ORAL ARGUMENT — 10/9/97
96-1131 & 96-1133
EPIC & GEORGE V. SNODGRASS & BROWN

YEATES: This is an attorney disqualification case where a team of lawyers at the former firm of Johnson & Gibbs represented Relator Epic, my client, and did millions of dollars in legal work for Epic to set up Epic, to structure it as an employee-owned corporation, and now members of the team of those lawyers who did that work and their new law firms are attacking Epic.

Now on this graphic, Johnson & Gibbs firm, the red people are the people who were on the team that did the work. There were about 20 of those lawyers, and we've listed Mr. Jordaan and Mr. Carter who thereafter joined the Jordaan firm and the McKool firm, because they happen to be the two people from the team of lawyers who are involved here. But there were actually 20 lawyers at the Johnson & Gibbs firm who I say were the red team, the red guys at the Johnson & Gibbs firm did all of this work, all these various issues, the corporate work, the securities work, the hospital work to form Epic. And then two of the red team members, Mr. Jordaan joined the Jordaan firm, Mr. Carter joined the McKool firm. And then there were the blue guys at Johnson & Gibbs, those are the lawyers who were at Johnson & Gibbs at the time, but were not on the red team. And the blue guys joined the McKool firm. And then the McKool firm and the Jordaan firm entered into a joint venture agreement, there's a written copy of it in the record, the purpose of the joint venture agreement we say was to attack the work product of the red team while they were at Johnson & Gibbs, and when they were setting up Epic. And this purpose was carried out by reconstituting significant players from the old Johnson & Gibbs firm.

And who were those players? It was Mr. McKool, who had been on the Johnson & Gibbs management committee for 9 years while Epic, my client, the relator, was their largest client in 1988. Epic paid $2.5 million in legal fees for the work of the red team in setting Epic up. And who else was in this joint venture? The top litigators from the old Johnson & Gibbs firm, Mr. McKool, Mr. Cunningham. And who else was in this joint venture? Importantly, the business lawyers who were on the red team, who put Epic together, including Mr. Jordaan and Mr. Carter. So that's the players that are involved here. And we believe that under the clear reading of disciplinary rule 1.09, which we recognize as not binding on you for procedural disqualification, but we believe forms the analysis, that under a clear reading of 1.09, these lawyers would be disqualified.

GONZALEZ: Would you address the River Center Associates' waiver of complaint because you didn't complain for a long time?

YEATES: If you look at the nature of our bases for disqualification, the nature of our bases is paragraph A1 of the rule, which is attack on work product, attack on the work product of the red team. That first of all was not the basis of the first motion to disqualify. But in any event, we

can't have a wavier of that bases for disqualification unless we know about it. And comment 10 to rule 1.09 says: "You can't have a waiver unless you know what the intended role of the lawyer is going to be." So unless you can find from this record that we should have known or we knew that they were going to attack work product, you can't find a waiver. And the reason that we say there's no waiver as a matter of law, and that's why there's no fact question on waiver to preclude mandamus here is because they told us and told us and told us that they would not attack work product.

It started in Oct. 1994, these are some of their statements. They said: "The plaintiff will not challenge the documents that were drafted in 1988." And 1988, the work of the red team that I hope to be able to demonstrate to your honors is exactly what they challenged in this trial. And they said: "The fair reading of our pleadings will confirm that we do not challenge the 1988 transactions." And they said, "We don't challenge the 1988 creation of Epic." And your honors, they made these statements in sworn answers to request for admissions in August 1995, and they never withdrew those sworn answers.

And it's our position that there is no way that we're supposed to know they were not telling us the truth. And then we get to trial and what do they do? They attack the work product. And that's what I would like to demonstrate to your honors as to why and why that's true.

What was the work product of the red team, the red group of lawyers at Johnson & Gibbs, who put Epic together? They created an employee-owned corporation that had an ESOP, an Employee Stock Ownership Plan. And the evidence in the record is that they told Epic: "we're going to put this together for you by the book. It will sustain any challenge. This will be by the book. And by the way, when you put this ESOP together and you put this employee-owned company togther, you need an integrity, you need a trustee for the ESOP who has integrity." Johnson & Gibbs' lawyers told them: "Don't hire that trustee you were going to hire, these are the red guys back in 1988, hire this trustee because he has integrity." And they sat in on the meetings and helped them pick the trustee. And the plaintiff's lawyers tell you in the brief they filed last Friday: "We didn't attack the integrity of the trustee when we got to trial." But look at what Mr. McKool and Mr. Cunningham said at trial. At trial Mr. McKool said: "The evidence is going to show that the reason that this ESOP trustee went along with the health care merger is because they paid him $350,000 over-and-above his regular fee, and when the issue was raised, "Well why is that relevant to this case?" Mr. Cunningham told the TC: "The issue of the bribe, what I call the bribe, the $350,000 that goes to the heart of why the trustee went along with the merger." In other words, the trustee's lack of integrity, the fact that he would take a bribe, and remember this is the trustee that the red guys at Johnson & Gibbs told them to hire because of his integrity. And they come to trial, these are the former Johnson & Gibbs partners...

SPECTOR: When did these folks leave Johnson & Gibbs?

YEATES: The McKool group left Johnson & Gibbs July 31, 1991. And Jordaan had previously left Johnson & Gibbs to join the Jordaan Pennington firm.

SPECTOR: And they're talking about something that happened in?

YEATES: In 1988. And remember what they're promises were, they repeatedly said: We will not attack the 1988 documents, we will not attack...

SPECTOR: No. What year is this?

YEATES: This is in the 1996 trial.

BAKER: When did they make the payments is what Judge Spector is asking?

YEATES: The payments were made in connection with the merger in 1995.

BAKER: Can't they argue that that is a part of what they said in the first place, that "No we're not attacking the work product, we're attacking the payments that were made when the merger came about?"

YEATES: But in attacking the payment and the fact that the trustee would go along with the merge to accept the payment, they were attacking the integrity of the trustee. And part of the work product...

BAKER: Isn't it possible he could have been okay in 1988, got a change of heart in 1994?

YEATES: That he was not a trustee of integrity?

BAKER: No, but he was honest or dishonest?

YEATES: That's possible. I still believe that's attacking the integrity of the individual who was chosen. Agreeing to the merger was the very type of thing that the trustee for the ESOP would have been selected to do. So this is the work of the trustee that they're selecting the trustee to do. And the red guys at Johnson & Gibbs are telling EPIC: "Pick this trustee because he's got integrity."

SPECTOR: Isn't that like any other employee? It seems to me that this just has to do with an employee of the clients.

YEATES: One of their themes at trial of the plaintiff's lawyers, the former Johnson &

Gibbs lawyers was this structure that the red team put together for EPIC was really a circle of power. And the trustee, the fellow we were just talking about, he's part of the circle of power. And this is just not a pretty drawing that we did for the oral argument, that is a reproduction of the drawing the plaintiff's lawyers here, the ex Johnson & Gibbs lawyers did at trial made for the jury, to show how the structure of EPIC that was put together in 1988 was really a sham and a fraud, because it was never going to be really an employee empowered corporation. It was always going to be a circle of power because the directors controlled the ESOP committee, and the ESOP committee controlled the trustee, and the trustee voted for the directors. So they set up this circle of power, and they had to do it because they had to get rid of the trustee. The trustee would come to trial and say this was a fair merger. So they had to undercut the trustee, and the way they did it was he didn't have any integrity, he took bribes. And 2) he was just a puppet of the board. And who set up this structure? Who sat it up was the red guys at Johnson & Gibbs. And look at what Mr. Cunningham, the ex Johnson & Gibbs partner, this is when he's cross-examining his former partner, Mr. Watson. And if you read that testimony, what is so striking to you is that if you had walked into the room and listened to it, you would have sworn that it was a malpractice case against Johnson & Gibbs. Because he repeatedly would say: "Now this document says this and it allowed this. And your firm, Johnson & Gibbs, set that up didn't they?" And here's what Mr. Cunningham says: "The way the _____ of this employee-owned company is set up, the employees don't have any power." And the way this worked it was a circle of power that allowed the board to perpetuate themselves forever. And so the employees were not empowered. In other words, in the words of Professor Sh_____, who was one of the redactors of rule 109, they came to trial and they attacked the entire set up of EPIC as a sham, and a fraud on the employees. And who set up EPIC? The red team from Johnson & Gibbs. And so this is clearly an attack on their work product, and we believe...

OWEN: What did you think their attack was going to be at trial?

YEATES: They told us that they would not attack the '88 transactions, and that they were going to say that the documents were valid, and that we just breached the documents. And that's what they are trying to convince you all in this mandamus, we weren't really attacking the documents, we were just attacking the misuse of the documents.

But as you can see from looking at their attack on the circle of power, they are attacking the very structure of EPIC that the red people at Johnson & Gibbs set up. And so it is an attack on work product.

BAKER: I've looked in the record, and I can't seem to find the administrative judge's order that assigned Judge Snodgrass to this case. Can you tell me where it is?

YEATES: I believe it's in there. But could I say, are you going to the issue of whether or not Judge Snodgrass was struck?

BAKER: Well that's one of the orders you're attacking. I haven't heard anything about it yet.

YEATES: You're right. And I'm glad you asked the question because we abandoned that complaint. We've looked at it more carefully, and we think Judge Snodgrass that there was not a valid challenge and we abandoned that part of our mandamus.

* * *

MOW: I am Bob Mow, I represent Ken George, and individual, who was a client of the Johnson & Gibbs firm at the time that this matter first came into the firm.

My client, Mr. George, took this matter to Jim Watson and said it was going to be a management buyout, and I want you to represent me and I want you to tell me how to put this deal together? What should it do? who should be the employees? how should we structure? There were 30 hospitals that ultimately came to be EPIC. There was no EPIC at that time.

The representation of Mr. George should be undisputed. Jim Watson said it was a representation. Mr. George said it was a representation. Mr. McClure, the ERISA specialist said it was a representation. Mr. Frank the tax specialist said it was. Mr. Cunningham drilled his former partner saying: "You represented Ken George personally didn't you?" So I don't think there's any question about my client being a client of Johnson & Gibbs.

And the policy question before this court is: Are you going to allow in this state side-switching lawyers in a breach of fiduciary duty case to take advantage of every document, every structure, and even mistakes if there were any of that firm to the disadvantage of a client like Mr. George. That's the question.

I think there's a clear answer to that question in *NME,* whether it's strictly under rule 1.09 and the analysis that Mrs. Yeates has given, or whether it's under an appearance of impropriety. Either way, the answer clearly should be: "No, in this state we are not going to allow side-switching attorneys to do that."

ABBOTT: Are you arguing as a standard, the appearance of impropriety?

MOW: I'm arguing that is an alternative that this court can use in addition to rule 1.09.

ABBOTT: How do we pin that down without it being a gray area and almost every case like this?

MOW: I don't know that that's easy. And I think that is difficult. But I think where you have a case like this, you have benchmarks that can be applied. You have a substantial relationship. You have lawyers who worked on the transaction who went over to each of these firms. And you have an attack made on the services, which is a word in 1.09, and the work product. So you have three benchmarks, and then you have a case where the lawyers questioned everything that they did and took advantage of it. And all I can do is ask you to read those examinations of Mr. Cunningham and Mr. McKool, and they took advantage of it to the disadvantage of my client.

The real difficulty in a case like this is the former lawyers, Mr. McKool and Mr. Cunningham especially, though they didn't work on the team, and although we say they are affected under rule 1.09, they stand up there as senior members, Mr. McKool is on the board of directors and to a jury they are saying: "We were there when this deal was put together." Those words don't come out of their mouth. But they are the avenging angels. "Well we were there, we know how Ken Watson did things. We know Ken George. And let us tell you how it went."

And Mr. George abused all this power, that's their claim, and if that's not an appearance of impropriety, I don't know what is, and it is impossible for a client in this state, like Mr. George, to overcome that before a jury.

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RESPONDENTS

MORRIS: There are many very important issues in this case that haven't been touched upon. For example, it is disputed that Ken George was a client of the Johnson & Gibbs law firm. In 50 boxes of papers that were subpoenaed, there's not one document that reflects that he's a client. There's not one dollar that was ever billed to him, or paid by him. There were disinterested witnesses who said: He was not a client of that firm that were on the red team as they called it here. He didn't object to the production of the documents, in the mandamus proceeding that was brought to you 1-1/2 years ago claiming they were privileged as to him. It was only EPIC, the corporation, that objected at that time.

OWEN: Did Johnson & Gibbs draft his compensation arrangement?

MORRIS: The drafted the employment contracts, yes. They were terminated then in 1994, and it's the termination of those contracts of which complaint is made. The plaintiff testified in this case unequivocably: "She had not one objection, not one complaint whatsoever to the compensation that had been paid to Mr. George pursuant to the employment contracts up until 1994." In 1994, what happened was, the company was sold for $250 million. It had been valued the same month outside the knowledge of the beneficial owners, the employees that had their claims through an ESOP program, had more than $100 million in excess of that. And as part of the resolution, part of this business transaction, Mr. George and some other insiders walked away with

about $44 million in lieu of their rights under those existing contracts that had been written by Johnson & Gibbs. Not pursuant to, but in lieu of.

In fact there's a document in evidence here that was written in 1993, two years after everybody that's been mentioned left Johnson & Gibbs, where one Johnson & Gibbs' partner tells another: "This payment is not authorized by the existing agreements." That's what the complaint is about. There's no complaint about 1988 and the way this was set up.

HECHT: I thought there was a complaint that if it had been set up another way this couldn't have happened?

LAWYER: No. There was a complaint that there was a gradual empowerment that was included that initially you have this circle of power, and that over time the share rights vest in individual beneficiaries of the ESOP plan and they can direct the voting of the trustee with respect to the sharers that are allocated to their respective accounts. So over a period of time there was empowerment of the employees. The change was made in 1991, immediately before some of these people left that law firm, but there was no effect to that change for 13 months until they had the next meeting, and give notice to the employees. They never gave notice to the employees and they never had another meeting after that time. That's the only complaint that arises out of that issue you raise, is that the company never told the employees they had the power to vote, and that could have been 13 months after the departure.

There are other reasons besides the ones I've given that clearly show that Mr. George was not a client of Johnson & Gibbs in connection with this transaction or any of these predicates, and never claimed to be until late in this process. When I say this process, this is not the first motion to disqualify. Seventeen months before this motion was filed another motion to disqualify was filed. They lost that motion to disqualify. They didn't take mandamus at that time. That mandamus petition is in your record. They raised in that petition expressly a complaint that these lawyers were going to attack work product, that the motion they filed in June 1996, is nothing but cold biscuits warmed up again trying to get into a mandamus position.

GONZALEZ: Please respond to Mrs. Yeates argument that you cannot compare apple and oranges here, that that mandamus was on a certain set of facts, but this mandamus we're here today is completely different due in fact to the testimony at trial of Mr. Cunningham and Mr. McKool?

LAWYER: They asked them questions, but of course questions "there's no pleadings?", "there's no motions?" The words of Rule 1.09 say, and I recognized that that's not the only controlling standard for procedural disqualification, those rules say that you attack the validity of the documents. There was never an attack on the validity of the documents. In order to show the abuse of power, you first have to show the existence of power. All of that work talking about the 1988 arrangement and how it evolved after that was to show the existence of power. In 1994, you had a

gross abuse of that power.

One of these charts that they haven't yet referred to, but probably will says:

Mr. Cunningham, just as an example for saying that Johnson & Gibbs drafted these documents didn't they Mr. Watson?

Listen to the context out of which that comes and that's volume 6 of the 11 document record:

Mr. Cunningham says we will offer ex. 245.
Mr. Sims, he hasn't authenticated, I object there's no foundation, and the court sustained.

Q - Mr. Watson are you familiar with the employee stock ownership plan of EPIC?

A - I remember there was a plan, sure.

Q - And you know Johnson & Gibbs drafted it don't you Mr. Watson?

Now is that an attack on work product? I mean to try to authenticate a document with a lawyer who was a principal lawyer...

OWEN: What about that exhibit, is that a fair representation of what the plaintiffs offered at trial or used demonstratively at trial?

LAWYER: Yes. I wasn't in the trial. I've only been in this case for a few weeks. But it's my understanding that I heard Mrs. Yeates say that that was actually an exhibit of the plaintiff at trial or something similar to that. But it is true that that circle of power argument was made because it is in fact the way things existed in 1988. In 1991, there was an amendment to the documents that would have changed that. But it never changed in reality...well they changed it on paper to satisfy the IRS, they never told the employees they had a right to vote themselves. They always left the impression the trustee would vote, and in fact, they just quit having meetings. They perpetuated that circle of power after the documents that were prepared by Johnson & Gibbs in 1988, 1989, 1990 and 1991, would have drastically altered that.

With respect to that, there's no attack on work product here. There's an effort to show as any good trial lawyer would the existence of power as a predicate to show the abuse of power.

HECHT: It looks like you would also argue if you were as you say a good lawyer for that side that it never should have been set up that way in the first place?

LAWYER: I don't think there's really any choice about it. I don't think that anybody has been critical of that and the plaintiff was very careful to say that she had no criticism of the way it was set up - none whatsoever. The trial judge in this case has had to make many unique factual determinations. One thing you haven't been told yet, and it's attached to the pleadings in this case, there was an assignment by EPIC to the plaintiff in this case of any claims that EPIC had against Mr. George and the other insiders - an assignment. So when she pursued this litigation, she pursued it as an assignee. As a matter of law, you cannot be adverse. If you stand in the shoes you can't be adverse to a party whose shoes your standing in.

When EPIC assigned their rights against the insiders, including Mr. George to the plaintiff, which they did in this lawsuit and they were dismissed ultimately from this lawsuit, then under those circumstances there's no adversity. If there's no adversity under rule 109, if you're not asserting a claim adverse to a former client, then both substantial relationship of part a(3), and work product attacks on validity under a(1) are irrelevant, you don't meet the requirements. So you look at this, you think trial judge makes some real strong factual determinations in this case that were not in for example, your *NME* case.

BAKER: Didn't that assignment say that it was without waiver of EPIC's claim that the plaintiff had no standing to file a suit at the outset?

LAWYER: Yes.

BAKER: Is that material in your argument?

LAWYER: No. It does say that, but it's not material, because the standing issue is another issue that has factual connotations in it that will have to be resolved by some method other than mandamus. I agree with the things that both the majority in the dissent said in *NME* about the use of mandamus; and one of those things that both sides obviously agreed upon is that this is not an appropriate remedy for an intensive factual determination case. And there's some facts that it won't be relevant in the determination of standing that haven't yet been adjudicated.

BAKER: I didn't mean to say that whether she had standing is an issue here in this mandamus. But does it affect the nature of your adversity argument?

LAWYER: I think I agree with what you said, that's right. You've written before that waiver is inherently a factual determination. The biggest judgment the trial court had to make is: Has there been a waiver, a failure to timely assert this action? Remember, this case was filed in April, 1994, it was removed to federal court by the defendants, it was thrown out of federal court,

and the defendants were sanctioned for doing so. They filed a motion to disqualify in May, 1995 that involves a whole range of essentially everything that is included here. There was a 2-day hearing, and at that 2-day hearing a big, big issue was: Have they waived any right if they had a right? And the court held: "Yes, they have waived it. No, they have not continuing right."

BAKER: Which judge held waiver?

LAWYER: Candace Tyson was the one that made that particular decision.

BAKER: But EPIC was not involved in the case at the time Judge Tyson ruled on the motion by the directors; isn't that correct?

LAWYER: EPIC was not in the case at that time. EPIC is only in the case now because they have intervened right before this mandamus was filed for the purpose of this complaint. There was also a second hearing on the motion that comes here by mandamus that Judge Hugh Snodgrass ruled there was waiver, and EPIC was a party at that time.

BAKER: But he didn't say that in his order.

LAWYER: No, but without findings of fact or conclusions of law, you would assume that he found everything that would be necessary to support the order he made.

SPECTOR: On the assignment that EPIC made to the plaintiffs give me some context of when that was in relation to the lawsuit and the merger, and so on?

LAWYER: The lawsuit was filed in April, 1994, and a temporary restraining order was obtained enjoining the merger. Four days after the temporary restraining order was issued, which was the same day the lawsuit was filed, EPIC made that assignment to the plaintiff, and the plaintiff withdrew her request for injunctive relief to block the merger. And that was all in April, 1994.

So you have these factual determinations. I look back at what this court has done in the last ten years and I read this record, and candidly I think it's pretty harsh, pretty critical. What's this court done with respect to the areas of ethics and professionalism in the last 10 years, actually in the last 8 years, you've promulgated the very rules that we are talking about here under 109, you've enacted the disciplinary rules of procedure, you've amended the rules with respect to advertising restrictions, you've set up the commission for lawyer discipline, you've set up the board of disciplinary appeals, you've adopted the code of professionalism and you clearly have a deep interest in that, but you don't have such a deep interest in that that you're willing to throw away all the other rules, such as, that waiver is a factual determination and not an appropriate matter to be reviewed on mandamus. You need to review this in the context of a full transcript because what you're seeing here as the one portion I quoted is terribly misguided, terribly incomplete, it

misrepresents the facts.

BAKER: On the waiver issue?

LAWYER: On many issues with respect to...if you look at the motion for disqualification that was filed back in 1995, you will see that it includes the attacks they bring to you now and say are fresh, that they learned them at trial.

OWEN: What about the affidavits that were filed at that time?

LAWYER: There were no affidavits. Responses to request for admissions, they were correct when they were made, they were correct continuously thereafter and they are still correct. They said: Do you question the 1988 documents? And we said: No, we didn't then, we don't now. The 1988 documents are relevant to show the existence of power. And a transfer of power over time, you have to know what power exists to determine if there's been an abuse of it. If you want to see if the trustee has breached a fiduciary duty, you have to see the duty's responsibilities and relationships that are pertinent to that role as a fiduciary of the trustee. And this is very much like that.

I would remind you, we've never had an opportunity at either hearing to put on any experts. There's a 2 day hearing to listen to the defendant's objections about a motion for disqualification, the judge says: "I've heard enough, they are not disqualified." We didn't get to put on our experts. They talk about what their's said, but we didn't get to put on ours. The same thing happened before Judge Snodgrass. This is not a case that comes to you with even a complete record with respect to the limited state that we're in. The only record that has ever been allowed by the defendants is cross-examination with respect to the disqualification.

BAKER: Are you saying you didn't have an opportunity to put on whatever evidence you wanted to?

LAWYER: You know, the judge said: "I've heard enough - I'm ruling." We weren't trying to build a record for you at that point in time.

BAKER: So you wouldn't concede that that's not a very strong argument in this case?

LAWYER: Well it is in the sense that not that we were deprived of it, but it's very strongly in the sense that you're not looking at a complete record. You're not looking at all of the evidence that exists with respect to the issues that are brought here to you. And so when you say I'm going to apply, put my mandamus hat on, and apply the standards of mandamus, and say: Was the choice that he made wrong? Was it totally unreasonable? And I think that the answer to it first is, that on the record before the court it was a very reasonable decision, but it was a factual

determination.

BAKER: Well you're not arguing that they didn't bring a record sufficient to sustain their side on the issue that we have now, which is...?

LAWYER: I'm saying that they brought the record that they had, but it's not sufficient to justify mandamus.

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REBUTTAL

YEATES: On Justice Baker's question, Tabs 23, 24 & 25 of the booklet are the statements that were made in the disqualification hearing before Judge Snodgrass, which is the one we're here on today, where it was very clear that the plaintiffs themselves introduced evidence, that the plaintiffs were entirely aware that Judge Snodgrass was going to take into account at the end of the hearing whether to accept our evidence, and that they knew that Judge Snodgrass had accepted our evidence. So there's no doubt as Judge Baker pointed out, they had every opportunity to make an evidentiary hearing. So that, I agree with Judge Baker is just not an issue.

SPECTOR: Going back to the assignment, why doesn't that moot this?

YEATES: The assignment as Mr. Morrison pointed out was to allow the merger to go forward. But the assignment cannot assign the disqualification rights of the prior client. In other words when EPIC assigns its claim, whatever that claim is to Ms. Vicky Anderson, she doesn't make Vicky Anderson the former client of EPIC's former lawyers. She doesn't assign the disqualification rights is what I am trying to say. It's an assignment of the cause of action, but it's not an assignment of the attorney/client relationship that existed between the red team and EPIC.

And you see there is adversity as Judge Hecht wrote in *NME*, you shouldn't have to stand under the tree when the lightning storm is all around you. There is adversity because there's clearly these indemnity agreements that require or may well require EPIC to indemnify for the hundreds of millions of dollars that they are trying to collect from the directors. So there can't be any doubt.

BAKER: Didn't they say in the assignment _____ that they pay everything even whatever EPIC owed at the end?

YEATES: There are two sets of indemnities. The first set of indemnities are in the 1988 transaction...

BAKER: But this was the last one

YEATES: In the latter set, both EPIC and Health Care agreed to indemnify.

BAKER: Does EPIC still exist?

YEATES: Yes sir. It was a surviving corporation and then reversed triangular merger. It does still exist and that was their big argument at trial and said: EPIC still existed. Now on Judge Hecht's question whether or not this really is an attack on work product and whether this merger could have gone forward but for the governance of the circle of power, the circle of power is absolutely necessary to their contention. Because you see if the trustee of the ESOP had not gone along with the merger, the merger couldn't have taken place. And there were 2 attacks on their trial argument against the trustee and one of them was the circle of power, ie, the trustee was the puppet of the board by virtue of the circle of power. The other attack was the trustee took bribes and was a crook. And this is the trustee that the Johnson & Gibbs red guys said: Go hire, he's the one with integrity. So it's absolutely an attack on work product.

HECHT: On another matter, under all the same initial circumstances if EPIC believed while Mr. George was still employed by it, that he had embezzled money could the Jordaan and McKool firms sue Mr. George on behalf of EPIC for that embezzlement?

YEATES: This raises the 1.12 argument that they made in their latest brief. Certainly under 1.12, the lawyers for the corporation may well have a duty under that rule to take remedial action. This is really your question: Does that go to attacking the work product? Does that go to suing? Does that rule contemplate that you're going to turn around and sue a former client and attack your own work product? I don't think so. And that's what went on here and that's the basis of the disqualification under 1.09, that's the distinction. And you're really writing on a clean slater here, because you've not written on 1.09(a)(1) before. You've written all this disqualification law and the substantially related aspect. Remember there are three subparts to rule 1.09. One part is attacking work product. One part is the concern about competence. And the other part is the substantially related. Those are the three subsets. And they overlap. But paragraph (a)(1), attacking work product vindicates policies that the others don't, or at least more significantly vindicates those policies. And what are they? Loyalty, loyalty to the client. I am not going to do the work and then turn around and say: The work I did for you is terrible, it was wrong, it was fraudulent. That's what (a)(1) is going to. And paragraph (b) of that rule says: Not only won't the red guys do it, the red guys won't turn around and do it, but the people who sit next door to the red guys in their law firm won't do it. So that means the Jordaan firm and the McKool firm can't say: Well Mr. Jordaan and Mr. Carter can't do it because they're red guys, but I will get my partner next door to go attack their work product. And that's why those firms are disqualified. The red guys are disqualified and their firms are disqualified. And it seems to us very clear under the language of rule 109, that that's true, and the policies that you would want to vindicate by that.

Now this statement by Mr. Morrison that if you just read his snippets in the

record you will see that all they were doing was trying to authenticate these documents. Your honor, I'm sorry, but that's just not true. If you will just read the cross-examination by Mr. Cunningham of his former partner, Mr. Watson, Mr. Watson was the head of the red guys, he was the head of the red team. And he gets Mr. Watson on the stand and he is not just authenticating those documents, he is repeatedly saying: "And your law firm did it, and your law firm drafted that didn't they? This document is fraudulent and your law firm did it."