ORAL ARGUMENT - 9/19/95
94-1198
ANDERSON V. KOCH OIL

ZUKOWSKI: Good morning. I am here on behalf of Anderson Producing, Inc. I represented them also in the CA, and in the TC below. This is a judgment collection fraud case. The CA took a judgment that it otherwise found to be legally factually sufficient and reversed it solely on the basis that an attorney had to be disqualified and the matter retried.

The problem with the CA's decision is that they tried to force a square peg into a round hole. And as always, the case the resulting fit is wrong. The round hole is the so called advocate witness rule, that's best articulated in the Code of Professional Responsibility, §3.08.

The square peg is unfortunately my partner K. Ray Campbell. Mr. Campbell does not fit into to the hole because he was not an advocate witness at the trial, which is the subject of this appeal.

There is no doubt he was a witness in that matter. He was a material and important witness. And in order to understand how he fell into that role it only takes a moment to understand how the case developed.

HECHT: Would it be fair to say that the case could not have been proved without his testimony?

ZUKOWSKI: Absolutely correct. He was the only witness that could be presented on behalf of Anderson. There was no one else that Anderson could designate. And that's best shown by the fact that we did present Mr. Anderson who is the principal of the company at the trial. A lot has been made of his testimony that basically, honestly he testified he did not know first hand what had happened here. And he testified to that. It was then incumbent upon Mr. Campbell to explain the circumstances for the litigation.

HECHT: There is an illusion in the briefs that your firm was compensated at least in the first litigation on the basis of a contingent fee. Is that in the record?

ZUKOWSKI: Yes, it is.

HECHT: Was there a separate compensation arrangement as to the garnishment proceeding?

ZUKOWSKI: Yes there was.

HECHT: Was it also contingent?

ZUKOWSKI: No, that was handled on time and hour.

HECHT: But the first case was on a contingent fee basis?

ZUKOWSKI: There was an original trial. I am confused by saying the first case. There was an original trial that ended in a judgment that was on time and hour basis. And then we went into collecting that judgment. Garnishments were filed. That was on a time and hour basis. And we moved into the cause of action and the resulting judgment that's before this court, that was on a contingency basis.

HECHT: So it would be fair to say then that Mr. Campbell's law firm and I suppose Mr. Campbell stood to benefit by his testimony?

ZUKOWSKI: That is correct.

CORNYN: Was he asked about that in cross-examination?

ZUKOWSKI: Yes he was. In fact a lot was made of the fact that Mr. Campbell had been a lawyer and that was brought out in cross-examination by one of the defendant's counsel. One of the points we would like to make is under that questioning it was clearly established what Mr. Campbell's role at trial was that he was not appearing as a lawyer in the case during the trial. He would not be arguing the case. His role was simply one as a witness. And that was clearly brought out under cross-examination.

PHILLIPS: He was still an expert witness. Was he getting any additional compensation for his testimony beyond that that he got as a member of the law firm?

ZUKOWSKI: No, sir.

PHILLIPS: So he was an expert witness being compensated on a contingency fee basis?

ZUKOWSKI: The expert witness is really a misnomer in this case. The reason that it comes up as an expert witness there was only one set of interrogatories that were proffered to Anderson during this entire litigation. And the only question they asked about witnesses were about expert witnesses. And because Mr. Campbell was going to be a witness in the case, and there was going to be attorney fee testimony, it was responded that he would be an expert. But in fact if the court would look at the record, the testimony given by Mr. Campbell was minuscule in regard to being an expert. Most of his testimony was in regard to presenting the documents. There were 265 exhibits in this case, the documents that he obtained in discovery that really proved the basis of the case.

HECHT: It is a violation of the Rules of Disciplinary Procedure for a lawyer to compensate a witness based upon the outcome of a case is it not?

ZUKOWSKI: Yes.

HECHT: Why isn't that a problem here?

ZUKOWSKI: Mr. Campbell was not being compensated for his time on the witness stand.

PHILLIPS: He was doing that free essentially?

ZUKOWSKI: Yes, that's correct. I mean Mr. Campbell's billings stopped at the time that he became a witness in this case.

PHILLIPS: The testimony was going to make a difference in house the case came out?

ZUKOWSKI: Yes.

PHILLIPS: Which was going to make a difference in his pocket?

ZUKOWSKI: Yes, that's correct because the firm was on a contingency fee basis. But as far as any kind of a billing basis or testimony in that regard that was stopped.

HECHT: The rule says: A lawyer shall not pay, or acquiescent the payment of compensation to a witness contingent upon the content of the testimony for the outcome of the case. But that's where Mr. Campbell was is it not?

ZUKOWSKI: The fee agreement was arranged with the firm prior to Mr. Campbell ever having any knowledge that he was going to be a witness in this matter. I want to make that clear, that the fact that Mr. Campbell would have to be a witness in the case was developed as the garnishment action evolved into this fraud case against _____. So there was not a fee agreement entered into at the time with Mr. Campbell when he knew he was going to be the main witness in the case.

PHILLIPS: If your firm had to withdraw from this case, let's suppose we affirm the judgment of the CA, how would you eventually obtain any compensation?

ZUKOWSKI: Well first of all the Beaumont CA did not disqualify my firm. The Beaumont CA disqualified Mr. Campbell as being plaintiff's counsel. Although the original motion to disqualify was also to disqualify the firm, the Beaumont CA did not disqualify my firm or myself individually from representing Anderson in this case. In fact depending on what happens here we would have to go back and discuss with Anderson what in fact we would do as far as continuing representation or the fee agreement under this case.

PHILLIPS: If he was solely acting as a witness why did he sit at counsel table?

ZUKOWSKI: Because he was the only person who had the information in regard to the matter. I would have anyone who is my main witness sitting next to me. He was there to in fact keep me informed in regard to the paperwork, things of that nature. It was a matter of having your most informed witness sitting next to you during the trial.

CORNYN: Did opposing counsel object to his presence at counsel table?

ZUKOWSKI: No, they never did. They never raised that in any manner. The only time his role was raised was in that cross-examination, that's been set forth in the briefing. That's when they raised it in trying to make a point.

CORNYN: Based on the CA's opinion in the case disqualifying Mr. Campbell, but not your firm, what would be the result on remand?

ZUKOWSKI: Well that's the truly troublesome thing we find here. We find that the result of this overturning is illusory. Mr. Campbell would have to again appear as a witness at the next trial. He is the only witness for Anderson. I know of no basis under which he can be disqualified as a witness. And there certainly hasn't been any basis of that set forth. He will again appear at trial. We have not been disqualified. We will talk to Anderson. But at Anderson's consent I believe that my firm could again represent Anderson at the trial. And so in fact we would have just an entire repeat of what we already had here. The few things that Koch could point out the fact that Mr. Campbell had signed a couple of pleadings, the fact that he set at counsel table. All things that you can't do anything. That's in the past. It's done. Those would all be facts that are still there. And we would just retry the case again to perhaps a different result, perhaps the same result.

The fact of the matter is there would be no changes as far as what the CA tried to remedy here. The same witness; the same lawyers based upon Anderson's consent to the same lawyers representing them.

PHILLIPS: I understand that since this case was tried we have amended these rules, and made

them a little clearer. But why on the face of the rule aren't you in trouble? It says: "A lawyer shall not continue employment in a pending adjudicatory proceeding."

ZUKOWSKI: The basic rule as set up is in regard to a lawyer appearing as an advocate before the tribunal. That is the first sentence of Rule 3.08: A lawyer should not accept or continue employment as an advocate before a tribunal.

PHILLIPS: I think you are taking A and B and putting...I mean that's the rule now. But the rule before 1994 was "accept or continue employment in a contemplated or pending adjudicatory proceeding."

ZUKOWSKI: The rules were changed in 1990. They changed from the disciplinary rules to the CPR in 1990. I believe I am looking at the 1990 codification of 3.08. One of the confusions I think the Beaumont CA had is although they talked about the Code of Professional Responsibility in 3.08, in fact they ruled as if it was still the disciplinary rule, which had the language the court is talking about. It was a prohibition. But it is _____ by the rule itself and particularly by the comments it's very clear that all the rule is going to is a prohibition to a lawyer being an advocate before the tribunal. And particularly comment 8 makes it very clear. You are not talking about pretrial preparation. You are not talking about any kind of negotiations or assistance or even pleadings. What you are talking about is causing confusion in the mind of the trier of fact. The fact that you have a duel role at trial: you are appearing as a witness, and then you are standing up and you are arguing the issue to the court. And then the jury is going to somehow be confused at what is evidence and what is argument. That is what the rule goes to now very clearly, and the fact that there is that dichotomy of role. What is very important here is that Mr. Campbell took no part of the advocacy whatsoever. He never spoke in the courtroom at any time other than from the witness stand with two exceptions: outside the hearing of the jury in direct response to questions that were posed to him.

ENOCH: And doesn't the rule as is currently written contemplate that the lawyers' firm would continue in the representation of the client?

ZUKOWSKI: Yes, comment 8 specifically speaks to that saying that, again at the client's consent you can go ahead and have another lawyer represent the party in the litigation where his partner is a witness. And in fact the rule and the commentaries are such that it's clear that that is the client's decision in that circumstance because it's a concern about a possible prejudice to the client as opposed to opposing party. And Anderson did consent. That consent is in the record. It would not have made sense frankly for Anderson not to because my firm had so much background as far as the original matter and the development of this matter.

The second part of the CA's decision, not only did they have to find that in fact there was a violation of this rule, they had to find that it was reversible error. And the manner they had to approach that was on the basis that there was some kind of prejudice to Koch; sufficient prejudice to in fact making this necessary to cause a reversal.

The CA also focused on the wrong thing. They focused solely on the importance of Mr. Campbell as a witness and not on the predicate finding which is this confusion in the duel roles. They spent no time in regard to Mr. Campbell's role as an advocate in the trial. They almost seemed to assume it without ever pointing anything out other than the fact that he signed 5 pleadings over a spectrum of time. The last one a good 6 months before the trial in this matter.

ENOCH: Is it in the record of Campbell taking the position that he withdrew 18 months before the trial of this case, but isn't that inconsistent with him continuing to sign-off on the pleadings as the attorney of record?

ZUKOWSKI: No, I don't believe so. Because the fact of the matter is again to affirm our side there were only 2 pleadings signed after that 18 month period of time. There was an amended supplemental pleading, and then a motion to sever. There were only 2 pleadings. I am not sure it's in the record. I can explain that each one of those were kind of emergency type situations where there wasn't someone else around, and that's why he signed the pleadings at the time.

But there is no inconsistency in that because as I understand the Rule, the Rule is is that you cannot take part in any of the presentation to the trier of fact or the tribunal. And Mr. Campbell never made an appearance in front of the court where he acted as the advocate. Never once. I did all of the advocacy throughout the entire proceeding: all motions; any appearance in front of the court and particular the trial.

OWEN: Would you tell us how you distinguish the decision in Mauzy v. Curry?

ZUKOWSKI: In Mauzy v. Curry it was clear that the lawyer had acted as a witness and as the advocate. He was an expert witness, but in fact his expert testimony went to the essential elements of the case. It was a negligence case, and he basically was testifying that based on his expert opinion there was a sufficient level of negligence in the case. He also was the only attorney of record, and he did the presentation. In this case Mr. Campbell never made any presentation to the court of any kind or nature. And I think that's the distinguishing fact. There was that dual role in Mauzy. There is not the dual role in this case.

PHILLIPS: Just for the record: The words "as an advocate" were added in 1994. I know there is comments that support this. But we also have a situation where the other side was not notified for 17 months; and I know you don't have to do that, but that's one of the ways you can get out from this rule is to promptly notify and show the substantial hardship. And was there any attempt to try to qualify under that exception to this rule?

ZUKOWSKI: That comes under §A of the rule. And we do not fit under §A of this rule. And that's the problem I have with the CA's opinion. That's where the lawyer is going to continue to be an advocate and a witness. And then you go ahead and use that rule...

PHILLIPS: But it didn't say that at the time that this case was tried. It said: "You shall not accept or continue employment in a contemplated or pending adjudicatory proceeding if the lawyer is a witness necessary to establish an essential fact." That's what the rule said. That seems to me it fits squarely into your situation. And we can read some comments and maybe look at the 1994 amendment as an attempt to clarify what the original intent of the rule was, but just on the face of the rule it seems to me it fits this situation. And B is not the one it fits - it's A.

ZUKOWSKI: And again the way we interpreted this is we do not think A or B applies. Because as soon as a decision was made that the lawyer would not appear to present the matter to the court would no longer act as a presenting lawyer in the case at that point A or B do not apply. You are simply going to C, which is at the time the lawyer is going to be a witness and someone else from his firm is going to present the matter. That's why we don't think A or B applies. We think in fact that subsection C applies. And it becomes a question whether in fact Mr. Campbell in any way was an advocate at the time of trial. And he was not.

I understand from the Court that the word "advocate" was added in 1994. But if the court looks at the case law that has been handed down in regard to this rule, and I am talking about the Heirs(?) case; I am talking about the Mauzy case. It's always spoken in terms of the advocate witness rule. And I think it's pretty clear that since the codification of the professional responsibility code that in fact, the

rule has been set up to dichotomize between this role of an advocate and a witness just because you are a lawyer does not disqualify you. It's the advocacy role.

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RESPONDENT

LOFTUS: May it please the honorable court. My name is Tom Loftus, and I represent Koch Oil Co., the respondent in this proceeding. This case involves the application of a rule of ethics. And as a rule of ethics it should be strictly enforced by this court. Likewise, any exception to a rule of ethics should be narrowly construed.

PHILLIPS: Haven't we said these rules of ethics did not automatically...they are not necessarily disqualification rules. It's like comparing apples to oranges except sometimes you can't tell the difference in the taste.

LOFTUS: I agree.

PHILLIPS: So there is really no way to strictly apply this rule in terms of a disqualification. We have to look at it by analogy.

LOFTUS: And I speak by analogy, that the court should examine this case very carefully as the point I made.

ENOCH: Can you disqualify Mr. Campbell from appearing as a witness in the second case?

LOFTUS: No, your honor.

ENOCH: Can you keep Mr. Zukowski from representing Anderson Oil in the subsequent case?

LOFTUS: I don't believe so your honor.

ENOCH: Then what changes anything about this case based on I guess the Beaumont decision? What changes now other than it is just a second trial?

LOFTUS: I believe that his sitting at counsel table had a direct impact on the jury. I believe the way that he presented himself to the jury as an attorney for Anderson was improper.

PHILLIPS: What did you do to try to stop that behavior?

LOFTUS: Your honor the cross-examination that occurred did not explore I believe the nature of his association with Anderson other than pointing out that he was an attorney.

PHILLIPS: For instance you knew he was going to be an attorney before the trial started. You knew he was going to be a witness didn't you? Did you ever seek to invoke the rule and put him outside the hearing of the proceedings?

LOFTUS: No, your honor.

CORNYN: Did you object to him sitting at counsel table on the record?

LOFTUS: No, your honor.

PHILLIPS: Why wasn't any prejudice then invited by you by your not exercising the rights which the rules provide?

LOFTUS: I don't know the answer to that question your honor. The rule as the court has noted states that a lawyer shall not accept or continue employment in a contemplated or pending adjudicatory proceeding. In the petitioner's application for writ of error the petitioner stated that Mr. Campbell was aware that he would be a witness 18 months before trial. The trial was in December of 1992. That means in June, 1991, he became aware that he would be a witness. The conspiracy action against Koch having been filed only 3 months prior to that. And yet 18 months went by before Mr. Campbell notified Koch that he would be a witness. The rule requires 2 conditions for a lawyer to continue employment: 1) he has to promptly notify opposing counsel; and 2) he has to show that a disqualification of a lawyer would work a substantial hardship on the client.

With regard to the prompt requirement that has to be a case-by-case determination within the context of each case: what is and is not prompt?

PHILLIPS: Do you agree with me that the word "as an advocate" was added in 1994?

LOFTUS: Yes your honor.

PHILLIPS: But don't the comments...isn't opposing counsel correct that the comments of such case development that there is under this make clear that the lawyer's appearance was in the advocacy role and not in the office role? In other words that the whole purpose of this rule is to prevent the trier of fact from becoming confused?

LOFTUS: Yes your honor. But I also think that there are mechanics that have to be observed for fairness to the other side. And that is the substantive basis for the prompt notification to opposing counsel requirement.

PHILLIPS: If you had gotten this notification in June, 1991, what would you have done differently?

LOFTUS: I believe that we would have pursued a more diligent course of discovery with regard to the alleged knowledge that Mr. Campbell possessed. The fact of the matter was we found out only 3 weeks before trial that he would be a witness.

CORNYN: Did you object to the late disclosure?

LOFTUS: We filed a motion for disqualification, which was overruled by the trial court.

CORNYN: Did you have an outstanding discovery request asking for the identification of persons with knowledge of relevant facts and experts?

LOFTUS: And that was the only way we found out about it. It was in response to the interrogatory 3 weeks before trial, that the status of Mr. Campbell as a witness was disclosed to us. In other words he did not do it voluntarily as required by the rule, but did it in response to a discovery request.

CORNYN: And do you contend that that was too late under the rules that he should have been excluded as a witness, or the case continued or some other remedy might have been more appropriate than

disqualification?

LOFTUS: Yes your honor or that simply he did not follow the requirements of rule 3.08 requiring prompt disclosure.

CORNYN: So you think rule 3.08 is an alternative to say a motion for sanctions to exclude a late designated witness or a continuance; is that right?

LOFTUS: Quite frankly I have not explored that your honor. But I think that is certainly a possibility.

OWEN: You did not make the motion to exclude him on the basis of designation within the 30 day window?

LOFTUS: I don't believe so.

PHILLIPS: And you did not move for a continuance to give you more time for discovery?

LOFTUS: That's correct your honor. The rule also requires that there would be a showing of substantial hardship. In this case there is nothing in the record that shows that Anderson Producing Co. would suffer substantial hardship if the disqualification motion had been sustained.

PHILLIPS: Was Mr. Campbell's testimony both fact and expert testimony?

LOFTUS: Yes, your honor.

ENOCH: The rule it seems contemplates Mr. Campbell assuming that he is going to be representing Anderson, and also being a witness it seems to me to get permission to do that it's his obligation to prove that otherwise it would be a substantial hardship. But the posture of this case comes from Koch trying to disqualify Mr. Campbell from representing that client. Arguably wouldn't Koch have the burden of showing that it would not be a substantial hardship to Anderson for them to lose their lawyer?

LOFTUS: No, I don't believe so your honor. But even if that were the case I think the record supports and affirmative showing of no hardship. The record shows that there was 18 months between the time Mr. Campbell realized he would be a witness and the trial of the case. I first believe that whatever the evidence or documents or facts were that Mr. Campbell through admittedly only investigatory action, not first-hand knowledge discovered, that enabled him to testify could certainly be assembled and presented at trial rather than second-hand through the petitioner's attorney. Documents can be brought into evidence other than the attorney authenticating the documents. If Mr. Campbell's investigation convinced him that Koch had engaged in a conspiracy then the individuals with whom he spoke could have been deposed or brought to trial rather than coming through the person of Mr. Campbell. So I think if you examine it from that perspective you find that there was no hardship that would have been suffered in this context because Mr. Campbell didn't have to testify. Mr. Campbell could have presented the evidence first-hand through the people that he talked to. Instead he took the stand, clothed with the authority and knowledge of an attorney, and told the jury in essence: I have special knowledge and here is what Koch did, and I am the lawyer that knows these facts." And I think it's from that perspective shows that Mr. Campbell's testimony was reasonably calculated to cause error and probably did cause error. So there was no showing of substantial hardship.

ENOCH: Your position is _____ substantial hardship because his testimony could have easily been replaced by other testimony and therefore since it was so easily replaced he's indicating it could

not have been a substantial hardship to have replaced him as the lawyer?

LOFTUS: Yes, your honor. Comment 8, that the petitioner relies on, also requires that the client give his informed consent to the testimony by the lawyer. In this case again there was 18 months between the time Mr. Campbell says he became aware of his necessity as a witness, and trial. His status as a witness went to the conspiracy charge against Koch. It seems beyond argument that he would have discussed the nature of his special knowledge regarding this conspiracy issue with Mr. Anderson, his client, in order to obtain that informed consent. And yet at trial when Mr. Anderson was asked if he had any knowledge of a conspiracy by Koch the answer was a flat No.

I believe that clearly shows that there was no informed consent by Anderson with regard to Mr. Campbell's testimony as a witness. Therefore they don't satisfy the requirements of comment 8 and exception to rule 3.8. They don't satisfy either requirement of 3.085 an exception to the general rule. Instead what happened was in June, 1991, Mr. Campbell became aware that he was a witness in this matter, and that he would testify, and yet contrary to rule 3.08 he continued his employment in a contemplated or adjudicatory proceeding. No notice was given to Koch on a timely basis. Instead he sat on the information until the last minute and then only in response to a discovery request.

CORNYN: Did you ask Mr. Anderson how it could be that he had no knowledge of any conspiracy on the part of your client, and yet his own lawyer, one of his lawyers who represented him got on the witness stand and testified to the existence of a conspiracy?

LOFTUS: No, your honor.

CORNYN: And you are asking us to infer from that that Mr. Campbell did not get the consent of his client?

LOFTUS: Yes your honor. Your honors in conclusion I believe that fairness, equity, and the proper administration of justice require that this case go down for a new trial.

CORNYN: And what's going to happen, the same thing?

LOFTUS: No, your honor. I don't believe the same thing. I think another point to think about as far as was there prejudice is to just take a look at the result in this case. And this is something the CA noted. And that was this was a garnishment case. Koch had collected only $18,000 in revenue of which all but about $3,700 was paid to the rightful title holders. The remaining $3,700 was deposited into the registry of the court. And yet this jury confused as it was primarily as a result of the testimony of Mr. Campbell, petitioner's attorney, rendered a verdict in the total amount of $9.5 million.

CORNYN: You have other points that go to that issue that the CA did not reach don't you?

LOFTUS: Yes, your honor.

OWEN: Would you tell us again how the new trial will differ from the one we've already had?

LOFTUS: Well it's hard to say exactly how your honor. But I believe that there will be a different result. I believe that...

OWEN: What relief are you asking from us other than another shot at a jury?

LOFTUS: That's all I am asking for your honor is that the CA's opinion be affirmed recognizing that the rule 3.08 was violated, and that the proper remedy for that violation is a new trial.

CORNYN: It's not disqualification, it's a new trial?

LOFTUS: Yes, your honor.

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REBUTTAL

ZUKOWSKI: First of all in regard to discovery. Koch sought no discovery in this matter of written kind of any kind or nature. The interrogatories were proffered on Oct. 15 by a co-defendant. Our responses were due Nov. 18, which means we were within the 30 day rule because trial was Dec. 7. Therefore we answered timely. In fact we answered on Oct. 12 before our full 30 day period had run. The fact of the matter is is that Koch never inquired about any witnesses of any nature, the interrogatories that were proffered to Anderson only inquired in regard to expert witnesses. Did not ask in regard to relevant witnesses with knowledge of relevant facts.

We answered them and at that time made a full disclosure. The court even though discovery was cut off allowed Koch to take Mr. Campbell's deposition. They had a full deposition of Mr. Campbell at that time and document production. Before trial they had all the discovery or more discovery than they were entitled to under the docket control order which said that discovery had already been terminated.

Let's go to substantial hardship. They keep pointing out that one phrase by Mr. Anderson. Mr. Anderson answered the question honestly. He had no first hand knowledge of this conspiracy. The fact of the matter is is Mr. Campbell was questioned and Mr. Anderson was questioned and the fact that the only witness that could be presented on behalf of Anderson was Mr. Campbell. Clearly it was shown during the trial and was never controverted or contradicted at trial that Mr. Campbell was the only witness that could be presented on behalf of Anderson. There was never even so much as a hint that somebody else could be presented. And I think it's very important to note that Koch presented its own in-house counsel as witnesses during the trial. They only had 2-3 witnesses. The witness that spent the most time at trial for Koch was Koch's in-house counsel. When I raised that in the CA the CA thought I was alibiing Mr. Campbell's role. I was not. I was simply pointing out that it was necessary for the lawyers to testify in this case because in great part it was their interaction that created the factual basis for the lawsuit.

Finally in regard to informed consent. Counsel misunderstands informed consent. Informed Consent is not for the witness. Informed consent comes under subsection (c) of 3.08. It is for the lawyer and the firm that is going to continue to represent the client, not for the witness. I have obtained and I received Anderson's informed consent to participate as Anderson's trial counsel. That's where the informed consent comes. Not from Mr. Campbell to get an informed consent to act as a witness. Mr. Campbell I think has a duty to appear as a witness. He certainly could have been compelled by subpoena to appear as a witness. It's my role as an attorney that the informed consent was sought and received from Anderson.

ENOCH: Mr. Loftus has taken the position that one of the things that might be changed in the TC, actually didn't say and gathered from his argument, that his concern with Mr. Campbell is that he apparently emphasized for the jury that he was Anderson's attorney, and that this information was gained because of his work with Anderson on this case and that sort of thing. Is that your recollection of the presentation of the case from Mr. Campbell?

ZUKOWSKI: It was not emphasized but by the nature of the case it will come out. It did come out and will come out again because he was acting as Anderson's lawyer in a garnishment action and seeking written discovery, document production, and depositions in regard to the response to the garnishment that led to the change of the lawsuit to a fraud lawsuit. So it was purposefully not emphasized by Anderson. But nevertheless it came out simply by the development in the case that he was a lawyer, and this is how he obtained the documents that were being presented, which is another reason why in fact Mr. Campbell had to appear as the witness. He authenticated the documents. He's the one who obtained them. He's the one who questioned people about their meaning, and various things you find in documents.

GONZALEZ: If we disagree with the CA with regard to their construction of 3.08 are there some unaddressed some points of error that Koch had before the CA that the CA did not address?

ZUKOWSKI: Yes.

GONZALEZ: Would we have to remand to the CA?

ZUKOWSKI: I think there are 5 issues that the court...the court addressed the 1st and the 2nd issues. I want to point out the court found that there was legally and factually sufficient evidence to support the jury's verdict in regard to the main issue, which was their fraud. A proper finding of fraud in this case. I'm not exactly quoting the issue, but it was the preliminary or basic issue was their good fraud finding here. But there were some other preliminary issues after that. There was some question about the punitive damage question in this case. One or two others. I don't recall. But they were not ruled on by the CA.