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| DOCKET NO. FST-CV15-5014808S |) | SUPERIOR COURT |
| |) | |
| WILLIAM A. LOMAS |) | JUDICIAL DISTRICT OF |
| |) | STAMFORD/NORWALK |
| Plaintiff, |) | |
| |) | |
| v. |) | AT STAMFORD |
| |) | |
| PARTNER WEALTH MANAGEMENT, LLC, |) | |
| KEVIN G. BURNS, JAMES PRATT-HEANEY, |) | |
| WILLIAM P. LOFTUS |) | |
| |) | AUGUST 11, 2015 |
| Defendants. |) | |

**PLAINTIFF’S OBJECTION AND MEMORANDUM OF LAW IN OPPOSITION TO
MOTION FOR ADMISSION *PRO HAC VICE***

Plaintiff William A. Lomas (“Lomas”) objects to the Motion for Admission *Pro Hac Vice* (the “Motion”) filed by Defendants Partner Wealth Management, LLC, Kevin G. Burns, James Pratt-Heaney and William P. Loftus, seeking to admit Attorney David Lagasse as appearing counsel in this litigation.¹ The Motion should be denied because Attorney Lagasse is a necessary witness in this case and, thus, a legitimate state interest overrides Defendants’ choice of counsel. In addition, the Motion and accompanying sworn statement of Attorney Lagasse fail to establish “good cause” for *pro hac vice* admission. Defendants have not provided any factual foundation for their claim that Attorney Lagasse has a “longstanding attorney-client relationship” with them or that “he possesses specialized skill or knowledge” applicable to this dispute. This a breach of contract case involving Connecticut parties (including a Connecticut LLC), a Connecticut contract, and Connecticut law.

¹ Partner Wealth Management, LLC will be referred to as “PWM.” Defendants Burns, Pratt-Heaney and Loftus will be referred to as the “Individual Defendants.” PWM and the Individual Defendants will be referred to as the “Defendants.”

FACTUAL BACKGROUND

This breach of contract case arises out of a limited liability company agreement among four members who are each residents of Connecticut. The gravamen of the claim is that Defendants have refused to purchase Lomas' equity interest in PWM, a Connecticut limited liability company, in accordance with a formula specified in the PWM Limited Liability Company Agreement dated November 30, 2009 – an agreement which, per its terms, is to be “governed by and construed in accordance with the internal laws of Connecticut.” See Affidavit of William Lomas (“Lomas Affidavit”), at ¶4, Ex. A, §11.9. Rather, Defendants have sought to amend the Agreement, and to do so in a manner adverse to Lomas, materially limiting the cash buyout to which he is contractually entitled. *Id.* at ¶¶6, 14.

Lomas was a 25% member of PWM. *Id.* at ¶¶4-5, Ex. A. On October 13, 2014, Lomas tendered his withdrawal in accordance with the Agreement's three month notice requirement. *Id.* at ¶¶4-5, Ex. A, §8.5. The effective date of his withdrawal was January 14, 2015. *Id.* at ¶5. Upon withdrawal of a member the Agreement provides:

If any Member withdraws from the Company for any reason except as provided in Sections 8.2 through 8.4, the Company or the remaining members shall be obligated to purchase from the Member, and the Member shall be obligated to sell to the Company or the remaining Members, all of his Interests of the Company at the price established in accordance with the provisions of Section 8.7(b).

Id. at ¶5, Ex. A, §8.5.

After Lomas tendered his withdrawal the Individual Defendants sought to amend the Agreement's provisions concerning the manner in which Lomas' equity interest would be valued and purchased by them. *Id.* ¶6. To carry out their plan they enlisted the assistance of Attorney Lagasse, who had been retained earlier to assist in restructuring the annual distribution of cash flow and to prepare a “partner compensation plan.” *Id.* at ¶¶7-8, Ex. B. Attorney Lagasse met

with the members of the LLC on December 18, 2014 in Westport Connecticut. *Id.* at ¶11. Lomas met Attorney Lagasse for the first time at this meeting. *Id.*

At the beginning of the meeting Attorney Lagasse announced that he was representing only PWM. *Id.* at ¶13. His pronouncement at the meeting stands in stark contrast to the conclusory statements in the Motion and sworn statement of Attorney Lagasse that he “has a longstanding attorney-client relationship with the defendants, Partner Wealth Management, LLC, Kevin G. Burns, James Pratt-Heaney, and William Loftus....” and “I have had an attorney/client relationship *with the aforesaid defendants* for an extended period of time” Motion ¶3; Sworn Statement ¶10 (emphasis added). Thus, to Lomas’ knowledge, prior to this litigation there was no attorney-client relationship between the Individual Defendants and Attorney Lagasse, and Attorney Lagasse’s prior attorney-client relationship with PWM was limited to two discreet matters, only one of which has any bearing on this litigation. Lomas Affidavit ¶13.

The purpose of the meeting was to amend the Agreement so as to limit the buyout rights triggered by Lomas’ withdrawal. *Id.* at ¶14. Lomas told all who attended the meeting, including Attorney Lagasse, that he would not agree to any changes, he objected, and that if he had a vote as a member who had already tendered his withdrawal he intended to vote against the proposed changes. *Id.* at ¶¶12, 15. Notwithstanding the clear conflict between Lomas’ position and the position of the Individual Defendants, Attorney Lagasse never advised the members of PWM that their conflicting positions necessitated that each retain separate counsel. *Id.* at ¶¶16, 17. Instead, Attorney Lagasse took notes at the meeting, corresponded with the members, including Lomas, about the proposed changes, and circulated a DocuSign version of a revised limited liability company agreement with a signature line for each of PWM’s individual members, including Lomas. *Id.* at ¶¶18, 20-21. Lomas refused to sign the revised agreement. *Id.* at ¶21.

ARGUMENT

I. BECAUSE ATTORNEY LAGASSE WILL BE A WITNESS IN THIS MATTER, A LEGITIMATE STATE INTEREST PREVENTS HIM FROM APPEARING *PRO HAC VICE*.

It is well-settled that “[t]he decision to deny an application to appear *pro hac vice* rests within the sound discretion of the court.” *See, e.g. UHY, LLP v. Master-Halco, Inc. et al.*, 57 Conn. L. Rptr. 668, *1 (Conn. Super. Feb. 26, 2014) (*quoting Enquire Printing and Publishing Co. v. O’Reilly*, 193 Conn. 370, 373 (1984)). “A litigant’s request to be represented by counsel of his choice, when freely made, should be respected by the court, *unless some legitimate state interest is thwarted by admission of the out-of-state attorney.*” *Id.* at *2 (*citing Herrmann v. Summer Plaza Corp.*, 201 Conn. 263, 269 (1986) (emphasis added)). Addressing *pro hac vice* applications, “Connecticut courts have identified two legitimate state interests that support the denial of an application if they would be thwarted by the out-of-state attorney’s admission: (1) *avoiding ethical problems that the out-of-state attorney’s appearance would cause*; and (2) the court’s control of its docket.” *Id.* at *3 (*citing Yale Literary Magazine v. Yale University*, 4 Conn. App. 592, 605 (1985), *aff’d*, 202 Conn. 672 (1987) (emphasis added)). The former state interest is at issue here.

Attorney Lagasse is a necessary witness in this matter and, therefore, not permitted by the Rules of Professional Conduct to appear on behalf of the Defendants. *Enquire Printing & Publishing Co.*, 193 Conn. at 376 (Stating that “whenever counsel for a client reasonably foresees that he will be called as a witness to testify on a material matter, the proper action is for the attorney to withdraw from the case.”). Rule 3.7 of the Rules of Professional Conduct expressly forbids an attorney from acting as advocate when the lawyer is likely to be a witness, except when specific exceptions, none of which are applicable here, apply. *See* Rules of Professional Conduct Rule 3.7. Rule 3.7 states as follows:

- (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.
- (b) A lawyer may act as advocate 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 1.9.

Rules of Professional Conduct Rule 3.7 (emphasis added).

Attorney Lagasse will be a witness in the trial of this case on a material matter and therefore should be denied admission *pro hac vice*. Attorney Lagasse was a participant in, and a witness to, a key meeting of the members of PWM on December 18, 2014, during which facts relevant to the claims in this litigation were discussed and disputed, including whether to amend the Agreement so as to materially alter and/or limit the buyout obligation the Defendants owe to Lomas. Lomas Affidavit ¶¶11-12, 14-19. Lomas recollects that during that meeting Attorney Lagasse kept minutes and/or notes concerning what transpired. *Id.* at ¶18. By virtue of his involvement in the proposed amendment to the Agreement, Attorney Lagasse is necessarily a witness in this case. It is expected that discovery will be sought from him, and that he will be required to testify, on the following subjects:

- When he was retained, for what purpose, and by whom?
- Who he considered to be his client(s)?
- Whether he represented the Individual Defendants and, if so, whether he purported to represent Lomas as well?
- What discussions he had with, and what direction he received from, whoever retained his services?

- What objectives he sought to accomplish on behalf of his client(s)?
- What he did?
- What he observed and heard at the December 18 meeting, including any private discussions he may have had with Lomas?
- Whether there was a dispute between and among the members of PWM at the December 18 meeting?
- Whether the dispute predated that meeting?
- How he addressed that dispute?
- Whether he ever advised that the dispute required the members of PWM to proceed through independent counsel and, if not, why not?
- Whether there was a vote of the members at the December 18 meeting or at any other time?
- Whether he kept notes at the December 18 meeting?
- What discussions he had with the Individual Defendants following the December 18 meeting?
- Why he included Lomas as a signatory on the proposed amended PWM agreement?
- What steps he took, if any, to secure Lomas' signature on the proposed amended PWM agreement?

Each of the foregoing topics will be a subject of discovery, and it is reasonably likely that they will be the subject of inquiry at the trial of this matter. The attorney-client privilege will not prevent this discovery because Lomas was a member of PWM and he was at the December 18 meeting.

The Connecticut Supreme Court has specifically held that an attorney who will be a witness at trial is properly denied admission *pro hac vice*. In *Enquire Printing and Publishing Company, Inc. v. O'Reilly, et al.* the Connecticut Supreme Court addressed "whether the trial court erred in refusing to permit an attorney, licensed by another state, to be admitted *pro hac*

vice when it was reasonably likely that the attorney would be called as a witness.” 193 Conn. 370 at 371. While acknowledging that a party should be allowed to be represented by counsel of his or her choice, the Court found that the trial court properly denied *pro hac vice* admission for a lawyer who was reasonably likely to be called as a witness. *Id.* at 651-52. In so ruling, the Court noted that an attorney admitted *pro hac vice* is governed by the Connecticut Rules of Professional Responsibility, which the attorney would violate by representing a party in an action where the attorney would be a witness. *Id.* As such, the Court held that the trial court did not err in denying the attorney’s application to appear *pro hac vice*. *Id.*

Moreover, in the analogous circumstance where a Connecticut-barred attorney is a necessary witness at trial, Connecticut courts routinely disqualify the lawyer from representing a party in the action. *See, e.g., Bopko v. Bopko*, No. FA-09-80149148-S, 2000 WL 1781826, at *4 (Conn. Super. Ct. Nov. 8, 2000)(granting plaintiff’s motion to disqualify because it was reasonably foreseeable that attorney would be called to testify in fraudulent conveyance action with regard to his role in witnessing the deed of transfer and taking defendant’s acknowledgment);² *Neumann v. Tuccio*, No. CV-07-5002831-S, 2009 WL 2506357, at *5 (Conn. Super. Ct. July 17, 2009)(granting plaintiff’s motion to disqualify where attorney was necessary witness).

In *Fredericks v. Fortin*, a suit arising from the sale of a corporation, defendant’s counsel sought to disqualify counsel who had represented the plaintiff at the closing of the sale of the corporation because plaintiff’s counsel was a necessary witness. No. CV-89-282910, 1994 WL 728787, *1 (Conn. Super. Ct. Dec. 29, 1994). Statements made at the closing were at issue in the suit. *Id.* The court granted the motion to disqualify after reviewing Rule 3.7, holding that:

² Copies of all unreported decisions cited are attached as Exhibit A to this memorandum.

(i) the testimony of the attorney related to a contested issue; (ii) the presence of others at the closing did not make the attorney's testimony unnecessary; and (iii) since he was the only attorney present and the evidence concerned what he said and did, the attorney was a necessary witness. *Id.*

Likewise in *Hogan v. Magana*, the defendant in a summary process action based on nonpayment of rent filed a motion to disqualify plaintiff's counsel because, as a result of handling the closing of the property and participating in two telephone calls during which the parties discussed the contract at issue, the attorney would be a necessary witness at trial. No. HDSP-134296, 2006 WL 1321282, *1 (Conn. Super. Ct. May 9, 2006). The court granted the defendant's motion to disqualify holding that because the defendant intended to offer testimony regarding the parties' discussion including their telephone conversations, the attorney's testimony related to a contested issue that was not obtainable elsewhere, and he was thus a necessary witness. *Id.*

Here, Lomas intends to call Attorney Lagasse as a witness to testify regarding the facts and circumstances surrounding his retention, the scope of his engagement, the work performed by him, conversations he had with the members of PWM concerning that work, and a key meeting of the members of PWM in December 2014 where the parties discussed whether to amend the Agreement. This is a central issue in this case, particularly if Defendants maintain that they no longer have any obligations to Lomas under the Agreement because it was amended. Accordingly, denial of the Motion is proper. *See, e.g. Enquire Printing and Publishing Company, Inc.*, 193 Conn. 370 at 371; *Bopko*, No. FA-09-80149148-S, 2000 WL 1781826, at *4; *Neumann*, No. CV-07-5002831-S, 2009 WL 2506357, at *5; *Fredericks*, No. CV-89-282910, 1994 WL 728787, *1; *Hogan*, No. HDSP-134296, 2006 WL 1321282, *1.

II. DEFENDANTS HAVE NOT -- AND CANNOT -- SATISFY THE “GOOD CAUSE” REQUIREMENT FOR *PRO HAC VICE* ADMISSION.

Even if Attorney Lagasse were ethically permitted to appear *pro hac vice*, the Motion must be denied because Defendants have failed to meet their burden of establishing good cause for admission. Admission *pro hac vice* is not an absolute right. State courts possess the inherent power to regulate admission to the bar. *See Leis v. Flynt*, 439 U.S. 438, 443(1979); *State v. Reed*, 174 Conn. 287, 293 (1978). Included within the general regulatory power is the right to establish guidelines for determining when an out-of-state attorney should be admitted to practice. *Reed*, 174 Conn. at 293. Connecticut Practice Book § 2-16 provides that the privilege to practice as a visiting lawyer must be limited to “special and infrequent occasion and for good cause shown.” Conn. Prac. Book. § 2-16. Here, Defendants have failed to establish good cause for Attorney Lagasse’s admission.

Practice Book § 2-16 states in relevant part:

Good cause for according such privilege shall be limited to facts or circumstances affecting the personal or financial welfare of the client and not the attorney. Such facts may include a showing that by reason of a longstanding attorney-client relationship predating the cause of action or subject matter of the litigation at bar, the attorney has acquired a specialized skill or knowledge with respect to the client’s affairs important to the trial of the cause, or that the litigant is unable to secure the services of Connecticut counsel.

Conn. Prac. Book. § 2-16.

Rather than set-forth specific facts which bear upon the personal or financial welfare of the Defendants, the Motion and accompanying sworn statement of Attorney Lagasse contain only conclusory statements alleging that “Attorney Lagasse has a long-standing attorney-client relationship with defendants Partner Wealth Management, LLC, Kevin G. Burns, James Pratt-Heaney, and William Loftus” and “due to this long-standing relationship and Attorney Lagasse’s background and qualifications, he has specialized skill and knowledge with regard to the

defendants' affairs, which will be of benefit to them in litigating this matter.” Motion ¶3; Sworn Statement ¶10. But the Motion and sworn statement are empty of factual support for these conclusory statements.

Lomas respectfully submits that Defendants' fail to substantiate their claim of good cause because there is, in fact, no good cause. Attorney Lagasse does not have a long-standing client relationship with the Defendants and brings no specialized skill or knowledge that is important to this case. Attorney Lagasse was retained in late 2013 to address a matter unrelated to this litigation – a partner compensation plan. *Id.* at ¶¶7-9, Ex. B. He was not engaged to address matters related to this litigation until sometime after Lomas tendered his withdrawal. *Id.* at ¶10. Viewing the facts most favorably to Defendants, Attorney Lagasse represented the Defendants in connection with two discreet matters over a period of about 14 months (December 2013 – January 2015). These two representations were unrelated, except that they both involved PWM and its members. Defendants have not shown how Attorney Lagasse's retention to provide a partner compensation plan and independent work to amend the Agreement (making him a witness) satisfies the good cause requirement for admission *pro hac vice*. The Motion and sworn statement only cursorily recite the elements of Practice Book § 2-16, without any substantiation. Such conclusory statements are insufficient to establish the requisite good case for admission *pro hac vice*.³

³ Attorney Lagasse's sworn statement creates an additional concern in that Attorney Lagasse claims to have a long standing client relationship with the Individual Defendants and the Defendant LLC. If this statement is, in fact, accurate, that in and of itself raises an ethical concern in that it raises the possibility of an impermissible conflict of interests under the Rules of Professional Conduct. *See Fairfax Properties, Inc. v. Lyons*, 72 Conn. App. 426, 430 (2002) (interpreting Rule 1.13(a) of the Rules of Professional Conduct to mean “that the corporation is the client, not the people who comprise corporate leadership, and the lawyer must act on behalf of the client”... and “counsel must exercise care to represent only the entity and not others whose

Moreover, Defendants have not shown what specialized expertise Attorney Lagasse brings to bear. This is a Connecticut dispute between Connecticut parties concerning a Connecticut contract governed by Connecticut law. Defendants have already retained seasoned Connecticut counsel in Attorney Richard J. Buturla, chair of the litigation department of Berchem, Moses & Devlin, P.C., a Connecticut-based firm with offices in Milford, Westport and Norwalk. On these facts, Defendants cannot establish good cause for admitting Attorney Lagasse *pro hac vice* despite the conclusory statements to the contrary contained in the Motion and Attorney Lagasse's sworn statement.

CONCLUSION

For the foregoing reasons, Lomas respectfully submits that a legitimate state interest prevents the admission of Attorney Lagasse *pro hac vice* and, in any event, Defendants have failed to establish the requisite good cause to support such admission. Accordingly, Lomas respectfully requests that the Court deny Defendants' Motion for Admission *Pro Hac Vice*.

Dated: August 11, 2015
Hartford, Connecticut

THE PLAINTIFF,
WILLIAM A. LOMAS

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interests may not be identical to that of the corporation.”) This ethical concern alone is a sufficient basis for the Court to deny the Motion. *See supra*, § I.

CERTIFICATE OF SERVICE

This is to certify that on August 11, 2015, a copy of the foregoing was served by e-mail and first class mail, postage prepaid, to all counsel of record as follows:

Richard J. Buturla, Esq.
Mark J. Kovack, Esq.
Berchem, Moses & Devlin, P.C.
75 Broad St.
Milford, CT 06460

/s/Thomas J. Rechen
Thomas J. Rechen

EXHIBIT A

2000 WL 1781826

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut.

BOPKO,
v.
BOPKO.

No. FA980149148S. | Nov. 8, 2000.

MEMORANDUM OF DECISION.

WEST.

*1 On October 27, 1998, the plaintiff, Arlene N. Bopko, commenced a divorce proceeding against the defendant, Richard H. Bopko. The law firm of Milhaly & Kascak represented Richard Bopko for approximately six months in the underlying divorce proceeding, until it subsequently withdrew its representation in April of 1999. On or about May 3, 2000, the plaintiff impleaded George A. Bopko as an additional defendant. In her amended complaint filed June 1, 2000, the plaintiff alleged in the third count that Richard Bopko fraudulently conveyed property to George Bopko, with the intent of depriving the plaintiff of her equitable interest in the property or hindering the property's equitable division in an action for dissolution of marriage.

The plaintiff now moves to disqualify the law firm of Milhaly & Kascak, through its attorney, Serge Milhaly, retained by George Bopko, on the grounds that Attorney Milhaly will likely be called as a fact witness at trial, that Attorney Milhaly's testimony will be necessary at trial, and that the firm has previously represented Richard Bopko in this action.¹ The plaintiff has filed a memorandum of law in support of her motion to disqualify, and George Bopko has filed a memorandum in opposition to the plaintiff's motion.

"The Superior Court has inherent and statutory authority to regulate the conduct of attorneys who are officers of the court." *State v. Jones*, 180 Conn. 443, 448, 429 A.2d 936 (1980). "[T]he Superior Court has broad discretionary power to determine whether an attorney should be disqualified ... *Id.* "The party moving for disqualification bears the burden of proving facts which indicate that disqualification is

necessary ..." (Internal quotation marks omitted.) *Gregg v. Case*, Superior Court, judicial district of New Britain, Docket No. 478441 (January 26, 1999) (Robinson, J.) (23 Conn.L.Rptr. 694, 695).

"Disqualification of counsel is a remedy that serves to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information." (Internal quotation marks omitted.) *Bergeron v. Mackler*, 225 Conn. 391, 397, 623 A.2d 489 (1993). "In disqualification matters, however, [the court] must be solicitous of a client's right freely to choose his counsel ... mindful of the fact that a client whose attorney is disqualified may suffer the loss of time and money in finding new counsel and may lose the benefit of its longtime counsel's specialized knowledge of its operations." (Citation omitted; internal quotation marks omitted.) *Id.*, 397-98, 623 A.2d 489. The court has "rejected the notion that an 'appearance of impropriety' [is] alone a sufficient ground for disqualifying an attorney." *Id.*, 399, 623 A.2d 489.

The plaintiff argues that Attorney Milhaly will likely be called as a fact witness at trial and that Attorney Milhaly's testimony will be necessary at trial. Specifically, the plaintiff argues that Attorney Milhaly was professionally involved in the transaction, witnessed the deed of transfer and took Richard Bopko's acknowledgment thereon. The plaintiff further contends that the firm should be disqualified for previously representing Richard Bopko in the same action.

*2 George Bopko argues that the plaintiff lacks standing to have Attorney Milhaly disqualified and that, even if the interests of the defendants are antagonistic, the defendants waived Attorney Milhaly's representation of George Bopko, in light of his prior representation of Richard Bopko. George Bopko contends that Attorney Milhaly cannot be forced to testify regarding confidential client information and further argues that Attorney Milhaly is the one responsible for determining if there is a conflict of interest and whether he should withdraw from representing George Bopko.

In *Mascia v. Faulkner*, Superior Court, judicial district of New Haven at New Haven, Docket No. 349036 (July 5, 1994) (Fracasse, J.) (12 Conn.L.Rptr. 122, 123), the court observed that "[i]n the representation of co-defendants the rules recognize that an impermissible conflict may exist by reason of a substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of

settlement of the claims or liabilities in question.” In that case, however, there was no indication in the defendant's objection to the motion that they consented to representation after being consulted regarding potential conflicts. *Id.*, 123. Here, the defendants have clearly indicated, through affidavits, that they consent to the representation even after they were consulted by Attorney Milhaly regarding possible conflicts.² “Waiver is a valid basis for denying a motion to disqualify when a former client knowingly refrains from promptly asserting its objection to an attorney representing an opposing party on the ground of conflict of interest.” *Talcott Mountain Science Center for Student Involvement, Inc. v. Abington Ltd. Partnership*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 549521 (January 28, 1997) (Aurigemma, J.).

“Disqualification may [also] be required ... when it is likely that the testimony to be given by the witness is necessary.” (Internal quotation marks omitted.) *Command Electric, Inc. v. Manousos*, Superior Court, judicial district of Hartford, Docket No. 560381 (April 14, 1997) (Aurigemma, J.) (19 Conn.L.Rptr. 294, 295). Rule 3.7, Lawyer as Witness, of the Rules of Professional Conduct provides in pertinent part: “(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.”

“An attorney is not absolutely prohibited from testifying on behalf of a client, but should only do so when the testimony concerns a formal matter, or the need for the testimony arises from an exigency not reasonably foreseeable.” *Enquire Printing & Publishing Co. v. O'Reilly*, 193 Conn. 370, 376, 477 A.2d 648 (1984). “[W]henever counsel for a client reasonably foresees that he will be called as a witness to testify on a material matter, the proper action is for that attorney to withdraw from the case.” (Emphasis added; internal quotation marks omitted.) *Id.* “Where ... an attorney does not withdraw, a court exercising its supervisory power can enforce the mandate of [Rule 3.7] and disqualify the attorney.” (Internal quotation marks omitted.) *Id.*

*3 “Testimony may be relevant and even highly useful but still not strictly necessary.” (Internal quotation marks omitted.) *Command Electric, Inc. v. Manousos*, *supra*, 19 Conn.L.Rptr. 295. “A finding of necessity takes into account such factors as the significance of the matters, weight of

the testimony and availability of other evidence.” (Internal quotation marks omitted.) *Id.* “[T]he mere statement that the attorney ‘will be a necessary party witness’ [would] not support [the] motion.” *Id.*

In *Fredericks v. Fortin*, Superior Court, judicial district of New Haven at New Haven, Docket No. 232910 (December 30, 1994) (Hadden, J.) (13 Conn.L.Rptr. 234), a suit arising out of the sale of stock of a corporation, the court determined that, despite the presence of four other people during the closing, “[h]e was the only attorney present, and since the evidence will concern what he did and said, he is a necessary witness.” *Id.* The court further noted that the attorney's testimony related to a contested issue and was not related to the nature and value of legal services. *Id.*

Further, in *Command Electric, Inc. v. Manousos*, *supra*, 19 Conn.L.Rptr. 294, a suit arising out of an alleged fraudulent conveyance of interest in properties, the plaintiff moved to disqualify the defendant's counsel on the grounds that the attorney's testimony would be necessary at trial and that the plaintiff intended to call the attorney as a witness. *Id.*, 294-95. The court observed that “a plaintiff in an action for fraudulent conveyance must often prove his case solely through the testimony of the defendants and the documents within the defendants' possession and control.” *Id.*, 296.

“Whether the conveyance in question was fraudulent is purely a question of fact.” *Tyers v. Coma*, 214 Conn. 8, 11, 570 A.2d 186 (1990). “Fraudulent intent must be proved, if at all, by clear, precise and unequivocal evidence.” (Internal quotation marks omitted.) *Id.* “[T]he determination of the question of fraudulent intent is clearly an issue of fact which must often be inferred from surrounding circumstances ... Such a fact is, then, not ordinarily proven by direct evidence, but rather, by inference from other facts proven—the indicia or badges of fraud.” (Internal quotation marks omitted.) *Dietter v. Dietter*, 54 Conn.App. 481, 487, 737 A.2d 926, cert. denied, 252 Conn. 906, 743 A.2d 617 (1999).

In this case, if Attorney Milhaly is not disqualified, the plaintiff will have to prove her case solely through the testimony of Richard Bopko and George Bopko and their documents. The plaintiff, in her motion and supporting memorandum, states that Attorney Milhaly will likely be called as a fact witness at trial with regard to the underlying real property transfer, because he was professionally involved in the transaction, witnessed the deed of transfer and took Richard Bopko's acknowledgment thereon. The plaintiff,

therefore, argues that the attorney's testimony is foreseeable and of extreme importance to all parties in this case.

*4 Attorney Milhaly's testimony is necessary, due to the allegations of fraudulent conveyance with regard to the transfer of the property in the plaintiff's amended complaint. Attorney Milhaly's testimony relates to a contested issue and is not related to the nature and value of legal services. *Fredericks v. Fortin, supra*, 13 Conn.L.Rptr. 234. It is reasonably foreseeable that Attorney Milhaly will be called to testify with regard to his role in witnessing the deed of transfer and taking Richard Bopko's acknowledgment. *Enquire Printing & Publishing Co. v. O'Reilly, supra*, 193 Conn. 376. Further, the plaintiff filed the motion to

disqualify approximately two months after George Bopko was impleaded into this action and, therefore, any hardship to George Bopko in obtaining the services of another attorney or firm would be minimal. *Command Electric, Inc. v. Manousos, supra*, 19 Conn.L.Rptr. 296.

Attorney Milhaly is a necessary witness in this action. The plaintiff's motion to disqualify is granted.

All Citations

Not Reported in A.2d, 2000 WL 1781826, 28 Conn. L. Rptr. 556

Footnotes

- 1 In a stipulated agreement dated September 19, 2000, and accepted by the court, Leheny, J., the parties agreed that "George Bopko shall retain new counsel if the law firm of Milhaly and Kascak is disqualified by Judge West within three (3) weeks of notice of Judge West's decision ..." Stipulated Agreement, ¶ 2.
- 2 On August 23, 2000, Richard Bopko and George Bopko each signed affidavits waiving their rights under the conflict of interest rules, Rules 1.7 and 1.9(2) of the Rules of Professional Conduct.

2009 WL 2506357

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Danbury.

Harry NEUMANN, Jr.

v.

Edward TUCCIO.

No. DBDCV075002831S. | July 17, 2009.

Attorneys and Law Firms

Zeisler & Zeisler, Bridgeport, for Harry Neumann, Jr.

John R. Williams, New Haven, Caldwell & Lavery, Sandy Hook, for Edward Tuccio.

SHABAN, J.

I

FACTS & PROCEDURAL HISTORY

*1 On June 26, 2007, the plaintiff, Harry Neumann, Jr., commenced this vexatious litigation action against the defendant, Edward Tuccio. The plaintiff filed a revised complaint on July 28, 2008, wherein the plaintiff alleges the following.¹ The plaintiff is a real estate agent for Neumann Real Estate, LLC. The defendant is a developer-builder in the construction industry. On September 6, 2005, the defendant initiated a slander lawsuit against the plaintiff.² Prior to serving the complaint on the plaintiff, the defendant had information, from an alleged witness, that the allegations in the complaint were incorrect. Specifically, the plaintiff alleges that the defendant “forwarded a copy of his proposed complaint to Robert Tuccio, Jr., his alleged witness, and received numerous communications from Robert Tuccio, Jr. that the allegations of the complaint were incorrect, and that the statements which were alleged in the complaint to have been made by Harry Neumann, Jr. were never in fact made.” *Amended Complaint*, paragraph 5. Despite this, the defendant proceeded with service of the writ, summons and complaint, which commenced the underlying action. That action went

to trial, where the court, Frankel, J., granted the plaintiff's motion for a directed verdict, as the defendant had failed to establish a prima facie case. The plaintiff now brings the present action seeking damages stemming from vexatious litigation.

On February 23, 2009, the defendant, represented by his attorney, John R. Williams (Williams), in his individual capacity, filed an answer and raised the special defense of advice of counsel. In response to the special defense, on April 29, 2009, the plaintiff filed a motion to disqualify Williams and his law firm, John R. Williams and Associates, LLC (the law firm), on the ground that Williams and the “attorneys, members, and/or employees” of the law firm will be necessary witnesses to the vexatious litigation action. The defendant did not file a responsive pleading to the motion, but did present oral argument in opposition at short calendar on May 26, 2009.

DISCUSSION

In his motion to disqualify attorney Williams and Williams' law firm, the plaintiff states that both should be prohibited from representing the defendant at trial because Williams and “the attorneys, members, and/or employees” of the firm will be necessary witnesses to the defendant's special defense of advice of counsel.³ In support of this proposition, the plaintiff cites to Rule 3.7 of the Rules of Professional Conduct, which prohibits an attorney from acting as an advocate at a trial in which he is likely to be a necessary witness, except in limited circumstances. The plaintiff further argues that “Defendant will not suffer substantial hardship because Defendant was aware of the Special Defense from the commencement of this case and chose to delay asserting the Special Defense until this close to trial.”⁴ *Motion to Disqualify*, page 3. In opposition, the defendant contends that his counsel should not be disqualified because he would suffer prejudice as a result, he did not use any delaying tactics, and because the plaintiff should have known that the defendant would assert the advice of counsel special defense as it is commonly used in vexatious litigation suits.

*2 “The trial court has the authority to regulate the conduct of attorneys and has a duty to enforce the standards of conduct regarding attorneys ... The trial court has broad discretion to determine whether there exists a conflict of interest that would warrant disqualification of an attorney.” (Citations omitted.) *Bergeron v. Mackler*, 225 Conn. 391, 397, 623

A.2d 489 (1993). “In disqualification matters ... [the court] must be solicitous of a client's right freely to choose his counsel ... mindful of the fact that a client whose attorney is disqualified may suffer the loss of time and money in finding new counsel and may lose the benefit of its longtime counsel's specialized knowledge of its operations ... The competing interests at stake in the motion to disqualify, therefore, are: (1) the [defendant's] interest in protecting confidential information; (2) the [defendant's] interest in freely selecting counsel of their choice; and (3) the public's interest in the scrupulous administration of justice.” (Citations omitted; internal quotation marks omitted.) *American Heritage Agency, Inc. v. Gelinis*, 62 Conn.App. 711, 725, 774 A.2d 220 (2001).

“A party moving for disqualification of an opponent's counsel must meet a high standard of proof.” (Internal quotation marks omitted.) *Chaiklin v. Bacon*, Superior Court, judicial district of Hartford, Docket No. CV 99 0590439 (June 30, 2000, Rubinow, J.). “[B]efore permitting a party to disqualify an attorney the moving party bears the burden of proving facts which indicate disqualification is necessary. The courts should act very carefully before disqualifying an attorney and negating the right of a client to be represented by counsel of choice.” (Internal quotation marks omitted.) *David M. Somers & Associates, P.C. v. Kendall*, Superior Court, judicial district of Windham at Putnam, Docket No. 064478 (February 23, 2001, Foley, J.).

A

DISQUALIFICATION OF THE INDIVIDUAL ATTORNEY

Connecticut's Rules of Professional Conduct address the issue of disqualification of a party's counsel. Rule 3.7(a) provides: “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.” Pursuant to Rule 3.7, “[w]hen counsel for a client reasonably foresees that he will be called as a witness to testify on a material matter, the proper action is for that attorney to withdraw from the case.” (Internal quotation marks omitted.) *State v. Webb*, 238 Conn. 389, 417, 680 A.2d 147 (1996). “An attorney is not absolutely prohibited from testifying on behalf of a client,

but should only do so when the testimony concerns a formal matter, or the need for the testimony arises from an exigency not reasonably foreseeable ... Where, however, an attorney does not withdraw, a court exercising its supervisory power can ... disqualify the attorney.” (Citations omitted; internal quotation marks omitted.) *Enquire Printing & Publishing Co. v. O'Reilly*, 193 Conn. 370, 376, 477 A.2d 648 (1984).

*3 “Under Rule 3.7, the first relevant inquiry is whether the attorney whose disqualification is sought is a necessary witness in the matter. A necessary witness is not just someone with relevant information, however, but someone who has material information that no one else can provide. Whether a witness ought to testify is not alone determined by the fact that he has relevant knowledge or was involved in the transaction at issue. Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary.” *Quinebaug Valley Engineers Assn., Inc. v. Colchester Fish and Game Club*, Superior Court, judicial district of New London at Norwich, Docket No. CV 08 4008053 (July 25, 2008, Abrams, J.).

“A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other evidence ... 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 ... There is a dual test for necessity. First the proposed testimony must be relevant and material. Second, it must be unobtainable elsewhere.” (Internal quotation marks omitted.) *Id.*

Attorney Williams' testimony is clearly relevant and material, and therefore satisfies the first element of “necessity.” The defense of advice of counsel is a matter of central importance to the determination of a vexatious litigation claim. The testimony the plaintiff seeks to elicit regards the advice and information Williams gave the defendant, including strategy and tactics discussed between them for the prosecution of the action against Neumann. This testimony is not informal or insubstantial, but rather, it is decidedly relevant and material. See, e.g., *Fredericks v. Fortin*, Superior Court, judicial district of New Haven, Docket No. CV 89 282910 (December 30, 1994, Hadden, J.) [13 Conn. L. Rptr. 234] (noting that the attorney “was the only attorney present, and since the evidence will concern what he did and said, he is a necessary witness”).⁵ In fact, the testimony regarding

Williams' advice to Tuccio may very well be dispositive of the case.

With regard to the second element, the defendant argues that the testimony is obtainable elsewhere, as the defendant himself can testify as to what advice or information was given by Williams. This argument is unpersuasive.

A factual situation that is extraordinarily similar to the present matter is found in *Talcott Mountain Science Center for Student Involvement v. Abington*, Superior Court, complex litigation docket at Waterbury, Docket No. X01 CV 95 0152121 (June 28, 2002, Hodgson, J.) (32 Conn. L. Rptr. 420). In that case, the plaintiff brought a vexatious litigation action against the defendants, who raised the special defense of advice of counsel. The plaintiff then sought to disqualify the defendants' attorney. The defendants argued that the testimony sought was obtainable from the defendants themselves, and, therefore, the attorney's testimony was not necessary. In determining whether the testimony was available elsewhere, and, therefore, necessary, the court noted that "fairness required that the plaintiff be able to present the testimony of the other witnesses with knowledge of the facts that relate to this special defense, namely, the lawyers who allegedly gave the advice that there was probable cause to bring an action." *Id.*, at 421. Ultimately, the court found that "there are no equivalent alternative witnesses to the facts alleged in the defendants' special defense and that the named lawyers are necessary witnesses. The lawyers are likely necessary witnesses on the issue of what information [the defendant] provided in seeking legal advice and what motivations it articulated as the reasons for bringing suit or pursuing the suit in a particular way." *Id.*, at 422.

*4 Similarly, in *Hogan v. Magana*, Superior Court, judicial district of Hartford, Docket No. H-1304 (May 9, 2006, Bentivegna, J.), the defendant intended to offer the plaintiff's attorney's testimony regarding the parties' discussions, including their telephone conversations, in which the plaintiff's attorney participated. The court found that the attorney had "relevant knowledge of the conversations at issue" and that his knowledge "was not obtainable elsewhere," even though the parties were also able to testify to the conversations. *Id.*

In the present matter, the defendant's special defense states in full: "The defendant instituted his civil action relying in good faith on the advice of counsel, given after a full and fair statement of all facts within his knowledge or which he was

charged with knowing." This assertion does not establish the existence of any other individual who would be able to testify to the truth of the special defense, aside from the defendant himself, and Williams. Given the expertise an attorney has over a lay witness in answering questions relative to decisions regarding legal procedure, theory and technique, it is unlikely that the defendant could completely relay the same depth of information, analysis and advice as could be presented by Williams. Moreover, in light of *Talcott* and *Hogan*, the defendant's ability to testify as to the advice Williams gave him, and the information he gave Williams, does not render Williams' testimony as evidence that is obtainable elsewhere. Accordingly, Williams' testimony is necessary to shed full light on material matters regarding his representation of the defendant in the underlying case and fairness dictates that the plaintiff should be able to present Williams' testimony at trial given the special defense that has been raised.

As the plaintiff has demonstrated that attorney Williams' testimony is both relevant and necessary, the court concludes that he is a necessary witness who may be disqualified from representing the defendant as an advocate at trial pursuant to Rule 3.7, subject to the three exceptions set forth therein. The defendant argues, however, that his counsel should not be disqualified because the circumstances satisfy the exception in Rule 3.7(a)(3), that "[d]isqualification of the lawyer would work substantial hardship on the client." The court disagrees with the defendant's contention.

The commentary to Rule 3.7 states that in considering a request for disqualification "a balancing is required between the interests of the client and those of the opposing party." The commentary further states that it "is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." The defendant argues that, even though he did not raise his advice of counsel defense until February of 2009, the plaintiff should have foreseen that the defendant would assert the special defense before it was raised, as advice of counsel is a common defense to a vexatious litigation suit. Thus, the defendant argues that the nearness of the trial date makes disqualification unduly prejudicial.

*5 Plaintiff's counsel cannot be expected to act by delving into the mind of opposing counsel to glean what defenses he might be contemplating or considering. An appropriate response by the plaintiff, through pleading or otherwise, can only be made by receiving and reviewing what pleadings have been filed with the court—not by guessing as to what

conceivably could be filed. Essentially, the defendant takes the position that the plaintiff is required to read the defendant's counsel's mind and to act before being required to do so. While plaintiff's counsel may have had knowledge that advice of counsel existed as a potential special defense, he would not have had any knowledge as to whether the defendant would pursue that defense until it was affirmatively raised in the pleadings. Furthermore, if the court is to take the defendant's argument at face value, the defendant also has had the knowledge of the existence and potential application of the special defense and could have acted to file the defense much earlier in the proceedings, thereby protecting himself from any potential prejudice that could result from the filing of a motion to disqualify. Rule 3.7, however, does not require such prescience and foresight by the parties.

In addition, this is not a case in which prohibition of an attorney from acting as an advocate at trial would cause the client to suffer the hardship of retaining replacement representation immediately before or at the time of trial. For example, in *A & R Magliocco, LLC v. Tighe*, Superior Court, judicial district of New Haven, Docket No. CV 05 4006944 S (June 12, 2006, Devlin, J.), the court concluded that the defendants would suffer substantial hardship if granted the plaintiff's motion to disqualify which was filed on the day the matter was scheduled for trial. Similarly, in *Murray v. Murray*, Superior Court, judicial district of Hartford, Docket No. CV 02 0820216 (June 16, 2003, Shapiro, J.) (35 Conn. L. Rptr. 103), the court found that disqualification of defense counsel would be unfairly prejudicial where, despite knowing that the appearing attorney may be a witness months before the trial date, the movant did not raise the issue until the date of trial.

In contrast to *A & R Magliocco, LLC v. Tighe* and *Murray v. Murray*, in this case, the plaintiff did not unreasonably delay filing the motion to disqualify. Moreover, the fact that the issue of disqualification has been addressed by the court merely four weeks before the trial date is, at least in part, the result of defendant's own delay in waiting to raise the special defense.⁶ By doing so, the defendant has effectively created the very hardship he now claims would be prejudicial to him. Finally, because the court has not disqualified the law firm; see *infra*; the defendant should have minimal difficulty retaining new counsel to represent him at trial.

Under the circumstances of this case, the court finds that Williams is a necessary witness and that prohibiting him from representing the defendant at trial would not cause the

defendant to suffer undue hardship or prejudice. Accordingly, the plaintiff's motion to disqualify Williams is granted.

B

DISQUALIFICATION OF THE ENTIRE FIRM

*6 The plaintiff also argues that disqualification of Williams alone is insufficient and therefore seeks disqualification of Williams' entire law firm. At oral argument, Williams asserted that he appeared in the underlying matter in his personal capacity, and that his firm did not make any appearance. This assertion was not contested and Williams' appearance filed with court on July 3, 2007, so reflects.

Rule 3.7(b) provides: "A lawyer may act as advocate 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." Under previous rules, "if one member of a firm had to testify, all members of the firm were disqualified." *Johnston v. Casey*, Superior Court, judicial district of New London, Docket No. 557021 (April 25, 2002, Corradino, J.) (32 Conn. L. Rptr. 74). "Rule 3.7(b) eliminates the blanket imputed disqualification which previously existed ... It is no longer mandatory for a lawyer, upon discovering she must testify on behalf of a client, to seek the services of another attorney and withdraw from the case. If either the lawyer-advocate or the lawyer-witness (both of the same law firm) has a conflict of interest pursuant to Rule 1.7 (General Conflict) or Rule 1.9 (Former Client) the lawyer-advocate may be precluded from the representation under Rule 1.10.⁷ However, absent those specific conflict situations, even if a lawyer is called to testify, another lawyer from the firm may now try the case." (Citations omitted; internal quotation marks omitted.) *Id.*, at 74-75.

In the present case, neither party has addressed Rule 3.7(b) in any detail. It is clear, however, that there are no allegations that the law firm ever represented the plaintiff at any point in time, and, therefore, preclusion under Rule 1.9, which governs conflicts between current and former clients, would not be appropriate. Similarly, Rule 1.7 does not apply to the present case, as Rule 1.7 only "applies to conflicts of interest between two *present* clients ..." (Emphasis in original.) *Beckenstein Enterprises v. Smith*, Superior Court, complex litigation docket at Tolland, Docket No. X07 CV 02 0080437 (March 28, 2003, Sferrazza, J.) [34 Conn. L. Rptr.

459]; see also *Talcott Mountain Science Center for Student Involvement v. Abington*, *supra*, at 32 Conn. L. Rptr. 422 (“[u]nder the approach to disqualification now mandated in Rule 3.7(b) and 1.7(b), the reason for disqualification of an entire law firm is a conflict between the client's position and the lawyer's or the law firm's responsibilities to another client or its own interests in the matter at issue”).

Although there exists a possibility, particularly before a jury, that the firm's participation as trial counsel in a case in which the trial counsel's colleagues are witnesses will raise skepticism, courts have found this concern to be an insufficient ground for disqualifying a firm. “A trier of fact might well adjust the weight to be given to testimony elicited from one ... lawyer from another ... lawyer [from the same law firm]. Since Rule 3.7 has been amended to permit counsel from the same firm as the attorney-witness to serve as trial counsel, it does not appear that this disadvantage can be viewed as substantial enough to require disqualification of the law firm as a whole.” *Talcott Mountain Science Center for Student Involvement v. Abington*, *supra*, at 32 Conn. L. Rptr. 420, 422. See also *Voruganti v. Voruganti*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. FA 03 0198611 (Apr. 15, 2009, Malone, J.) [47 Conn. L. Rptr. 543] (“the appearance of impropriety alone is simply too slender a reed on which to rest a disqualification order except in the rarest of cases”). The commentary to Rule 3.7 is similarly dismissive of this contention, stating: “Because

the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, subsection (b) permits the lawyer to do so except in situations involving a conflict of interest.”

*7 There has been no showing by the plaintiff that there has been, or is, a conflict between the defendant's position and the lawyers' or the law firm's responsibilities to some other client or its own interests in the matter at issue. In that the plaintiff has failed to supply the court with sufficient reason to disqualify the law firm of John R. Williams and Associates, LLC from this matter, it declines to do.

CONCLUSION

For the foregoing reasons, the motion to disqualify attorney John R. Williams from serving as defendant's counsel in the pending trial is granted. The motion to disqualify all other attorneys, members and/or employees of the law firm of John R. Williams and Associates, LLC is denied.

All Citations

Not Reported in A.2d, 2009 WL 2506357, 48 Conn. L. Rptr. 298

Footnotes

- 1 On March 27, 2008, and again on April 6, 2009, the plaintiff filed a motion to cite in an additional defendant along with a request for leave to amend the complaint and corresponding amended complaint in order to include the defendant's corporation and defendant's attorney, respectively, as defendants in this case. The court denied each motion to cite in. Generally, a properly filed and served amended complaint that is not objected to or acted upon by the court is considered operative pursuant to Practice Book § 10-60(a)(3). Nevertheless, where an amended complaint proposes to add an additional defendant and is not predicated on a successful motion to cite in, as is the case here, the complaint does not become operative because an amended complaint is not the proper vehicle to add a party. See *Palazzo v. Delrose*, 91 Conn.App. 222, 226, 880 A.2d 169, cert. denied, 276 Conn. 912, 886 A.2d 426 (2005) (“if the amendment is deemed to be a substitution or entire change of a party, it will not be permitted”) *Powell v. State's Attorney*, Superior Court, judicial district of New Haven, Docket No. CV 07 4026234 (June 19, 2008, Bellis, J.) (finding original complaint to be operative where plaintiff used amended complaint to add defendants). Accordingly, the court will treat the July 28, 2008, revised complaint as the operative complaint.
- 2 *Tuccio v. Newmann*, Superior Court, judicial district of Danbury, Docket No. CV 05 5000138 (March 14, 2007, Frankel, J.).
- 3 “Advice of counsel is a complete defense to an action of ... vexatious suit when it is shown that the defendant ... instituted his civil action relying in good faith on such advice, given after a full and fair statement of all facts within his knowledge, or which he was charged with knowing.” *Vandersluis v. Weil*, 176 Conn. 353, 361, 407 A.2d 982 (1978). Once advice of counsel has been raised as a defense, that party has been deemed to waive the attorney-client privilege. See *Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co.*, 249 Conn. 36, 52-3, 730 A.2d 51 (1999); see also *Talcott Mountain Science Center for Student Involvement v. Abington*, Superior Court, complex litigation docket at Waterbury, Docket No. X01 CV 95 0152121 (June 28, 2002, Hodgson, J.) (32 Conn. L. Rptr. 420) (in the vexatious litigation context, the defendant, “by

asserting that it brought its suits ... upon the advice of counsel, has put the substance of that advice squarely at issue and has waived the attorney-client privilege concerning the communications that led to the initiation and continued pursuit of the case").

4 The special defense was filed on February 23, 2009, and the matter had been scheduled for trial on May 12, 2009, but was then continued to August 11, 2009.

5 A court may hold an evidentiary hearing to determine what facts the attorney knows and whether they are necessary to the disposition of the matter. See *Patchell v. Automobile Ins. Co.*, Superior Court, judicial district of New Haven at New Haven, Docket No. 368147 (August 30, 1994, Hartmere, J.). In this case, such a hearing is unnecessary because Williams' knowledge of the nature of the advice and information provided to the defendant in the underlying case is apparent and undisputed by the defendant. Cf. *Jean v. Angle*, Superior Court, judicial district of Fairfield, Docket No. CV 06 4016486 (May 1, 2008, Arnold, J.) (evidentiary hearing, pursuant to a motion to disqualify, was required to determine whom the attorney represented in the sale of a limousine company, and material matters regarding the purchase transaction of the limousine company and financial payments to the parties, as that information was not readily apparent from the pleadings and motions).

6 As noted above, the special defense was filed on February 23, 2009.

7 Rule 1.10 provides that "(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Rules 1.7 and 1.9 are not material to the issue currently before the court.

1994 WL 728787

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut, Judicial
District of New Haven, at New Haven.

Patricia FREDERICKS

v.

Edward J. FORTIN.

No. CV89 28 29 10. | Dec. 29, 1994.

***MEMORANDUM OF DECISION ON DEFENDANT'S
MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL***

HADDEN, Judge.

*1 This motion to disqualify plaintiff's counsel is based on a claim by the defendant that he intends to call plaintiff's attorney, Charles A. Sherwood, as a necessary witness in this case. The plaintiff objects, claiming that Mr. Sherwood is not a necessary witness and that to require the plaintiff to obtain a new attorney at this late date would be a substantial hardship. The court held an evidentiary hearing on the motion on December 5, 1994.

The suit arises out of the sale of all of the stock of a corporation including inventory, fixtures, assets, leasehold interests and good will by the defendant to the plaintiff. The corporation, Lite Styles, Inc. was engaged in the business of selling lighting fixtures and similar electrical devices. The sale was finally consummated at a closing held on November 30, 1987 when an agreement was signed by the parties.

In attendance at the closing were the plaintiff, the defendant, Mr. Sherwood representing the plaintiff, Robert Bishop, who was supplying the funds for the purchase to the plaintiff, and John Matteis who was the manager of the defendant's store. The defendant seller may have indicated prior to the closing that he would have an attorney but he was unrepresented at the closing.

One of the disputed areas in this case is whether or not certain oral statements were made at the closing by the parties to the agreement or by Mr. Sherwood concerning various financial documents. The failure of the defendant to produce various financial records is among the various claims made in the

complaint by the plaintiff. The defendant claims that at the closing he agreed to produce financial records at a later date if he had any, while the plaintiff claims that the defendant did not mention at the closing that there was a possibility that he did not have such records. There is also a dispute between the parties concerning the precise role of Mr. Sherwood at the closing insofar as to what he said or did not say to the defendant with respect to the meaning of certain portions of the agreement.

Rule 3.7(a) of the Rules of Professional Conduct provides as follows:

A lawyer shall not act as an 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 related 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.

The testimony of Mr. Sherwood does relate to a contested issue and is not related to the nature and value of legal services. The plaintiff claims that there were four other people present during the closing and therefore Mr. Sherwood's testimony is not necessary. The court is of the opinion that in view of the allegations by the defendant with respect to what took place at the closing and Mr. Sherwood's role in it, which is denied by the plaintiff, that merely because other participants in the closing *may* be able to recall what took place, does not make Mr. Sherwood's testimony unnecessary. He was the only attorney present, and since the evidence will concern what he did and said, he is a necessary witness.

*2 The plaintiff also claims that the disqualification would work substantial hardship on him at this late date. The defendant filed an identical motion on April 18, 1989, which was the return day of the summons and complaint. The court (Purtill, J.) denied the motion without prejudice on May 3, 1989 on the basis that it will only become important at the trial and the matter had only recently been returned to court. In addition the court noted that factual issues were raised which would require an evidentiary hearing.

This court has now held an evidentiary hearing and, among other things, has heard the claims of hardship by the plaintiff

Fredericks v. Fortin, Not Reported in A.2d (1994)

13 Conn. L. Rptr. 234

if she is forced to obtain new counsel at this point. It is not necessary to discuss them in detail. The court does not believe that the disqualification of Mr. Sherwood will work "substantial" hardship on the plaintiff. The factual and legal issues in this case are not particularly complicated and another attorney could become familiar with them very quickly.

Accordingly, for the reasons above stated, the motion to disqualify is granted.

All Citations

Not Reported in A.2d, 1994 WL 728787, 13 Conn. L. Rptr. 234

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2006 WL 1321282

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Jacqueline HOGAN,

v.

Sandra MAGANA, et al.

No. HDSP-134296. | May 9, 2006.

Synopsis

Background: Lessor brought summary process action against lessee based on nonpayment of rent. After lessee filed answer, special defenses, and counterclaims, lessee moved to disqualify lessor's counsel because lessee intended to call counsel as witness.

Holding: The Superior Court, Judicial District of Hartford, Bentivegna, J. held that lessor's attorney was a necessary witness.

Motion to disqualify plaintiff's counsel granted.

**MEMORANDUM OF DECISION DEFENDANT'S
MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL**

BENTIVEGNA, J.

*1 This is a summary process action based on nonpayment of rent. On August 29, 2005, the Summons and Complaint were filed with a return date of September 2, 2005. On September 7, 2005, the defendant filed an Answer, Special Defenses and Counterclaims. The defendant alleges the existence of an oral contract between the parties as the basis of the defendant's Fifth Special Defense (Unclean Hands) and First, Second, Third and Fifth Counterclaims (Specific Performance, Promissory Estoppel, Breach of the Covenant of Good Faith and Fair Dealing, and Fraud).

On September 28, 2005, the defendant filed the Motion to Disqualify Plaintiff's Counsel, Attorney Davis. The defendant argues that Attorney Davis' testimony will be a necessary at trial because he handled the closing of the property and participated in two telephone conversations during which the parties discussed the contract at issue. The defendant intends to call Attorney Davis as a witness. The plaintiff's Objection to Motion to Disqualify was filed on or around September 29, 2005. The plaintiff contends that Attorney Davis did not listen or participate in a telephone conversation between the parties in April 2004. Attorney Davis denies ever meeting or speaking with the defendant.

On October 7, 2005, the court ordered the parties to submit affidavits in support of their respective positions. After reviewing the affidavits, the court ordered the matter to be scheduled for an evidentiary hearing. The matter was heard on December 16, 2005 and January 18, 2006. The court gave the parties the opportunity to submit post-hearing briefs with the last brief due on April 15, 2006.

Facts

"It is well established that in cases tried before courts, trial judges are the sole arbiters of the credibility of witnesses and it is they who determine the weight to be given specific testimony....It is the quintessential function of the fact finder to reject or accept certain evidence...." (Citations omitted; internal quotation marks omitted.) *In re Antonio M.*, 56 Conn.App. 534, 540, 744 A.2d 915 (2000). "The sifting and weighing of evidence is peculiarly the function of the trier [of fact]." *Smith v. Smith*, 183 Conn. 121, 123, 438 A.2d 842 (1981). "[N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of witnesses and of the weight to be accorded to their testimony." (Citation omitted; internal quotation marks omitted.) *Toffolon v. Avon*, 173 Conn. 525, 530, 378 A.2d 580 (1977). "The trier is free to accept or reject, in whole or in part, the testimony offered by either party." *Smith v. Smith*, supra, 183 Conn. at 123, 438 A.2d 842. "That determination of credibility is a function of the trial court." *Heritage Square, LLC v. Eoanou*, 61 Conn.App. 329, 333, 763 A.2d 199 (2001). The trial court's function as the fact finder "is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *In re Christine F.*, 6 Conn.App. 360, 366, 505 A.2d 734, cert. denied, 199 Conn. 808, 508 A.2d 769 (1986).

*2 Based on the evidence presented, it is reasonable and logical to infer that Attorney Davis participated in one or more telephone conversations during which the parties discussed the contract at issue.

Discussion

“The trial court has the authority to regulate the conduct of attorneys and has a duty to enforce the standards of conduct regarding attorneys. *State v. Jones*, 180 Conn. 443, 448, 429 A.2d 936 (1980), overruled in part, *State v. Powell*, 186 Conn. 547, 442 A.2d 939 (1982), cert. denied sub nom. *Moeller v. Connecticut*, 459 U.S. 838, 103 S.Ct. 85, 74 L.Ed.2d 80 (1982). Since October, 1986, the conduct of attorneys has been regulated also by the Rules of Professional Conduct, which were approved by the judges of the Superior Court and which superseded the Code of Professional Responsibility. *Williams v. Warden*, 217 Conn. 419, 432, n. 5, 586 A.2d 582 (1991). The trial court has broad discretion to determine whether there exists a conflict of interest that would warrant disqualification of an attorney. *State v. Jones*, supra. Disqualification of counsel is a remedy that serves to ‘enforce the lawyer’s duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information.’ *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, 518 F.2d 751, 754 (2d Cir.1975). In disqualification matters, however, we must be ‘solicitous of a client’s right freely to choose his counsel’; *Government of India v. Cook Industries, Inc.*, 569 F.2d 737, 569 F.2d 737, 739 (2d Cir.1978); mindful of the fact that a client whose attorney is disqualified may suffer the loss of time and money in finding new counsel and ‘may lose the benefit of its longtime counsel’s specialized knowledge of its operations.’ *Id.* The competing interests at stake in the motion to disqualify, therefore, are: (1) the defendant’s interest in protecting confidential information; (2) the plaintiffs’ interest in freely selecting counsel of their choice; and (3) the public’s interest in the scrupulous administration of justice. *Goldenberg v. Corporate Air, Inc.*, 189 Conn. 504, 507, 457 A.2d 189 Conn. 504, 457 A.2d 296 (1983), overruled in part, *Burger & Burger, Inc. v. Murren*, 202 Conn. 660, 522 A.2d 812 (1987).” *Bergeron v. Mackler*, 225 Conn. 391, 397-398, 623 A.2d 489 (1993).

Rule 3.7, Lawyer As Witness, of the Rules of Professional Conduct provides as follows:

(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.

(b) A lawyer may act as advocate 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.

*3 COMMENTARY: Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Subsection (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Subsection (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, subsection (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 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 principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

“Whenever a counsel for a client reasonably foresees that he will be called as a witness to testify on a material matter, the proper action is for that attorney to withdraw from the case.” *Enquire Printing & Publishing Co. v. O'Reilly*, 193 Conn. 370, 376, 477 A.2d 648 (1984). “Where, however, an attorney does not withdraw, a court exercising its supervisory power can ... disqualify the attorney.” *Id.*

*4 “Whether a witness ‘ought’ to testify is not alone determined by the fact that he has relevant knowledge or was involved in the transaction at issue. Disqualification may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other evidence....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 ... There is a dual test for ‘necessity.’ First the proposed testimony must be relevant and material. Second, it must be unobtainable elsewhere.” *Tropical Suntan Centers, Inc. v. Salvati*, 1 CONN. L. RPTR. 497, 498 (April 12, 1990) (Meadow, J.), quoting *S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 445-46, 515 N.Y.S.2d 735, 508 N.E.2d 647 (1987), see also *Keoseian v. Von Kaulbach*, 707 F.Supp. 50, 154 (S.D.N.Y. 1989); and quoting *Security General Life Ins. v. Superior Court*, 149 Am. 332 (1986).

“In *Fredericks v. Fortin*, No. CV89-282910, 13 CONN. L. RPTR. 234, 1994 Ct. Sup. 12877 (Dec. 30, 1994, Hadden, J.), a suit arising from the sale of a corporation, defendant's counsel sought to disqualify the plaintiff's counsel who had represented the plaintiff at the closing of the sale of the

corporation on the basis that he was a necessary witness. Statements made at the closing were at issue in the suit. After reviewing Rule 3.7 the court in *Fredericks* granted the motion to disqualify and stated:

The testimony of Mr. Sherwood [plaintiff's attorney] does relate to a contested issue and is not related to the nature and value of legal services. The plaintiff claims that there were four other people present during the closing and therefore Mr. Sherwood's testimony is not necessary. The court is of the opinion that in view of the allegations by the defendant with respect to what took place at the closing and Mr. Sherwood's role in it, which is denied by the plaintiff, that merely because other participants in the closing may be able to recall what took place, does not make Mr. Sherwood's testimony unnecessary. He was the only attorney present, and since the evidence will concern what he did and said, he is a necessary witness.

The court in *Fredericks* also noted that the defendant had initially moved for disqualification very shortly after the case was commenced and that the suit did not involve complex legal issues.” *Command Electric, Inc. v. Stathis Manousos et al.*, Superior Court, judicial district of Hartford, Docket No. CV 960560381 (Aurigemina, J.; April 14, 1997)(1997 Ct. Sup. 3633, 3635-3636).

In *Command Electric, Inc.*, a suit arising from an allegedly fraudulent conveyance of an interest in two properties, the plaintiff moved to disqualify defendant's counsel on the grounds that the attorney was a necessary witness at trial because the attorney had a better recollection of the of the transactions than the defendant did. In granting the motion to disqualify, the court in *Command Electric, Inc.*, stated that: “[u]nlike actions for personal injury where the plaintiff generally has personal knowledge of the pertinent facts, a plaintiff in an action for fraudulent conveyance must often prove his case solely through the testimony of the defendants and the documents within the defendants' possession or control. In this case the testimony of Attorney Case will be necessary because Mr. Manousos has little or no recollection of many of the material facts. The Motion to Disqualify was filed within three months after the return date. The case is less than one year old and another attorney would have ample time to become familiar with the case prior to trial. The hardship to the defendant, Mrs. Manousos, is, therefore, minimal.” *Command Electric Inc., v. Manousos, supra*, 1997 Ct. Sup. at 3636.

*5 In the instant matter, the defendant alleges the existence of a contract that forms the basis of several special defenses and counterclaims. The defendant intends to offer testimony regarding the parties' discussions including their telephone conversations. The defendant intends to call Attorney Davis to testify regarding the parties' discussions.

Based on the evidence presented, the court finds that Attorney Davis has relevant knowledge of the conversations at issue. His testimony relates to a contested issue and does not relate to the nature and value of legal services. The testimony is relevant and material to the defendant's case; it is not obtainable elsewhere. Furthermore, it is probable that Attorney Davis' testimony will conflict with that of other witnesses.

Having considered the significance of the matters, weight of the testimony and availability of other evidence, the court finds that Attorney Davis is a necessary witness.

Before deciding this motion, the court must consider plaintiff's interest in freely selecting counsel of her choice.

First of all, the plaintiff could have reasonably foreseen that Attorney Davis would be called as a witness. Moreover, shortly after the action was commenced, the Motion to Disqualify was filed. The plaintiff objected to the Motion to Disqualify. Any delay has been necessitated by the need to fully litigate the Motion to Disqualify. Another attorney would have ample time to become familiar with the case prior to trial. Under these circumstances, the court finds that disqualification would not work a substantial hardship on the plaintiff.

Conclusion and Order

After balancing the competing interests of the parties, the court finds that the defendant will likely suffer prejudice if Attorney Davis is not disqualified. Based on the foregoing reasons, the Motion to Disqualify Plaintiff's Counsel is granted.

All Citations

Not Reported in A.2d, 2006 WL 1321282