ORAL ARGUMENT — 11/5/97
97-0654 & 97-0655
AMERICAN HOME V. RAMIREZ & TANNER

LAWYER: This mandamus stems out of four different lawsuits filed in four different counties in South Texas, which basically allege medical malpractice and products liability claims against the distributor of the Contraceptive Norplant, and the physicians who prescribed them.

The question in front of this court today is simple, but is very important to the integrity of the judicial process. The question is, can a party of opponent the middle of a lawsuit and hire away his opponent's consultants and then turn around and use them against that first party who originally hired them in the exact same litigation?

SPECTOR: Now, are you talking about the doctor or the _____?

LAWYER: I'm talking about both.

SPECTOR: They were both hired as consultants?

LAWYER: Yes, they were.

ABBOTT: With regard to the integrity of the judicial system there appears to be a situation where the defense team swept into the area and hired up almost every doctor who was available even available for the plaintiffs to go see for their treating physicians. If that's the case, how does that promote the integrity of the judicial system?

LAWYER: First of all, that's not the case, and the record doesn't support that. What the record shows is that what happened was, one plaintiff in Zavala county filed, and then after they got the court they wanted, they intervened over 600 other people from all over the nation. And so it was important that we have local physicians there to be able to do IMEs, be able to defend...

ABBOTT: On how many plaintiffs at that time hired all those doctors?

LAWYER: There were over 600 plaintiffs in that county alone. There were also...

ABBOTT: How many doctors did you hire in that county?

LAWYER: I want to say 5 or 6.

PHILLIPS: How many doctors practice in that county?

LAWYER: The testimony is such that there was at least 8, but there may be more. The

testimony was, "I don't know."

PHILLIPS: I'm wondering why the doctors couldn't be in New York City, or Houston?

LAWYER: As the court knows, it's important when as in the Zavala county case, you want a Zavala county doctor to be able to get up there and testify. I mean the questions should really be asked to the other side: Why did you bring all of these plaintiffs from all these other places, stick them in Zavala County?

ABBOTT: How many plaintiffs live in Zavala county?

LAWYER: I think out of the total, less than 20.

ABBOTT: So of those, less than 20. Since you hired 5 of the 8 doctors in the town, they were confined to going to three of the remaining 8 to get their medical care, even if the doctor they had been going to all along was another doctor?

LAWYER: Let me correct a misapprehension there. Eight is all the record shows. The testimony is he couldn't remember them all, but 8 was all he could remember. There's not just testimony that there's just 7 or 8 doctors. I was trying to stick to what the record shows. Now the question is, why would we need that many?

ABBOTT: First of all, why would you need that many, but secondly, looking at the broader concept of how you started out and that is due to the fact that this has on the appearance of our judicial system what impact does that create when you have 19 people who are confined to one of the three doctors, whereas, they may otherwise want to be able to choose one of the other doctors in town, but they can't go to one of those doctors because they've already been hired by one of the lawyers?

LAWYER: They're not confined to going to any certain doctor.

ABBOTT: But that can't go to the doctor hired by the other lawyers?

LAWYER: They not only can, they did go.

ABBOTT: Then we have this dispute.

LAWYER: No, if I can correct the court here just for a second. Dr. Gonzalez, let's take him because he's the only one in the record that's really developed on. We attempted to depose the other doctors and those depositions were quashed. The record shows that Dr. Gonzalez since the dispute offered treatment to whomever came in his office, and some of them included one of the plaintiffs. Unbeknownst to us. Now that doesn't prohibit the plaintiff from contacting him as a fact

witness, or an expert witness with regard to his treatment.

ABBOTT: What about the lawyer talking to him?

LAWYER: The lawyer can talk to him as far as his treatment of the plaintiff.

PHILLIPS: So he's an expert witness for you as to one plaintiff, and a treating expert witness for another plaintiff in the same case?

LAWYER: He could be. But that's not the facts in this case. What happened was, they were hired away to be an expert in a completely different county having nothing to do with these plaintiffs.

OWEN: You say there's 600 plaintiffs. Were they all scheduled to be tried in the same case, or were there going to be groups of plaintiffs tried, or do we know?

LAWYER: Both. They were going to be tried in the same case, but there were going to be groups of plaintiffs. The original schedule was the first three, they were going to try three and out of those first three none were from Zavala county. In fact, two of the three hadn't even heard of Zavala county. They didn't even know where it was when we deposed them.

SPECTOR: I don't understand. Dr. Gonzalez was hired by the defense, and what was his purpose? Was he hired as an expert witness, a consulting expert?

LAWYER: He was hired as a consulting expert originally. Up to today, there has not been one plaintiff who has identified him in their interrogatories as a treating physician. So, the argument they're making is: You screwed up, you relied on what we told you in the interrogatories.

SPECTOR: My question is, what was the agreement between Dr. Gonzalez and Wyeth?

LAWYER: The agreement was, he was initially going to be a consulting witness with the prospect that he was going to become a testifying expert should we have a plaintiff that he would do an IME on, or a testifying expert with regard to the generic area of birth control. So it was more than likely going to be our intent that he would testify but we never got that chance.

This is not an *Axelson* situation. This is not a situation where we're trying to hide a fact witness by saying: He's a consultant only. That's not the situation here. In fact, we've never complained about, never prohibited, never tried to prohibit anyone from talking to these witnesses about any of the facts in this case. And I think that's important.

ENOCH: I thought you were trying to disqualify the other firm for their contacts with some of these doctors?

LAWYER: Yes.

ENOCH: Now has it that consistent with your statement: It's fine for the lawyers to talk to these doctors, and it's fine to have conversations with them, and it's fine to inquire of them, and it's fine to have them be treatments but, by the way, because they did contact this doctor it disqualifies him.

LAWYER: The undisputed evidence is, and this is what I think they are trying to raise in their brief, it's not accurate. The undisputed evidence is, that they didn't go in and try to talk to this doctor about his treatment of Mrs. X, or Mrs. Y. What they did is, they went and paid him $10,000 to switch sides, gave him our documents and had him review those so he could testify against us as their expert.

ENOCH: The disqualification issue goes to: We revealed confidential information to our consulting only expert, they went in and co-opted that consulting expert for them, so disqualify the firm because there is...I assume there's a presumption that there is a divulging of confidential information. What you're telling us in argument is with respect to the doctors, the lawyer can go ask the doctor anything he wants to.

LAWYER: No. I draw the line on that.

ENOCH: Then how can you rely on the presumption issue that there is a divulging of confidential information if you concede that they are entitled to talk to them about the case?

LAWYER: First of all, they can talk to him about the plaintiff they treat. They can talk to him about: Yes, I treated Mrs. X for a cold, and this is what her treatment was, and this is my opinion about her treatment. That, I, think is permissible. I don't think we've ever tried to stop that. Secondly, if the court thinks you need a presumption in this case, you're mistaken. Because we have undisputed proof in this record that confidences were divulged. This court has written on at least two difference occasions, that the identity of consultants is confidential and privileged information, and the record is undisputed that this doctor got with Mr. Herrera, and Mr. Herrera asked him: Well who are their other consultants? And he told them, and then he went and met with them.

ENOCH: But if you're not relying on the presumptions, then doesn't this become a factual dispute in front of the TC and an abuse of discretion test? Don't we now come down to it's disputed about what information got divulged or the doctors disputed about what information got divulged or didn't get divulged and now aren't we faced with just point blank, the judge's abuse of discretion on reviewing the evidence?

LAWYER: I'm not suggesting that you don't rely on the presumptions, because I think that's the only safe way for this court to rule. As you look at the facts, you rely on the presumptions to disqualify. What I am saying is though if you feel uncomfortable doing that, or some of the cases

that the other side has cited, you don't have to rely on the presumptions, because we have undisputed proof. It's not a fact issue, it's not arguing: Well he didn't tell me, he did tell me. It's undisputed proof from Dr. Gonzalez's own mouth is: I told Mr. Herrera about who these other doctors were. And then Dr. Gonzalez and Ms. Palacios, the investigator, got together and set up a meeting and had Mr. Herrera meet with them. So that's a clear disclosure of confidential information. So, I don't think you've reached that. The fact of the matter is, the court never has to even get to Dr. Gonzalez because of the taking away of the paralegal that worked for us or the investigator. I don't think it matters what label you call it. The State Bar of Texas has a label it calls The Para(?) Professional in the ethics rules, and that's what we used in our brief when we briefed it to this court. But it clearly states there, that if you take somebody, and this court has clearly stated it, *Phoenix Founders* has clearly stated it, in the *Grant* case if you hire someone and bring them into your law firm and they've worked on the exact case that you have, and you don't screen them away from that law firm, you don't have a Chinese wall or a screening procedure, disqualification will be required.

SPECTOR: Now, did she ever work for the defense law firm?

LAWYER: There is a fact issue on whether she was an employee of a defense law firm. There is no fact issue about whether she worked for Wyeth, my client. Her undisputed testimony is: She was hired by Mr. Frank Reevis(?), in-house counsel for Wyeth, as a consultant, and hired by Leslie Bonitas, Clark Thomas & Winters in Austin.

SPECTOR: As a consultant?

LAWYER: Well as a more or less a contract employee. That's her testimony. There is no dispute as to that.

SPECTOR: What is your testimony as to what her duties are?

LAWYER: I think she testified: She arranged for us to contact and meet consultants, she helped set up consultants, she investigated the plaintiffs, she wrote confidential memorandum. If the court would look at Exhibits 56 through about 64 in the record, you will see that she wrote us a memorandum where she did investigations stamped with confidential and with the first opening line of many of these: I found this information out from confidential sources. And she sent it to us. And now they have access to that.

SPECTOR: That was not from the defense side? Those confidences did not come from the party to the suit?

LAWYER: We didn't tell her. But see that's their argument. But that ignores the whole relationship of why you hire a consultant. I mean you don't hire a consultant for you to help them. You hire a consultant for them to help you.

SPECTOR: And she was paid for her services, or not?

LAWYERS: She was not paid. She billed our local counsel who subsequently quit, and apparently I think the record is clear, that he didn't pay her bill. But I don't think whether you're paid or not, she certainly did it with expectation of payment, and I don't think that makes it different. I mean if you have to be paid, then any lawyer that's on a contingent fee that loses doesn't have any ethical obligations because he would not have gotten paid. So whether you're paid or not, I don't think makes any difference in this equation.

The interesting thing about all of this is they don't deny this. They don't deny the conduct. They don't deny that they went in and grabbed this paralegal, and she then set up meetings with our consultants. Their argument is basically 1) that we waived it; or 2) that we didn't have a right to talk to these physicians anyway. But they make no waiver argument as to the paralegal.

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RESPONDENT

HUNT In contrast to the position taken by the relator defendants, this is a lawyer discipline case of first impression since it involves third-parties and not staff employees addressed by this court in *Phoenix Founders* and *Grant*. This court it today asked to expand the basis of disqualification because 1) the defendants designated a treating physician as a fact witness, a treating physician fact witness as a consulting expert; 2) a freelance promoter sought employment with the defense; and 3) these so-called consulting expert and the freelancer were hired by the plaintiffs after defense counsel assured the plaintiffs that neither had any confidential relationship or confidential information.

Faced with hotly disputed facts, heard over 5 days by Judge Tanner in Bexar County, the DC rejected the disqualification, and so should this court as a look at the two third-persons should indicate. And in looking at these third-persons it should be kept in mind that this is not a plaintiff's or a defendant's issue. The decision this court makes today cuts both ways. So consider each of these third-parties. First, is Dr. Salvador Gonzalez, a treating physician. As a treating physician, he could not be a consulting expert as a matter of law. As this court said in 1990 in *Axelson v. McIhaney*: A fact witness can never be a consulting only expert. And, yet that's what the defense hopes to do here is somehow shield the medical witnesses in Zavala County by placing on each of them the half of consulting expert.

OWEN: If there are 600 plaintiffs, and they are tried over a period of 5-6 years in groups of cases, can Dr. Gonzalez be a fact witness in one and a consulting expert in another case? What's wrong with that?

HUNT: That is the claim that the defense makes. But *Axelson* really answers that.

Because in *Axelson* you were dealing with two employees, one who was designated as a consulting only who had fact information. And this court said there that that witness could not be so shielded, and the witness must be able to give the facts. But in that case this court was dealing with whether there was a difference between what the witness knew as one who was there at the time of the blowout and what information one gained later. And the answer has to be that you can't go in with a scalpel and divide the mind of the witness. Always the witness must be able to testify to the facts that that witness knows. And that's the answer. So long as Dr. Gonzalez knows facts or gains knowledge of facts about these plaintiffs, then he ought to be able to testify, and he ought to be protected in the sense that he's free to give expert testimony.

GONZALEZ: How do you respond to the argument of Mr. ____ that Dr. Gonzalez disclosed confidential information?

HUNT: That was a hotly disputed fact issue. Here is how it came down: Jessie Gamez, the local attorney arranged for the meetings with a doctor along with Diana Palacios. Each of those testified along with Dr. Gonzalez that no confidential information was ever disclosed to them. Instead the representation was made to them before hand, that all we want is your information, your opinion on how the Norplant product is worth, come to a luncheon and we will pay for your time. So the representation was made to Dr. Gonzalez and each of the other treating physicians on which the consulting experts' hat is attempted to be placed: Come to the luncheon, share your knowledge, this is not for the purpose of making you a consultant of any kind.

But contrary to that oral representation, contrary to the testimony of the three people involved: Jessie Gamez; Diane Palacios; Dr. Gonzalez, the defense claims that somehow confidential information was shared. They say: No. They say that the representation was made, that come to lunch, share what you know about the product, you're not to be a consultant, and we'll pay you for your time. Despite that, a letter was sent suggesting they were a consultant and a check was sent.

Now that's the fact issue that's created right there. That fact issue Judge Tanner had to resolve and she resolved it in a way with a holding and implied findings that this doctor was not a consulting expert and had no confidential information.

ENOCH: It occurs to me there's several levels we are dealing with here. When a lawyer works with one firm that's representing a client on one side, then leaves and goes to work with another firm that has the other side, we don't permit a Chinese wall, we don't permit some sort of demarcation or BMZ, we just say the second law firm is disqualified from representing the client.

LAWYER: That's correct.

ENOCH: A staff member, a paralegal, moves from one firm to another and the court seemed to be concerned that this is a different circumstance and a Chinese wall might be permissible.

If this is just another level of staffer, a Chinese wall might be permissible. And so you move them over there, and you've got a Chinese wall and maybe that's okay. It seems to me that in this case, there would not be a presumption of shared confidences that would result in the firm being disqualified merely from employing this third-party. It seems to me though there is a problem even acknowledging this isn't a paralegal or a staff of the attorney, there is a potential problem but there is no Chinese wall record here. In fact this person is hired over here to provide information and deal on the issues that they ostensibly were inquired of by the other side.

It seems to me the issue in this case is, is there going to be a presumption of shared confidences here, or is this strictly going to be a resolution of the fact issue of if any confidences were shared? A middle level where with a Chinese wall, we still operate under the presumption that there's been shared confidences or through their work they obtained it. But this is even a lower level. Is there even a presumption or should the court have a presumption that there's been shared confidences, or should this simply be a fact issue? Can Dr. Gonzalez, can Ms. Palacios testify: We had no shared confidences. And can a court without abusing its discretion rely on that testimony?

HUNT: First, you make two points and let's address whether there is a shared presumption. Now in both *Phoenix Founders* and *Grant* there was an unquestioned relationship between a staff employee and a law firm. Staff employees, paralegals who have the run of the law office, who have keys to the file cabinet, who can get in and look at the files, indeed are given files and expected to assist the attorneys on that very case. But that's the reason why there is a shared presumption. There should be no shared presumption where there is a third-party. Indeed, the projected or what Judge Tanner was asked to do was apply the federal test from such cases as _____ *v. Sherman Williams* and *Hall v. Rollins Sporting Goods*. Under that federal test, what the court is looking for is the two-step process. First, an objective reasonable belief that a confidential relationship exist; and 2) does the party actually disclose confidential information. So at this lower level applying the federal test there first must be established this objective reasonable belief that a confidential relationship existed. And using that, whether you call it some sort of presumption or say it's a fact issue, that cannot never be here. And the reason why is that Dr. Gonzalez was a treating physician. Now references have been made to interrogatories, but what was omitted is that the plaintiffs, some of the very patients who were suing, came to court and testified that Dr. Gonzalez was their treating physician about Norplant treatment.

OWEN: What about Ms. Palacios?

HUNT: Ms. Palacios can also be tested by this same analysis. Now understand her relationship to this case. She unquestionably was a promoter. And what she was interested in doing was promoting herself. She was interested in getting hiring. This record reflects that as a freelance non-staff, she was attempting to be employed by the defense. She sought employment there, indeed she explained on the record that she thought she was employed, and then came to discover that she wasn't.

HANKINSON: Do you disagree with Mr. Hannon's characterization of the record that the evidence is undisputed that confidences were disclosed to her?

HUNT: Oh, yes, your honor.

HANKINSON: So is it your position that the record reflects that that's disputed or that there were no confidences disclosed?

HUNT: Hotly disputed.

HANKINSON: If confidences were disclosed to her, then under the test that you propose would the law firm be disqualified?

HUNT: No.

HANKINSON: Why not?

HUNT: This should be a one-step process. For example: You have two law firms here: Frank Guerrera and the Cherry Davis firm. Now just as this court has written in situations where you have lawyers who share offices, that there is no disqualification, because there's no presumption here. There's not any necessary presumption that whatever Frank Guerrera might have known is that Cherry Davis is disqualified. But neither should be disqualified because this record reflects that Jessie Gamez, the local counsel, Diane Palacios and Dr. Gonzalez all testified that there were no confidences ever shared...

HANKINSON: But assume with me that confidences were shared with Ms. Palacios, then would the lawyers be disqualified under your test that you're proposing for third-parties?

HUNT: If there was that the meeting of the first test, the first prong, an objective, reasonable belief that a confidential relationship existed, then you make the assumption as you've asked me to do that the party actually discloses confidences then, yes. But, the defense can't pass the first prong here, and the reason why the defense can't pass the first prong is, that the defense started out with the idea that she is somehow an employee of Jessie Gamez.

HANKINSON: And if I understand you correctly, this is an objective test? It's not what Ms. Palacios believed or did not believe, but an objective test, a reasonable person test?

HUNT: That's correct. And as a reasonable person test it's the same sort of fact analysis and submission of facts to a fact finder as there would be in an objective person test for negligence. But, the point is that Diane Palacios is a person about whom the defense could have had no objective belief that she was a hired employee.

HANKINSON: Do we look to both the lawyer and the third-party in terms of this objective test, what both sides would have believed as to whether or not there's a confidential relationship?

HUNT: No. You only look at the moving party, the party who is seeking to disqualify. That's clear under the federal test. It is the moving party that needs to have the objective reasonable belief. But here, the plaintiffs argue that the defense could not have had that objective reasonable belief. And here's why. At the beginning of the disqualification hearing, the defense was taking the argument, indeed, that was the opening argument of the attorneys that Diane Palacios is a paralegal investigator of Jesse Gamez. Now what was wrong with that, is that both Jesse Gamez and Diane Palacios got on the witness stand and explained that: No, she had never worked for Jesse Gamez, never had a W2, never had a 1099, she was not his employee in any shape, form or fashion.

BAKER: Who did she work for then, if anybody?

HUNT: Wyeth. If she worked for anybody, she worked for Wyeth.

BAKER: That's the moving party in this court?

HUNT: Correct. Now, it must be at least said, that Diane Palacios said in her testimony that she was trying to be employed by Wyeth, she thought she was. But as it turned out, the defendant never did anything to complete the employment. There was never any opportunity, the defense never asked her to sign a confidentiality statement, the defense never furnished her any files, the defense never shared any information with her as the testimony from the parties who were there said. Now that's a hotly disputed fact issue. Because conceivably, the defense attorneys say that confidences were shared.

OWEN: You said today and your briefs state that defense counsel assured plaintiff's counsel that Diane Palacios had not been hired by them?

HUNT: Correct.

OWEN: Who said that, and to whom?

HUNT: Jesse Gamez. Frank Herrera, before he ever did anything about employing Diane Palacios or talking to Dr. Gonzalez, called Jesse Gamez, the local counsel for defendant Wyeth and American Home Products. Frank Herrera inquired of the person who appeared for all the world to be the defense counsel.

OWEN: What was the timing of this? When did Jesse Gamez withdraw as counsel in relation to this conversation?

HUNT: He withdrew in November. This conversation occurred on October 13 or 14,

a day or two before the employment of Diane Palacios on Oct. 15, 1996. This telephone conversation, the record showed, occurred that day or a day or two before. But, what must be kept in mind here, because the record could be confusing here, Jesse Gamez wrote a letter to the defendants and explained that he was withdrawing. It's admitted that was received on Sept. 29, 1996, but he didn't withdraw until he submitted his motion of withdrawal at the end of October, which was granted on Nov. 4. But the important thing to keep in mind is, that Frank Herrera didn't know about that letter. Frank Herrera would had to treat Jesse Gamez as the counsel for Wyeth and American Homes as indeed he was. In fact, the defense took the position in the disqualification hearing that Jesse Gamez was still the attorney for Wyeth because his motion of withdrawal only withdrew for one of the defense parties. And that's critical when you look at Diane Palacios and the argument that somehow she was the employee of Jesse Gamez. After the defense originally started out with the argument that she was the employee and was faced with the evidence that, no, she wasn't, then suddenly she was supposed to be the employee of Wyeth. And now in the latest brief filed last Friday by the defense, the shoe has been switched again, that the explanation is given why Wyeth never paid her any money is because it was Jesse Gamez's duty to make that payment. So it's been shifted again here late in the ball game and the argument is made that somehow the bill should have been paid by Jesse Gamez, but because it would have to be, she is his employee. But that simply doesn't fit the facts.

OWEN: Did the Herrera law firm know that she had billed Wyeth or Gamez?

HUNT: Not at that time.

OWEN: Did they subsequently find that out?

HUNT: I'm sure they did. In discovery it came out. There was a time when all these facts became known.

OWEN: Well did they ask her: Have you ever done any work for Wyeth?

HUNT: Oh, yes.

OWEN: And what did she say?

HUNT: Assurances were given by Diane and both Dr. Gonzalez that while they had talked, and they received no confidential information and that there was no relationship there. So that was a disputed issue of fact. And in the end, mandamus must be rejected. If mandamus results in disqualification today, then the gamesmanship attorneys of Texas are given a powerful new tool for disqualifying attorneys simply by designating the other side's fact witnesses as a consulting expert, and then attempting to disqualify that attorney if the attorney breaches the code of silence by attempting to contact that witness. The DC's rejection should be upheld.

PHILLIPS: The fact witness you refer to is Dr. Gonzalez?

HUNT: Yes, Dr. Gonzales was a treating physician.

PHILLIPS: For how many plaintiffs before he was contacted by the defense?

HUNT: The record reflects at least 3. A suggestion was made that interrogatories didn't show it, but at the disqualification hearing, it shows on pages 477, 507 and 533, that Dr. Gonzalez was a treating physician of at least 3 of the Zavala county plaintiffs.

PHILLIPS: A treating physician for the problems that were the subject of this lawsuit, before contacted by the defense?

HUNT: Yes. Two of them said: Dr. Gonzalez treated them for Norplant problems. One said: that she saw Dr. Gonzalez for her pregnancy before she got the Norplant product. The DC's judgment should be upheld.

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REBUTTAL

LAWYER: There are so many things I want to say, and I would just ask this court to really look at the record. With all due respect to counsel for the opposing side, 95% of what he just said was in the record isn't in the record. This is the kind of case quite frankly where I don't think factually you need the presumption for this case, but you ought to have the presumption for the State of Texas. Because what they are saying is: Well show us what you disclosed to her, show us your confidential information. Well if you have to do that, I mean, it's just a tactic. And this court has rejected that in *Coker*, *Phoenix Founders*, and in *Grant*. You never have to disclose your confidential information to disqualify somebody.

HANKINSON: Are you then saying that we should use the *Phoenix Founders* test in reviewing situations involving third-parties who were not employees of law firms?

LAWYER: Absolutely.

HANKINSON: You would disagree with Mr. Hunt's position that this federal test he talks about should be adopted?

LAWYER: Absolutely. Let me point out about the federal test. First of all, he says it's the federal test. It's one Ohio court magistrate. So it's not adopted like it's the federal test. I mean to give it that much, is to really give it too much credit. Secondly, it applies not to disqualification of counsel, but to disqualification of the witness. And I invite the court to read this. He's given you no reason why *Phoenix Founder* shouldn't apply. And I suggest the court look at Rule 503...

ENOCH: If you accept what Mr. Hunt says, that Dr. Gonzalez is invited to a lunch by some lawyers because they have an interest in Norplant, and they want him to come to lunch and visit with him, and they have some conversations, are you saying that that should be sufficient for disqualifying a law firm that later has a conversation with that same doctor, because of you talking to the doctor first?

LAWYER: That might be, depending on the content of the conversation, but that's not what happened here, and that's why I urge you to look at it. Here's Dr. Gonzalez' bill. It list over 20 hours of work. It list all of the meetings he had with defense counsel, all the consultations he had. He met with Wyeth's attorneys and representatives 8 times. This is all undisputed. And that's why I really urge you to look at what the real facts are in this case.

Secondly, he said: We tried to designate Dr. Gonzalez as a consulting only. I, mean, that's clearly an attempt to say, we tried to get under *Axelson* or they are trying to get us under *Axelson*. We've never designated. The time for designating witnesses has not come up. The fact of the matter is, it was our full intention to have him testify in which case anything he said or anything we said to him would be fair game, and anybody could discover whatever they wanted to.

ABBOTT: Have you paid him any money?

LAWYER: Dr. Gonzalez was retained with a letter. And the letter says: We are now retaining you as our consultant in the Zavala county Norplant cases, and paid him $1,000. Later he sent us the bill for all this work he had done - $3,500. We sent him the $3,500. And in that letter: This is for your work as our consultant in the Norplant cases. And that's undisputed in this record.

ENOCH: This isn't a question of whether or not the witness is disqualified. It's a question of whether or not one party's lawyers are disqualified. And that can only be if there was some conduct that they obtained an advantage: My employee who worked on this case is now their employee who worked on the case, we are going to presume there are confidences that are being transferred so disqualify the lawyer. If I understand what you said, if we decide that Dr. Gonzalez can testify, then they can ask him any questions they want to. Oh, but by the way, they can't be the lawyers asking the questions.

LAWYER: No. They have two advantages. One, they just didn't take Dr. Gonzalez. They paid Dr. Gonzalez $10,000, gave him our documents and said: Alright, now you're our expert in the Starr County cases. It doesn't have anything to do with treating people. So we are already at a disadvantage. They've taken away our expert in Zavala county cases, they made him their expert.

SPECTOR: The documents you're talking about are documents that Dr. Gonzalez has gotten from Wyeth?

LAWYER: From Mr. Harrison. They met, he gave him a stack of Wyeth documents, undisputed in the record.

SPECTOR: But were those confidential documents?

LAWYER: No, they were documents that they discovered during the course of the lawsuit. But the point being, this isn't any testimony about the treatment of a plaintiff. This isn't any testimony about factual matters as they keep arguing in *Axelson* you're trying to hide it. This is: We're going to take your consultant, we're going to make him our witness, and the only different is, we paid him $10,000, and you didn't. Now that's the first. The second answer Judge Enoch to your question is, if they were truly on the up and up, both with Diane Palacios and with Dr. Gonzalez, first of all they would have had screening procedures for Diane Palacios and said: You can't work on Norplant. But that's not why they hired her. They hired her to work on Norplant. And what they did is they didn't go in and say as an ethical lawyer should have and said: I'm going to hire you, don't talk about Norplant, I don't want to know anything about your conversations, I don't want you to do anything that might even hint of this. They did just the opposite. They went in to Dr. Gonzalez and Ms. Palacios and said: Tell me, who are their consultants, who are their other consultants, and set up meetings for me, and they did it, and that's undisputed. That's where they got the information. And that's how they met them. And he makes a point of saying: It only applies to when they have the run of the office. Well she did have the run of the office. She met with Mr. Herrera in our local counsel's office.

GONZALEZ: Do you dispute the fact that Mr. Herrera consulted Mr. Gamez and asked him whether or not there were any confidences or any problem in him hiring Dr. Gonzalez? Furthermore, did Gamez testify in court, under oath, that there were no confidences violated, and did Palacios testify to the same thing? Was that the evidence before Judge Tanner?

LAWYER: No. It's close to that. What he testified to, under oath, and what he was asked was: Did she have access to Wyeth's confidential information? And he said: No. That's conceded. But what they don't tell you is there's actually testimony about whether he gave consent. They are ignoring that. They try to imply consent, which incidentally they argued in this case to this court for the first time. They didn't plead that at the TC. That wasn't raised there and neither was this *Paul* federal test.

What they asked Mr. Herrera is: Did you ask consent to hire him? No, I didn't need any. What they are trying to say is, they asked Jesse Gamez at the hearing: Was she your employee? And he said: No. Because she's not his employee. Section 503 of the State Bar Disciplinary Ethical Rules clearly make an attorney responsible for and it makes no distinction of whether they are retained. And let me read this to you: Employed, retained by, or associated. The State Bar of Texas has clearly said: We're not going to have a different rule, whether she's your employee or whether she's a contract employee, or a contract lawyer, we've got the same rule. And that's the rule that ought to be enforced here.

OWEN: What is the evidence about the Oct. 13 or 14 conversation between Jesse Gamez and Frank Guerrera; and two, as a legal matter, does it matter whether the hiring law firm knows or doesn't know that Diane Palacios for example had worked for the other side. For disqualification purposes does it matter if they know?

LAWYER: Well, it doesn't. The honest answer is it doesn't matter. In this case, they knew. So it was an intentional act. But it really doesn't matter whether they know or they don't know. Now the facts about the conversation, I don't think, are as stated by Mr. Hunt in the record, but they are very similar to what I just told Judge Gonzalez, and that is, there was never any permission for them to hire her. And it was clear, they were told that she worked on the Norplant cases.

GONZALEZ: Was permission necessary? Under what law are you hanging your hat on that permission was necessary to hire somebody that's not going to share any confidential information?

LAWYER: First of all, the disciplinary rules say that. Section 402 says that. Section 402 says: You can't hire someone like that, or even talk to them unless you have consent. So the difference is, this is an issue they raised. It's more or less an affirmative defense on their part and they raised it for the first time in this court. And it says: Hey, well we talked to him and he said she wasn't his employee. Well, that's not consent. In fact, when you read the brief we filed Friday, we highlighted for the first time because they raised it for the first time what the testimony was on consent. And Diane Palacios said: I never asked consent for Wyeth. Jesse Gamez said: I never gave consent. And Mr. Herrera said: I never asked for consent.