IN THE COURT OF APPEALS OF
THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re: Leonard Louis Prescott,
Appeal from July 1, 1994 Gaming
Commission Final Order

Ct. App. No. 003-94

Leonard Prescott,
Appellant,

vs.

Ct. App. No. 004-95

Shakopee Mdewakanton Sioux
(Dakota) Community Business
Council,
Appellee.

MEMORANDUM OPINION AND ORDER

Summary

These cases are before the Court of Appeals on two issues: whether the trial court judge correctly declined to recuse himself in each case below, and whether the trial court also correctly refused to disqualify the counsel of the Defendants/Appellees in each case below.[1]

Both issues arise from the facts that the three persons who have been appointed by the Shakopee Mdewakanton Sioux (Dakota)

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[1] Ct. App. File No. 003-94 was File No. 041-94, below, and was decided by Judge Buffalo on December 12, 1994. Ct. App. File No. 004-95 was File No. 043-95, below, and was decide by Judge Buffalo on April 5, 1995.

Community ("the Community") to serve as judges of this Court are also attorneys, engaged in the practice of law; from the fact that the persons who serve as counsel for the Defendants/Appellees in these cases also serve as judges for the Courts of other Indian tribal governments; and from the fact that the persons who serve as judges in these two cases may, in other matters before other tribal courts, appear as counsel before the persons who serve here as Defendants/Appellees' counsel.

No allegations of wrongdoing, or improper contact, or improper influence, relating either to the judges of this Court or to the counsel for Defendants/Appellees has been made. Rather, the Plaintiff/Appellant contends that the impartiality of the judge below--and all of the judges on the Court of the Shakopee Mdewakanton Sioux (Dakota) Community--might reasonably be questioned in the matters at bar, simply because, in the Plaintiff/Appellant's words, "...interlocking contacts between the Judges and Community Counsel give rise to a situation where the Judges [sic] impartiality might reasonably be questioned." (Appellant's brief, at 3).

On this basis, the Plaintiff/Appellant contends that Rule 32(b)[2] of the Rules of Civil Procedure of the Court of the Shakopee

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[2] In its entirety, Rule 32 of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux Community provides:

> Rule 32. Disqualification of Judge.
>
> (a) Any judge of the Court of the Shakopee Mdewakanton Sioux Community shall disqualify himself or herself in any proceeding, or portion of a proceeding, in which, in his or her opinion, his or her impartiality might reasonably be questioned.
>
> (b) A judge of the Court of the Shakopee Mdewakanton Sioux

Community also shall disqualify himself or herself in any proceeding, or portion of a proceeding, in the following circumstances:

(1) Where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he or she served as a lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he or she has served in governmental employment, and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) Where the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) Where the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the knowledge of the judge likely to be a material witness in the proceeding.

(c) A judge should inform himself or herself about his or her personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the financial interest of the judge's spouse and minor children residing in the judge's household.

(d) A judge may refer the question of whether to disqualify himself or herself to another judge on the Court. In the case of such referrals, Associate Judges shall refer the questions concerning their disqualification to the Chief Judge for decision; the Chief Judge shall refer questions concerning his or her disqualification to the Senior Associate Judge for decision.

(e) In deciding questions concerning disqualification, in matters being heard by a Three Judge Panel under the provisions of Rule 25 or Rule 31, a Judge may be disqualified from participating in one portion of a mater but not all portions of a matter, if the facts and law, and the Judge's position with respect to them, are substantially

Mdewkanton Sioux Community requires that all of the judges of this Court disqualify themselves. And the Plaintiff/Appellant asserts that the same "interlocking contacts" require that Defendants/Appellees' counsel be disqualified, to "dispel appearances of impartiality as well as to promote and protect public trust in its judicial system...". (Ibid., at 8).

As to the Plaintiff/Appellant's first contention, the trial judge observed that Ordinance No. 02-13-88-001 ("the Court Ordinance"), which created this Court, defines the organization and powers of the Community's judicial arm. He held that the Court Ordinance establishes (and limits) the complement of the Community's judges at three; it defines the manner in which the Court's judges are appointed; and it gives neither the Court nor any other officer of the Community the authority to appoint additional judges, absent a vacancy on the Court due to the death, resignation, or removal of a judge. Therefore, the trial judge, invoking the common law Rule of Necessity, held that, if these two cases are to be heard by this Court, they must be heard by the judges who have been appointed by the Community, interlocking connections or not.

As to the Plaintiff/Appellant's second contention--that counsel for Defendants/Appellees should be disqualified--the trial judge held that the motion raised issues under the Minnesota Rules of Professional Conduct or the Minnesota Canons of Ethics, and that he had no authority to interpret or enforce either body of rules.

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different in different portions of the matter.

He therefore held that, if Plaintiff/Appellant believed that Defendant/ Appellee's counsel had committed an ethical breach, a complaint to that effect should be filed with the Minnesota Lawyers Board of Professional Responsibility. He went on to opine, however, that, it "strains credibility" to assert that Defendants/Appellees' counsel violated any professional rules merely by the fact that they appeared before the Court of the Community, and also served as judges on the courts of other Indian tribal governments where the persons who serve here as judges may appear as counsel. (Opinion of Judge Buffalo, Court File No. 041-94 [Dec. 8. 1994], at 8).

Discussion

This Court takes very seriously any suggestion that its decisions may be regarded by litigants, or members of the Community, or the public generally, as being biased. But in our admittedly subjective view, that suggestion, in the cases at bar, is unfounded. And, perhaps more compellingly, from an objective standpoint it is pointless, because, as the trial judge correctly concluded, if the judges of this Court do not hear the Plaintiff/Appellant's cases, there is no judicial remedy available to the Plaintiff/Appellant within the Community's government.

It is undeniably true that, for historical and other reasons, the size of the bar which practices for Indian tribes in this nation is relatively small, and attorneys who serve tribes may tend to encounter one another more frequently than, perhaps, attorneys

in other areas of practice. It is true that each of the judges of this Court has encountered, and may in the future encounter, in different contexts, the attorneys who serve as counsel for Defendants/Appellants. Neither the judges of this Court nor the attorneys for Defendants/Appellant have attempted to hide this fact. Indeed, the facts were the subject of a formal "Letter of Disclosure", dated May 31, 1994, which appears in the record of this matter.

It also bears noting that this phenomenon, where one or more judges has encountered attorneys and parties in other contexts, is not one-sided, in these two cases. One of the judges of this Court, Judge Jacobson, in the past served as co-counsel, for a different client, with one of the attorneys who represents the Plaintiff/Appellant. And before he was appointed to this Court, Judge Jacobson also represented the Plaintiff himself, in certain matters unrelated to the facts of these cases. At a different level of connection, two of the judges of this Court, including the trial judge in these cases, were appointed to the Court at a time when the Plaintiff was Chairman of the Community.

But no judge of this Court has evinced any personal bias with respect to any party to these cases. None of the judges of the Court have served as counsel to either party concerning these cases, nor are any judges a material witness concerning these cases. And no judge, and no family member of a judge, has any interest in these cases, financial or otherwise. Therefore, there clearly is no requirement that any judge must disqualify himself

under the provisions of Rule 32(b) of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux Community.

But the Plaintiff/Appellee asserts that, nonetheless, Rule 32(a) of the Rules, requires each of us to disqualify ourselves, because the impartiality of each of us "might reasonably be questioned".

We do not agree--for the reasons we have just set forth. But even if we did agree, the matter would be moot, because we clearly are the only judges which the Community has, and we have no power to appoint other or substitute judges.

The Court Ordinance is extremely specific, with respect to the number of judges, and the appointment and removal of judges. Section IV.A. of the Court Ordinance provides:

> Appointment and Recall of Judges. There shall be three Judges on the Tribal Court. Except for the initial panel of Judges, who shall be selected pursuant to Section VI, the Judges of the Shakopee Mdewakanton Sioux Tribal Court shall be appointed by the Chairman with the advice and consent of the General Council voting by secret ballot at a meeting or by mail referendum. Balloting shall be supervised by the Court and if a special meeting is held to confirm an appointment, mail ballots shall be available to those members who request them. If a majority of the General Council does not disapprove a nominee within 30 days of written notice of nomination by the Chairman, such nominations shall be deemed to be approved. Once confirmed by the Council, the Judges of the Shakopee Mdewakanton Sioux Tribal Court shall be subject to recall with or without cause only upon the passage of a Resolution of Recall by absolute two-thirds majority of all of the enrolled and eligible voting members of the Shakopee Mdewakanton Sioux Community. Recall votes may only be cast by mail referendum or by secret ballot at a Special Meeting of the General Council.

Section V.D. of the Court Ordinance provides:

> Extraordinary Appointment of Judges. If the Chairman

and the General Council fail to appoint and approve any nomination to fill any vacancy on the Tribal Court within 90 days of the resignation, death, or recall of a Judge or Judges, the remaining Judge or Judges shall have the authority and the duty to appoint a qualified person or persons to fill the vacancy. Appointments made by the Tribal Court on this extraordinary authority shall be effective upon delivery of written notice to the Chairman and the Secretary-Treasurer.

Section VI of the Court Ordinance provides:

> Initial Panel of Judges. The Council hereby approves the following process to select the initial panel of Judges for the Tribal Court:
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> > A. Nominees: The following persons are hereby appointed to serve as Judges:
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> > Henry Buffalo, Tribal Attorney, Fond du Lac Band of Chippewa Indians.
> > Kent P. Tupper, Tribal Attorney, Minnesota Chippewa Indians; Nett Lake Band of Chippewa Indians; Grand Portage Band of Chippewa Indians.
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> > B. Qualifications of Judge. All Judges of the Tribal Court shall be Attorneys at Law.
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> > C. Judicial Appointment. The persons appointed pursuant to Section VI A shall appoint a third Judges within 30 days of passage of this resolution. That appointment shall be effective upon delivery of written notice to the Secretary-Treasurer.

Finally, Section VII of the Court Ordinance provides:

> Appeals Cases shall be heard by one Judge, under assignment procedures which shall be determined by the Court. Upon the motion of any party, a matter may be certified for appeal to a three Judge panel of the full Court by any Judge of the Court. Motions for appeal shall be filed with the clerk of Court and served upon all parties not less than 15 calendar days after the date of entry of a final order for judgment. If the motion for certification is not granted within 30 days, no further appeal shall be granted.

Nowhere, in any of these provisions, is the slightest suggestion that the Community intended that the judges of the Court

could create additional judgeships, if some or all of the sitting judges recused themselves. This is not to say that the Court does not have inherent authority to appoint special masters, to hear certain matters and to make recommended decisions to the Court. But counsel for Plaintiff/Appellee, when asked about his views on special masters during the oral argument in these cases, indicated that if the authority to decide this controversy, finally and without appeal to the three judges of the Court, could not be vested in a special master, then the Plaintiff/Appellant's objections would not be resolved.

The Plaintiff/Appellant asserts to vest such power actually is possessed by this Court, under the following language of Section II of the Court Ordinance:

> ...The Tribal Court shall have the authority to formulate appropriate equitable and legal remedies to secure the protections of tribal law and the Indian Civil Rights Act for the Shakopee Mdewakanton Sioux Community and other Indians within its jurisdiction.

But this argument confuses remedies which the Court can fashion for a case it hears with the structure of the Court itself. If, in a matter over which this Court has jurisdiction, the Plaintiff establishes that he has been wronged, then indeed the Court Ordinance gives us considerable latitude in fashioning a remedy. But the Community has vested <u>in this Court</u> the duty to decide whether the Plaintiff has been wronged, and by the very specificity of the appointment and removal provisions in the Court ordinance the Community has made it clear that that deciding authority cannot be conveyed away by us.

Hence, the trial court correctly applied the Rule of Necessity--an ancient rule which has been adopted by courts of virtually every jurisdiction in the United States. See e.g., United States v. Will, 499 U.S. 200 (1980); and State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (Minn. 1954). The rule fundamentally is: it is error for a judge to disqualify himself or herself--even if he or she might otherwise do so--if there is no other judge to decide a case.

As to the decision concerning Plaintiff/Appellant's motion to disqualify Defendant/Appellee's counsel, we think the trial judge's decision was correct, albeit we believe that he read the Court's powers too narrowly. The trial judge held that any contention with respect to the propriety of the actions of Defendants/Appellees' counsel was a matter only for the Minnesota Lawyer's Professional Responsibility Board or the Minnesota Supreme Court. But this Court, under Rule 3 of its Rules of Civil Procedure, has established that membership before the bar of the Community is a prerequisite to practice before us. We believe that Plaintiff/Appellant is correct when he asserts that it is implicit, under that Rule, that we can establish and maintain standards of professional conduct for counsel practicing before us.

That having been said, however, we think that the circumstances at bar--where the offense alleged by Plaintiff/Appellant is simply being party to the same set of "interlocking relationships" which the Defendant/Appellees' counsel have objected to in the context of the judges of the Court; where

there has been no suggestion of any personal, professional, financial, or ethical misconduct on the part of counsel--we think the trial court clearly was correct in denying the motion to disqualify.

Order

For the foregoing reasons, the Orders of the trial court denying the Plaintiff's motions for recusal and for disqualification of Defendants' counsel, in File No. 041-94 and File No. 043-94 are AFFIRMED.

November 7, 1995

John E. Jacobson
Judge

Henry M. Buffalo, Jr.
Judge

Robert Grey Eagle
Judge

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