CONFIDENTIAL ATTORNEY - CLIENT COMMUNICATION

Johns-Manville **Internal Correspondence**

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Date: June 3, 1982

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Subject: Clifford L. Sheckler

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Within the past two weeks we have learned and confirmed that Cliff Sheckler did not attend Rutgers University for three years as he has previously testified, but that his involvement with Rutgers, if any, was limited to some Extension courses. This is particularly troublesome in that in 1978 Sheckler was caught on previous testimony that he was a graduate of Rutgers. The balance of this memo discusses the events surrounding the discovery and confirmation of this information, the consequences to the company and to Sheckler and the action that has been taken in view of these events.

FACTUAL BACKGROUND: As early as the Borel and Karjala cases, Cliff Sheckler had testified that he was an engineering graduate of Rutgers University. In 1978 in a deposition being taken in Louisville, Kentucky, Cliff was examined extensively about his being a graduate of Rutgers. That deposition was recessed for the evening and after everyone had retired, Cliff called me from his hotel room and said that it was urgent that he speak with me. I met with Cliff and he told me, for the first time, that he was not in fact a graduate of Rutgers. He indicated that he had attended Rutgers for three years majoring in Construction Engineering, but after the death of his father was financially unable to continue working at Johns-Manville, help out with family support, and continue his education. He indicated that he had gotten caught up in an earlier statement that he was a graduate of Rutgers and now wanted to set the record straight. I indicated to Cliff that was exactly the course of action we would take, and that the next morning we would clear up the record. I told Cliff that much like going to the dentist it would hurt for a few minutes and then it would be over, but let's make sure we had everything correct, and he assured me that we did. At that time I did not directly ask him the question of whether he had attended Rutgers at all. Frankly, in the context of the discussion and our relationship with Cliff, it never occurred to me to make such an inquiry. The next morning I revealed this

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information to Lively, and again, we asked Cliff if we had the story straight and he assured us that we did. The correction was made on the record, and since that time Cliff, when asked about his education, has indicated that he attended Rutgers for three years.

In the present trial in Biloxi, Mississippi, we had Sheckler listed as a witness by deposition. Early in the case, plaintiffs' counsel, Ron Motley, was overheard bragging about his proof that Sheckler had never set foot on the Rutgers campus and how anxious he was for us to read the Sheckler deposition. Lively Wilson advised me of this turn of events and we proceeded to investigate. Rutgers is one university that is reticent about disclosing information without written authorization from the individual involved. Accordingly, I spoke with Cliff and asked him to sign a release which would authorize us to obtain his transcript in order that we might put this matter behind us once and for all. Cliff, in a very untypical fashion, indicated that he had maintained no files and no personal records of his attendance at Rutgers, that he was tired of the litigation, that he did not want to be involved with Motley anymore, and that he would not sign a release for his transcript from Rutgers. Subsequently, utilizing contacts of David Gross's office with a trustee of Rutgers, we were able to ascertain that Sheckler was never a full time student at Rutgers, and never made application to become a student at Rutgers.

Subsequently, Cliff called me and in a far more candid and cooperative mood indicated to me that he had not been a student at Rutgers, but that his association with the university was limited to some Extension courses given at Middlesex County Vocational School. In addition, he claims to been involved in a program with the United States government at Rutgers University that involved drawing plans of historic buildings in New Jersey for some archival purpose. Cliff offered no particular explanation for his earlier testimony other than to say he was sorry that it had happened.

A recheck of company records confirmed a showing of three years of college with no particular institution specified. We are attempting to verify the attendance at the Extension courses, but are doubtful that that inquiry will prove fruitful as those records are generally not kept or maintained.

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Since 1978, there has been no testimony as to his graduating from Rutgers, but on numerous occasions, Cliff has testified that he attended Rutgers for three years and studied engineering in one form or another. The testimony subsequent to 1978 on his educational background has not been extensive as it is not particularly germaine to any of his testimony.

ISSUES: The issues arising from this discovery are several and are hereafter enumerated:

1. The consequences of incorrect or misleading testimony on judgments in favor of Johns-Manville in cases where Sheckler has testified.

2. The personal consequences, if any, to Clifford Sheckler.

3. The continued representation of Sheckler by J-M in cases in which he is named as a direct party defendant (New Jersey and Louisiana).

4. The effect of this discovery on cases in which Sheckler is listed as a witness by answer to interrogatories, pre-trial statements, and cases in which a Sheckler deposition is on file.

5. The future course of action to be taken.

DISCUSSION:

(A) Impact on judgments: The immediate issue of greatest impact to J-M becomes whether or not in a case where Johns-Manville prevailed or plaintiffs obtained a low verdict or a low settlement, would the inconsistent Sheckler testimony alone be sufficient to set aside the judgment or settlement and necessitate a new trial.

I believe the answer to that question to be "no".

Rule 59 of the Federal Rules of Civil Procedure and most state counterparts thereof provide that motion for new trial shall be served not later than 10 days after entry of judgment. Therefore, motions for new trial would not be appropriate in any of the cases where Sheckler testimony was utilized.

Rule 60 (b) of the Federal Rules of Civil Procedure and its state counterparts provide for relief from judgment for various grounds including fraud, misrepresentation,

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or other misconduct of an adverse party. However, even if Sheckler's statements constitute perjury, general perjury is not considered such fraud as warrants a new trial. In numerous circuit court opinions of recent vintage perjury has specifically been held not to be grounds for a new trial. Our argument and the supporting precedent finds added weight that Sheckler's testimony about his education should be given minimum impact as primarily he testified as a fact rather than opinion witness. Based upon existing precedent Sheckler's inconsistent testimony should be considered harmless error.

While precedent is on our side I do not mean to minimize the risk involved. We must anticipate that some plaintiffs counsel will file motions to set aside verdicts or settlements, and because we are not the most popular kid in town with some courts, we may anticipate that some court somewhere may grant plaintiff's relief. In terms of a course of action we are preparing a brief to be utilized in any jurisdiction to combat a motion to set aside a judgment or a settlement.

(B) Perjury. Perjury is covered in U.S. Code Title 18, Sect. 16.21. Inasmuch as Sheckler is not our client I will not belabor the perjury point. Suffice it to say that his statements must not only be false, but must have been material for it to constitute perjury. It is unfortunate that Sheckler has testified so often and corrected a prior inconsistency on his education regarding graduation because there can be no issue that he had ample opportunity to correct his testimony about his education and would be held to have willfully failed to do so. Accordingly, the only question remaining is the materiality of the untrue statement. There is no question that his college education or lack thereof is and was irrelevant for the purposes for which he is testifying and, accordingly, are arguably immaterial. There is a case, Beckanstin v. U. S., 232 F.2d 1 (5th Cir. 1956) which appears to be directly on point in which it was ultimately determined that false testimony about graduating from MIT was held not to be perjury. In summary, Sheckler's defense must be that his inconsistent statements were not material and, accordingly, do not constitute perjury.

Cliff will have to worry about any perjury indictments himself, but we cannot ignore this possibility as to the obvious spin-off effect on J-M.

(C) Dual representation. Pursuant to our agreement with Sheckler and the by-laws and insurance policies of the company, we are defending Cliff in cases in New Jersey and

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Louisiana in which he has been named as a party defendant. To that extent David Gross represents him personally in New Jersey and Jerry Weigel represents him in Louisiana. I see no reason why we should not continue to provide Cliff a defense in those cases. Obviously, if he is deposed or is required to testify in any of those cases, he would have to testify very candidly regarding his Rutgers experience or lack thereof and his previous Rutgers testimony. We certainly have an obligation to defend him for his activities as an employee, and tactically, we have the total control of the case factor to be considered.

A much more difficult question is the ethical one which presents itself to Gross and Weigel inasmuch as Cliff has been deposed in both the New Jersey and Louisiana cases. Drawing from Canon's disciplinary rule 1-102 (A)(4) states "a lawyer shall not engage in conduct involving dishonesty, deceit, fraud, or misrepresentation". Disciplinary rule 7-102 (B)(1) states, "a lawyer who receives information clearly establishing that his client has, in the course of the representation, perpetrated a fraud upon the person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except the information is protected as a privileged communication." The disciplinary rules go on to provide that if advised by counsel to make a correction in the record or to the tribunal and the client refuses to do so, that the lawyer must withdraw from representation and independently advise the tribunal of the misrepresentation which has taken place.

This presents a real dilemma for Gross and Weigel. As the disciplinary rules do not clearly state what is a fraud, they must decide what to advise Cliff. On one hand they might decide to advise him to correct the record in New Jersey and Louisiana, which could be beneficial to J-M, but at the same time harmful to Cliff as their individual client in that it could create a perjury inquiry. On the other hand, they may decide that Cliff should do nothing and simply withdraw him as a witness in the case. This would normally be satisfactory, but because he is an individual defendant he may be called upon in the case in New Jersey or his deposition be read independently in Louisiana, in which case the repercussions would be harmful to J-M.

We have discussed numerous ramifications of the ethical considerations, and will withhold any ultimate decision

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until we complete our investigation of Cliff's Extension course activities. Rest assured, that neither anyone at J-M nor any of our local counsel will even entertain the appearance of impropriety in the handling of this matter.

(D) Ramifications on existing cases: With the exception of cases in New Jersey and Louisiana Cliff is not a party defendant in any other cases, and in no circumstances is he our "client". Because he is not our client, we do not have a responsibility under the Code of Professional Responsibility to correct any existing record. Further, I do not believe we have a legal responsibility to take any action concerning this discovery. However, I do strongly feel that we have an ethical responsibility to avoid any appearance of impropriety, and, accordingly, I intend to "delist" Sheckler as an potential witness in all pending and future J-M cases. This will entail removing his name as a potential witness in answers to interrogatories and pre-trial statements and withdrawing his deposition where it has been filed with the court in pending cases. Were we not to do so, I suspect we would be faced with additional depositions of Sheckler to investigate this point which would him tactically devastated as a witness particularly in light of his previous correction of his testimony relative to being a graduate of Rutgers. More than that, however, is that one must question other aspects of his testimony and to avoid the appearance of impropriety I feel we have no option but to discontinue the use of Cliff as a witness regardless of the impact that it may have on our trial capabilities. We will simply go forward with other witnesses and do the job.

In fairness you should know that there has been some sentiment expressed that in some transcripts in pending cases Sheckler has not been asked about his education at all, and has not been cross-examined on the same. In those cases we could continue to keep Cliff listed as a witness and wait for plaintiffs reaction. In other words, if the plaintiffs made no move to depose Sheckler, we could proceed to read his transcript into evidence with impunity. While this is technically correct, it is a course of action that I personally do not approve of and have vetoed. Again, I think there is the appearance of impropriety, and secondly, I think it subjects the company to the potential of rampant adverse publicity and the trafficking upon a legal loop-hole. However, as I started this paragraph, you should be aware that there is a school of thought that adheres to this course of conduct. Just as emphatically I disapprove of that suggested course of conduct.

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(E) Future action.

1. Senior management of the company must be briefed upon this subject as there may be some publicity surrounding it.

2. Curt Linke must be given information to enable him to respond to inquiries.

3. As indicated above we will proceed with the delisting of Sheckler as a witness in pending cases, and will not use him in future cases.

4. We will prepare a brief to be used to counter any motions to set aside judgments or settlements.

5. We will prepare a standard motion to quash any future depositions of Sheckler in cases where we delist him as a witness on the theory that if he is not a witness there is no reason to depose him on other than factual issues and he has already been deposed on those matters. (I might add that there could be some effort to proceed with additional Sheckler depositions on the grounds that they are relevant to punitive damage issues. While I do not feel these arguments have merit, we must be prepared to deal with them.)

6. We will continue to provide Cliff with the defense to which he is entitled. Whether this representation continue to be through David Gross and Jerry Weigel will depend upon future investigation of Cliff's involvement with Extension courses at Rutgers and a resolution of potential ethical questions facing David and Jerry.

7. That Cliff be advised that in the event of any perjury indictments or proceedings, that J-M will not be responsible for his defense, and that our sole contribution would be in cooperation with his private counsel.

8. That John Lonnquist in the Washington office be briefed on this matter in order that he might be prepared for questions he receives in Washington, and possible political ramifications of the Sheckler matter.

CONCLUSION: I have attempted to deal with all of the ramifications surrounding the Sheckler dilemma. This matter was discussed extensively at a impromptu Regional

Coordinators meeting in Atlanta on Friday last and the positions set forth herein represent the collective thinking of the Regional Counsel. If you have other questions regarding this matter or the course of action outlined herein, please do not hesitate to contact me.

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