

“Superintendent Michael Hinojosa retained the two lawyers [Paul Coggins and Madeleine Johnson] Tuesday to lead an investigation into district credit card use. Details of their hiring were not available Tuesday night, but district spokesman Celso Martinez said the two have agreed to lead the effort. ‘We’re asking them to look deep into our operation and come back to us, and the public, with a report that can, if warranted, be passed on to law enforcement,’ Mr. Martinez said.”

DMN, July 18, 2006. *See* Exhibit “A”.

3. On August 3, 2006, *F & R* entered into a formal agreement with the Defendants DISD and Hinojosa whereby *F & R* would assist DISD “in conducting an internal investigation involving allegations of improper use of credit cards.” Such employment includes representation of DISD “in connection with requests by law enforcement for records, interviews and other cooperation on the credit card issue.” *See* Exhibit “B”.

4. During the course of the factual investigation on behalf of DISD, *F & R*, through its attorneys have interviewed many witnesses, including Plaintiff and other DISD employees, and they have collected many documents in connection with the credit card issue. As such, Plaintiff alleges that *F & R*, and its attorneys and investigators, are material fact witnesses.

5. “(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of

formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.”

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure....

Tex. Disciplinary R. Prof'l Conduct 3.08(a)(b), *reprinted in* Tex. Gov't Code, tit. 2, subtit. G app. A (Tex. State Bar R. art. X, § 9). Disqualification is appropriate if the lawyer's testimony is “necessary to establish an essential fact.” Tex. Disciplinary R. Prof'l Conduct 3.08(a). Plaintiff contends that the testimony of Fish & Richardson will be necessary to establish an essential fact, i.e. that Plaintiff is not guilty of any wrongdoing in connection with the DISD p-card program.

6. On January 4, 2007, undersigned counsel for Plaintiff notified *F & R* of her intent to seek object and seek disqualification if *F & R* sought to appear as counsel for the Defendants in the above cause. *See* Exhibit “C”.

7. “[D]isqualification cases are governed by state and national ethical standards adopted by the court.” *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir.1995)(quoting *In re Am. Airlines, Inc.*, 972 F.2d 605, 605 (5th Cir.1992)). Ethical canons relevant to the district court's order include (1) the

local rules for the Northern District of Texas; (2) the American Bar Association's ("ABA's") Model Rules of Professional Conduct; (3) the ABA's Model Code of Professional Responsibility; and (4) the state rules of conduct. *See id.* The Rules of the Northern District of Texas specifically adopt the Rules of Professional Conduct of the Supreme Court of Texas. *See* N.D. LR 83.8.

8. The Fifth Circuit will interpret these rules as it would any other source of law. *In re Dresser Indus.*, 972 F.2d 540, 543 (5th Cir.1992). In considering a disqualification motion, the Fifth Circuit will view the rules in light of the litigant's rights and the public interest, considering "whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case." *Id.* at 544.

9. This case involves alleged civil rights violations by the Defendants depriving Plaintiff of her procedural and substantive due process rights under the 14th Amendment to the United States Constitution to be free from arbitrary deprivation of property and liberty interests, and the right of Plaintiff, a public employee, to be free of false, stigmatizing charges by state officials which damage her reputation. *See* Complaint at ¶¶ 30-33. Plaintiff was the head of the p-card program at DISD before its suspension by Defendant Hinojosa.

10. *F & R's* public investigation into the alleged abuses of the procurement cards, which began before the alleged civil rights violations complained of herein, and continues to date, renders the testimony of *F & R*, and its attorneys and investigators, necessary to establish essential facts on behalf of Plaintiff surrounding her alleged and on-going deprivations of civil rights. This is so because Plaintiff denies any wrongdoing while head of the p-card program, which

included some 1500 card-holders. Because *F & R* have had exclusive access to the facts and documents surrounding any allegations of Plaintiff's wrongdoing, *F & R* is a necessary witness on Plaintiff's behalf, and will be required to give evidence as to the same.

11. The items of evidence that Plaintiff will seek to obtain from *F & R* is not available from any other source because of the exclusivity of the investigation entrusted to *F & R*. On the other hand, Plaintiff will be prejudiced if *F & R* is representing the Defendants against allegations of depriving Plaintiff of her civil rights, while at the same time *F & R* is in possession of necessary and material evidence to show that Defendants did indeed arbitrarily deprive Plaintiff of property and liberty interests, and the right of Plaintiff, a public employee, to be free of false, stigmatizing charges by state officials which damage her reputation.

12. When a lawyer is or may be a witness necessary to establish an essential fact, Texas Disciplinary Rule of Professional Conduct 3.08 prohibits the lawyer from acting as both an advocate and a witness in an adjudicatory proceeding. *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004). The investigative facts in the possession of *F & R* are required to establish Plaintiff's contentions that under all the facts and circumstances of the p-card program, she is guilty of no wrongdoing or malfeasance, and that the Defendants' actions have deprived Plaintiff of her rights to due process of law. Furthermore, *F & R*'s public report of its investigative findings will in all likelihood be a necessary element of the Defendant's defense to the Plaintiff's allegations in this case, and to such extent, Plaintiff will necessarily object and attack such findings and conclusions in support of her case from the witness stand.

WHEREFORE, Plaintiff respectfully requests that the Court disqualify Fish & Richardson and all of its attorneys and investigators, from representing

Defendants **DALLAS INDEPENDENT SCHOOL DISTRICT (“DISD”);
MICHAEL HINOJOSA, INDIVIDUALLY AND AS SUPERINTENDENT
OF THE DALLAS INDEPENDENT SCHOOL DISTRICT, CELSO
MARTINEZ, DAVID RASTELLINI, TROY L. COLEMAN, AND RONALD
PEACE**, and grant the Plaintiff such further relief, at law or in equity, to which
she may show herself entitled.

Respectfully submitted,

JAMES M. MURPHY
Texas State Bar # 14700800

/s/ James M. Murphy

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Counsel For Plaintiff

Dated: April 4, 2007.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2007, I electronically submitted the foregoing pleading with the United States District Clerk’s Office for the Northern District of Texas, Dallas Division, utilizing the electronic case filing system of the Court. The electronic case file system sends a “Notice of Electronic Filing” to Defendants’ counsel of record, who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ James M. Murphy

JAMES M. MURPHY