

IN THE SUPREME COURT OF TEXAS

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No. 97-0654
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IN RE AMERICAN HOME PRODUCTS CORPORATION, WYETH-AYERST
LABORATORIES DIVISION OF AMERICAN HOME PRODUCTS CORPORATION,
WYETH LABORATORIES, INC., AND WYETH-AYERST LABORATORIES COMPANY,
RELATORS

=====
ON PETITION FOR WRIT OF MANDAMUS
=====

- consolidated with -

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WYETH LABORATORIES INC., AND WYETH-AYERST LABORATORIES COMPANY,
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Argued on November 5, 1997

JUSTICE SPECTOR, concurring and dissenting.

This case concerns the disqualification of two law firms representing several hundred plaintiffs in five lawsuits in four counties. The defendants filed motions to disqualify in two courts based on assertions that plaintiffs' law firms had hired two members of defendants' defense team—Diana Palacios, allegedly a paralegal, and Dr. Salvador Gonzalez, allegedly a consulting

expert. After a five-day, hotly contested evidentiary hearing, the Bexar County trial court denied the motion to disqualify. The Hidalgo County trial court, after reviewing the record, reached the same result.

On the same record, this Court reaches the opposite result. I dissent to the Court's disqualification of the Herrera law firm because I believe that we cannot say that the facts and the law in this case permit both trial courts to reasonably reach but one conclusion concerning Palacios's status. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). While it may be reasonable to conclude that Palacios worked as a paralegal for Wyeth, it was not unreasonable on this record for the trial courts to conclude that her role did not provide her with access to confidential information. Additionally, the trial courts could have reasonably concluded that the facts and circumstances of this case do not warrant disqualification. *See In re Meador*, 968 S.W.2d 346, 351 (Tex. 1998). Under these circumstances, I disagree with the Court's rigid application of the presumption we recognized in *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994).

Disqualifying a law firm is a harsh remedy. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990); *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989). A disqualification motion implicates a broad range of interests, such as clients' right to the counsel of their choice, the financial burden of replacing counsel, the mobility of lawyers and nonlawyers, preservation of attorney-client confidences, and maintaining the ethical standards of the profession. *See, e.g., In re Complex Asbestos Litig.*, 283 Cal. Rptr. 732, 739 (Ct. App. 1991). Courts should carefully consider the prejudice to the party that inevitably results from disqualification. *Kapco Mfg. Co., Inc. v. C&O Enters., Inc.*, 637 F. Supp. 1231, 1241 (N.D. Ill. 1985). These concerns are magnified when disqualification is sought in mass litigation. *Complex Asbestos Litig.*, 283 Cal. Rptr.

at 739.

This Court recently recognized that disqualifications should not be automatic and that trial courts “must consider all the facts and circumstances to determine whether the interests of justice require disqualification.” *Meador*, 968 S.W.2d at 351. In *Meador*, we observed that trial courts should consider factors such as the promptness with which the attorney notifies the opposing side of a potential conflict, the significance of any privileged information that may have been shared, and the extent to which the nonmovants would suffer prejudice from the disqualification of their attorneys. *Id.* at 351-52. Rather than take that measured approach, the Court in this case mechanically applies the *Phoenix Founders* presumption to disqualify the plaintiffs’ law firms three years into a complex case.

The paramount concern in disqualifications must be the preservation of the public’s trust in the court system and the bar. *Complex Asbestos Litig.*, 232 Cal. App. 3d at 586. Courts should beware of parties using motions for disqualification to attain a tactical advantage. *See Sequa Corp. v. Lititech, Inc.*, 807 F. Supp. 653, 663 (D. Colo. 1992); *Kapco*, 637 F. Supp. at 1241; *see also Phoenix Founders*, 887 S.W.2d at 836. “[J]udges must exercise caution not to paint with a broad brush under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public’s respect. The opposite effects are just as likely—encouragement of vexacious tactics and increased cynicism by the public.” *Panduit Corp. v. All States Plastic Mfg. Co., Inc.*, 744 F.2d 1564, 1576-77 (Fed. Cir. 1984).

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Although I concur in the Court’s denial of mandamus relief as to the Cherry law firm, I dissent to the Court’s disqualification of the Herrera law firm on this record.

Rose Spector
Justice

OPINION DELIVERED: December 31, 1998