



ON THE CASE

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Opioids MDL judge ousts ex-prosecutor from two cases against Endo

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(Reuters) - U.S. District Judge Dan Polster ruled Wednesday that former Cleveland U.S. Attorney Carole Rendon, now in private practice at Baker & Hostetler, may not represent the pharmaceutical company Endo in two cases in the multidistrict litigation accusing opioids defendants of sparking the opioid crisis by misrepresenting the addictiveness of prescription painkillers.

Judge Polster said that through Rendon's previous leadership of an interdepartmental task force on the opioid crisis, the ex-prosecutor was privy to confidential information about how Cleveland and Cuyahoga County were responding to the consequences of opioid abuse. He concluded that the confidential information Rendon possessed "may go to the heart" of damages claims by the city and county she once served as a federal prosecutor, so it would "not be appropriate" for her and Baker Hostetler to continue to defend Endo in those suits.

The judge said he was swayed by a letter from the Justice Department, sent in response to a query from him, confirming that Cuyahoga County and Cleveland law enforcement officials shared confidential information with Rendon in the course of the task force's work. Judge Polster also cited a declaration and testimony from Cleveland police commander Gary Gingell, head of the city's specialized opioids unit, who said he felt "betrayed" by Rendon's work for Endo after working with her on the task force.

"In community relations, just as in personal relationships, years of trust can be undone in a very short period of time," Judge Polster wrote.

The judge said he has high regard for Rendon and believes her work as U.S. attorney, including a consent decree between the federal government and the Cleveland police force, “will benefit the citizens of this area for years to come.” But in the unique circumstances of the opioids MDL, in which more than 1,500 cities and counties are seeking to recoup billions of taxpayer dollars under novel legal theories, Judge Polster said, Rendon and her firm can’t defend Endo.

Rendon did not immediately respond to my email requesting comment. Endo chief legal officer Matthew Maletta said in an email statement that he agrees with Judge Polster’s praise for Rendon’s work but not with the judge’s DQ ruling. “I respectfully disagree ... with both his analysis and his decision to disqualify Ms. Rendon and Baker Hostetler from representing Endo in opioid cases involving Cuyahoga County and the City of Cleveland,” Maletta wrote. “Endo is currently evaluating its options.”

Cleveland’s lawyer, Mark Pifko of Baron & Budd, referred my email to Cuyahoga County counsel Hunter Shkolnik of Napoli Shkolnik, who sent an email statement: “We appreciate the careful consideration Judge Polster has given to a very difficult issue and further appreciate the additional steps taken by referring the matter to the Department of Justice for guidance ... A fair judicial process is critical. Today’s decision is a step in that direction.”

As I’ve written, the plaintiffs’ disqualification effort provoked heated briefing from both sides about ethics rules for ex-prosecutors who have entered private practice. Cleveland and the other plaintiffs seeking Rendon’s disqualification argued that the former U.S. attorney breached two Ohio ethics rules: She was representing Endo “in connection with a matter in which the lawyer participated personally and substantially as a public officer”; and she was using “confidential government information” to the material disadvantage of plaintiffs that provided information to her when she was a prosecutor. Rendon’s prosecutorial past, according to Cleveland and Cuyahoga County, gave her “direct knowledge about and insight into the impact of the opioid crisis on plaintiffs in this litigation, as well as their response to the crisis - all of which now puts her private clients at a significant advantage vis-à-vis Cleveland and the other plaintiffs.”

Endo responded that Rendon's work on the opioids task force and as lead counsel on the Cleveland police department's consent decree was entirely unrelated to the opioids litigation by cities and counties. It also contended that the plaintiffs' theories threatened prosecutors' ability to work in the private sector after serving in the government. "If advocating views, fostering a policy, or establishing a framework for competition were sufficient to disqualify counsel, every government attorney holding a position of authority in an executive department or an administrative agency would be disqualified from the practice of law in his field for a very long time," Endo asserted. "That is not, that cannot be, the law."

Twenty former U.S. attorneys submitted a letter urging Judge Polster not to issue a ruling that would discourage lawyers from entering public service. Rendon's leadership of the Cleveland opioids task force, the letter said, was exactly the kind of non-case-specific role that U.S. attorneys frequently play when the federal government seeks to reassure the public that it is responding to a crisis. To construe Ohio's ethics rules (which track the American Bar Association's model rules) as barring ex-prosecutors from handling private litigation that overlaps with such non-case-specific work "would render the subsequent private practice of law extraordinarily difficult, if not impossible," the U.S. attorneys' letter said.

Judge Polster seemed to acknowledge those policy concerns in Wednesday's opinion. He specifically rejected Cleveland's theory that Rendon's work on the opioid task force was a matter related to the private opioids litigation. The ethics rule on related matters, he said, is supposed to preclude government lawyers from switching sides in the same case. That's not what Rendon did, according to Polster, because the opioids task force she headed did not investigate Endo or bring claims against the company.

Instead, Polster disqualified Rendon and Baker Hostetler under the ethics rule barring ex-government lawyers from using confidential information obtained in their service – and the judge only did so because the Justice Department confirmed Rendon's receipt of such information. As a result, it seems unlikely that his ruling will have a big impact outside of the opioids litigation.

It's an unfortunate day for Rendon and Endo, but not for all ex-prosecutors.

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