

FILED ON DOCKET
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
HARRINGTON, GEORGE & DUNN, P.C.,)	CASE NO. 05-91725
)	
Debtor.)	
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S. GREGORY HAYS, TRUSTEE,)	
)	
Plaintiff,)	
)	
v.)	ADVERSARY PROCEEDING
)	NO. 06-6253
PARADISE MISSION CHURCH, INC.)	
d/b/a PARADISE CHURCH OF GOD IN)	
CHRIST; BOYKIN CONSTRUCTION CO.)	
n/k/a GABOY, INC.; DUNN/BOYKIN)	
CONSTRUCTION CO., Joint Venture;)	
ANTHONY GEORGE,)	
)	
Defendants.)	

ORDER

This adversary proceeding was filed by Trustee against Paradise Mission Church, Inc., d/b/a Paradise Church of God in Christ ("Paradise Church"), to recover damages from Paradise Church in connection with the alleged breach by Paradise Church of a settlement agreement between Debtor and Paradise Church relating to prepetition construction and architectural services provide by Debtor. The Answer in this adversary proceeding was filed by Kenneth Mitchell on behalf of Paradise Church. Mr. Mitchell withdrew as counsel

for Paradise Church and on March 6, 2007, Joyce Parks Williams filed a notice of appearance as substitute counsel for Paradise Church.

Now before the court is Trustee's motion to disqualify Ms. Williams as counsel for Paradise Church. Trustee shows that Ms. Williams represented Paradise Church in connection with the dispute between Debtor and the church, which led to the arbitration proceedings and the settlement that resulted from the arbitration. Therefore, Trustee argues, in the instant proceeding, which arises from the alleged failure of Paradise Church to comply with the parties' settlement agreement, Ms. Williams will be a critical fact witness. Trust asserts that the Georgia Rules of Professional Conduct and the local rules of this district prohibit an attorney from appearing as an advocate in a case in which the attorney will likely be a necessary witness.

Specifically, the Georgia Rules of Professional Conduct, Rule 3.7,¹ state:

(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;

¹ The Georgia Rules Professional Conduct are applicable to conduct which occurred after January 1, 2001. The Georgia Code of Professional Responsibility applies to conduct before January 1, 2001. The provision in the Georgia Code of Professional Responsibility that applies to disqualification of a lawyer who will be a witness is DR 5-102 and provides:

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

The similarity between the pre- and post-2001 rules, therefore, permits consideration of caselaw decided prior to 2001.

(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.

The official Comment to Rule 3.7 explains the basis for the rule:

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has a 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.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (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.

[4] Apart from these two exceptions, 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 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: Imputed Disqualification has no application to this aspect of the problem.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7: Conflict of Interest: General Rule or Rule 1.9: Conflict of Interest: Former Client. 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: Conflict of Interest. 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: Imputed Disqualification disqualifies the firm also.

The cases cited by Plaintiff are all cases from Georgia state courts, which presumably involved jury trials. In the instant case, neither party has timely requested a jury trial; therefore, the matter will be tried before the undersigned, who will act as fact-finder. When a judge is the trier of fact, the danger that the trier of fact will be unable to distinguish between testimony and advocacy is eliminated. *Duncan v. Poythress*, 777 F. 2d 1508, 1515, fn. 21 (11th Cir. 1985).

Additionally, as pointed out by Ms. Williams, Georgia law protects her from being called to testify for or against her client as to any knowledge she acquired as a result of her employment as attorney for Paradise Church, O.C.G.A. 24-9-25, which could appear to cover all knowledge she acquired relating to Trustee's claim for relief. Based upon the parties' briefs, it seems likely that Paradise Church would assert attorney-client privilege to most of the matters upon which Ms. Williams may be asked to give evidence and that

evidence regarding non-privileged matters is attainable other than from Ms. Williams.

Accordingly, it is hereby

ORDERED that Trustee's motion to disqualify Defendant's attorney is *denied*.

IT IS SO ORDERED, this the 29th day of May, 2007.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE