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Alaska Bar Examination

**FEB
2006**

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STATEMENT OF FACTS

John Butler and Lynn Long were business partners in a toxic waste disposal business.

During a successful three years of business, Butler handled bookkeeping and most of the toxic waste disposal itself while Long dealt mostly with customer relations and promoting the business, though she did have some hands-on experience in the disposal of waste.

Their partnership continued until Long decided to leave the business. The breaking up of the partnership was not amicable, and the valuation of the business became a source of conflict for Butler and Long. As a way of resolving their dispute they chose to hire a business dispute mediator, Flora Hernandez. During a mediation session, Butler revealed to Long and Hernandez that he had maximized profits for the business by forgoing the legally prescribed methods of toxic waste disposal in ~~the~~ favor of dumping ~~one half of the~~ toxic chemicals directly into the Green River. He stated that he had done this 'on the last couple jobs' and that he had ~~not~~ illegally disposed of approximately one half of the chemicals in his charge on those occasions.

After some reflection, Long reported Butler's statement to the police. A criminal prosecution of Butler has since commenced, but ~~as unfortunately~~ the prosecution's witness, Ms. Long, ~~died~~ passed away after a massive heart attack. She took with her the testimony that would have implicated Butler for the crimes he has been charged with.

The prosecution has been forced to rely on the testimony of the business dispute mediator, Ms. Hernandez, because she is the last remaining link to ~~the~~ Butler's admission.

hearing { Ms. Fernandez's Motion to Quash should be Denied because the FUMA context of Mr. Butler's statement does not grant ~~the~~ privileged communication in ~~this~~ this situation because he used his mediation session to confess a crime.

The FUMA statute itself anticipates this situation. According to Section 6(a)4, there is no privilege for a mediation communication to conceal a crime or ongoing criminal activity.

The decision in Retail & Retail Store Employees Union Local is inapplicable here because the Driveway L L L

case involved the negotiations that were being mediated.

The situation here is like Binker where societal issues come into play.

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MOTION IN OPPOSITION TO MOTION TO QUASH

2. Statement of facts

1. Lynn Long stated that John Butler of BQ 2 Disposal illegally dumped toxic chemicals into the Green River at the South Footbridge on the outskirts of Elkhart.

2. Post test samples show elevated levels of toxic chemicals at that site in July and August of 2005.

3. On August 15, 2005, unusually large numbers of dead blue fish were observed floating in the area.

4. There are discrepancies regarding waste

disposal for B&L Disposal.

5. There are no witnesses to the alleged dumping.

6. Lynn Long has died of a massive heart attack.

7. Flora Hernandez is the only available witness to testify regarding Butler's statements of illegal dumping.

II Relevant law

The Franklin Uniform Mediation Act grants privilege against disclosure, admissibility and discovery. In section 4(a) requires a mediation to be waived for admissibility. Section 4(b)(2)

states that a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

There is no precedent in Franklin, but there is in Columbia which has a mediation act similar to ours. In Rinker, the court of appeal indicated a balancing act was required ~~to~~ before a court could override the mediation provision of confidentiality. There, the court held that if the need for the evidence substantially outweighs the interest in protecting mediation confidentiality,

then the court could compel mediation communications otherwise inadmissible.

An in camera review is required to make this determination.

The judge must weigh the relevance of the mediation communication, determine if the sought after communication is otherwise available and whether the mediation evidence is competent.

If the court finds that the need for the evidence outweighs the important interest in maintaining mediation confidentiality, then the court may introduce the evidence without breaching

mediation confidentiality.

II Argument

1. The notion to quash the state's subpoena of the mediator should not be granted.

A. The public's interest in this case is greater than the right to mediation confidentiality.

This case involves a felony. Serious risk is involved. Toxic chemical dumping can cause great harm to the environment and to the people of the local community.

In this case, the interests of justice far outweigh the individual

mediator's right to confidential communication. If the mediator is not allowed to testify, leading to a conviction of chemical dumping, the seriousness of proper waste disposal will be minimized.

Mr. Butter must be held accountable. The city and state will bear the clean up costs if the mediator is not allowed to testify, and that expense could conceivably be great. Mr. Butter should be accountable for damages he may have caused by illegally dumping.

There is no other way to prove

that Buter admitted to illegal dumping. The only other witness is unavailable.

IV Conclusion

The state respectfully requests this court to ~~quash~~ deny the motion to quash and schedule an in camera hearing to decide if the states interests in obtaining the medication communication outweighs the policy of keeping such communications confidential.

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John Butler has been charged with illegally dumping chemicals. During a Mediation session between Lynn Long^(Long) and John Butler^(Butler) including Mediator Flora Hernandez, a local mediator specializing in business disputes, Butler admitted to "... dumping half of the collected chemicals into the Green River." (Notes of interview of Long) Long + Butler owned a business, as co-equal partners, called B + L Disposal. Long has since died. The 3 were only one's private information.

During the investigation by Assistant State's Attorney Kathy Chang^{of Long's allegations,} Chang reviewed records from the Department of Natural Resources^{resources} concerning tests routinely done on local waterways. There were elevated levels of several toxic chemicals just down river from the alleged dumping site during July + August 2005. (Pending criminal investigation note Case No. 05-7844). ~~Her notes also indicated that chemicals were dumping to the river.~~

Flora Hernandez has been ^{subpoenaed} ~~called~~ to be a witness but has invoked mediator privilegeⁱⁿ according to ~~FUMA~~ Franklin Uniform Mediation Act (fuma).

A. A MOTION TO QUASH A SUBPOENA ^{THE} ~~OF~~ MEDIATOR TESTIMONY SHOULD NOT BE GRANTED UNTIL A IN CAMERA HEARING ~~IS HELD~~ IS HELD IN ACCORDANCE WITH FUMA §6(b).

Fuma creates a privilege for mediators but the privilege is not absolute. There are

specific exceptions found in § 6(a) + another § 6(b). The sections in 6(a) do not apply + will not be discussed by Fume § 6(b) does.

Where the proponented evinces allegations that the mediator's testimony is relevant in a criminal matter, as identified by the court in Rinaker v. Superior Court of San Joaquin County, the court should hold an in camera hearing. The proponent must first show that no other evidence is available and that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality + is offered in court proceedings involving a felony or misdemeanor.

a, There is no other evidence available.

According to Chang's report Hernandez, Long + Butler were the only ones privy to the ~~inter~~ admission in the mediation conference. Though, Chang's ~~disco~~ investigation detected discrepancies in Butlers Books this circumstantial evidence is tenuous at best. The only real evidence is Hernandez's testimony since Long has died.

b, evidence that substantially outweighs the interest in protecting confidentiality.

As noted by the court in Retail Store Employees Union Local 79 v. National Labor Relations Board., that intervening of mediator privilege ^{probably} would be considered for any compelling public health or safety issues though these issues not

faced with those issues there. In support of the policy that "... the trier of fact is entitled to every person's evidence," a fundamental principle of American law (Retail Store) and in view of the public safety ~~at risk~~ put at risk by the chemicals dumped into the river. The ~~admission~~ testimony is the only evidence ~~to~~ ~~exist~~ that is probative on the issue of who dumped the chemicals. It is noted that, ^{the} success of mediation requires that mediators maintain a reputation of impartiality and integrity ^(Retail Store) but as the same court noted it would probably be a different story when faced with a compelling reason - polluting a public water way.

C, charge involves a felony,

Section 6(b) also requires π to prove that a felony is at issue. As identified in Officer Chang's report case # 05-7844 Butler was charged under §330 for felony unlawful disposal of hazardous waste.

According to the afore argument the court should ~~be~~ deny the motion to Quash Subpoena pending evidence according to Fuma §6(b) + a in camera hearing.

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STATE OF FRANKLIN'S BRIEF IN OPPOSITION TO MOTION TO QUASH

STATEMENT OF FACTS

In September 2005, Lynn Long, a former partner in the waste disposal company B & L Disposal met with Elkhart Police Officer Kevin Kelly, alleging that her former business partner, John Butler, had dumped toxic chemical waste into the Green River at the south footbridge on the outskirts of Elkhart. Ms. Long asserts that Mr. Butler made this admission during a mediation session in July 2005 intended to resolve the parties' dispute over dissolution of the business. State investigators have since uncovered discrepancies in the amount of waste collected and the amount for which B & L had disposal permits.

Green River was just last year restocked with native bluefish and is a popular site for public recreation, including swimming, fishing, and kayaking. Test samples from Green River in the area downstream of the alleged dumping show elevated levels of toxic chemicals during July and August 2005 (~~although~~ current water samples show a return to normal levels). August also saw an unusually large kill of bluefish in that vicinity.

In December 2005, Mr. Butler was charged under §330 of the Franklin Criminal Code with felony unlawful disposal of hazardous waste.

In ~~the~~ ^{January} 2006, Ms. Long died suddenly of a massive heart attack. The only other witness to Mr. Butler's ~~admission~~ admission of having dumped toxic waste in the river is thus the mediator, Ms. Flora Hernandez.

The State subpoenaed Ms. Hernandez in early February, and she has filed a Motion to Quash with this court, claiming privilege under the Franklin Uniform Mediation Act (FUMA).

I. FUMA REQUIRES A HEARING IN CAMERA IN RESPONSE TO THE MOTION TO QUASH BECAUSE THE MEDIATOR'S TESTIMONY IS RELEVANT TO A CRIMINAL MATTER

While FUMA privilege has not previously been invoked, the state of Columbia has addressed the issue under its Uniform Mediation Act, which is identical to Federal. In Rinaker (Columbia Court of Appeal 2004), the court was similarly faced with a request for mediator testimony in a criminal matter and a motion to quash from the media which was rejected by the trial court without a hearing. The Rinaker court concluded, *inter alia*, that "Where the proponent of the evidence alleges that the mediator's testimony is relevant in a criminal matter, §6(b) provides that the court is to hold an in camera hearing... where the court determines, among other things, whether the evidence is not otherwise ~~admissible~~ available and whether the need for the evidence substantially outweighs the interest in protecting confidentiality." The Rinaker court made clear that this is not discretionary, stating in a footnote that "when a proponent argues that the mediation privilege is overcome pursuant to §6(b)... a court must hold the in camera hearing..." (emphasis added). Section §6(b) of FUMA, like that in Columbia's version, requires an in camera hearing in response to Ms. Hernandez's motion to quash, as her testimony is "relevant in a criminal matter", namely the felony prosecution of Mr. Butler.

II. THE MOTION TO QUASH SHOULD BE DENIED BECAUSE THE MEDIATOR'S TESTIMONY IS NEEDED FOR A FELONY PROCEEDING AND THE EVIDENCE IS NOT OTHERWISE AVAILABLE, AND BECAUSE PUBLIC HEALTH AND SAFETY REQUIRES IT

The only parties present when Mr. Butler admitted dumping toxic chemical waste were Ms. Long and Ms. Hernandez. Ms. Long has since died, leaving only Ms. Hernandez to testify in Mr. Butler's felony trial.

As noted above, §6(b) of FUMA allows for no privilege to be found when the in camera hearing reveals that the evidence is not otherwise available, is needed in a way that substantially outweighs the confidentiality interest, and is offered in a court proceeding involving a felony (subsection (1)). All apply here.

First, as just noted, the evidence is not otherwise admissible.

Second it is... I N M. P. H. I. N. I.

Third, there is an interest here that outweighs confidentiality. In Retail Store, the 15th Circuit found confidentiality in labor mediation ~~to~~ outweighed the defendant's ~~substantial~~ argument about the need to provide the trier of fact with all evidence, but the court explicitly limited the holding to the facts before it and declared that the "absence of any compelling public health or safety issues" was a factor in its decision, noting that it could envision "a situation where public policy would lead us to a contrary result." Here, public health and safety issues are at play because of Mr. Butler's dumping of toxic chemicals in an area of public recreation and newly reintroduced wildlife. This concern should prevail. Concerns about confidentiality can be addressed by limiting Mrs. Hernandez's testimony to only Mr. Butler's admission under § 6(d) of FUMA. This will preserve the important interest of confidentiality while protecting the public health and safety as well.

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2)

State Of Franklin

District Court of Western County

State Of Franklin

)

v.

)

Case No. CF-06-057

John Butler

)

Brief in Opposition to Motion to Quash Subpoena

Statement of Facts

During the month of July, 2005, John Butler allegedly dumped several hundred pounds of toxic waste into the Green River. Department of Natural Resources testing of the Green River over the next two months showed elevated levels of several toxic chemicals just down river from the dumping site (the Elkheart south footbridge). These toxic chemicals also killed of a large number of bluefish. During the same period of time, large discrepancies between the amount of waste collected and the amount of waste that B & LJ Disposal, run by John Butler, appeared in the records.

A mediation occurred on August 15, 2005. 3 people attended this session: John Butler and Lisa Long, who had a business dispute, and Flora Hernandez. During this mediation, John

Butler stated that he dumped several hundred pounds of toxic waste into the Green River in order to make a bigger profit off of their disposal.

On September 2, 2005, Lisa Long met with Officer Kevin Kelly of the Elkheart Police Department. She told Officer Kelly that she and John Butler had been business partners for about 3 years, that the business started well, but that eventually she wanted to get out. She based this desire to leave on her uneasiness in continuing to work with John Butler and on the desire to pursue another business opportunity. They disagreed over the value of the business, which eventually lead them to mediation. During the mediation Long questioned Butler's honesty, which lead Butler to state that if it were not for him she would not have earned as much as she had. This lead to his statement that he saved a bunch of money on their last couple jobs by dumping half the collected toxic chemicals into the Green River.

Lisa Long passed away on February 17, 2006. Only 3 people know for a fact that John Butler dumped these toxic chemicals into the Green River: Lisa Long, Flora Hernandez, and John Butler. John Butler cannot be forced to testify against himself. If Flora Hernandez cannot be subpoenaed, then Lisa Long will have gone to her grave without making right a wrong she helped create.

The need to exclude Flora Hernandez's testimony to preserve the confidentiality of mediation does not transcend the need place all relevant evidence before the trier of fact in the criminal case against John Butler.

The 15th Circuit Court of Appeals (COA), in *Retail Stores*, states that agencies are required to balance the need for the confidentiality of mediation against the need to place all relevant evidence before the trier of fact. The courts should follow this standard for subpoenas, as the forum should not make any difference. The COA considered the following factors in *Retail*

Stores: the history of mediation between the parties; the relative sophistication of the parties; the subject matter of the litigation; and the absence of any compelling public health or safety issues. This brief will now analyze these factors as they apply to the present case.

1) The history of mediation between the parties. In *Retail Stores*, the COA emphasized that the mediation relationship had a long history and would continue on into the future, therefore it was important not to disturb the confidence either party had in the mediation. This does not apply here. Long and Butler went to mediation once. More importantly, Long is dead. There cannot be any further mediation between the parties. Therefore revealing the contents of their past mediation will not upset future mediations.

2) Sophistication of the parties. Butler was a relatively experienced business man. He had been running a company for three years. He was not ambushed by the mediation process.

3) Subject matter of the litigation. This litigation concerns a criminal charge of dumping toxic waste into a public waterway. This is a serious criminal matter between the People of the State of Franklin and John Butler. The mediation was regarding the dissolution distribution of a private business between Lisa Long and John Butler. The two matters have virtually nothing to do with each other, besides the fact that it was in the course of the business that Butler committed his illegal actions.

4) The absence of any compelling public health or safety issues. Here, unlike *Retail Stores*, there are serious public health and safety issues. Polluters, such as Butler, must be shown that they cannot poison the water in which the People of the State of Franklin swim, canoe, and fish. They must not be allowed to endanger our drinking water and destroy our natural resources.

Throwing toxic waste into our rivers creates a danger for the entire community and it must be severely dealt with.

Other Jurisdictions with Identical Mediation Privileges have laid out a test which, applied in this case, would allow the Court to determine that Flora Hernandez can be compelled to testify.

We believe that the court should adopt the Four Part Test for assertion of Mediation Privilege, as laid out by the Columbia Court of Appeals in *Rinaker*. The following is a list of the four factors and an analysis of the factors applied to the present case. Please note that Section 6(b) of the Columbia Uniform Mediation Act is identical to Section 6(b) of the Franklin Uniform Mediation Act.

- 1) The trial court should hold an in camera hearing, pursuant to Section 6(b) to determine if the party being subpoenaed is competent to testify regarding the statement. If Flora Hernandez denies that Butler made the statement that he polluted the Green River or does not remember and the court finds her credible, that would eliminate the need for her to testify in open court.
- 2) If she acknowledges that she heard the statement during the in camera hearing, the court can then assess the statement's probative value, whether it makes the consequential fact more or less likely. In this case the statement will have a very large probative value, as it is the main piece of evidence. The statement is the link between Butler and the proven toxic waste in the Green River.
- 3) During the in camera hearing, the court can determine if the evidence can be introduced

without breaching the confidentiality of mediation. Here it is not possible. The only other proof of the statements we have is inadmissible hearsay of Lisa Long. Lisa Long wanted to testify against Butler, but she is dead. Flora Hernandez is the only one left who can prove that Butler threw toxic waste into the Green River.

4) If the mediator's evidence is competent, probative, and not otherwise available, the court must then balance the confidential nature of mediation versus preserving the integrity of the truth-seeking process of trial. Butler's statement was not part of the matter being mediated, it did not concern the business dispute being discussed. Butler knew that he had wronged Long and the community and wanted to taunt her with this knowledge. Allowing Flora Hernandez to avoid testifying will not preserve the integrity of the truth seeking process of trial, it will have the exact opposite effect. If Flora Hernandez cannot testify, Butler walks away, free to pollute again.

END OF EXAM