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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

AL HUTTON AND DOUG WHORTON,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CITY OF FAIRBANKS, CHIEF DANIEL P. HOFFMAN AND DEPUTY CHIEF BRAD JOHNSON, EACH IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,	)	
	)	**Case No. 4:08-CV-00029 (RRB)**
Defendants.	)	
	)	

INDIVIDUAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO DISQUALIFY COUNSEL JOSEPH W. EVANS

Introduction

Plaintiffs have moved to disqualify the undersigned counsel for the individual Defendants in this matter because their counsel of choice:

- "is named specifically in the [Plaintiffs'] Complaint as a witness"[1]
- "entered an appearance on behalf of the [individual] defendants"[2]
- "has participated in the defense of this case"[3]

[1] Docket 14, page 1 of 5, lines 19-20.
[2] Id., line 21.
[3] Id., lines 21-22.

- "has no intention of withdrawing"[4]

- "name appears in three separate factual paragraphs: 33, 34, and 37 [of Plaintiffs' Complaint]"[5]

- "performed an investigation into the allegations of 'hostile work environment' leveled against his current client, Brad Johnson, at the request of the Mayor"[6]

- "was not acting as an attorney, but as an investigator"[7]

- "issued a written report"[8]

- will be deposed and placed on Plaintiffs' witness list[9]

- "[has] testimony…[that] will be required and even 'indispensable' "[10]

- "was the only investigator into Defendant Brad Johnson's conduct"[11]

- "conducted interviews and his testimony thereon could be central to the underlying case, and cannot be obtained elsewhere"[12]

- "was not added to the Plaintiffs' witness list on a whim or for tactical reasons"[13]

- "is a legitimate witness, who was added to the complaint prior to the knowledge of his representation"[14]

- "[i]f allowed to remain as an advocate in this case, [he] would be placed into 'the unseemly position of arguing his own credibility to the jury' "[15]

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[4] Id., line 23.
[5] Id., page 2 of 5, lines 2-3.
[6] Id., lines 3-5.
[7] Id., lines 5-6.
[8] Id., line 6.
[9] Id., lines 6-7.
[10] Id., page 3 of 56, lines 2-3.
[11] Id., lines 3-4.
[12] Id., lines 4-6.
[13] Id., lines 6-7.
[14] Id., lines 7-8.
[15] Id., lines 9-10.

- "may very well be called as a trial witness and would then be required to step down as an attorney"[16]
- "does not move the case forward and could very well impede the proceedings later"[17]
- can be replaced by another attorney[18]

Plaintiffs cited Alaska Rule of Professional Conduct 3.7, "Lawyer as Witness," Alaska Bar Association Ethics Opinion 86-5 and Munn v. Bristol Bay Housing Authority, 777 P.2d 188 (Alaska 1989) in support of their Motion to Disqualify.

Plaintiffs' Motion to Disqualify is improper, premature and without merit. The case law establishes that motions to disqualify an attorney are disfavored and carry a heavy burden on the moving party. The strong presumption is that a party should be entitled to choose his own attorney. The Plaintiffs cannot disqualify an attorney merely by naming him in the Complaint or announcing their plan to take his deposition. Rather, the Plaintiffs have to make a concrete, factual showing that the attorney is a "necessary witness" who will testify about "disputed facts" that are prejudicial to his client. Even if the Plaintiffs could make such a showing in this case (which they cannot), their motion is grossly premature because Professional Rule 3.7 only applies "at trial" and does not preclude the undersigned from participating in the earlier stages of this case. Therefore, the Court should deny the Plaintiffs' ill-conceived and premature motion.

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[16] Id., lines 12-13.
[17] Id., lines 13-14.
[18] Id., page 3 of 5, line 14 to page 4 of 5, lines 1-2.

Pre-Litigation Factual Background

On Friday, February 1, 2008, the undersigned counsel for the individual Defendants in this matter (hereinafter referred to as "I") was contacted by the City of Fairbanks and informed that two FPD employees, Investigator Al Hutton and Lieutenant Doug Whorton, had approached the Mayor with allegations that:

(1) Investigator Hutton had been threatened with retaliation (i.e., demotion in position and/or pay) for suggesting that a grievance might be filed; and,

(2) there was a hostile work environment at FPD, created by the Chief of Police and Deputy Chief of Police.

On Monday, February 4, 2008, I met with the Mayor and Chief of Staff, in the Mayor's Office, regarding these allegations.

On Tuesday, February 5, 2008, I met with PSEA Business Agent TK Kleiner at the Offices of Borgeson & Burns, 100 Cushman Street, Suite 311, in Fairbanks. Ms. Kleiner and I then conducted a series of interviews with Investigator Al Hutton, Lt. Tara Tippett and Lt. Doug Whorton, which were tape-recorded and copies of the tape recordings were provided to Hutton's and Whorton's Union Representative, TK Kleiner.

On February 6, 2008, I met with Deputy Chief Brad Johnson at the Offices of Borgeson & Burns and interviewed him. I tape-recorded this interview and provided a copy of the interview to TK Kleiner, Hutton's and Whorton's Union Representative.

On Thursday, February 7, 2008, Investigator Hutton contacted me at my office in Kotzebue, Alaska. I also spoke with him, again, that same evening. On Saturday, February 9, 2008, I spoke once more with Investigator Hutton when I returned his phone call.

On Thursday, February 14, 2008, I conducted interviews with Lt. Geier (in person) and Lt. Welborn (via telephone). PSEA Business Agent TK Kleiner also participated in these interviews, telephonically. These interviews were also tape-recorded and copies of the tape-recordings were provided to Hutton's and Whorton's Union Representative, TK Kleiner.

As noted above, the two allegations formally submitted to the Mayor, involved;

(1) threatened retaliation (i.e., demotion in position and/or pay) for suggesting that a formal, written grievance might be filed; and,

(2) hostile work environment.

Based upon the interviews with the various FPD personnel noted above and after due consideration of the facts and circumstances in this matter, I reported to the Mayor on February 21, 2008 that these two allegations were unfounded. (Unfounded is defined in the Collective Bargaining Agreement in Section 12(E)(10)(d), at page 21, as "mean[ing] that the act alleged did not occur.")

Alaska Rule of Professional Conduct 3.7

Fifteen years ago, by Supreme Court Order, effective July 15, 1993, Alaska adopted Rule 3.7, "Lawyer as Witness," which provides:

> **Rule 3.7, Lawyer as Witness.**
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except when:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

> (b) A lawyer may act as advocated in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.
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> (SCO 1123 effective July 15, 1993)

The "Comment" to ARPC 3.7 states, in pertinent part:

> COMMENT
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> * * *
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> Paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is a risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principal of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.
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> * * *

Alaska Case Law

The Alaska case law deals exclusively with former DR 5-102 and DR 5-101(B), although there are some references to RPC 3.7, which replaced these DRs.

In Murray v. Feight, 741 P.2d 1148, 1160 (Alaska 1987), the court confirmed that an attorney who witnessed the repossession of a store could continue to represent the lessees against the lessors since it was unlikely that the attorney would be called as a witness on the consent issue where the consent issue had been decided in a previous case.

In Munn v. Bristol Bay Housing Authority, 777 P.2d 188, 196-197 (Alaska 1989), the Supreme Court held that the superior court did not abuse its discretion in denying a disqualification motion:

> We conclude that they are mistaken and that the superior court did not abuse its discretion in denying their disqualification motion. Vollintine's affidavit that BBHA and Nannery do not intend to call him as a witness on their behalf supports the conclusion that DR 5-102(A) does not apply. The conclusion that DR 5-102(B) does not apply is supported by the absence from the record of any evidence making it apparent that he will be called as a witness "other than on behalf of" his clients ***and*** that his testimony "is or may be prejudicial to [them]."
>
> We recognize that a party might attempt to disqualify opposing counsel as a tactical weapon. The ethical rules regarding lawyers as witness "w[ere] not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel." Galarowicz v. Ward, 119 Utah 611, 230 P.2d 576, 580 (1951). A party cannot disqualify an opponent's attorney by making a "mere declaration of an intention to call opposing counsel as a witness," thereby interfering with an opponent's "***right*** to the counsel of its choice . . . for mere strategic or tactical reasons." Security Gen. Life Ins. Co., 718 P.2d at 988 (emphasis in original). "Furthermore, some courts have required that "[w]hen an attorney is to be called other than on behalf of his client, a motion for disqualification must be supported by a showing that . . . the evidence is unobtainable elsewhere." Cottonwood Estates v. Paradise Builders, 128 Ariz. 99, 624 P.2d 296, 302 (1981), cited in Security Gen. Life Ins. Co., 718 P.2d at 988 (interpreting Model Rules of Professional Conduct Rule 3.7(a)); Ray v. Stuckey, 491 So.2d 1211, 1214 (Fla. App. 1986) (attorney's testimony must be "indispensable"). We hold that this burden on the disqualification movant is appropriate where the attorney is not a central figure in the litigation.

(Footnote omitted; emphasis in original)

In Kanulie v. State, 796 P.2d 844, 846-848 (Alaska App. 1990), the Court of Appeals held that the prosecutor who had participated in the videotaped interrogation of the defendant was not required to withdraw from the case where the trial judge directed the prosecutor not to refer to his participation in taking the statement and where, in the event either side needed to call a witness to the statement, a policeman who was present during the statement was available.

In O'Brannon v. State, 812 P.2d 222, 226-227 (Alaska App. 1991), a prosecution for criminal contempt, the Assistant Attorney General ("AAG") who investigated the underlying civil complaints was permitted to sit with the prosecutor during the criminal trial, act as an investigator for the criminal charges and testify as a witness for the prosecution. (The trial court instructed the jury that the AAG was only a witness in the case and the AAG was not participating as counsel in the trial.)

In Eufemio v. Kodiak Island Hospital, 837 P.2d 95,103-104 (Alaska 1992), the Supreme Court held that the trial court abused its discretion in using DR 5-102 of the Code of Professional Responsibility to disqualify an attorney from representing a client:

> The Code of Professional Responsibility should not be used as an offensive pretrial maneuver. As the Borman court stated:
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> Notwithstanding the purposes served, application of the rule may have harsher consequences for the client than the continued service of the attorney. Most obviously, the rule may deny a litigant of the right to counsel of his choice. When disqualification occurs after employment has begun, it temporarily (and possibly permanently) disables the litigant in his effort to prosecute a claim or mount a defense. It is not surprising therefore that the code has been used increasingly as a catalog of pretrial tactics. When needless disqualification occurs as a result of these tactics, the very rules intended to prevent public disrespect for the legal

> profession foster a more dangerous disrespect for the legal process. We, therefore take this opportunity to state the first and foremost, the code is self-executing. We expect lawyers to know and comply with its provisions. If an attorney is unsure whether in a given case his conduct violates the code, he should terminate the questionable conduct or seek the advice of the appropriate Committee on Ethics and Professional Responsibility. If he persists in questionable conduct, he risks disciplinary action including disbarment. When a lawyer, exercising his best judgment, determines that his employment will not bring him into conflict with the code, disqualification may occur only if the trial court determines that his continued participation as counsel taints the legal system or the trial of the cause before it. 393 N.E.2d at 855 (citations, footnotes omitted).

In Estate of McCoy v. Cannon, 844 P.2d 1131, 1135-1136 (Alaska 1993), a will contest alleging undue influence, the Supreme Court upheld the disqualification of the lawyer who was a central figure in the litigation and who drafted the will for the decedent at the request of the new, sole beneficiary of the will. However, the Supreme Court noted that:

> The Code of Professional Responsibility indicates two situations in which withdrawal is required where the attorney involved becomes a witness. In the first situation, following the dictates of DR 5-102(A), an attorney must withdraw if there is notice or reasonable probability that the attorney will be called as a witness on behalf of a client and attorney testimony does not fall within one of the four exceptions enumerated in DR 5-101(B). The second situation requiring withdrawal arises if an attorney learns or it is obvious that the attorney may be called by the other side ***and*** attorney testimony is or may be prejudicial to the client. DR 5-102(B). This court has raised the burden in the second situation to avoid the risk that parties might attempt to disqualify opposing counsel by calling counsel as a witness. Where the attorney is not a "central figure in the litigation," a motion for disqualification under DR 5-102(B) must be supported by a showing that the evidence is unobtainable elsewhere, Munn, 777 P.2d at 197.

Other State Cases Regarding RPC 3.7

In Security General Life Ins. Co. v. Superior Court, 149 Ariz. 332, 718 P.2d 985, 987-989 (1986), the Arizona Supreme Court vacated a trial court order and held that an attorney was not disqualified from representing an insurer on the grounds that the insured had indicated he planned to call the attorney as a witness:

> Tallent's main argument in support of the disqualification order is that ER 3.7, *supra,* which has replaced former Disciplinary Rule 5-102 (Rule 29, Rules of the Supreme Court, 17A A.R.S.), requires disqualification. The current rule provides in relevant part:
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> Lawyer as witness
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> (a) A lawyer shall not act as advocate at a trial in which the lawyer ***is likely to be a necessary witness*** except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
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> ER 3.7, Rule 42, Rules of Supreme Court, *supra* (emphasis supplied).
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> The official comment to the rule indicates that a party can easily be prejudiced when opposing counsel acts as both advocate and witness. Thus, courts have recognized that a party may object when his opponent's counsel desires to serve in the dual capacity of advocate and witness. Id., comment. On the other hand, it has also been long recognized that because every litigant has the ***right*** to the counsel of its choice a party should not be allowed to disqualify opposing counsel for mere strategic or tactical reasons. See Cottonwood Estates, Inc., v. Paradise Builders Inc., 128 Ariz. 99, 104-105, 624 P.2d 296, 301-302 (1981). See also Kendall v. Atkins, 374 Mass. 320, 372 N.E.2d 764, 767 (1978); Freeman v. Kulicke & Soffa Industries, Inc., 449 F.Supp. 974, 977 (E.D. Pa. 1978), *aff'd,* 591 F.2d 1334 (3rd Cir. 1979).

We acknowledge, of course, that the rules do permit a party to call adverse counsel as a witness and therefore there are times when counsel must be disqualified because an adverse party intends to call him as a witness. See Freemen v. Kulicke, *supra.* We believe, however, that the obvious dangers inherent in such a practice and the importance of the right to have the counsel of one's choice require careful scrutiny of the facts before such a result is permitted. Cottonwood Estates, *supra.*

We believe that the new ethical rules establish standards that will protect the rights of a party to counsel of his choice and prevent abusive disqualification of counsel by an opponent. Ethical Rule 3.7 requires that a lawyer-witness may be disqualified only if he is a "necessary witness." Even if he is a necessary witness, there are three enumerated exceptions to disqualification. See also HAZARD and HODES at 405. Although two of those exceptions have been raised in this case, we think it unnecessary to consider them because respondent has not shown the *sine qua non* for disqualification under ER 3.7 -- that Low is a ***necessary*** witness. A party's mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony Stocking v. Biery, 677 S.W.2d 792, 794 (Tex. App. 1984). We think that the governing principle is as follows:

When an attorney is to be called other than on behalf of his client, a motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated [and], that the evidence is unobtainable elsewhere . . . . " Cottonwood Estates v. Paradise Builders, 128 Ariz. at 105, 624 P.2d at 302.[FN1] Thus there is a dual test for "necessity." First the proposed testimony must be relevant and material. Then it must also be unobtainable elsewhere. Assuming, *arguendo,* that Low's testimony would be relevant and material, Tallent failed to show that it could not be obtained from other witnesses. Low had no personal knowledge of any matter relating to either Tallent or Security General. Low's affidavit contains an averment that "the only purpose to which he could testify as a witness in this matter is the fact that the Department did issue certain orders over his signature relating to Security General Life Insurance

> Company." Certainly such testimony was obtainable from a host of departmental employees, past and present.
>
> [FN1] Cottonwood Estates was decided under DR 5-102. *See,* p. 987, *supra.* We believe that ER 3.7 requires an even more specific showing of necessity. [Emphasis added.]

In Fognani v. Young, 115 P.3d 1268, 1272-1279 (Colo. 2005), a medical malpractice action, the plaintiffs wanted to call their attorney as a witness in their case-in-chief to testify about an alleged admission made by the defendant doctor. The trial court disqualified the plaintiffs' attorney and his entire firm from representing the plaintiffs. The Colorado Supreme Court upheld the disqualification of the attorney who was going to be called as a witness on behalf of his clients, but remanded the portion of the order disqualifying the entire firm to the trial court for further review and consideration by the trial judge. However, the Supreme Court held that the disqualified attorney could participate in pretrial activities "unless the [trial] court determines that [such] participation . . . would have the tendency to disclose his dual rule to the jury." 115 P.3d at 1279.

In a series of unpublished decisions, the Connecticut Superior Court denied attempts to disqualify counsel. See, Flanigan v. Kohary, 1991 WL 44310 (March 19, 1991) [plaintiff failed to provide sufficient evidence to satisfy burden of persuasion in case where the attorney sought to be disqualified had negotiated the purchase and sale agreement and held the escrow money sought to be returned by the plaintiffs]; Haven Plaza East Associates v. Gargano, 1991 WL 121677 (June 20, 1991) [attorney sought to be disqualified could continue to act as advocate unless and until he was called as a witness at trial at which time other counsel from his firm could serve as advocate at trial]; Matlis v.

Probate Appeal, 2004 WL 2896616 (November 19, 2004) [disqualification is both harsh and draconian and the movants have a heavy burden to clearly show that disqualification is warranted; courts should act very carefully before disqualifying an attorney and negating the right of a client to be represented by counsel of choice]; Nevas v. MacDonald, 2006 WL 618568 (February 14, 2006) [motion to disqualify was premature; attorney could participate in pretrial and discovery proceedings; when discovery is completed, the motion to disqualify may be renewed if the attorney is a necessary witness and must testify at trial]; and, Quinebaug Valley Engineers Assoc., Inc. v. Colchester Fish and Game Club, 2008 WL 3853372, *3 (July 25, 2008) [disqualification can have an improper, chilling effect on attorneys early involvement in matters, "to no one's benefit"]. *cf.,* Jean v. Angle, 2008 WL 2168873 (May 2, 2008) [attorney disqualification granted where attorney's testimony was necessary to determine which parties he represented in the dispute; his actions and knowledge regarding the purchase of the limousine company; and, his knowledge of payments that he received which may have been in violation of previous court orders].

In Thompson v. Goetz, 455 N.W.2d 580, 587-588 (N.D. 1990), the North Dakota Supreme Court, in an attorney malpractice action, affirmed the trial court's denial of a disqualification request:

> [A] party cannot disqualify an opponent's attorney by making a "mere declaration of an intention to call opposing counsel as a witness," thereby interfering with an opponent's "***right*** to the counsel of its choice . . . for mere strategic or tactical reasons." Security General Life Ins. v. Superior Court, 149 Ariz. 332, 718 P.2d 985, 988 (1986) [Emphasis in original]. Rule 3.7(a) thus disqualifies an attorney only when the attorney is "likely to be a necessary witness." "This standard requires the opposing party to bear a higher burden on a disqualification motion, permits the court to delay ruling until it can be determined that no other witness could testify, and

> obviates disqualification if the lawyer's testimony is merely cumulative." ABA/BNA Lawyers' Manual on Professional Conduct 61:507 (1984). Even when it has been adequately shown that an attorney will be a "necessary witness," Rule 3.7(a) envisions a balancing of the interests at stake in resolving the disqualification question. The Comment to Rule 3.7 states:
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>> "[P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probably tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. ***Even if there is a risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client***." [Emphasis added.]

In Kehrer v. Nationwide Ins. Co., 1994 WL 805877 (August 9, 1994), the Pennsylvania Court of Common Pleas (Lancaster County), in a bad faith and fraud action, denied the defendant insurance company's effort to disqualify the plaintiff's attorney "due to his 'inevitable role as a trial witness'." After contrasting RPC 3.7 and DR 5-102(A) and DR 5-101(B), the Court denied the motion for disqualification:

> We disagree with defendant's assertion that the prior ethical provisions are "essentially parallel" to current Rule 3.7, and therefore find any reliance upon cases granting disqualification issued pursuant to the language of the prior provisions have little precedential value. Courts and legal commentators have both recognized Rule 3.7 represents a change in the standard for attorney disqualification, thereby placing a higher burden on the party seeking disqualification than did the Model Code standard. Stonerock, The Advocate-Witness Rule: Anachronism or Necessary Restraint?, 94 Dick. L. Rev. 821, 846 (Summer 1990); United Food and Commercial Works v. Darwin Lynch, 781 F.Supp. 1067, 1069 (M.D. Pa. 1991).

Under the prior ethical provisions, courts were required to determine not whether an attorney will testify, but whether he "ought to testify." The fact a lawyer and his client independently decided the lawyer need not testify was not controlling. See Kalmanovitz, 610 F.Supp. at 1325. Courts interpreted the "ought to testify" language broadly finding it was irrelevant whether the information known to the attorney was merely corroborative; the client was entitled to every scrap of favorable evidence available. Id.

An important criticism of the code formulation is that it was susceptible to use as a tactical measure to disrupt an opposing party's preparation for trial and divest opposing parties of their counsel of choice. Cannon Airways v. Franklin Holding Corp., 669 F.Supp. 96 (D. Del. 1987). Present Rule 3.7 minimizes this potential for abuse of disqualification motions as tactical weapons by placing a higher burden on the party moving for disqualification.

In order to succeed in a motion to disqualify counsel under Rule 3.7, the moving party must demonstrate the opposing counsel is "likely to be a necessary witness." In addition, the testimony must relate to a contested issue, since Rule 3.7(a)(1) permits an attorney to act as both advocate and witness where the testimony related to an uncontested issue. The rule also provides two other exceptions which allow counsel to exercise the roles of both advocate and witness, the most significant of which would preclude disqualification where it would work substantial hardship on the client. However, the threshold issue is whether counsel is "likely to be a necessary witness." The American Bar Association and courts agree the term "necessary" means no other witness could testify, and precludes disqualification if the lawyer's testimony would merely be cumulative. See United Food, 781 F.Supp at 1069-70; Law Manual on Professional Conduct (ABA/BNA) 61:507 (April 14, 1984). To hold otherwise "would be to ignore the obvious meaning of 'necessary' " and would "invite abuse in an area where broad exceptions can wreak havoc with fundamental rights." Cluck v. Jesus Is Lord Ministries, 15 Pa. D. & C. 4th 401, 406 (Adams Co. 1992).

* * *

We find implicit in the language and meaning of Rule 3.7 the requirement that a party calling opposing counsel as a

> witness must demonstrate the proposed testimony will be prejudicial to the testifying attorney's client. Obviously, if the testimony of counsel will conflict with the testimony of his client, the client's case will be adversely affected, and the attorney should withdraw or be disqualified. However, there is no basis for disqualifying counsel where the testimony offered on behalf of the opposing party benefits or has no effect on the client. Disqualification would only serve as an unwarranted penalty under such circumstances.

In Harter v. Plains Ins. Co., 1998 S.D. 59, 579 N.W.2d 625, 631-632 (1998), the South Dakota Supreme Court, in an UIM bad faith case, upheld the trial court's refusal to disqualify the plaintiff's attorney by the insurance company:

> Harter cites authority which provides that the movant bears the burden of supporting the motion for disqualification with a showing that the evidence or testimony sought is unobtainable elsewhere. E.g., Munn v. Bristol Bay Hous. Auth., 777 P.2d 188, 197 (Alaska 1989) (collecting cases); accord Smithson v. United States Fidelity & Guar. Co., 185 W.Va. 195, 411 S.E.2d 850, 856 (W. Va. 1991):
>
>> [W]e conclude that when an attorney is sought to be disqualified from representing his client because an opposing party desires to call the attorney as a witness, the motion for disqualification should not be granted unless the following factors can be met: First, it must be shown that the attorney will give evidence material to the determination of the issues being litigated; second, the evidence cannot be obtained elsewhere; and third, the testimony is prejudicial or may be potentially prejudicial to the testifying attorney's client.

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Federal District Court Cases[19]

In Mike v. Dysnon, Inc., 1996 WL 427761 (D. Kansas, July 25, 1996), the plaintiff sought to disqualify defense counsel from acting as defense counsel at the trial of dispute involving an employment and compensation agreement and counterclaim of revealing confidential information. The court denied the motion to disqualify:

> "A motion to disqualify counsel deserves serious, conscientious, and conservative treatment. The court must decide each such motion carefully and on its own facts, in an effort to balance the interest in protecting the integrity of the process against the right of a party to have counsel of its choice." Regent Ins. Co. v. Insurance Co. of N. Am., 804 F.Supp. 1387, 1390 (D. Kan. 1992) (citations omitted). Courts are especially sensitive to the potential for abuse when the party seeking disqualification is also the one seeking to call the attorney as a witness. See Chapman Eng'rs, 766 F.Supp. at 959; FDIC v. Frazier, 637 F.Supp. 77, 81 (D. Kan. 1986). "Where the party moving for disqualification chooses to call its opponent's attorney as a witness, we must be especially sensitive to the potential for abuse. If disqualification were routinely granted in such situations, the temptation to remove an opponent's counsel from the scene would be tremendous." Frazier, 637 F.Supp. at 81.
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> The Kansas Court of Appeals recently discussed Rule 3.7 in LeaseAmerica Corp v. Stewart, 19 Kan. App.2d 740, 875 P.2d 184 (1994). In reversing a decision to disqualify counsel upon motion by the opposing party, the court adopted at three part test set forth in Smithson v. U.S. Fidelity & Guar. Co., 411 S.E.2d 850 (W.Va. 1991):

[19] LR 83.1, "Attorneys," of the Local Rules (Civil) of the U.S. District Court, District of Alaska, at ¶(i)(1) provides:
Professional Conduct. Every member of the bar of this court and any attorney admitted to practice or appear in this court must:
(1) be familiar with and comply with the Standards of Professional Conduct required of the members of the State Bar of Alaska and contained in the Alaska Rules of Professional Conduct and decisions of any court applicable thereto, except insofar as those rules and decisions are otherwise inconsistent with federal law;

> [W]e conclude that when an attorney is sought to be disqualified from representing his client because an opposing party desires to call the attorney as a witness, the motion for disqualification should not be granted unless the following factors can be met: First, it must be shown that the attorney will give evidence material to the determination of the issues being litigated; second, the evidence cannot be obtained elsewhere; and third, the testimony is prejudicial or may be potentially prejudicial to the testifying attorney's client.
> LeaseAmerica Corp, 19 Kan. App.2d at 751, 876 P.2d at 192. According to the Smithson court, this analysis "strikes a reasonable balance between the potential for abuse and those instances where the attorney's testimony may be truly necessary to the opposing party's case." 411 S.E.2d at 856.
>
> "The burden of proof is on the moving party to establish that: 1) the attorney will give material evidence relevant to the litigated issues; 2) the evidence is unobtainable from another source; and 3) the testimony is or may be prejudicial to the witness attorney's client." Mayhew v. Learjet, Inc., No. 95-1003-FGT, unpublished opinion, D. Kan. February 21, 1996.

In Michel v. Miller, 1998 WL 42887 (E.D. La., January 30, 1998), a complaint alleging §1983 violations against a police chief, the plaintiff sought to disqualify the City Attorney from defending the police chief because the City Attorney would be called as a necessary witness at trial. The court denied the motion to disqualify:

> When determining whether a lawyer, like Mr. LeBlanc, is "likely to be a necessary witness" courts have required three things to be shown to demonstrate the "likely to be a necessary witness" factor exists:
>
> 1. The attorney will give evidence material to the determination of the issues being litigated;

> 2. The evidence cannot be obtained elsewhere; and,
>
> 3. The testimony is prejudicial or potentially prejudicial to the testifying attorney's client.
>
> These requirements allow a court to balance ethical considerations and societal interests, such as the right of a party to select his counsel. Moreover, this Court is aware that it "must be especially sensitive to the potential for abuse: when, as here, the party seeking disqualification is also the one wanting to call the attorney as a witness. (Footnotes omitted.)

In Javorski v. Nationwide Mutual Ins. Co., 2006 WL 3242112 (M.D. Pa., November 6, 2006), the court denied the insurance company's motion to disqualify the plaintiff's attorney who was a former employee of the insurance company, holding, *inter alia* under RPC 3.7, that "the rules addressing attorney as witness contemplate a determination of the need for disqualification at the time of trial . . . " and acknowledging that RPC 3.7 "allows an attorney-witness to participate in pretrial activity -- disqualification occurs at the time of trial." 2006 WL 3242112, *9.

In Calhoun v. City of Austin, 2007 WL 496721 (W.D. Tex., February 6, 2007), the City of Austin sought to disqualify the plaintiff's lawyer in an illegal arrest civil case, alleging that the plaintiff's attorney was a witness to the events that underlie the suit. The trial court denied the motion to disqualify:

> A lawyer is not "likely to be a necessary witness" when evidence pertaining to the matters on which he could testify is available from another source. Horaist v. Doctor's Hosp. of Opelousas, 255 F.3d 261, 267 (5th Cir. 2001). In Horaist, the Fifth Circuit held that because a lawyer's potential testimony was cumulative of the testimony of other witnesses, the lawyer was not a necessary witness and the trial court was correct not to disqualify him. Defense

> counsel stated numerous times at the hearing that she needed to call Mr. Parr so she could "impeach" one or more of the Plaintiffs with Parr's testimony. Even assuming for the sake of argument that Mr. Parr would testify inconsistently with the Plaintiffs on some particular, that does not make his testimony material or necessary to the Defendants' case. It is "well established that a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter." United States v. Beauchamp, 986 F.2d 1, 3 (1st Cir. 1993). Defendants have failed to establish how Parr's testimony would impeach his clients on any issue central to the case. Indeed, as discussed below, Parr's testimony would not be central to any issue in the case. Therefore, not only would Parr's testimony not be necessary it is likely also inadmissible.

See, also, Gov't of the Virgin Islands v. Seafarers Int'l Union, 2008 WL 4525838 (D. Virgin Islands, October 2, 2008) [RPC 3.7 "is only applicable to trial"]; Umphenour v. Mathias, 2008 WL 2785609, *2 (E. D. Ky., July 16, 2008) [motions to disqualify are governed by two sources – local rules and federal common law]; Anderson v. Nickolson, 2008 WL 2782756, *2 (C.D. Ill., July 15, 2008) [discovery in case had not yet begun, so what other sources may be available cannot yet be ascertained]; and, Rupp v. Transcontinental Ins. Co., 2008 WL 2627516, *2 (D. Utah, July 2, 2008) [motions to disqualify in federal proceedings are substantive motions affecting the rights of the parties and are decided by applying standards developed under federal law].

Ninth Circuit Case Law

In Optyl Eyewear Fashion Int'l Corp. v. Style Companies, Ltd., 760 F.2d 1045, 1049-1050 (9th Cir. 1985), the Ninth Circuit Court of Appeals affirmed the trial court's determination that a disqualification motion was without merit, brought solely for tactical reasons and was brought in bad faith, thereby justifying the imposition of costs and attorney's fees as a sanction:

Optyl produced evidence in the district court showing that the extent of its counsel's participation in drafting the letter was limited to giving legal advice. Optyl claimed that any testimony its counsel might be asked to give would be protected by the attorney-client privilege. Optyl further asserted that it had no reason to call its counsel to testify and, even if they were called, their testimony would not be prejudicial to Optyl's case.

Style did not point to any evidence to refute Optyl's assertions. In fact, Style did not depose Optyl's counsel prior to moving for disqualification. Style relied entirely upon one interrogatory answer in which Optyl acknowledged that its counsel had participated in drafting the disputed letter. In short, Style offered absolutely no showing that Optyl "ought" to call its counsel to testify or that counsel's testimony might have been prejudicial if Anten had called Optyl's counsel to testify. See Rosen v. NLRB, 735 F.2d 564, 575 (D.C. Cir. 1984) (mere allegations of impropriety are insufficient to compel withdrawal); *cf.* Rhinehart v. Stauffer, 638 F.2d 1169, 1171 (9th Cir. 1979) (*per curiam*) (before filing an action, attorney has duty to investigate claims to see that they have merit).

* * *

Anten does not allege any specific improprieties that would result if Optyl's counsel testified in this case. Instead, his theory is that his client, Style, would be prejudiced if Optyl's counsel testified, since Anten would then be handicapped in challenging the credibility of opposing counsel. We find several difficulties with this theory.

First, we cannot see why Optyl's counsel need be witnesses. Optyl asserts that it will not call its counsel to testify, and Anten has not offered any reason why Style would or should call them. In fact, he admits that counsels' testimony would be favorable to Optyl and unfavorable to Style. The only reason we can see for Anten's suggestion that he will call Optyl's counsel is to use it as a predicate for the disqualification motion.

Second, we find Anten's "prejudice" argument unpersuasive. It may be awkward to impeach a fellow attorney's credibility, International Electronics Corp. v. Flanzer, 527 F.2d at 1294, but the problem remains since

> counsel, disqualified or not, still can testify. See Comment, The Rule Prohibiting an Attorney from Testifying at Client's Trial: An Ethical Paradox, 45 U.Cin.L.Rev. 268, 271 (1976). Opposing counsel's duty to represent his client's interest zealously, see ABA Code, Canon 7, DR 7-101(A)(1), should overcome any professional loyalty owed to a colleague. See Greenebaum-Mountain Mortgage Co. v. Pioneer National Title Insurance Co., 421 F.Supp. 1348, 1354 (D. Colo. 1976). Nor is there any special reputation for truth-telling reserved to lawyers that would unduly prejudice the opposing side. See Wydick, Trial Counsel as Witness: The Code and the Model Rules, 15 U.C.D.L.Rev. 651, 662-663 (1982).
>
> Finally, and perhaps most important, Anten's "prejudice" theory sweeps overbroadly. The ethical rules strike a balance between the competing interests of a client's right to choose counsel and the inconsistency of an advocate giving testimony. The drafters of the rules clearly contemplated that in some circumstances the balance would tip in favor of the client, and trial counsel would be permitted to testify. See, e.g., DR 5-101(B)(4), 5-102(A) (attorney may continue representation if testimony would be on behalf of client and "substantial hardship" would result from withdrawal); Cal.Rule 2-111(A)(4) (attorney may continue representation if testimony would be on behalf of client and client consents after full disclosure). Anten's view would preclude trial counsel's ever taking the stand. The "prejudice" he describes would exist in all cases, and courts would be forced to grant disqualification motions whenever counsel threatens to call opposing counsel.

Discussion

Plaintiffs have failed to meet the heavy burden placed on them at this stage of the litigation of this matter to disqualify the individual Defendants' counsel of choice. Namely, Plaintiffs have failed to produce any cognizable evidence that:

- the individual Defendants intend to call their counsel as a witness;

- individual Defendants' counsel would proffer testimony prejudicial or potentially prejudicial to their defense;
- the evidence sought by Plaintiffs is unobtainable elsewhere;
- the individual Defendants' counsel is a central figure in the litigation;
- continued participation of the individual Defendants' counsel would taint the legal system or the trial of the cause before it; and/or,
- individual Defendants' counsel has any testimony related to a contested issue in this case.

As a result, Plaintiffs' Motion to Disqualify must be denied on these bases, alone.

Beyond the failure to meet the heavy burden required for disqualification, Plaintiff's Motion to Disqualify is inapposite because:

- no discovery has been conducted in this case;
- no trial has been set in this case;
- the Motion for Disqualification is, at best, premature;
- merely acting as an "investigator" in the early stages of a dispute does not serve as a basis for disqualification;
- merely naming the individual Defendants' counsel in Plaintiffs' Complaint is not grounds for disqualification;
- merely threatening to call the individual Defendants' counsel as a witness at trial is not grounds for disqualification;
- the individual Defendants have a right to counsel of their choice; and,

- a Party should not be allowed to disqualify opposing counsel for mere strategic or tactical reasons.

Finally, in the unlikely event that discovery, once it is conducted in this matter, shows that individual Defendants' counsel: (1) will give evidence material to the determination of the issues being litigated; and (2) the evidence cannot be obtained elsewhere; and (3) the testimony of individual Defendants' counsel is prejudicial or may be prejudicial to the individual Defendants, then, the individual Defendants would consent to have the City's present counsel in this matter, Jermain, Dunnagan and Owens, P.C., provide their defense at trial with their undersigned counsel's participation only as directed by the Court during the course of the trial. However, the individual Defendants do not believe this will become necessary.

Conclusion

Based upon the facts in this matter, the authority cited herein and the stage of this litigation, the individual Defendants respectfully request that Plaintiffs' Motion to Disqualify their counsel of choice be denied.

Dated this 6th day of November, 2008.

LAW OFFICES OF JOSEPH W. EVANS
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Chief Daniel P. Hoffman and
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CERTIFICATE OF SERVICE

I hereby certify that, on November 6th, 2008, a true and correct copy of the foregoing document was served electronically on the following counsel of record:

Linda J. Johnson
Clapp, Peterson, Van Flein,
Tiemessen & Thorsness LLC

Howard S. Trickey
Matthew Singer
Jermain Dunnagan & Owens, P.C.

_____*s/Joseph W. Evans*_____