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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

AL HUTTON And DOUG WHORTON Plaintiffs, vs. CITY OF FAIRBANKS, CHIEF DANIEL P. HOFFMAN and DEPUTY CHIEF BRAD JOHNSON, each in his individual and official capacity, Defendants.	)))))))))))))	Case No. 4:08-CV-00029 (RRB)

REPLY TO INDIVIDUAL DEFENDANTS' AND CITY OF FAIRBANKS' OPPOSITIONS TO MOTION TO DISQUALIFY JOE EVANS

Plaintiffs Hutton and Whorton combine their replies to the oppositions filed by the individual defendants and by the City of Fairbanks. Plaintiffs filed a motion to disqualify Joe Evans as the individual defendants' attorney because he is a likely witness. Both oppositions claim that the motion is premature. However, the timing of the motion was intended to give the defendants the best chance of finding good counsel at an early stage of this case and to prevent disruptions later on.

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I. THE RECITATION OF FACTS BY JOE EVANS PROVES HIS INVOLVEMENT SHOULD PRECLUDE HIS REPRESENTATION.

In the individual defendants' opposition, Joe Evans gives a recitation of his alleged involvement in this case. He does so without benefit of an affidavit or other exhibit that would corroborate his unsworn testimony to the court. The factual statement is inadmissible for any purpose and should not be relied upon.

However, the mere fact that Mr. Evans must recite facts related to his involvement in the underlying facts unmistakably demonstrates Plaintiff's point: Mr. Evans is a witness in this case.

The facts alleged by Mr. Evans show that Mr. Evans alone[1] interviewed at least one of his own clients during the investigation, and therefore the facts surrounding that interview are "unavailable elsewhere" and potentially detrimental to his client. See Opp. at 4: The tape recording is insufficient for Plaintiffs to rely upon because it does not provide the observations of the interviewer, off record comments, what his personal conclusions were and how he came to the conclusion that no hostile work environment occurred[2], which are all important issues in this case and discoverable. Likewise, Mr. Evans' perception of what instructions were issued by the City of Fairbanks are evidence along with what efforts they advised him to take, what parameters they placed on his interviews, and what other

[1] The City of Fairbanks Opposition incorrectly states that all interviews were conducted in TK Kleiner's presence. Opp. at 2.

[2] Mr. Evans characterizes his conclusion and says: "Based upon the interviews with the various FPD personnel noted above and after due consideration of the facts and circumstances in this matter. . ." This is a statement that certainly will entail discovery. See Opp at 5.

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measures could have been taken. These are fair questions asked of any investigator and there is no reason to shield Mr. Evans from discovery. Unlike many of the cases cited by individual defendants, Mr. Evans did not merely sit in during an interview conducted by another person. He conducted the interview himself, and as such is a witness.

Although no discovery has yet taken place, Plaintiffs have possession of a document written by individual defendant Hoffman that indicates that **he consulted with Mr. Evans** when evaluating whether to send Plaintiff Hutton for a psychological evaluation. Whether this document is authentic and its statement valid will be the subject of discovery. Ex. 1, memo from Chief Dan Hoffman to Al Hutton, dated Marcy 3, 2008, at 2 ("Mr. Evans also expressed concern about your projected emotional state. . .") Based upon this document, the deposition of Mr. Evans will be necessary to ascertain what he said, if anything to Chief Hoffman to influence the Chief's decision on the evaluation.[3] The psychological evaluation is a central part of Plaintiff Hutton's case and any recommendation about that evaluation is central to the case.

The court should not wait to see what <u>further</u> facts develop in this case. There are sufficient reasons already to disqualify Mr. Evans from acting as both a witness and an advocate. The court should not wait to see if there will be disruption to the case later on. Stalling the case later because Mr. Evans must recuse himself is an improper litigation tactic.

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[3] Deposing the Chief is not sufficient: the Plaintiffs have a right ot check the veracity of the Chief with Mr. Evans' testimony.

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II. HIS STATUS AS AN ATTORNEY DOES NOT SHIELD JOE EVANS FROM DISCOVERY.

The individual defendants spend an inordinate amount of time unhelpfully reciting cases without any analysis of why the cases might or might not apply to this issue. The poor style of briefing leaves it to the court to determine whether any cited case has any connection to the facts of this one. They do not. No case cited discussed a fact pattern wherein the attorney had conducted an investigation himself prior to litigation and then tried to represent one party of the investigation.

The crux of whether Mr. Evans should be disqualified lies within the individualized facts of this case. Mr. Evans was hired as an investigator by the City of Fairbanks. His actions, the interviews he conducted, and his conclusions were made as a determiner of fact and an investigator. He evaluated facts and gave an opinion of his findings to his employer, rendering his discussions with witnesses no different than those of any other investigator. The investigation was performed as part of the City of Fairbanks' ordinary business, and the City acted upon the report.

There can be no question that if Mr. Evans were not an attorney, he would be a witness. He cannot hide from discovery based solely upon his JD. Just because the City hired an attorney to perform the investigation and now wants to retain that same person as an attorney in court, does not mean that Plaintiffs cannot or should not inquire into the investigation. Mr. Evans chose to accept an assignment outside the bounds of a normal attorney-client relationship, and he must accept the consequences of that act.

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III. PLAINTIFFS DID NOT BRING THIS MOTION LIGHTLY AND THERE WAS NO INTENT TO DEPRIVE DEFENDANTS OF THE COUNSEL OF THEIR CHOICE.

Many of the cases cited by individual defendants discuss instances in which *during the litigation*, a party suddenly decides that the opposing counsel is a potential witness. In contrast, in this case, Plaintiffs had no idea the Joe Evans would ignore his own role as an investigator in this case and would attempt to insert himself as an attorney. Plaintiffs drafted their complaint based upon the facts of their claims and not to try to deprive anyone of counsel. In fact, as established in their initial motion, Plaintiffs warned Joe Evans that he would be named as a witness prior to when he entered an appearance.

Alaska Prof. R. Conduct 3.7 contains a mandatory provision prohibiting an attorney from serving as an advocate at the trial in which the lawyer is likely to be a necessary witness.[4] The individual defendants interpret this provision to mean that the attorney may represent the defendants until trial, and then abdicate his role. The position taken by Defendants is not defendable. Joe Evans was hired as a factual investigator and rendered an opinion. Further, he appears to have had input into the decision to evaluation Al Hutton's psychological state. Defendants ask the court to take a wait and see approach, but the delay is unreasonable and Plaintiffs should not be required to be patient later when Joe Evans must testify.

Joe Evans is a witness in this case. Hs should be disqualified now, not later on when it will cause delay to the case.

[4] Unlike some of the cases cited by individual defendants, Rule 3.7 does not require that there be testimony which is prejudicial to the attorney's client.

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IV. IF THE CITY'S COUNSEL CAN REPRESENT THE INDIVIDUAL DEFENDANTS LATER, THERE IS NO REASON THEY COULD NOT DO SO NOW.

The City of Fairbanks offers to allow its counsel to step in and represent the individual defendants at the last minute if Joe Evans is determined to be a witness in this case. Given this offer, presumably there is no reason why the City cannot pick up the representation of the individual defendants now, if they are able to do so later in the case. The individual defendants protest that Mr. Evans is their choice for counsel, but their choice cannot exempt Mr. Evans from Alaska Prof. R. Conduct 3.7 which prohibits an attorney from representing a party at trial when he is also a witness. Defendants offer no valid reason why Mr. Evans must remain in the case other than to say that he is the individual defendants' counsel of choice. But the practical and logical results will spell delay down the road. Because the ethics rule prohibits the practice, there is no reason not to apply the ethics rule now.

V. CONCLUSION.

For all the above named reasons, the court should disqualify Joe Evans.

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DATED AT Anchorage, Alaska this 12th day of November 2008.

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Certificate of Service

I hereby certify that on November 12, 2008
a copy of the foregoing document was served
electronically on Howard S. Trickey and Joe Evans.

s/ Linda J. Johnson

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