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BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

IN THE APPEAL OF	)	Docket No. OPA PA-17-10
	)	
CORE TECH INTERNATIONAL CORP.,	)	**APPELLANT CORE TECH INTERNATIONAL CORP.'S MOTION TO DISQUALIFY APPELLEE DEPARTMENT OF PUBLIC WORK'S COUNSEL THOMAS KEELER**
Appellant.	)	

Pursuant to Guam Rules of Professional Conduct Rule 3.7(a), Appellant Core Tech International Corp. ("CTI") files this motion to disqualify Appellee Department of Public Works' legal counsel, Thomas Keeler. In response to CTI's retaliation claim, ("DPW") DPW asserts the defense of reliance on advice of its counsel, Mr. Keeler. Mr. Keeler is a "necessary" witness in the above-captioned matter and he is disqualified from representing DPW at the hearing of this appeal. All other attorneys who assisted or participated in providing such advice are also disqualified from acting as trial counsel. Further, by asserting the reliance on advice of counsel defense, DPW waived all attorney-client communications and attorney work product concerning the issue.

STATEMENT OF FACTS

CTI filed a notice of appeal in this matter asserting, among other things, that DPW had wrongfully terminated the Contract as retaliation for CTI's successful prosecution of appeals in

In the Appeal of Core Tech International Corp., OPA-PA-16-007/OPA-PA-16-011 and *In the Appeal of Core Tech International Corp.*, OPA-PA-17-001. The Scheduling Order in this matter required the parties to submit Exhibit Lists, Witness Lists, and List of Issues on November 22, 2017. DPW submitted its lists, including an Exhibit List containing the Declaration of Joaquin Blaz, attached hereto as Exhibit A. Mr. Blaz's Declaration states:

> The timing of DPW August 23, 2017 Notice of Termination/Default was based ***on the advice of counsel*** who informed DPW that the Route 1/8 Project's Surety's Bond might not be enforceable if DPW failed to terminate prior to the one year anniversary of Substantial Completion (i.e., August 25, 2016). ***DPW's counsel provided this advice*** as early as June, 2017.

J. Blaz Decl., ¶ 8 (emphasis added). Mr. Blaz states that DPW intends to assert a reliance on advice of counsel defense in response to CTI's retaliation claim; specifically, that DPW relied on Mr. Keeler's advice in issuing the Notice of Termination/Default and not as a result of any retaliation against CTI. The defense squarely places in issue Mr. Keeler's advice, the reasons supporting the advice, and DPW's good faith reliance upon such advice.

I. MR. KEELER IS A NECESSARY WITNESS.

Rule 3.7 provides in relevant part:

> LAWYER AS WITNESS.
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

The comments to Rule 3.7 succinctly state its reason:

> [1] Combining the roles of advocate and witness can involve a conflict of interest between the lawyer client and can prejudice the opposing party. If a lawyer is impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the

> credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility.
>
> [2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness would be taken as proof or as an analysis of the proof.

DPW must meet four requirements in order to establish a reliance on advice of counsel defense: (1) a request for advice of counsel on the legality of a proposed action, (2) full disclosure of the relevant facts to counsel, (3) receipt of advice from counsel that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice. *C.E. Carlson v. SEC,* 859 F.2d 1429, 1436 (10th Cir.1988). CTI is entitled to discover from DPW all evidence which bears upon, or is related to, these four requirements, as well as to cross-examine Mr. Keeler about his advice. *Miller v. Colorado Farms*, 2001 WL 629463 at *2 (D. Colo. 2001). In addition, CTI is entitled to discover and cross-examine Mr. Keeler about when the attorney's advice occurred, how much research was conducted by the attorney, and what information DPW provided in seeking such advice. *Randolph v. PowerComm Const., Inc.*, 309 F.RD. 249, 367 (D. Md. 2015).

A. Mr. Keeler's testimony is relevant, material and unobtainable elsewhere.

It is well established that a lawyer is a "necessary" witness if his or her testimony is relevant, material and unobtainable elsewhere. *Carta ex rel. Estate of Carta v. Lumbermens Mut. Cas. Co.*, 419 F. Supp. 2d 23 (D. Mass. 2006); *World Youth Day, Inc. v. Famous Artists Merchandising Exchange, Inc.*, 866 F. Supp. 1297, 1302 (D. Colo. 1994). The testimony of Mr. Keeler is highly relevant and goes to a key issue in the case about whether DPW retaliated against CTI or whether DPW relied in good faith upon advice of counsel.

It is anticipated that DPW will argue its own personnel, such as Mr. Blaz, can testify about the defense and that Mr. Keeler's testimony is therefore unnecessary and obtainable elsewhere. However, it cannot be presumed that DPW's testimony will mirror Mr. Keeler's testimony. A lay witness cannot give the same depth of information, analysis and advice as Mr. Keeler. Fairness dictates that CTI should be able to challenge that testimony and the best way to do that is to cross-examine Mr. Keeler. More importantly, the question is not whether the lawyer will be called as a witness, but whether he "ought" to be called as a witness, if not by DPW, then by CTI. *Miller*, 2001 WL 629463 at *4. Only Mr. Keeler will be able to testify as to the precise content of the conversations or written advice he gave to DPW, the facts relayed to him by DPW, and the substance of his advice to DPW. The nature of the testimony is not peripheral to the case, rather it is highly material as it goes to the heart of the key defense DPW intends to present. Without the ability to subpoena Mr. Keeler and have him testify, CTI will be left with only the ability to try to impeach DPW's version of the advice and facts supporting the advice. *See U.S. v. Gouaz*, 2003 WL 22862653 at *3 (S.D. Fla. 2003) (disqualifying lawyer based on advice of counsel defense where substance of lawyer's advice and facts supporting such advice were material).

In addition, credibility is an issue in this case. CTI is entitled to test the credibility of DPW's assertions with respect to its claim of advice of counsel. The only way to do that is to question Mr. Keeler and discover evidence from him. *FDIC v. Isham*, 782 F .Supp. 524, 528 (D. Colo. 1992) (defendants' assertion of reliance upon advice of counsel defense required disqualification of lawyer and plaintiff's ability to discover information about the advice).

Finally, advice of counsel is not a complete defense; it is a defense only if advice is sought in good faith. *Phillips v. Ceribo*, 1982 WL 30792 at *4 (App. Div. D.Guam 1982). Reliance on advice of counsel must show what was discussed and why a party's reliance upon that advice

was either reasonable or prudent. *Attorney General of Guam v. Gutierrez,* 2011 Guam 10 at ¶ 14. CTI is entitled to discover and cross-examine Mr. Keeler about those facts.

The exceptions under Rule 3.7(a) (1) and (2) do not apply here. The testimony does not relate to an uncontested issue, *see People v. Pasillas-Sanchez*, 214 P.3d 520 (Colo. Ct. App. 2009) (exception does not apply to testimony about undisputed facts if testimony offered in support of disputed issue), and the testimony does not relate to the nature and value of legal services rendered in the case.

A. DPW will not suffer substantial hardship.

Rule 3.7(a)(3) provides that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless disqualification of the lawyer would work substantial hardship on the client. The substantial hardship exception to Rule 3.7 is construed narrowly. Accordingly, the "expense and possible delay inherent in any disqualification of counsel" without more, do not qualify as substantial hardship, *Estate of Andrews v. U.S.,* 804 F.Supp. 820, 829 (E.D.Va., 1992) (citations omitted). To find "substantial hardship," courts have required something beyond the normal incidents of changing counsel, such as substantial discovery conducted in the actual litigation. *See Lumbard v. Maglia, Inc.*, 621 F.Supp. 1529, 1540 (S.D.N.Y. 1985); *Carta*, 419 F. Supp. 2d at 31. Here, no discovery has taken place. Further, obtaining new counsel would not pose a substantial hardship for DPW, where the appeal was filed barely a month ago.

Typically the movant must satisfy a high standard of proof that disqualification is warranted. *See Buckley v. Airshield Corp.,* 908 F.Supp. 299, 304 (D. Md. 1995). But "[w]hen the attorney in question is so clearly aware before the fact of the potential conflict between his roles as advocate and witness, then the scrutiny usually applied to an opposing party's motion for disqualification is unnecessary, and the burden shifts to the attorney in question." *Klupt v.*

Krongard, 126 Md.App. 179, 728 A.2d 727, 741 (1999). Mr. Keeler knew or should have known that his client would raise reliance upon advice of counsel as a defense and he should have known that he was likely a necessary witness. He should have disqualified himself as trial counsel. A client should not be placed in the position where he must balance competing interests: whether to keep someone as his attorney, and thereby lose him as a witness, or whether to lose him as an attorney, but gain him as a witness. *Miller*, 2001 WL 629463 at *4.

If not disqualified, Mr. Keeler's dual role would taint this appeal and would give DPW an unfair advantage in advancing their defense – their counsel would act as both advocate and witness, essentially asking the OPA to believe his veracity in contrast to that of any impeaching or rebuttal witnesses. The need for disqualification of Mr. Keeler in this case is highlighted by the fact that the defense of advice of counsel will be a key issue in this case. CTI is entitled to show the elements of defense of reliance upon advice of counsel are not established.

II. ALL OTHER ATTORNEYS WHO ASSISTED OR PARTICIPATED IN RENDERING ADVICE TO DPW ARE DISQUALIFIED FROM ACTING AS TRIAL COUNSEL IN THIS APPEAL.

If DPW or Mr. Keeler relied upon legal research, assistance or advice from other attorneys, such as from the Office of the Attorney General or outside counsel, such lawyers would also be disqualified from acting as trial counsel in this appeal as they are likely to be necessary witnesses in the case. *See* Rule 3.7(a). Even if a party claims to have relied on the legal advice of one attorney, any relevant advice he received from other attorneys is also discoverable because it "bears on the issue of their reasonable reliance." *In re Gaming Lottery Sec. Litig.*, No. 96 CIV. 5567, 2000 WL 340897 at *2 (S.D.N.Y. Mar. 30, 2000).

III. BY ASSERTING AN ADVICE OF COUNSEL DEFENSE, DPW WAIVED THE ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES.

Where a party has placed in issue the decisions, conclusions, and mental state of its attorney who will be called as a witness to prove such matters, any privileged information goes to the heart of the claim, and "fundamental fairness requires that it be disclosed for the litigation to proceed." *Mitchell v. Superior Court*, 37 Cal. 3d 591, 605 (1984); *see XYZ Corp. v. United States*, 348 F.3d 16, 24 (1st Cir. 2003) (when a party asserts an advice of counsel defense, he waives the attorney-client privilege as to the entire subject matter of that defense); *Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co.*, 249 Conn. 36, 53 (1999) (party who put the substance of legal advice squarely at issue waived the attorney-client privilege concerning the communications that led to the initiation and continued pursuit of the case).

In *United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, 2017 BL 111755, No. 9:14-cv-230-RMG, 2017 WL 1282012 at *3 (D.S.C. April 5, 2017), the U.S. District Court of the District of South Carolina held that a defendant who asserts an advice of counsel defense waives attorney-client privilege to all communications that occurred during the alleged misconduct and extends "to advice received during the entire period the misconduct is alleged to have been ongoing," right up to trial. In addition, the court held that the waiver included privileged attorney work product prepared during that time period, even work product that was never communicated to the client. Similarly, in *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994), the court held that when a party affirmatively asserts a good faith belief that its conduct was lawful, "it injects the issue of its knowledge of the law into the case and thereby waives the attorney-client privilege." The court in *Cox* explained that the attorney-client privilege was "'intended as a shield, not a sword.' [A party] waives the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications."

DPW, Mr. Keeler, and all other attorneys should be required to turn over immediately all communications, documents and other information concerning DPW's advice of counsel defense

up to the date of the hearing in this matter, including but not limited to: all communications between Mr. Keeler, DPW, and any third parties; all communications between all other attorneys, DPW, and any third parties; and all work product of Mr. Keeler and any other attorneys concerning the defense, whether or not communicated to DPW.

CONCLUSION

For all of the foregoing reasons, Appellant Core Tech International Corp. respectfully requests that the Public Auditor and the Hearing Officer in this matter find:

1. That Assistant Attorney General Thomas Keeler be, and is disqualified, from acting as trial counsel for Appellee Department of Public Works in this appeal;

2. That any other attorneys who provided legal research or who assisted or participated in advice of counsel to Department of Public Works, are also disqualified from acting as trial counsel for Appellee Department of Public Works in this appeal; and

3. That Appellee Department of Public Works, Mr. Keeler and all other attorneys should produce immediately to Appellant all communications, documents and other information concerning the advice of counsel defense up to the date of the hearing in this matter.

Dated this 27th day of November, 2017.

ARRIOLA, COWAN & ARRIOLA
Counsel for Core Tech International Corp.

By: _____
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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

IN THE APPEAL OF:	)	DOCKET NO. OPA-PA-17-009
	)	
	)	
CORE TECH INTERNATIONAL CORP.,	)	**DECLARATION**
	)	
Appellant.	)	
	)	
	)	

JOAQUIN BLAZ makes this declaration under penalty of perjury under the laws of Guam and states:

1. I am employed by Guam Department of Public Works ("DPW"), Division of Highways, as its Acting Highway Administrator.

2. I am also a member of the Guam Transportation Group ("GTG") that was formed in early 2008 to provide policy direction and overall guidance related to the vision, goals and objectives of Guam's 2030 Guam Transportation Plan ("GTP"). The GTP defines Guam's long-term transportation improvement strategy, including the Route 1/ 8 Intersection Improvements and Agana Bridges Replacement Project No. GU-DAR-T101(001) ("Route 1/8 Project").

3. The Route 1/8 Project is with the U.S. Department of Transportation through the Federal Highway Administration. Its management is independent of that responsible for the Simon Sanchez High School Project No. 730-5-1057-L-YIG ("SSHS Project"). The SSHS

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Project, as I understand, is governed by representatives of the Guam Department of Education, Department of Land Management, Guam Economic Development Authority, Guam Environmental Protection Agency and DPW, under the Division of Capital Improvements Projects (CIP).

4. I am not involved in the daily operations of CIP nor am I aware of any of their procurement projects.

5. I am not aware of any animosity between DPW and Core Tech Internal Corp. ("Core Tech"). The numerous time extensions granted Core Tech on the Route 1/8 Project contradict any such belief.

6. Substantial Completion on the Route 1/8 Project was achieved on August 25, 2016.

7. Notwithstanding numerous promises to complete the Route 1/8 Project, as of August 23, 2017, Core Tech failed to complete outstanding items, including but not limited to the need to correct sidewalks that Core Tech itself agree failed to comply with the American with Disabilities Act (ADA), the parties Contract and the Plans and Specifications.

8. The timing of DPW August 23, 2017 Notice of Termination/Default was based on the advice of counsel who informed DPW that the Route 1/8 Project's Surety's Bond might not be enforceable if DPW failed to terminate prior to the one year anniversary of Substantial Completion (i.e., August 25, 2016). DPW's counsel provided this advice as early as June, 2017.

I declare under penalty of perjury that the aforementioned is true.

Submitted this 30th day of October, 2017.

By: _____

JOAQUIN BLAZ
Acting Highways Administrator
Department of Public Works