

**Senator Charles Grassley
Supplemental Questions for the Record**

**Stephen R. Bough
Nominee, United States District Judge for the
Western District of Missouri**

A member of the Missouri Bar recently drew my attention to your participation in *Marcus Champion, et al. v. High-Tech Institute, Inc.*, Case No. 4:11-CV-00506-SOW (W.D. Mo.), a case originally assigned to your former employer, Senior United States District Judge Scott O. Wright. Prior to your appearance in the case, plaintiffs' counsel moved the court on April 24, 2013, to transfer the case to another judge. Senior Judge Wright denied that motion with a few hours. One week later, on May 1, 2013 – nearly two years after plaintiffs filed their complaint – you entered an appearance. The next day, on May 2, 2013, Senior Judge Wright issued a perfunctory order recusing himself and transferring the case to another judge for further proceedings. Your entry of appearance was apparently the reason for Senior Judge Wright's *sua sponte* recusal. According to the court's electronic dockets, you made no filings in the case until you noticed your withdrawal on December 9, 2013.

As you are no doubt aware, Missouri Rule of Professional Conduct 4-3.1 forbids you from filing frivolous motions or otherwise acting in bad faith. Put otherwise, it imposes upon you “a duty not to abuse legal procedure.” Mo. R. Prof. Conduct 4-3.1, Comment 1.

One such abuse of legal procedure is a litigation gambit known as “judge shopping:” when an attorney having a preexisting relationship with a judge creates a conflict by noticing an appearance in a case “solely or primarily for the purpose of disqualifying the judge.” *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1264 (5th Cir. 1983). This practice, widely criticized by federal and state courts, “creates the impression that, for a fee, the lawyer is available for sheer manipulation of the judicial system” and “brings the judicial system itself in disrepute.” *Id.* at 1265. See *United States v. Phillips*, 59 F.Supp. 2d 1178,1180 (D. Utah 1999) (judge shopping “invite[s] public skepticism of the ability to receive justice in our court system” and “is universally condemned by the courts”) (citation omitted); *Grievance Administrator v. Fried*, 570 N.W.2d 262, 267 (Mich. 1977) (judge shopping “is prejudicial to the administration of justice” and “surely exposes the legal profession and the courts to contempt and ridicule”). The Michigan Supreme Court has concisely summarized how courts throughout the country view judge shopping: it “is contrary to justice, ethics, honesty, and good morals. It is wrong.” *Fried*, 570 N.W.2d at 267. It is grounds for professional discipline as well. See, e.g., *id.* at 268.

With these preliminary observations in mind, please answer the following supplemental questions for the record related to your participation in *Champion*.

- 1. Please explain why you noticed your appearance in *Champion* on plaintiffs' behalf. Include in your answer the name and contact information of any person who requested that you represent plaintiffs or approached you about appearing on plaintiffs' behalf.**

Response: In March 2013, one of the lead trial counsel for the plaintiffs in the *Champion* case left his firm and withdrew as counsel. At that point, Mr. Gene Graham, the lead trial counsel, contacted me about becoming co-trial counsel. I have had a decade long professional relationship with Mr. Graham and I was asked to serve as co-trial counsel, as well as to advise on strategy and federal procedure.

I would like to emphasize that the decision to enter my appearance in the *Champion* case was made on factors entirely irrelevant to the judge to which the case was assigned. At the time of my entry of appearance, Judge Wright was assigned to the case but due to his declining health he was no longer handling jury trials and the parties understood that the case would need to be reassigned to a judge who would ultimately set a trial date. The decision to enter my appearance was based on my professional relationship with plaintiffs' counsel, the merits of the case, the fact that other plaintiff counsel had recently withdrawn from the *Champion* case and the need for experienced trial counsel.

Gene Graham
White, Graham, Buckley & Carr
19049 E. Valley View Parkway, Suite C
Independence, MO 64055

- 2. At the time of your appearance in *Champion*, what was the nature of your relationship with Senior Judge Wright? Following your clerkship, did you maintain personal contact with him?**

Response: After Judge Wright's law clerks completed their clerkships it was his policy to include them on his conflicts list – meaning that he would not be assigned to any matter they were involved in – for two years. This same policy was followed for me. After those two years I would occasionally have cases in front of him. In the mid-2000's, as Judge Wright grew older, I began spending more time with him – we would go to lunch frequently and I would help organize law clerk events and important birthdays. Because of this closer personal relationship, in approximately 2006, Judge Wright added me to his conflicts list to ensure that there would never be an appearance of impropriety under Canon 2 of the Code of Conduct for United States Judges.

- 3. Please describe with particularity all legal work you performed on plaintiffs' behalf between your entry of appearance on May 2, 2013, and your withdrawal on December 9, 2013. Please provide all documentation supporting your response, including billing records, appropriately redacted to omit any information protected by the attorney-client privilege, that substantiate the nature and amount of work done and any filings you made with the court during that time period.**

Response: Almost 99% of my work is on a contingent fee agreement and I never bill or record hours on such cases, including this one. Based on a review of emails, my calendar

and my case file I am able to list the following activities with particularity, but I am not able to provide additional documentation due to the attorney-client privilege. I also engaged in numerous phone conversations regarding decisions to file motions, decisions to not oppose certain defense motions and the content of the plaintiff's motions and responses, but I do not have a specific record of such calls.

5/02/2013	Review email and attachments from defense counsel and court documents
5/06/2013	Receipt and review of amended deposition notice of Sandra Jones
5/06/2013	Receipt and review of deposition notice of Faith Perdue
5/07/2013	Review joint motion to amend/correct 5 th Amended Scheduling Order
5/07/2013	Review plaintiff's unopposed motion for extension of time
5/10/2013	Receipt and review of amended deposition notice of Faith Perdue
5/12/2013	Receipt and review of amended deposition notice of Faith Perdue
5/13/2013	Review notice of hearing, contact plaintiff counsel regarding my unavailability
5/16/2013	Receipt and review of amended deposition notice of Sandra Jones
5/22/2013	Review scheduling order setting trial for 1/27/2014 and order granting plaintiff's motion for extension
5/27/2013	Receipt and review of deposition notice of Chuck Torres and Marilyn Knight
6/07/2013	Receipt and review of amended deposition notice of Erin Reed and Chuck Torres
6/11/2013	Receipt and review of amended deposition notice of Marilyn Knight and notice of intent to serve document subpoenas
6/13/2013	Receipt and review of amended deposition notice of Marilyn Knight
6/14/2013	Receipt and review of notice of filing of intent to serve document subpoenas
6/15/2013	Review three emails between defense and plaintiff counsel regarding confidential documents
6/17/2013	Receipt and review of third notice to take deposition of Marilyn Knight
6/20/2013	Review email, ECF filing and notice of videotaped deposition of Terrie Payne
6/24/2013	Review email and defendant documents DEF-AND-EMP000818-855

6/25/2013 Receipt and review of affidavit of service to SEMO, Truman State, William Jewel College, Avila University, Rockhurst University, University of Missouri, Central Missouri State and Northwest Missouri State

7/01/2013 Review documents produced to defendant via email ANTHEM 00577-591

7/09/2013 Receipt and review of amended notice to take deposition of Terrie Payne

7/11/2013 Receipt and review of amended notice to take deposition of Marilyn Knight

7/11/2013 Receipt and review of plaintiff's motion for extension of time to respond to summary judgment, defendant's motion to file six additional pages and order regarding same

7/15/2013 Review defendant's motion for summary judgment and suggestions in support

7/24/2013 Receipt and review of amended notice to take deposition of Marilyn Knight

8/05/2013 Receipt and review of motion for extension of time to respond to defendant's motion for summary judgment

8/06/2013 Review order granting extension

8/12/2013 Review motion to seal confidential documents and order granting

8/12/2013 Review opposition to motion for summary judgment

8/13/2013 Review defendant's motion to seal documents and order granting

8/28/2013 Review defendant's motion to extend time and order granting

8/30/2013 Review defendant's motion for additional pages and order granting

9/03/2013 Review defendant's motion for leave to file documents under seal and reply to motion for summary judgment

9/04/2013 Review order granting defendant's motion to file under seal

9/26/2013 Review plaintiffs' motion for oral argument

10/03/2013 Review defendant's opposition to motion for oral argument

11/06/2013 Review amended scheduling order

11/27/2013 Review notice of hearing

12/05/2013 Review notice of hearing cancellation

12/05/2013 Review order granting oral argument

12/05/2013 Review notice of hearing
12/09/2013 File motion to withdraw

4. Please explain why you noticed your withdrawal from *Champion* prior to resolution of the case.

Response: While under consideration for nomination to the District Court, I began consulting with several judges who had recently gone through the nomination process, including Judge Beth Phillips, to whom the *Champion* case had been reassigned. As our conversations increased, Judge Phillips believed this could create the appearance of impropriety under Canon 2 of the Code of Conduct for United States Judges. On December 6, 2013, Judge Phillips *sua sponte* recused herself from the case of *Lagas v. Verisma Systems, Inc.* 4:13-cv-01082-SWH because I was lead counsel and had a pending motion. The case was then randomly reassigned to Judge Ortrie Smith. Judge Smith, another judge with whom I consulted, then transferred the case to Magistrate Judge Sarah Hays.

Realizing that one of my ethical duties is candor to my client and co-counsel, I informed Mr. Graham that I believed Judge Phillips was going to recuse herself from all cases in which I was involved to avoid the appearance of impropriety. We decided it was in the best interest of the clients that I withdraw my entry of appearance to avoid *sua sponte* recusals that would delay the case. The parties in the *Champion* case notified the court of settlement on January 2, 2014.

5. Prior to noticing your appearance in *Champion*, did you consult any caselaw or ethics rules relevant to the creation of a conflict with a judge intended to occasion the judge's recusal? If so, cite the precedents, rules, or other materials you consulted.

Response: No. I did not enter my appearance with the intention of causing the judge's recusal. I fully intended to – and did – provide legal counsel to the plaintiffs and intended to serve as trial counsel if needed.

6. Have you appeared in any other cases before Senior Judge Wright in which you were Counsel of Record at the inception of the matter? If so, please provide the caption and case number for each such case.

Response: Yes. I have appeared in the following cases:

Madden et al. v. Great-West Life & Annuity, 4:02-cv-00186-SOW

Bray v. Ford Motor Company, Inc., 4:02-cv-00315-SOW

Pritchett et al. v. Cottrell, Inc., 4:04-cv-01004-SOW

Scott et al. v. Cottrell, Inc., 4:04-cv-01005-GAF

Todd et al. v. Cottrell, Inc., 4:04-cv-01006-GAF

Fix et al. v. Cottrell, Inc., 4:04-cv-01107-SOW

Paradise et al. v. Cottrell, Inc., 4:04-cv-01108-SOW

Fix et al. v. Cottrell, Inc., 4:05-cv-00006-GAF

Hancox v. Cottrell, Inc., 4:05-cv-00314-GAF

Newton v. State Farm Fire & Casualty Co., 4:14-cv-00158-DGK

7. **Have you every joined Counsel of Record in an ongoing lawsuit that was pending before Senior Judge Wright? If so, please provide the caption and case number for each such case.**

Response: No, not to my knowledge. I have, however, entered my appearance in numerous ongoing lawsuits to provide assistance to current legal counsel, including the following lawsuits:

Clark v. Morarity, Jackson County, Missouri, Case No. 1416-CV00628

Rice v. Allstate, 8th Circuit Court of Appeals, Case No. 13-1878

Berhorst v. Liberty Tow et al., Clay County, Missouri, Case No. 09CY-CV003953

Freeman v. Shaw, Cass County, Missouri, Case No. 07CA-CV03759

Comeaux v. Malone, Jackson County, Missouri, Case No. 04CV235222