

DOJ Opioid Trial Team Tainted By Kirkland Ties, Ex-CEO Says

By **Jeff Overley**

Law360, New York (December 21, 2021, 10:43 PM EST) -- A U.S. Department of Justice lawyer who acquired "inside knowledge" about a drug distributor while at Kirkland & Ellis has seemingly been enlisted to exploit that knowledge in the opioid prosecution of the distributor's ex-CEO, and the DOJ's entire trial team should be disqualified, according to filings in New York federal court.

In Monday's filings, counsel for onetime Rochester Drug Co-Operative Inc. CEO Laurence F. Doud III argued that the DOJ lawyer, Thomas Somerset Burnett, has a conflict of interest because of confidential information he obtained while working on pharmaceutical antitrust cases at Kirkland.

As a result, Burnett should get the boot, and "on the basis of spillover taint stemming from Mr. Burnett's conflict," the rest of the government's trial team should also be sent packing, according to a motion to disqualify.

Doud's attorneys recently brought their concerns to the government's attention, but "the response was dismissive" and held that there is "no issue having [Burnett] on this government trial team," one of Monday's filings said.

"That view, in and of itself, is striking given the case law and guidance in this area," Doud's attorneys wrote Monday.

"But, perhaps more incredible, is any notion that Mr. Burnett was brought onto this particular trial team for benign reasons; it strains credulity to believe that Mr. Burnett was added just a couple months ago to lend a helping hand," the attorneys added. "The appearance is that Mr. Burnett was added to this trial team in order to tap his inside knowledge in an effort to gain advantage against Mr. Doud."

Doud's trial is set to start in mid-January, and his attorneys appeared to anticipate that attempting to eighty-six all the government's lawyers at the eleventh hour might be greeted with a bit of skepticism. The defense attorneys wrote that no request to oust opposing counsel "should ever reflect gamesmanship of any kind."

"For the avoidance of doubt, if there be any question that this motion is brought as a means to distract, trick or delay, such a view is patently false and wrong," the attorneys added. "Mr. Doud and his defense team are ready for trial."

The trial stems from one of the few criminal cases involving opioid sales that the DOJ has brought

against executives of large pharmaceutical companies. Doud is contesting allegations that he directed Rochester Drug Co-Operative to brazenly ship massive quantities of oxycodone, fentanyl and other opioids to pharmacies that were likely selling the narcotics for recreational use.

In explaining the last-minute disqualification bid, Doud's attorneys submitted a detailed timeline outlining recent revelations about Burnett's past work. The government in late September disclosed that Burnett had joined the trial team, but key information only emerged in mid-December after Doud's counsel received "an unsolicited email" from Faruqi & Faruqi LLP pharmaceutical lawyer Peter Kohn, the timeline said.

Kohn has represented Rochester Drug Co-Operative in civil antitrust litigation, and in his email, he described noticing that Burnett had joined the DOJ's trial team in Doud's criminal case. In a subsequent phone call, Kohn told one of Doud's attorneys, Robert Gottlieb, that Burnett had represented drugmaker defendants in two antitrust cases where Rochester was a plaintiff.

"Mr. Kohn told me that he believed Mr. Burnett had a clear conflict of interest in now representing the government in this criminal matter adverse to Mr. Doud, based on the substantial work that he had performed on those antitrust cases while working as an associate at Kirkland & Ellis LLP," Gottlieb wrote in a declaration on Monday.

In both cases, Burnett wrote and signed papers opposing class certification, and he had access to "confidential information not available to the defense in this case about our client, Mr. Doud," according to Monday's filings.

That information includes depositions of Doud and an unindicted co-conspirator in the criminal case. In those depositions, the "areas of examination were broad and expansive, providing Mr. Burnett with potentially critical information about RDC for the purposes of this criminal trial," the motion for disqualification said.

Doud's lawyers also filed a declaration from Kohn, who described protective orders in antitrust cases involving the cholesterol drug Niaspan and the epilepsy drug Lamictal. In each case, "the only persons permitted under the protective order to see, hear about or use the information from RDC's document production ... are counsel in that case, including Mr. Burnett and myself," Kohn wrote.

Gottlieb and a representative of the DOJ declined to comment on Tuesday. Kohn and representatives of Kirkland could not immediately be reached for comment.

The government is represented by Alexandra Rothman, Nicolas Roos and Thomas Somerset Burnett of the U.S. Attorney's Office for the Southern District of New York.

Doud is represented by Robert Gottlieb of Robert C. Gottlieb Associates PLLC and Derrelle Janey of The Janey Law Firm LLP.

The case is U.S. v. Doud, case number 1:19-cr-00285, in the U.S. District Court for the Southern District of New York.

--Editing by Michael Watanabe.

All Content © 2003-2021, Portfolio Media, Inc.

