

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

IN RE THE MARRIAGE OF:

J. ANDREW BEDNALL,

Petitioner,

and

LAURA J. BEDNALL,

Respondent.

AFFIDAVIT

Case No. 94 FA 0583

FILED
IN CIRCUIT COURT
JAN 11 2005
WAUKESHA CO WIS.
FAMILY DIVISION

05 JAN 11 AM 8:21
CLERK OF CIRCUIT COURT
FAMILY DIVISION

STATE OF WISCONSIN }
WAUKESHA COUNTY }

Marjorie A. Wendt, being first duly sworn on oath, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of Wisconsin, and represent the respondent in the above referenced matter.
2. That shortly after Attorney Rebecca Grassl Bradley filed her Notice of Retainer in this matter in the fall of 2004, I came aware that she was the long-time girlfriend of the petitioner, Andrew Bednall.
3. That I understood at that time that she had a personal relationship with the minor child, [REDACTED] but mistakenly assumed that she understood that Supreme Court rules prohibit her from having contact with the minor that is the subject of a placement or custody dispute during the pendency of an action, without the permission of the ward's Guardian ad Litem. Pursuant to Supreme Court Rule 20:1.10, Imputed Disqualification: General Rule, and Supreme Court Rule 20:1.7, Conflict of Interest: General Rule, Attorney Bradley disqualified as a representative for the petitioner because of her contacts with the minor child. Any contacts with another party in litigation, specifically, one represented by counsel, in this case a Guardian ad Litem, are prohibited. Additionally, Supreme Court Rule 20:3.7 created an additional conflict in that as the

girlfriend of the petitioner as well as someone in regular contact with the minor child to the extent that they exchange gifts, creates the potential of her acting as a witness. As the Court knows, many times significant others of parties in post judgment actions are called as witnesses.

4. That during the pendency of the action it has now come to my attention that Attorney Rebecca Grassl Bradley has had continued contact with the minor child, and in fact on Christmas Eve of 2004, ██████████ spent the entire day with petitioner and his attorney at her extended family's home, and the children of this marriage exchanged gifts with counsel.

5. Based upon this personal relationship that Attorney Bradley has with the respondent and the minor child, and the fact that she has had continued contact during the pendency of this action, I am requesting that the Court require Attorney Bradley to withdraw as respondent's counsel of record. I make this Affidavit in support of the attached motion.

Dated this 10 day of January, 2005.

Marjorie A. Wendt
Marjorie A. Wendt

Subscribed & sworn to before me
this 10 day of January, 2005.

Patricia A. Clark
Notary Public, Waukesha Co., WI.
My Commission expires 3/16/08

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

In Re the Marriage of:

J. Andrew Bednall,
Petitioner,

v.

Laura J. Bednall,
Respondent.

AFFIDAVIT OF MICHAEL J. FINN
CASE No.: 94 FA 0583

FILED
IN CIRCUIT COURT

JAN 11 2005

WAUKESHA CO WIS.
FAMILY DIVISION

STATE OF WISCONSIN)
WAUKESHA COUNTY)

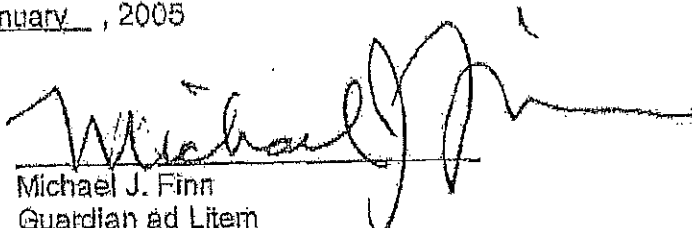
Michael J. Finn, being first duly sworn on oath, deposes and says:

- 1) That I am an attorney duly licensed to practice law in the State of Wisconsin.
- 2) On November 9, 2004 I was appointed by the Honorable Michael Bohren to serve as Guardian ad Litem for the minor child [REDACTED] born [REDACTED] regarding physical placement issues that have arisen between the parties.
- 3) In the course of my Guardian ad Litem representation, I was apprized that Attorney Rebecca Grassl Bradley, who represents the Petitioner in this matter, is the long-time girl friend of the Petitioner, and has a personal relationship with the minor child, [REDACTED].
- 4) That I have been advised that for Thanksgiving 2003, [REDACTED] spent Thanksgiving with the "extended Bradley family".
- 5) That I have been advised that for Christmas Eve 2004, just a few weeks ago, the Bednall children spent the day with their father and Rebecca Grassl Bradley and her family. This relationship extends to the exchange of gifts and regular contact.
- 6) That based upon this personal relationship that Attorney Bradley has with the Petitioner and the minor child, I support the request that the Court require Attorney Bradley to withdraw as Petitioner's counsel of record.
- 7) That I was aware that Attorney Bradley was a "friend" of Mr. Bednall; however, the extent of the friendship and the involvement of her

relationship with the children vis-a-vis the "friendship" would ethically preclude her ability to be advocate counsel for Mr. Bednall in this matter.

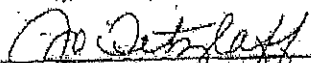
I make this Affidavit in support of the attached Notion of Motion and Motion.

Dated this 11th day of January, 2005



 Michael J. Finn
 Guardian ad Litem
 State Bar No.: 1018532

Subscribed and sworn to before me this 11th day of January, 2005



 Notary Public, Waukesha County
 My Commission Exp.: July 1, 2007

Prepared by:

Michael J. Finn S.C.
 155 East Capitol Drive
 Hartland, WI 53029
 Telephone: 262/367-8485
 Facsimile: 262/367-4499
 Email: mfinnsc@sbcglobal.net

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

In re the Marriage of:

J. ANDREW BEDNALL,

Case No.: 94-FA-0583

Petitioner,

vs.

LAURA J. BEDNALL,

Respondent.

FILED
IN CIRCUIT COURT
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FAMILY DIVISION

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CLERK OF CIRCUIT COURT
FAMILY DIVISION

AFFIDAVIT OF REBECCA GRASSL BRADLEY

STATE OF WISCONSIN)
) SS.
WAUKESHA COUNTY)

Rebecca Grassl Bradley, being first duly sworn on oath, deposes and states as follows:

1. I am an attorney licensed to practice law in the State of Wisconsin and I represent the Petitioner, J. Andrew Bednall, in the above captioned matter.

2. The trial in this case was scheduled for January 13, 2005. On January 11, 2005 Respondent's counsel filed a motion seeking my disqualification as counsel for Petitioner, due to an alleged conflict of interest arising from my "contacts with the minor child" and my personal relationship with Petitioner. Affidavit of Marjorie A. Wendt, ¶ 3.

3. I have known Petitioner for over four years and consider him to be a close personal friend. At one time I had a romantic relationship with Petitioner, which we both believed might result in marriage. We broke off that relationship in November 2002, although we have continued to date on a non-exclusive basis since that time.

4. I am not related by blood or marriage to Petitioner or his minor son. I have not represented Petitioner in any other matter. My notice of retainer in the above-captioned matter was filed with the court on September 13, 2004. Prior to undertaking this representation, I considered whether my representation of Petitioner would present a conflict of interest and concluded that it would not. My representation of Petitioner is not adverse to any other client of mine. I have no responsibilities to another client or to a third person that would materially limit my representation of Petitioner. I have no interests that would materially limit my representation of Petitioner. Even though I concluded that my representation of Petitioner did not present any conflict of interest, I discussed with Petitioner the potential for a conflict of interest and he agreed to waive any potential conflict.

5. Respondent knows me and knows of my relationship with Petitioner. I therefore conclude that Respondent's counsel learned of my past relationship with Petitioner no later than September 20, 2004, when I was present in court with Respondent and her counsel at the order to show cause hearing.

6. The court appointed Attorney Michael Finn as Guardian ad Litem on November 9, 2004 and Attorney Finn accepted this appointment on November 16, 2004. I met with Attorney Finn on November 19, 2004 to discuss the case and advised him at that time that I personally know the minor child and am in contact with him.

7. The court ordered the parties to disclose witnesses to the court and opposing counsel on or before December 14, 2004. I filed a witness list on behalf of Petitioner on that date. Neither Attorney Wendt nor Attorney Finn filed a witness list. In addition, the court ordered counsel to make trial exhibits available to opposing counsel no later than January 10, 2005. I made Petitioner's exhibits available for counsel on January 10, 2005. Neither counsel

requested to review them. Neither counsel made any exhibits available to me, other than Respondent's incomplete Financial Disclosure.

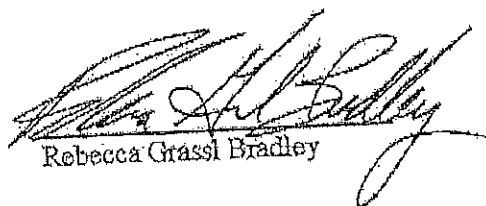
8. Prior to the filing of Attorney Wendt's motion on January 11, 2005 neither Attorney Wendt nor Attorney Finn ever advised me or the court that they expected to call me as a witness at trial. My client appeared pro se from the filing of his motion for a change in support and placement on May 27, 2004 until I entered an appearance on September 13, 2004 (after Respondent filed a motion for contempt). If I were disqualified at this point, my client would be required to retain a new attorney. Because there is no other attorney who is familiar with the ten year procedural and substantive history of this case, retaining new counsel would require my client to incur substantial expense and would be likely to result in further delay of the trial.

9. I do not have personal knowledge of any facts concerning Petitioner's son that would be relevant at the trial of this matter There are other potential witnesses who have far more significant relationships with the minor son than I do, and would have substantially greater knowledge of the issues relevant to placement. These potential witnesses would include parents of the minor child's friends, the minor child's teachers and physicians, as well as the individuals named as witnesses by Petitioner.

10. I have never discussed any issues relating to custody or placement with Petitioner's minor son, nor have I had any other communications with Petitioner's son about the subject of my representation of Petitioner.

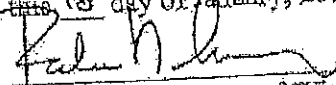
11. During the time that I have known Petitioner I have had infrequent, limited contacts with his minor son, who is currently age sixteen. At no time have I resided with or stayed overnight as a guest in the same household with Petitioner and his minor son. I have seen

Petitioner's son briefly at social occasions and at school events. I was present on Christmas Eve 2004, when Petitioner and his children, who are friends of my sister and her family, visited my sister's home for approximately two and one-half hours, during which I spoke only briefly with the minor son, who spent most of his time interacting with the other children who were present. Except for this occasion I have had no significant contact with Petitioner's minor son since I began representing Petitioner in this matter.



Rebecca Grassl Bradley

Subscribed and sworn to before me
 this 18th day of January, 2005



Notary Public, State of Wisconsin
 My Commission IS PERMANENT.

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

In re the Marriage of:

J. ANDREW BEDNALL,

Petitioner,

vs.

LAURA J. BEDNALL,

Respondent.

Case No.: 94-FA-0583

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WAUKESHA CO WIS.
FAMILY DIVISION

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO
DISQUALIFY COUNSEL

I. INTRODUCTION

Two days before the scheduled trial of this matter Respondent filed a motion to disqualify Petitioner's counsel, Attorney Rebecca Grassl Bradley ("Bradley") Petitioner asserts that because Bradley has a personal relationship with Petitioner and Petitioner's minor son, Bradley's representation of Petitioner is prohibited by numerous provisions of the Wisconsin Rules of Professional Conduct for Attorneys (SCR Chapter 20). Respondent's motion is untimely and has therefore been waived.

Even if the motion had been timely filed, there is no basis in fact or law for Respondent's motion. Based on the record before the court it is apparent that Respondent's motion is brought merely for the purpose of embarrassing Ms. Bradley, harassing Petitioner, and obtaining a delay in the trial.

Respondent's motion must therefore be denied. Respondent's motion is frivolous within the meaning of Wis. Stat. §814.025 and Petitioner is entitled to an order awarding Petitioner costs and actual attorneys fees incurred in defending against the motion.

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CLERK OF CIRCUIT COURT
FAMILY DIVISION

II. ARGUMENT

Respondent has alleged the following grounds for disqualification: (1) Respondent had contacts with the minor child without permission of the guardian ad litem, contrary to SCR 20:4.2; (2) Disqualification is required by SCR 20:3.7 because Bradley may be called as a witness; and (3) Bradley committed unspecified violations of SCR 20:1.10 (imputed disqualification) and SCR 20:1.7 (conflict of interest - general rule). Respondent has cited no facts or case law that would support a finding that Bradley has violated any of these disciplinary rules.

A. Standard For Deciding Disqualification Motions.

Motions for disqualification of counsel are addressed to the sound discretion of the trial court. Trial courts possess "broad discretion in determining whether [attorney] disqualification is required in a particular case . . ." *Berg v. Marine Trust Co.*, 141 Wis. 2d 878, 887, 426 N.W. 2d 643 (Ct. App. 1987), quoting *Schloetter v. Ratloc of Indiana, Inc.*, 546 F. 2d 706, 710 (7th Cir. 1976). Disqualification motions ordinarily should be granted only when a violation of the ethics rules poses a significant risk of trial taint, and a violation of professional ethics does not automatically result in disqualification of counsel. See ABA/BNA Lawyers Manual on Professional Conduct 31:1903 and cases cited therein.

The court in *Berg* stated:

While disqualification is the primary means of assuring that the ethically canons are not violated, a party to litigation also has an important interest in being represented by the counsel of his or her choice. As a result, disqualification "ought not be applied so indiscriminately as to undercut this interest without justification." *Moritz v. Medical Protective Co., Etc.*, 428 F. Supp. 865, 874 (W. D. Wis. 1977)

Berg, 141 Wis. 2d at 887.

Motions for disqualification of counsel are frequently based on alleged conflicts of interest. The Wisconsin Supreme Court has noted, however, that the Rules of Professional Conduct:

... can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of rule.

SCR Chapter 20: Preamble, Scope. The official comment to SCR 20:1.7 states:

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. . . . *Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the objection. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.*

Id., emphasis supplied.

Trial courts should be alert to the possibility that a party "may seek to 'manufacture' a conflict to eliminate a formidable lawyer as an adversary and to prevent a defendant from having a particularly able defense counsel at his side." *State v. Miller*, 160 Wis.2d 646, 654, 467 N.W.2d 118 (Ct. App. 1991), quoting *Wheat v. United States*, 486 U.S. 153, 163 (1988).

Accordingly, courts have taken a dim view of disqualification motions because of the perception that such motions make use of the ethics rules for purely tactical purposes, and sanctions have been imposed against lawyer who file bad faith disqualification motions. See Law. Man. Prof. Conduct. 51:1909 and cases cited therein.

B. Respondent Has Waived Her Right To Bring A Motion For Disqualification.

Failure to timely make a motion for disqualification may result in waiver. (In re *Marriage of Batchelor v. Batchelor*), 213 Wis.2d 251, 570 N.W.2d 568 (Ct. App. 1997)(delay from May to August resulted in waiver)

The rationale behind this rule was explained succinctly *Central Milk Producers Coop. v. Sentry Food Stores*, 573 F.2d 988, 992 (8th Cir. 1978) when the court held that "[t]his court will not allow a litigant to delay filing a motion to disqualify in order to use the motion as a later tool to deprive his opponent of counsel of his choice after substantial preparation of a case has been completed."

Id. 213 Wis.2d at 256. See also, *Weber v. Weber*, 169 Wis.2d 538, 545, 485 N.W.2d 447 (Ct. App. 1992).

Respondent failed to bring her motion for disqualification until three days before trial, despite knowing the basis for her motion for nearly four months. The court should find that she has waived the right to bring this motion and award Bradley her costs and attorney's fees in defending the motion.

C. Ms. Bradley's Contacts With The Minor Child Do Not Constitute Grounds For Disqualification.

Respondent incorrectly states that "any contacts with another party in litigation . . . are prohibited." Wendt Aff. ¶ 3. Respondent cites no rule or case in support of this statement. Communications with persons represented by counsel are governed by SCR 20:4.2, which provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The comment to SCR 20:4.2 specifically states: "this rule does not prohibit communication with a party . . . concerning matters outside the representation" (emphasis

supplied). Due to her personal relationship with Petitioner, Bradley has had contacts with Petitioner's minor son, but she has had no communication with the minor son concerning custody, or any other issue concerning the subject matter of her representation of Petitioner. Bradley Aff. ¶10-11. Bradley's contacts with Petitioner's minor son are therefore not prohibited by SCR 20:4.2 and may not be used as a basis for disqualifying her from representing Petitioner.

D. Bradley Is Not Disqualified Because She Is A Potential Witness.

Respondent alleges that Bradley has a conflict under SCR 20:3.7 because of the "potential of her acting as a witness." Wendt Aff. ¶ 3. Respondent's characterization of Rule 3.7 is misleading and inaccurate. SCR 20:3.7 does not require disqualification under any circumstances, but states only that "a lawyer shall not act as *advocate at a trial* in which the lawyer is likely to be *necessary witness*."

SCR 20:3.7 is inapplicable here in any event because Respondent has neither alleged nor shown that Bradley is a necessary witness. Respondent was required by the trial court's order in this case to designate witnesses to be called at trial on or before December 14, 2004. Bradley was not designated as a witness by either Respondent or the Guardian ad Litem, nor did they designate any other witnesses to be called at trial.

Even if Respondent or the guardian ad litem had designated Bradley as a witness, the designation would not establish that she is a necessary witness. Bradley has had only infrequent, limited contacts with Petitioner's minor son, and has no personal knowledge of any facts concerning Petitioner's son that would be relevant at the trial of this matter. Bradley Aff. ¶ 9-11. In addition, there are other potential witnesses not named by Respondent or the guardian ad litem who would have far more significant relationships with the minor son and would have substantially greater knowledge of the issues relevant to placement. Bradley Aff. ¶ 9.

Finally, even if Respondent could show that Bradley is a necessary witness, she would still be entitled to act as advocate at the trial under SCR 20:3.7(a)(3), which states that the rule does not apply where "disqualification of the lawyer would work substantial hardship on the client." Despite the fact that Respondent knew of the relationship between Bradley and the Petitioner in September 2004, she failed to seek disqualification or otherwise bring the issue to the attention of the court until January 11, 2005, two days before the commencement of trial. To require Petitioner to obtain new counsel at this late date would require petitioner to incur substantial expense and would be likely to result in further delay of the trial. Bradley Aff. ¶ 8.

E. Supreme Court Rules 1.10 (Imputed Disqualification) And 1.7 (Conflict of Interest) Are Inapplicable.

SCR 20:1.10 governs disqualifications that may occur upon a lawyer leaving or joining a law firm. Bradley is not a member of a law firm, and no firm by which she was ever employed has represented any of the parties to this action. Respondent has not offered any explanation as to why Rule 1.10 is applicable here. Respondent's reference to the Rule should therefore be ignored by the court.

Respondent also cites Rule 1.7, which is the general rule regarding conflicts of interest. The rule consists of two basic parts: Rule 1.7(a) prohibits a lawyer from representing a client or the representation will be "directly adverse to another client"; Rule 1.7(b) prohibits a lawyer from representing a client if the representation "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." Both parts of the rule permit the lawyer to undertake the representation if the lawyer reasonably believes the representation will not be adversely affected, and the client consents in writing after consultation. Bradley's representation of Petitioner is not directly adverse to any other client, and Bradley has no responsibilities to another client or to a third person that would materially

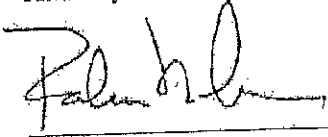
limit her representation of Petitioner. Bradley Aff. ¶ 4. Respondent has provided no explanation as to how Bradley's conduct violates Rule 1.7. Respondent's allegation of a violation of Rule 1.7 should therefore be ignored by the court.

III. CONCLUSION

Respondent has failed to provide the court with any law or facts that would support an order disqualifying Petitioner's counsel. We respectfully urge the court to deny Respondent's motion and award Petitioner her reasonable costs and attorneys fees incurred in defending against the motion.

Dated at Milwaukee, Wisconsin this 18th day of January 2005.

HUNSHAW & CULBERTSON LLP
Attorneys for Rebecca Grassl Bradley



Randal N. Arnold
State Bar No.: 1004492

P.O. Address
100 East Wisconsin Avenue
Suite 2600
Milwaukee, WI 53202-4115
Telephone: 414-276-6464



Whyte Hirschboeck Dudek S.C.

Mark A. Miller
414-978-5406
mmiller@whdlaw.com

December 8, 2004

Rebecca Grassl Bradley, Esq.
20700 Swenson Drive
Suite 400
Waukesha, WI 53186-0904

Re: J. Andrew Bednall

Dear Attorney Bradley:

Over the past several months, an issue has arisen regarding the background of Andrew Bednall's separation from employment at Whyte Hirschboeck Dudek S.C. I believe a framework is helpful.

I am the Chief Executive Officer of Whyte Hirschboeck Dudek S.C. My position was created in 2001 and I have held the post since that time. Mr. Bednall was the firm's Chief Operating Officer prior to the creation of the CEO position. Thereafter, he was the firm's CFO.

The change of status for Mr. Bednall did not work out well for the firm or for Mr. Bednall. Consequently, I requested that Mr. Bednall find new employment. At the time, I gave Mr. Bednall a final date of employment at the firm (November 2003) and we agreed upon a severance package.

I hope this clarifies your understanding. If you have any further questions, please do not hesitate to contact me. Thank you.

Sincerely,

Mark A. Miller
Chief Executive Officer

MAM/sas

EXHIBIT 8

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

In re the Marriage of:

J. ANDREW BEDNALL,

Petitioner,

vs.

LAURA J. BEDNALL,

Respondent.

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FEB 7 2005

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FAMILY DIVISION

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CIRCUIT COURT
FAMILY DIVISION

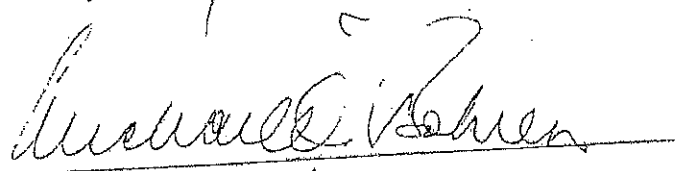
ORDER

The Respondent's motion for disqualification of Petitioner's counsel having been heard on January 18, 2005 at 3:00 p.m.; and the counsel for Petitioner, Rebecca Grassl Bradley; counsel for Respondent, Marjorie A. Wendt; and the guardian ad litem, Michael J. Finn having appeared by telephone; and Hinshaw & Culbertson LLP, by Randal N. Arnold, having appeared in person as special counsel for Attorney Rebecca Grassl Bradley; and the court having reviewed the affidavits and briefs of the parties and having heard the arguments of counsel;

NOW THEREFORE IT IS HEREBY ORDERED:

1. Respondent's motion for disqualification of petitioner's counsel is denied, without costs to any party.
2. Discovery is extended to February 11, 2005. The parties may not name additional witnesses.
3. The trial date is adjourned to February 16, 2005 at 9:00 a.m.

Dated this 4 day of February 2005.



 Honorable Michael O. Bohren