A party litigant's right to employ the counsel of his or her choice is fundamental. A disqualification order is a drastic measure. The standard for granting a motion to disqualify counsel is whether real harm to the integrity of the judicial process is likely to result if counsel is not disqualified. If a trial court grants a motion to disqualify counsel based on conflict of interest or possession of confidential information, it must hold an evidentiary hearing and make a specific factual finding that the attorney had knowledge of material and confidential information.

Id. at ¶ 25, 171 P.3d at 911.

The holding of *Arkansas Valley State Bank* establishes that before granting a motion to disqualify counsel, the trial court must hold an evidentiary hearing and make a

specific factual finding that the attorney had knowledge of confidential information. In this case, however, the court need not conduct such a hearing, because Sisney has not made even a colorable claim that either Mr. Mann or the undersigned attorney had access to the type of confidential information that would warrant possible disqualification.

Sisney has not identified the type of information he claims Mr. Mann and the undersigned attorney accessed, except to say that such information was contained in the “files, documents, and correspondence” retained by the School District. This is not remotely comparable to the “confidential work product information” about a pending lawsuit that was at issue in *Arkansas Valley State Bank*. Nor has Sisney identified any person to whom Mr. Mann or the undersigned attorney allegedly disseminated such information. He simply makes bald-faced allegations of improper conduct impugning the character of Mr. Mann and the undersigned attorney without offering a shred of supporting evidence.

Sisney has not identified how “real harm to the integrity of the judicial process” could possibly result from an attorney’s knowledge of the information in the School District’s relating to Sisney. Indeed, any attorney who was retained to represent the School District after Sisney’s dismissal – as was the undersigned attorney – would have access to the same information. Sisney’s wholly unsupported assertions regarding his so-called “confidential information” are nothing more than an attempt to gain a tactical advantage in this case by depriving the School District of the counsel of its choice.

Courts in other jurisdictions have uniformly held that a party seeking to disqualify opposing counsel must present more than conclusory allegations to trigger the court’s

obligation to act. See *Papyrus Technology Corp. v. New York Stock Exchange, Inc.*, 325 F.Supp.2d 270, 274, n.4 (S.D.N.Y. 2004) (stating that “bald, conclusory allegations that [opposing counsel] received confidences or secrets” is insufficient to warrant disqualification); *J.K. and Susie L. Wadley Research Institute and Blood Bank v. Morris*, 776 S.W.2d 271, 278 (Tex. App. 1989) (noting that “a party moving to disqualify cannot rely upon conclusory statements; he must provide the trial court with sufficient information so that it can engage in a painstaking analysis of the facts”) and *Olmoz v. Town of Fishkill*, 648 N.Y.Supp.2d 611 (N.Y. App. Div. 1999) (stating that “mere conclusory assertions that there is a conflict of interest are insufficient to warrant a hearing”).

Sisney has not identified any facts that justify a hearing in this matter. His conclusory allegations are insufficient to put this School District and this court to the time, effort and expense of conducting an evidentiary hearing. Sisney’s motion is facially inadequate to disqualify RFR as the School District’s attorneys. His motion should be denied.

Conclusion

Sisney’s claim that RFR should be disqualified from representing the School District in this matter because he intends to call Mr. Mann as a witness is contrary to Rule 3.7(b) of the Rules of Professional Conduct and the Oklahoma Supreme Court’s decision in *Crussel v. Kirk*, 1995 OK 41, 894 P.2d 1116. Magistrate Judge Cleary considered and rejected the identical argument in Sisney’s prior federal court action. See Exhibit 1.

Sisney provides no factual support for his claim that RFR attorneys possess “confidential information” about him. His conclusory allegations are wholly inadequate to require an evidentiary hearing on this issue. Sisney’s motion should be denied as inadequate on its face.

Sisney’s motion falls far short of meeting the high burden necessary for the drastic measure of disqualifying an attorney. His motion to disqualify RFR from representing the School District in this matter should be denied.

Respectfully submitted,

ROSENSTEIN, FIST & RINGOLD

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CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of May, 2010, I served the attached document by United States Mail, Certified-Return Receipt Requested, on the following:

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Kent B. Rainey

JAMES DAVID SISNEY
December 22, 2009

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIM SISNEY, an individual,)
)
Plaintiff,)
)
VS.) CASE NO.
) 09-CV-253-TCK-PJC
INDEPENDENT SCHOOL)
DISTRICT NO. 3 OF TULSA)
COUNTY, a Political)
Subdivision; and the)
BROKEN ARROW SCHOOL BOARD,)
)
Defendants.)

DEPOSITION OF JAMES DAVID SISNEY

TAKEN ON DECEMBER 22, 2009

IN TULSA, OKLAHOMA

ON BEHALF OF THE DEFENDANT

APPEARANCES:

MR. DAVID R. KEESLING and MS. DENISE P. JAMES,
Attorneys at Law, RICHARDSON, RICHARDSON, BOUDREAUX,
6450 S. Lewis, Suite 300, Tulsa, Oklahoma 74136, (918)
492-7674, appearing on behalf of the Plaintiff.

MR. KENT B. RAINEY, Attorney at Law, ROSENSTEIN,
FIST & RINGOLD, 525 South Main, Suite 700, Tulsa,
Oklahoma 74103, appearing on behalf of the Defendants.

ALSO PRESENT: LEE SISNEY and GARY GERBER

REPORTED BY:

SUSAN G. STOTTS, CSR

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Office: 405-232-4114 Fax: 405-232-1060 Toll Free: 1-8

EXHIBIT

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1 STIPULATIONS

2

3 It is hereby stipulated and agreed by and between

4 the parties hereto, through their respective attorneys,

5 that the deposition of JAMES DAVID SISNEY be taken on

6 behalf of the Defendant on December 22, 2009, in the

7 City of Tulsa, State of Oklahoma, before Susan G.

8 Stotts, Certified Shorthand Reporter within and for the

9 State of Oklahoma, pursuant to Court Order.

10 It is further stipulated and agreed by and

11 between the parties hereto, through their respective

12 attorneys, that all objections except as to the form of

13 the question and the responsiveness of the answer, are

14 reserved until the time of the trial, at which time

15 they may be made with the same force and effect as if

16 made at the time of the taking of this deposition.

17

18

19

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23

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1 JAMES DAVID SISNEY,

2 having been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 MR. RAINEY: Hi. This is Bo Rainey.

5 JOAN: Hi. This is Joan with Judge Cleary.

6 Mr. Rainey, tell me who else is with you representing

7 the other side.

8 MR. RAINEY: We have all the parties in the

9 room with us.

10 JOAN: What attorneys?

11 MR. RAINEY: David Keesling and Denise James

12 for the plaintiff.

13 JOAN: All right.

14 MR. RAINEY: Myself only for the school

15 district.

16 JOAN: Okay.

17 MR. RAINEY: And also present is Dr. Gary

18 Gerber, who is the representative of the district.

19 JOAN: All right.

20 MR. RAINEY: Dr. Sisney, the plaintiff.

21 JOAN: Right.

22 MR. RAINEY: And Dr. Sisney's brother, Lee

23 Sisney.

24 JOAN: All right. Thank you. I'm going to

25 call the case. When I do so, we'll ask you again to

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1 enter your appearances just in turn.

2 MR. RAINEY: Okay.

3 JOAN: Case number 09-CV-253-TCK-PJC Sisney

4 versus Independent School District No. 3 of Tulsa

5 County. And will you, please, enter your appearances

6 for the record?

7 MR. KEESLING: On behalf of the plaintiff,

8 David Keesling.

9 MR. RAINEY: On behalf of the defendants, Bo

10 Rainey.

11 THE COURT: All right. This is Judge

12 Cleary, and I've now had an opportunity to look at the

13 emergency motion to stay deposition. Mr. Keesling, is

14 there anything you want to add to what is in that

15 pleading?

16 MR. KEESLING: Just to point out, your

17 Honor, if I could, that we are going to supplement

18 with an additional filing that is referenced in the

19 pleading and, additionally, noting that we have had a

20 motion pending to dismiss this claim without prejudice

21 that's been sitting for some time, which there's also

22 some authority, I believe, included that would provide

23 that basis also for a stay pending the motion to

24 dismiss.

25 THE COURT: And if this case is dismissed

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1 without prejudice, what happens to us then? Does this
2 get consolidated with the state court action, or where
3 do you go from there?
4 MR. KEESLING: It does, your Honor.
5 THE COURT: Okay. And where are you in the
6 state court action?
7 MR. KEESLING: Preliminarily, we're at the
8 very beginning with discovery having just been
9 initiated in the state court action. We had --
10 previously had some discovery or depositions
11 scheduled. There was a death on the part of one of
12 the lawyer's legal secretaries that caused that to
13 postpone. Then we played with some dates, and there
14 have been recently counterclaims filed in the state
15 court action by three of the named defendants.
16 THE COURT: All right. Are you representing
17 Dr. Sisney in the state court action?
18 MR. KEESLING: Yes, sir, I am.
19 THE COURT: Is Mr. Rainey or his law firm
20 representing the defendants in that action?
21 MR. RAINEY: No, sir. We're not
22 representing any of the current parties in the state
23 court action. The Broken Arrow School District is not
24 a party to the state court action at this time.
25 THE COURT: All right. Okay. All right.

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1 Beyond that, anything further, Mr. Keesling?
2 MR. KEESLING: Judge, we will stand on the
3 motion then, of course, supplementing with what we've
4 referenced earlier.
5 THE COURT: Okay. What will that supplement
6 be, and when will we see it?
7 MR. KEESLING: We would expect that we would
8 have that out probably by close of business tomorrow,
9 your Honor. It will include what we believe are
10 exhibits attached to a motion setting forth what we
11 believe the conflict to be, particularly with a member
12 of the firm of Rosenstein, Fist and Ringold, that
13 being Mr. Mann, and in linking those connections up
14 with regard to that conflict that we believe is
15 incorporated into the state claim, and, now,
16 obviously, it's also part of this federal claim. So I
17 think the Court would want to and deserves more than
18 just the mere allegation, and that's why we have
19 referenced in the motion that we have in front of you
20 now that we would be immediately pursuing that for
21 further supplementation on that issue.
22 THE COURT: And this is material that came
23 to your attention -- or Mr. Richardson's attention
24 sometime last Thursday the 17th?
25 MR. KEESLING: Since that time, I received

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1 and saw an e-mail in reference to some delivery of
2 information between parties, nonparties that -- or
3 parties that were part of the lawsuit but not
4 represented by Mr. Mann or the law firm of Rosenstein,
5 Fist and Ringold, and it occurs, when that has
6 happened, that there is participation by Mr. Mann
7 between the parties beyond that of just an attorney,
8 which, I believe, makes him both a fact witness who we
9 could issue discovery to and depose and places them in
10 a significant conflict to continue with this
11 particular case.
12 THE COURT: The conflict being that he's a
13 witness in the case?
14 MR. KEESLING: Yes, sir, a fact witness,
15 yes, sir. And the door would be open for the -- to
16 just state that he could become a party.
17 THE COURT: On what theory?
18 MR. KEESLING: If he is part of the civil
19 conspiracy in the state court case.
20 THE COURT: Okay. Conspiracy to do what?
21 MR. KEESLING: Basically, one of the
22 theories would be that Mr. Sisney's contract has been
23 violated in the state court case in that that was by
24 design because Mr. Sisney had brought to the attention
25 of the school board certain facts that he believed

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1 were improper in relationship to their relationship
2 with a local company, and, as a result of that, some
3 of those matters were, by design, then created to
4 eliminate Mr. Sisney to prevent him from having a
5 platform with which to air that because there was an
6 agreement between certain members of the board and the
7 school district, in our belief, which included, if not
8 the acquiescence, but the leadership of Doug Mann to
9 help oust Mr. Sisney to prevent him from being able to
10 come forward and present that in a public and open
11 forum, and that would be the theory behind how we
12 would include Mr. Mann in that, your Honor.
13 THE COURT: All right. So you're saying the
14 board members were wanting to protect some entity that
15 Mr. Sisney was complaining about and that Mr. Mann, as
16 the attorney for the school board, participated in
17 some conspiracy with them to get rid of Mr. Sisney,
18 violate his contract?
19 MR. KEESLING: Yes, sir.
20 THE COURT: Okay. Mr. Rainey, do you want
21 to respond to this?
22 MR. RAINEY: It's a little difficult because
23 I don't really know exactly where they are going with
24 it. I can add a few points, your Honor. Mr. Mann was
25 added as a party in the state court action, I believe,

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1 in September of 2008, and he was subsequently
2 dismissed without prejudice by Dr. Sisney, so Mr. Mann
3 is not a party to that action. Mr. Mann has not
4 entered an appearance in this federal case, and,
5 frankly, I believe I'm the only one who has from the
6 firm.
7 THE COURT: All right.
8 MR. RAINEY: We know -- I have seen nothing
9 that supports any claim for the disqualification of
10 this firm from conducting this deposition which was
11 originally noticed for last Thursday, and then when
12 Dr. Sisney failed to appear, it was subsequently
13 agreed to by plaintiff's counsel for this day, and
14 then the Court subsequently entered its order
15 compelling the deposition for today.
16 THE COURT: Right.
17 MR. RAINEY: Then on the eve of this
18 deposition with the discovery cutoff date of
19 December 31st in this case, now this motion arises.
20 So I just want to take Dr. Sisney's deposition. I
21 want to take Dr. Sisney's deposition, and I want to
22 file a dispositive motion in this lawsuit. We've had
23 a pending motion to dismiss on the merits of the
24 action for quite some time, and I want to proceed
25 forward in this lawsuit. The school district has not

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1 been named in the state court action. To my
2 knowledge, there has not been an application filed in
3 the state court action to name the school district,
4 and therefore, your Honor, I want to proceed with the
5 discovery in this case as required by Judge Kern in
6 the scheduling order.
7 THE COURT: Was this case originally filed
8 in federal court, or was it removed?
9 MR. RAINEY: It was originally filed in
10 federal court, your Honor.
11 MR. KEESLING: That's correct. If I could,
12 your Honor, basically it was filed initially by
13 Mr. Richardson, and then the case continued to
14 develop, and the reason that we had filed a motion to
15 dismiss without prejudice on the federal claim is
16 because we believe the federal claim basically became
17 absorbed by the larger picture in the state court
18 claim. And to address one of the items Mr. Rainey
19 brought to the Court's attention, we will be making an
20 application to amend and include those additional
21 parties in the state court claim. The problem is,
22 from a timing perspective, is we need resolution on
23 the pending application that we have before the Court
24 to dismiss in the federal claim before we can do that.
25 And out of an abundance of caution and on behalf of

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1 our client, we would need to get resolution there
2 first.
3 THE COURT: All right. I've looked through
4 the motion that's before me now, which basically is a
5 Rule 26 motion. I don't see any basis in the Rule 26
6 for a disqualification. Now, under the Rules of
7 Professional Conduct, 3.7 deals with a lawyer as a
8 witness, and says a lawyer shall not act as an
9 advocate at trial -- a trial in which he is likely to
10 be a necessary witness unless certain circumstances
11 exist. Mr. Mann has not entered an appearance in this
12 case, and based on what Mr. Rainey has said, Mr. Mann
13 is not going to be the trial counsel here, so we do
14 not have that situation. Further, Rule 3.7(b) says
15 that a lawyer may act as an advocate in a trial in
16 which another lawyer in that lawyer's firm is likely
17 to be called as a witness unless precluded under Rules
18 1.7 and 1.9, which don't really apply here. They are
19 conflicts with former clients. So I'm going to deny
20 the motion to stay the deposition, the motion for
21 protective order, and direct that the deposition go
22 forward. I mean, this is a situation where, as
23 Mr. Rainey mentioned, Mr. Mann was added to the state
24 court action some time ago, so there must have been
25 some knowledge of these activities. I don't have

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1 anything in front of me, and I appreciate,
2 Mr. Keesling, that you're going to supplement, but, at
3 this point, I don't have anything in front of me, and
4 I certainly don't have a basis under Rule 26 to take
5 any action here. I don't see any annoyance or
6 embarrassment. Mr. Sisney brought a lawsuit in
7 federal court, and the routine part of that lawsuit is
8 discovery. You've got a discovery cutoff coming up in
9 just a little over a week, and I think the defendant
10 is entitled to take discovery and find out more about
11 the claims asserted herein, and I understand about the
12 motion to dismiss, but that's out of my hands, so I'm
13 going to deny the motion, as I said, and direct you
14 folks to go ahead with your deposition. Anything
15 further?
16 MR. KEESLING: No, sir.
17 MR. RAINEY: No, sir.
18 THE COURT: All right. Thank you.
19 MR. RAINEY: Thank you.
20 **Q. (By Mr. Rainey) Will you state your**
21 **full, complete name for the jury, please?**
22 A. James David Sisney.
23 **Q. Dr. Sisney, have you ever given a**
24 **deposition before?**
25 A. Never.