

STATEMENT OF THE CASE

(1) **BEDFORD files exceptions** to the ALJ's oral decision to deny Bedford's Motion to Disqualify Counsel. A protest in the captioned cause was entered by John E. Lee, III ("Lee") on May 18, 2011. Lee was an expert witness for Sooner, one of the protestants in the present Commission cause and one of the Defendants in the ongoing District Court proceedings CJ-2010-279. Lee gave evidence relating to operations, OCC rules and proceedings. Bedford alleges Lee, as a witness, disparaged Mr. Bruce J. Scambler ("Scambler"), Representative for Bedford, and made statements on behalf of the Commission.

(2) Oklahoma Rules of Professional Conduct state:

Rule 3.7(a) Lawyer As A Witness: A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.

(3) Bedford and Sooner have an ongoing district court action in Lincoln County in CJ-2010-279. The present cause was filed by Bedford seeking a change of operator removing Ramsey as operator of the existing Merrick 19-0-1 well and making Bedford the operator. Bedford alleges in this motion that Lee's activity as a witness in the Lincoln County District court case goes beyond minor informational testimony allowed in certain circumstances by the professional rules of conduct, but goes to the heart of key issues being litigated. Therefore, Bedford alleges that Lee cannot be allowed to continue in both the capacity of witness and then at the same time act as counsel. Thus, Bedford is seeking to disqualify Lee prior to the commencement of any trial and at the earliest opportunity.

BEDFORD TAKES THE POSITION:

(1) That said oral ruling is contrary to law in that a lawyer may not act as an advocate or attorney and a witness at a trial or hearing.

(2) Lee is a current witness for Universal, one of the protestants in CD 201102106, and one of the defendants in the ongoing District Court proceedings, CJ-2010-279, in Lincoln County. (consolidated with CJ-2010-290).

(3) CJ-2010-279 involves the same parties, legal description and subject matter as in this cause CD 201102106.

(4) Lee's testimony as witness in CJ-2010-290 in Lincoln County District Court goes beyond minor informational testimony allowed in certain circumstances under the rules, but goes to the heart of key issues being litigated. The ALJ was advised Lee will also be called as a witness in CD 201102106. Therefore Lee can not be allowed to continue in both the capacity of witness and then at the same time act as Counsel in the judicial examination of the issues.

(5) The Oklahoma Rules of Professional Conduct, Rule 3.7 (a) is clear that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness.

(6) Wherefore, Bedford requests that the oral ruling of the ALJ be reversed and that the Commission determine that Lee should be disqualified and protestants ordered to replace Counsel.

REPORT OF THE ALJ

(1) This matter came on the Motion Docket on May 31, 2011. At that time there were two motions presented. This is the one involving disqualification of counsel. It was indicated that there has been a district court case involving the parties. There was a Temporary Restraining Order ("TRO") hearing in district court, at which Lee testified as an expert.

(2) The District Court Judge permitted Lee to testify as an expert witness regarding his knowledge of the rules of the Commission with respect to change of operator or operatorship in general. Lee has been hired by Universal, who was involved in the district court litigation that he testified on behalf of, to handle at the Commission Universal's position in this cause in the administrative context.

(3) The relevant rule of Professional Conduct is Rule 3.7, Lawyer As A Witness. This rule pertains to an attorney being a necessary witness in a proceeding.

(4) It appears that Lee could be called as an adverse witness by Bedford. However, it is not apparent that there would be a factual situation that would require Lee's testimony, except to put him in a position of being subjected to a request to disqualify. Lee indicated that this could cause prejudice to his clients, and that the rule provides if great prejudice would be caused to the party, that's reason for consideration to be given for not requiring the rule to be applied.

(5) It was not apparent, regarding Lee's participation in this Commission proceeding, which is an administrative application with respect to the agency's rules of operatorship, that Lee would be a "necessary" witness. Lee said the District Court Judge permitted him to testify strictly about opinion evidence that related to his knowledge through having worked at the Commission as an ALJ.

(6) It is the opinion of the ALJ that this appeared to be an effort to put Lee in a position where he would have to withdraw or be disqualified as counsel. He is not a necessary witness in this present Commission proceeding. It is the opinion of the ALJ that this does not fall within the context of the rules of civility which apply. Calling nonparty witnesses simply for the purposes of attempting to discredit them or to burden them in some way is considered to be outside the scope of what the Bar rules provide.

POSITIONS OF THE PARTIES

BEDFORD

1) **Larry D. Stewart**, attorney, appearing on behalf of Bedford, appeals the ALJ's oral recommendation not to disqualify Lee with regards to his appearance and representation of Sooner and Universal. Lee appeared as an expert witness in a district court case regarding a TRO involving the same parties as this present Commission case. Lee was hired by Sooner and Universal to represent their position before the Commission.

2) Bedford states that Lee originally testified, in a district court case involving a TRO, as an expert witness regarding the Commission rules. Bedford states they did agree, with reserved objection, that Lee was going to testify concerning his expert knowledge as to Commission Rules. Bedford takes the position that the testimony digressed into Lee giving his opinion regarding who the operator of the well should be, as well as personal testimony regarding Scambler and whether he should be an operator. Bedford states that Lee testified that there's even a Scambler Rule.

3) The Merrick 19-0-1 well ceased producing in September 2004. Bedford states that Lee gave specific testimony in the District Court case concerning abandoned wells.

4) Bedford states that the day before they were to come before the Corporation Commission to get operations on the Merrick 19-0-1 abandoned well, Lee's clients plugged this well. On May 16, 2011, Bedford obtained a TRO from the Lincoln County District Court against Lee's clients, Ramsey, Universal, and Sooner, to cease and desist on plugging the well.

5) Bedford states that although the well had been plugged, the district court granted an injunction so that Bedford could get on the property before the cement set and rehabilitate the well. Bedford takes the position that Lee filed a protest at the Commission on behalf of his clients in violation of that injunction, and that Lee violated District Rule No. 11, that one judge will not override another judge's orders, or if they are simultaneous actions, will not disturb an order in place.

6) Bedford states that Lee's clients, Sooner and Universal, have a citation order for contempt and each have been ordered to place a \$10,000 bond. It is the position of Bedford that Lee violated the district court injunction on May 17, 2011 when he filed his Entry of Appearance and Notice of Protest in the present Commission case. Lee will be a witness in the contempt trials, and will also be testifying the next day at the Commission on the change of operator. Lee's testimony goes to the heart of the matter.

7) Bedford takes the position that Lee cannot continue as counsel as he is now very involved as a witness in this case, may be named as a party in the case, and may be called to explain discrepancies in his testimony.

SOONER, UNIVERSAL AND RAMSEY

1) **John E. Lee, III**, attorney, appearing on behalf of Sooner, Universal and Ramsey, stated that he was called to testify in Lincoln County as an expert on Commission rules regarding the plugging duties and liabilities of operators.

2) Lee states that the well under consideration was operated by his client Ramsey on behalf of Sooner, and that the well had not produced and therefore under Commission rules had to be plugged within a year. Lee states that he was called in district court by Sooner to explain Commission rules regarding plugging requirements, as well as sanctions and other liabilities operators could face for violation of Commission rules.

3) Lee states that the Scambler Rule he referred to in his district court testimony is based on courthouse jargon used to refer to a new Commission rule that allows an application before the Commission preventing an individual, an operator, or a corporation from using Commission remedies if there is a showing of repeated violations of Commission rules or orders. Lee states that he was never an adverse party of Scambler or any of his entities, but did represent another client in an adverse hearing with Scambler in another matter.

4) Lee states that Ramsey was designated by the Commission as the operator of the well in question, and plugged it according to Commission rules and Statutes of the State of Oklahoma. Lee states that the TRO does not enjoin anyone from plugging the well, that the well was due to be plugged under Commission rules and Oklahoma State Statutes, that the plugging was witnessed and approved by a field inspector, and that a 1003-C is on file at the Commission.

5) Lee takes the position that his clients are exercising their due process rights at the Commission by filing a protest of an application of Bedford, and that it would be unconstitutional if a TRO precluded a party from exercising their due process rights.

6) Lee states that Rule 3.7 refers to a necessary witness, and that if he were called before the Commission to advise the Commission of its own rules he would not be a necessary witness. Lee states that if he were called to testify it would be to challenge his expertise as to the Commission rules, not as a fact witness.

7) Lee states that everything else having to do with the district court case, including the body of the TRO, has to do with things other than plugging, and has nothing to do with anything within the purview of the Commission's jurisdiction. Lee takes the position that Bedford should not have any reason to call him as a witness at the Commission.

RESPONSE OF BEDFORD

1) Bedford presents file stamped copies of the application for Contempt Citation, the citation and the TRO from district court. Bedford states that Lee would be called to testify regarding his knowledge of the TRO and why he did or did not bring it up to the Commission.

2) Bedford states that they are setting an emergency hearing under 12 O.S. 1390 for immediate restitution for breach of injunction. Bedford states that in Cause No. CD 200608594, which Lee was involved in, the parties argued over this very same well. Bedford suggests that Lee may be a witness in a suit for punitive damages and may be called to testify regarding his knowledge of the TRO, and whether or not he deliberately broke an injunction.

3) Bedford states that Lee's clients had operations of the well for less than six months and were not under an order by the Commission to plug the well. Bedford is of the opinion that Ramsey plugged the well with a malicious intent not to let Bedford get operations the next day.

4) Bedford reiterates that Lee is a necessary party and will have to be called in future proceedings.

CONCLUSIONS

The Referee finds the Oral Report of the Administrative Law Judge should be affirmed.

1) The Referee finds the ALJ's recommendation to deny Bedford's Motion to Disqualify Counsel should be affirmed as supported by the weight of the evidence and by law.

2) 5 O.S. Ch. 1, App. 3-A, Rule 3.7 provides:

Rule 3.7. Lawyer As Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(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.

* * *

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be

misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenure of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is a risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client.

3) In the present case the Referee has read the transcript of the testimony of Lee given in the District Court case CJ-2010-290 on March 29, 2011 before the Honorable Cynthia Pharaoh Aswood District Judge. Lee testified as an expert witness regarding his knowledge of the rules of the Commission with respect to plugging requirements and Commission rules as they apply to operators.

4) Ramsey was designated by the Commission as the operator of the Merrick 19-0-1 well and plugged it according to Commission rules and statutes of the State of Oklahoma. The Notification Of Intention To Plug the Merrick 19-0-1 well was prepared by Ramsey as operator on May 9, 2011. Said form indicated that the date the plugging would begin would be May 12, 2011 and the Notification Of Intention To Plug was filed at the Oklahoma Corporation Commission on May 12, 2011. The TRO in the District Court Case CJ-2010-279 was not obtained by Bedford until May 16, 2011. The TRO does not enjoin anyone from plugging the Merrick 19-0-1 well. The well was plugged under Commission rules and Oklahoma State statutes. The plugging was witnessed and approved by a field inspector and a Form 1003-C is on file at the Commission. See OCC-OAC Rule 165:10-11-1 through 9.

5) Rule 3.7 states that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness. The Referee agrees with the ALJ that there is no factual situation that would require Lee's testimony in the present Commission proceeding. Lee's participation in the Commission's present administrative application would not require Lee to be a necessary witness in a matter of this nature.

6) The Supreme Court in *Boyd v. State*, 839 P.2d 1363 (Okl.Cr. 1992) stated:

This court has held that the role of advocate and witness should be kept separate, and an advocate should be called as a witness only in circumstances of the upmost necessity. *Cavaness v. State*, 581 P.2d 475, (Okl.Cr. 1978), cert. denied, 439 U.S. 1117, 99

S.Ct. 1024, 59 L.Ed.2d 76 (1979); see also Oklahoma Rules of Professional Conduct, Rule 3.7(a), 5 O.S. at Supp. 1989, App. 3-A.

7) In addition, Rule 3.7 recognizes that "a balancing is required between the interests of the client and those of the tribunal and the opposing party." It is unlikely in the present contested proceeding concerning change of operator that Bedford will suffer prejudice as Lee's testimony would not concern any factual issues. In addition, in the present case the disqualification of Lee would sustain a substantial hardship and prejudice on his clients.

8) For the above stated reasons, Bedford's Motion to Disqualify Counsel should be denied.

RESPECTFULLY SUBMITTED THIS 19th day of July, 2011.


PATRICIA D. MACGUIGAN
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
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