

**Responses of John J. McConnell, Jr.
Nominee to be United States District Judge for the District of Rhode Island
to the Written Questions of Senator Jon Kyl**

- 1. Identify all cases where you and/or your current or previous law firms have represented a State or local government (including but not limited to any state attorneys general office, Governors office, political subdivision, instrumentality, or authority of a State or States) under a contingency fee contract or other legal services arrangement to pursue civil litigation against private defendants. In addition to identifying the case, and as part of your response, provide the following:**

Response: See Attachment A.

- a. The name of the state or local government officials and related entities involved with the contingency fee contract or legal services arrangement.**

Response: See Attachment B.

- b. A detailed description (including dates and amounts) of any political campaign contributions from you or your law firm to any of the state or local government officials identified in your response to question 1(a).**

Response: My firm does not maintain a list of contributions by members or employees to elected public officials, and therefore I have no way to gather the information requested as it relates to members or employees. I have done a diligent and reasonable inquiry of the attorneys in the firm and am able to provide the following information:

My firm was retained by the State of Rhode Island by and through its then Attorney General Sheldon Whitehouse to represent the State in litigation against the lead paint industry in 1999. According to Rhode Island Board of Elections files, I contributed \$2,000 in 1998 to Sheldon Whitehouse's 1998 campaign for Rhode Island Attorney General. In addition, although I cannot find a record of it, I do believe that Joseph F. Rice and I contributed to Governor Christine Gregoire's campaign for governor of the State of Washington.

- c. The amount of any money (whether by contingency fee or otherwise) you or your firm received in the representation.**

Response: In the lead paint case brought on behalf of Rhode Island and other government entity, neither my firm nor I received any money. With respect to other cases, both my prior firm (MRRM, P.A.) and I have received money pursuant to the Master Settlement Agreement for tobacco litigation. The monies that I will receive as deferred compensation from the tobacco litigation are listed on my "Net Worth Statement" submitted to the Senate Judiciary Committee.

2. **Identify all states, local governments or municipalities where you or your law firm pursued lead paint litigation. Please note any litigation similar to that brought in Rhode Island. As part of your response, provide the following:**

Response: See the lead paint section of Attachment A in which Motley Rice LLC or predecessor firms were hired or otherwise engaged by one or more elected officials.

- a. **The names of all state and local government officials with whom you or your law firm (including their agents or representatives) contacted or communicated.**

Response: See the lead paint section of Attachment B in which Motley Rice LLC or predecessor firms were hired or otherwise engaged by one or more elected officials.

- b. **To the extent not already covered by question 1, provide a detailed description (including dates and amounts) of any political campaign contributions from you or your law firm to any of the state or local government officials identified in this response.**

Response: None.

- c. **If you or your law firm entered into any contingency fee arrangement to pursue lead paint litigation on behalf of any of these other states or local government officials, please provide those contracts to the Committee.**

Response: I am providing all of the contracts.

3. **As part of your contingency fee contract with the State of Rhode to pursue lead paint litigation against defendant paint companies, did you or your law firm agree to pay all the costs and expenses of prosecuting that litigation?**

Response: We agreed to pay all of the costs and expenses of prosecuting such claims. The agreement states as follows: "All costs and expenses of prosecuting such claims, including, without limitation, expert witness fees, costs of depositions, discovery, and travel, will be borne by Ness, Motley, Loadholt, Richardson & Poole."

4. **In the Rhode Island lead paint case, the State asked the trial court to immediately begin implementing an abatement plan for the alleged public nuisance, and to appoint co-examiners, or outside experts, to aid in the development of the complex plan. Although the defendants asked the court to refrain from doing so pending their appeal, the court sided with the State; the court seemed to have been persuaded, at least in part, by the State's contention that reimbursement of the co-examiner fees could be sought if the verdict was reversed on appeal. After the Rhode Island Supreme Court did, in fact, reverse and vacate the judgment, the defendants moved for such reimbursement. At a hearing on that motion, the State**

argued that reimbursement could not be ordered because the State had sovereign immunity. The trial court ultimately rejected that argument and ordered the State to pay the fees.

- a. **Did you play any role, either as counsel or in an advisory capacity, in any proceedings relating to the co-examiner fees, either before or after the Rhode Island Supreme Court's decision?**

Response: Yes.

- b. **Although it appears Motley Rice had agreed to pay all costs associated with the litigation, the firm contended it was not responsible for these fees. You yourself commented to the press that Motley Rice "certainly never offered, intended or agreed to pay defense costs in the case." Eric Tucker, *R.I., Paint Cos. Await Decision on Lawsuit Costs*, ASSOCIATED PRESS, Mar. 28, 2009. In view of Rhode Island's pending budget deficit, explain why you personally disavowed this contractual obligation to pay such costs and expenses of litigation after the State was ordered by a court reimburse defense costs associated with the lead paint litigation.**

Response: The contract required that Ness, Motley, Loadholt, Richardson & Poole incur "[a]ll costs and expenses of prosecuting such claims." It was never anticipated by either party, nor does the contract require, that it would include opposing counsel's costs, only the costs of prosecuting the claims.

- c. **Did you or your law firm ever reimburse the State of Rhode Island to cover court-ordered payment of defense costs from the lead paint litigation?**

Response: There are no court-ordered payments of defense costs from the lead paint litigation in Rhode Island.

1. **Do you agree that when state attorneys general enter into contingency fee arrangements with private law firms to pursue civil litigation on behalf of a state, the process should be open and transparent?**

Response: Yes.

- a. **Was the lead paint litigation contingency fee contract between Motley Rice and the State of Rhode Island procured under an open and transparent process?**

Response: Yes.

- b. **Was the lead paint litigation contingency fee contract made publicly available prior to its execution?**

Response: I am unaware whether the Attorney General made the contract publicly available prior to its execution.

- c. Did the Rhode Island state legislature approve the lead paint litigation contingency fee contract between Motley Rice and the State of Rhode Island?**

Response: No.

- 6. At your hearing, I asked whether you approached Senator Whitehouse, in his capacity as Rhode Island Attorney General, to initiate the Rhode Island lead paint litigation. You stated that you did not, but then testified that your firm was asked to “analyze the law and the facts in the case, and we prepared an analysis in a binder and turned it over to then-Attorney General Pine and then to Attorney General Whitehouse.” However, during the lead paint litigation (*State of Rhode Island v. Lead Industries Association, Inc., et al.*, C.A. No. 99-5226), then-Rhode Island Attorney General Whitehouse testified that it was your firm (then Ness Motley) that approached him about bringing the case:**

Q. Can you tell me who approached you? Is it true that Ness Motley approached you about bringing this kind of case?

A. Yes, it is.

Please explain the discrepancy in your testimony.

Response: I do not know specifically what then Attorney General Whitehouse was referring to in his deposition. I assume he meant that his initial involvement in this matter began when he reviewed a binder that Ness Motley attorneys had prepared for the Rhode Island Attorney General’s Office at the request of former Attorney General Jeffrey Pine.

- 7. Please describe your involvement in the litigation brought by Sherwin-Williams against your firm in the Court of Common Pleas of Cuyahoga County, Ohio concerning certain documents belonging to Sherwin Williams that were obtained without the company’s consent and alleged to be privileged. (*Sherwin Williams Co. v. Motley Rice LLC*, No. CV 09 689237 (Ohio Ct. Common Pleas Apr. 03, 2009)).**

Response: I have no involvement in that case except to assist my firm’s counsel in the defense. I am not listed as a defendant in the case or mentioned in the complaint.

- a. Do you know the identity of any of the unidentified “Doe” defendants in that lawsuit? Are you one of them?**

Response: I do not know the identities of any John Does (if any even exist). I have no reason to believe that I am one of them.

- b. At present, do you have any reason to believe that you may be deposed or subject to any discovery in the lawsuit?**

Response: The firm's attorneys have informed me that Sherwin Williams has requested my deposition in this case.

- c. Have you discussed this litigation with any other member of the Motley Rice firm? If so, with whom did you discuss it, when, and what was the content of the discussion?**

Response: Yes, I have discussed the litigation with other members of Motley Rice. As to the contents of those communications, those communications may be subject to attorney-client or the work-product privileges.

- d. Do you have any other information related to the Sherwin-Williams lawsuit? If so, please describe and/or provide to the Committee.**

Response: The Rhode Island Superior Court judge who presided for ten years over this litigation specifically found, after full briefing and hearing on the issues at the center of Sherwin-Williams' lawsuit, that the documents at issue in the Sherwin Williams law suit were not privileged and that all counsel acted in an "exemplary fashion" with regard to this matter specifically and in the litigation generally.

- e. Do you believe it would be appropriate for Motley Rice to retain documents that Sherwin-Williams has claimed are privileged and confidential?**

Response: It would depend on the particular applicable state law and the facts surrounding their claim of privilege.

- f. Have you asked Motley Rice to return the misappropriated document belonging to Sherwin-Williams?**

Response: By agreement, all copies of the disputed documents that Sherwin-Williams claims were privileged have been turned over to the trial court in Ohio. Motley Rice has not retained any copies of the document.

- g. Were you familiar with these documents, prior to this suit being filed in Ohio? Please explain your answer.**

Response: I saw the documents prior to suit being filed in Ohio. I briefly saw them when they were first faxed to our firm and then again a few years later, I saw them when we submitted one page of the documents to the court in Rhode Island. I would not say I was familiar with the documents in any fashion.

8. **You have acted as counsel on behalf of numerous States in bringing lawsuits against lead paint and tobacco manufacturers. If confirmed, you may preside over cases involving lead paint or tobacco manufacturers and mass tort claims in general. At your hearing, I asked whether, given your extensive representation in these types of matters, you had thought about recusal. Please answer each of the following questions fully. Reciting 28 U.S.C. § 455 is not sufficient.**

- a. **Would you recuse yourself from any action involving a party that has been adverse to a party represented by either you or your firm?**

Response: I would make that decision on a case-by-case basis after a thorough analysis of the prevailing issues presented by the parties and based on the applicable statutes, rules and Canon 3 of the Code Conduct for United States Judges. I would be guided specifically by Canon 3 (C) (1) that requires a judge to disqualify himself or herself if “the judge’s impartiality might reasonably be questioned,” or if I had “personal knowledge of disputed evidentiary facts” in the case. If I determined that my previous involvement as an advocate required my recusal from the case, then I would recuse myself.

- b. **Would you recuse yourself from actions that involve paint manufacturers that were named in *State of Rhode Island v. Lead Industries Association* 951 A.2d 428 (R.I. 2008)?**

Response: I would make that decision on a case-by-case basis after a thorough analysis of the prevailing issues presented by the parties and based on the applicable statutes, rules and Canon 3 of the Code Conduct for United States Judges. I would be guided specifically by Canon 3 (C) (1) that requires a judge to disqualify himself or herself if “the judge’s impartiality might reasonably be questioned,” or if I had “personal knowledge of disputed evidentiary facts” in the case. If I determined that my previous involvement as an advocate required my recusal from the case, then I would recuse myself.

- c. **Would you recuse yourself from actions that involve paint manufacturers that were named in *Steven Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005)?**

Response: I would make that decision on a case-by-case basis after a thorough analysis of the prevailing issues presented by the parties and based on the applicable statutes, rules and Canon 3 of the Code Conduct for United States Judges. I would be guided specifically by Canon 3 (C) (1) that requires a judge to disqualify himself or herself if “the judge’s impartiality might reasonably be questioned,” or if I had “personal knowledge of disputed evidentiary facts” in the case. If I determined that my previous involvement as an advocate required my recusal from the case, then I would recuse myself.

- d. **Would you recuse yourself from actions that involve paint manufacturers in general?**

Response: I would make that decision on a case-by-case basis after a thorough analysis of the prevailing issues presented by the parties and based on the applicable statutes, rules and Canon 3 of the Code Conduct for United States Judges. I would be guided specifically by Canon 3 (C) (1) that requires a judge to disqualify himself or herself if “the judge’s impartiality might reasonably be questioned,” or if I had “personal knowledge of disputed evidentiary facts” in the case. If I determined that my previous involvement as an advocate required my recusal from the case, then I would recuse myself.

e. Would you recuse yourself from actions that involve the tobacco companies involved in the Master Settlement that you helped negotiate and draft?

Response: Yes, if it involved any of the Original Participating Manufactures that contribute to the payment of attorney fees.

f. Would you recuse yourself from all actions that involve companies that are a party to litigation on which some or all of your compensation depends?

Response: Yes.

g. Would you recuse yourself from actions that involve tobacco companies or tobacco retailers?

Response: Yes, if it involved any of the Original Participating Manufacturers that contribute to the payment of attorney fees. In addition, I would further make that decision on a case-by-case basis after a thorough analysis of the prevailing issues presented by the parties and based on the applicable statutes, rules and Canon 3 of the Code Conduct for United States Judges. I would be guided specifically by Canon 3 (C) (1) that requires a judge to disqualify himself or herself if “the judge’s impartiality might reasonably be questioned,” or if I had “personal knowledge of disputed evidentiary facts” in the case. If I determined that my previous involvement as an advocate required my recusal from the case, then I would recuse myself.

h. Would you recuse yourself from actions that involve product manufacturers?

Response: I would make that decision on a case-by-case basis after a thorough analysis of the prevailing issues presented by the parties and based on the applicable statutes, rules and Canon 3 of the Code Conduct for United States Judges. I would be guided specifically by Canon 3 (C) (1) that requires a judge to disqualify himself or herself if “the judge’s impartiality might reasonably be questioned,” or if I had “personal knowledge of disputed evidentiary facts” in the case. If I determined that my previous involvement as an advocate required my recusal from the case, then I would recuse myself.

9. **In your Questionnaire, you stated: “I do not foresee any recurrent basis for disqualification, except possibly in connection with matters in which my firm or my brother is counsel for a party.”**

- a. **Please explain what you mean by “possibly.”**

Response: I meant that if Mottley Rice (where my brother is a partner) came before me in a matter, I would recuse myself. The use of the term “possibly” reflects my uncertainty as to whether any matters involving him would be “recurrent.”

- b. **Under what circumstances would you choose not to recuse yourself if your brother or your law firm partners/colleagues were to appear before you as counsel for a party?**

Response: I would always recuse myself if my brother or other family member came before me as a litigant or attorney. I would always recuse myself from any case in which a law firm where my brother or other family member is partner. For a period of years—the specific numbers of years appropriate for recusal, which I would determine by following the rules and seeking guidance from colleagues on the bench—I would recuse myself from cases involving my former law firm partners/colleagues.

ATTACHMENT A
LIST OF LAWSUITS

Tobacco

Blaylock et al. v American Tobacco Co. et al, Circuit Court, Montgomery County, No. CV-96-1508-PR

State of Alaska v. Philip Morris, Inc., et al, Superior Court, First Judicial District of Juneau, No. IJU-97915 CI (Alaska)

State of Hawaii v. Brown & Williamson Tobacco Corp., et al., Circuit Court, First Circuit, No. 97-0441-01 (Haw.)

State of Idaho v. Philip Morris, Inc., et al., Fourth Judicial District, Ada County, No. CVOC 9703239D (Idaho)

State of Iowa v. R.J. Reynolds Tobacco Company et al., Iowa District Court, Fifth Judicial District, Polk County, No. CL71048 (Iowa)

State of Kansas v. R.J. Reynolds Tobacco Company, et al., District Court of Shawnee County, Division 2, No. 96-CV-919 (Kan.)

Ieyoub v. The American Tobacco Company, et al., 14th Judicial District Court, Calcasieu Parish, No. 96-1209 (La.)

Commonwealth of Massachusetts v. Philip Morris Inc., et al., Middlesex Superior Court, No. 95-7378 (Mass.)

Kelley v. Philip Morris Incorporated, et al., Ingham County Circuit Court, 30th Judicial Circuit, No. 96-84281-CZ (Mich.)

State of Montana v. Philip Morris, Inc., et al., First Judicial Court, Lewis and Clark County, No. CDV 9700306-14 (Mont.)

State of New Jersey v. R.J. Reynolds Tobacco Company, et al., Superior Court, Chancery Division, Middlesex County, No. C-254-96 (N.J.)

State of New York et al. v. Philip Morris, Inc., et al., Supreme Court of the State of New York, County of New York, No. 400361/97 (N.Y.)

State of Ohio v. Philip Morris, Inc., et al., Court of Common Pleas, Franklin County, No. 97CVH055114 (Ohio)

State of Oklahoma, et al. v. R.J. Reynolds tobacco Company, et al., District court, Cleveland County, No. CJ-96-1499-L (Okla.)

State of Oregon v. The American Tobacco Co., et al., Circuit Court, Multnomah County, No. 9706-04457 (Or.)

Rossello, et al. v. Brown & Williamson Tobacco Corporation, et al., U. W. District Court, Puerto Rico, No. 97-1910JAF

State of Rhode Island v. American Tobacco Co., et al., Rhode Island Superior Court, Providence, No. 97-3058 (R.I.)

State of South Carolina v. Brown & Williamson Tobacco Corporation, et al., Court of Common Pleas, Fifth Judicial Circuit, Richland County, No. 97-CP-40-1686 (S.C.)

State of Utah v. R.J. Reynolds Tobacco Company, et al., U.S. District Court, Central Division, No. 96 CV 0829W (Utah)

State of Vermont v. Philip Morris, Inc., et al., Chittenden Superior Court, Chittenden County, No. 744-97 (Vt.) and 5816-98 (Vt.)

State of Washington v. American Tobacco Co. Inc., et al., Superior Court of Washington, King County, No. 96-2-1505608SEA (Wash.)

McGraw, et al. v. The American Tobacco Company, et al., Kanawha County Circuit Court, No. 94-17-7 (W. Va.)

Lead Paint

State of Rhode Island v. Lead Industries Assn. C.A. No 99-5229

In Re Lead Paint Litigation, Case Code: 702-MT, Superior Court of New Jersey

City of Cincinnati v. Sherwin-Williams et al., C.A. No. A0611226

City of Columbus v. Sherwin-Williams et al., 06CVH-16480

Ohio v. Sherwin-Williams et al., 07CVC-04-4857

City of East Cleveland v. Sherwin-Williams et al., CA No CV-06-602785

City of Athens v. Sherwin Williams, et al., C.A. No. 07CI136

City of Massillon v. Sherwin-Williams et al., C.A. No. 07 CV O1224

City of Canton v. Sherwin-Williams et al., C.A. NO. 06 CV 05048

City of Dayton, Ohio v. Sherwin-Williams, et al., C. A. No. 07 CV 12701

City of Cleveland v. Sherwin-Williams et al., C.A. No. CV-06-602785

City of Lancaster v. Sherwin-Williams et al., C.A. No. 06 CV 1055

City of Toledo v. Sherwin-Williams et al., C.A. No. G-4801-CI-200606040

City of Youngstown v. Sherwin-Williams, et al., C.A. No. 07-CV-1167

City of New York Housing Authority v. Lead Industries Assn., Index No. 14365/89, IAS Part 39

County of Santa Clara, et al. v. Atlantic Richfield Company, et al., Case No. CV 788657

Other

Kurikose v. Fed. Home Loan Mortgage Co., No. 1:08-cv-7281 (JFK) (S.D.N.Y);

Various individual asbestos cases on behalf of Bob Whittaker, Director, Division of Workers' Compensation Funds, Commonwealth of Kentucky Labor Cabinet

State of Oklahoma v. Tyson Foods, Inc., et al., 4:05-cv-00329-GKF-PJC, N.D. Okla.

In re: W.R. Grace & Co., et al., Case No. 01-01139 (JKF), D. Del. (Bankruptcy) - Claims No. 6937-6944 (State of Washington claims); Claims No. 6945-6947 (Port of Seattle claims); Claims No. 3405 (Fargo Housing and Redevelopment Authority claims).

ATTCAHMENT B
LIST OF PUBLIC OFFICIALS

Tobacco

Honorable Bruce M. Botelho	Attorney General of Alaska
Honorable Margery S. Bronster	Attorney General of Hawaii
Honorable Alan G. Lance	Attorney General of Idaho
Honorable Tom Miller	Attorney General of Iowa
Honorable Carla J. Stovall	Attorney General of Kansas
Honorable Richard P. Ieyoub	Attorney General of Louisiana
Honorable Scott Harshbarger	Attorney General of Massachusetts
Honorable Frank J. Kelley	Attorney General of Michigan
Honorable Joseph P. Mazurek	Attorney General of Montana
Honorable Peter Verniero	Attorney General of New Jersey
Honorable Dennis C. Vacco	Attorney General of New York
Honorable Betty D. Montgomery	Attorney General of Ohio
Honorable W. A. Drew Edmondson	Attorney General of Oklahoma
Honorable Hardy Myers	Attorney General of Oregon
Honorable Jose A. Fuentes-Agostini	Attorney General of Puerto Rico
Honorable Jeffrey B. Pine	Attorney General of Rhode Island
Honorable Charlie Condon	Attorney General of South Carolina
Honorable Jan Graham	Attorney General of Utah
Honorable William H. Sorrell	Attorney General of Vermont
Honorable Christine O. Gregoire	Attorney General of Washington

Honorable Darrell V. McGraw Jr.

Attorney General of West Virginia

Lead Paint

Honorable Sheldon Whitehouse

Attorney General of Rhode Island

Louise Renne, Esq.

San Francisco City Attorney

Mayor John T. Gregorio

Linden, New Jersey

Mayor Sara B. Bost

Irvington, New Jersey

Mayor Karen McCoy Oliver

Hillside, New Jersey

George Devaney

Union County, New Jersey Manager

Mayor Robert L. Bowser

East Orange, New Jersey

Mayor Joseph V. Doria

Bayonne, New Jersey

Thomas S. Plaia

Township Attorney – Union Township, NJ

Mayor Samuel Rivera

Passaic, New Jersey

John D. Massi

Borough Attorney - Roselle, New Jersey

Mims Hackett, Jr.

Mayor of Orange, New Jersey

Unknown

Essex County, New Jersey

Unknown

Jersey City, New Jersey

Unknown

West New York, New Jersey

Garry E. Hunter

Athens, Ohio Director of Law

Joseph Martuccio

Canton, Ohio Director of Law

Pericles G. Stergios

Massillon, Ohio Director of Law

Richard C. Pfeiffer, Jr.

Columbus City Attorney

Mayor Eric J. Brewer

City of East Cleveland

Terre Vandervoort

Lancaster, Ohio Director of Law

John Madigan

Toledo, Ohio Director of Law

Iris Guglucello

Youngstown, Ohio Director of Law

Milton R. Dohoney, Jr.

Cincinnati, Ohio City Manager

Ricardo Elias Morales

General Counsel, NYC Housing Authority

Other

Richard H. Moore

Treasurer, State of North Carolina & Sole
Trustee of the North Carolina Retirement
Systems

Linda Strout

Port of Seattle

Lynn Fundingsland

Fargo Housing Authority

Unknown

Deputy Attorney General, State of
Washington

Bob Whittaker

Director, Kentucky Division of Worker'
Compensation Fund

W.A. Drew Edmondson

Oklahoma Attorney General