

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE:

MARY EVELYN MOULTON,

Debtor.

CASE NO.: 19-30103-KKS
CHAPTER: 7

TDMA, LLC,

ADV. NO.: 19-03011-KKS

Plaintiff,

v.

MARY EVELYN MOULTON,

Defendant.

ORDER DENYING, WITHOUT PREJUDICE, PLAINTIFF'S *MOTION*
***TO DISQUALIFY COUNSEL* (DOC. 12)**

THIS MATTER is before the Court on Plaintiff's *Motion to Disqualify Counsel* ("Motion," Doc. 12), and Defendant's response in opposition.¹

For the reasons that follow, the Motion is premature and due to be denied without prejudice.

Plaintiff alleges that Defendant's attorney, T.A. Borowski ("Mr. Borowski") and his law firm, Borowski & Traylor, P.A. ("Firm"), should

¹ *Response to Motion to Disqualify Counsel and Memorandum in Support* ("Response," Doc. 22).

be disqualified from representation of Defendant in all aspects of this adversary proceeding. Plaintiff maintains that Mr. Borowski is a material and necessary witness to many issues giving rise to the Complaint. According to Plaintiff, Mr. Borowski has long been Defendant's attorney, advisor, family friend, and trustee. Plaintiff further argues that Mr. Borowski and his Firm should be disqualified because they are simultaneously representing Defendant's mother, an alleged creditor of Defendant/Debtor in the administrative bankruptcy case.

Defendant argues that disqualification is premature and would only relate, if at all, to Mr. Borowski's representation of Defendant at trial. Further, Defendant contends that Plaintiff exaggerates Mr. Borowski's relationship with her and that Plaintiff's attempt to disqualify Mr. Borowski is a thinly veiled effort to deprive her of the benefit of free legal representation. Defendant "does not believe" that Mr. Borowski has personal knowledge of any pertinent facts that are also unprivileged.

Disqualification of a party's chosen attorney is "a harsh sanction often working substantial hardship on the client,' and should therefore

‘be resorted to sparingly.’”² Two sources of authority govern disqualification of attorneys: first, “attorneys are bound by the local rules of the court in which they appear,”³ and second, “[m]otions to disqualify are substantive motions. Therefore, they are decided under federal law.”⁴ Plaintiff bears the burden of proving that disqualification is warranted.⁵

In the Northern District of Florida, “[a]n attorney must comply with the Rules of Professional Conduct that are part of the Rules Regulating The Florida Bar . . . or with any set of rules adopted by The Florida Bar in their place, unless federal law provides otherwise.”⁶ Rule 4-3.7 of the Rules of Professional Conduct governs an attorney’s role as witness:

- (a) **When Lawyer May Testify.** A lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness on behalf of the client unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

² *Hermann v. GutterGuard, Inc.*, 199 Fed. Appx. 745, 752 (11th Cir. 2006) citing *Norton v. Tallahassee Mem’l Hospital*, 689 F.2d 938, 941 n. 4 (11th Cir. 1982). The Eleventh Circuit Court of Appeals cautions courts in reviewing motions to disqualify brought by opposing counsel as they could be used strategically. *See Hermann v. GutterGuard, Inc.*, 199 Fed. Appx. 745, 752 (11th Cir. 2006).

³ *Herrera-Shorthouse v. La Cubana Bail Bonds, Inc.*, No.: 98-1888-CIV, 1999 WL 33266031, *2 (S.D. Fla. July 14, 1999) citing *Hermann v. GutterGuard, Inc.*, 199 Fed. Appx. 745, 752 (11th Cir. 2006).

⁴ *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995); *see also Hermann v. GutterGuard, Inc.*, 199 Fed. Appx. 745, 752 (11th Cir. 2006).

⁵ *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003).

⁶ N.D. Fla. Loc. R. 11.1(G)(1). The Local Rules of the District Court for the Northern District of Florida are made applicable to practitioners in this Court by N.D. Fla. LBR 1001-1 D.

- (3) the testimony relates to the nature and value of the legal services rendered in the case; or
- (4) disqualification of the lawyer would work substantial hardship on the client.⁷

In interpreting the application of Rule 4-3.7, federal courts in Florida have held that an attorney may be a witness at trial, but still proceed in being a client's attorney in all pre- and post-trial matters.⁸ The Eleventh Circuit Court of Appeals has, in fact, overturned a district court's disqualification of counsel as error on the basis that "... Florida courts have limited counsel's disqualification under the Rule [4-3.7], in cases where counsel's disqualification arises because of his role as a witness, to counsel's appearance at trial and have allowed such counsel to participate in pretrial and posttrial matters."⁹

For several reasons the Motion is premature.

⁷ R. Regulating Fla. Bar 4-3.7 (emphasis added). The rule also allows an attorney at the same firm to "act as an 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 4-1.7 or 4-1.9." R. Regulating Fla. Bar 4-3.7(b).

⁸ *Turbyfill v. Scottsdale Indemnity Co.*, Case No.: 3:14cv283-RV/EMT, 2016 WL 741657, *3 (N.D. Fla. Feb. 24, 2016) ("As the emphasized language clearly indicates, even if Lemley is deemed a necessary witness, Rule 4-3.7(a) only applies 'at a trial.'"); *Zuma Seguros, CA v. World Jet of Delaware, Inc.*, Case No.: 15-22626-CIV-GOODMAN, 2017 WL 3705585, *3 (S.D. Fla. Aug. 28, 2017) ("... Rule 4-3.7 focuses on the harm an advocate may cause when that advocate testifies on behalf of a client 'at a trial' only."); and *Shaffer v. Independent Administrative Services, LLC*, Case No.: 8:18-cv-853-T-24 CPT, 2018 WL 3219411, *2 (M.D. Fla. July 2, 2018) ("... the Rule does not allow the Court to disqualify Hightower from representing Defendants in pretrial proceedings. Instead, the Rule mandates that the Court determine whether Hightower should be disqualified from representing Defendants at trial if he is called as a witness.").

⁹ *In re Thompson*, No.: 06-12375-F., 2006 WL 1598112, *1 (11th Cir. June 7, 2006).

Plaintiff filed this adversary proceeding on September 20, 2019; Defendant's motion to dismiss is still pending.¹⁰ Without a ruling on the Motion to Dismiss, the pleadings being closed, or discovery complete, it is impossible to tell what issues, if any, will survive for trial. Given that, it is entirely too early to determine what material facts, if any, may require testimony from Defendant's attorney, Mr. Borowski. Even if issues remain for trial that might require Mr. Borowski's testimony the Court will have to determine whether any testimony from Mr. Borowski will relate to: "an uncontested issue;" "solely to a matter of formality;" or "to the nature and value of legal services rendered."

Another threshold issue is what adverse effect disqualification of Mr. Borowski may have on Defendant. In defense of the Motion Defendant claims that disqualification of Mr. Borowski would render a substantial hardship and virtually ensure her inability to defend this proceeding.

Plaintiff's allegation of Mr. Borowski's long-standing relationship with Defendant and her family, even if true, does not necessarily constitute cause to disqualify Mr. Borowski and his Firm from the entire pro-

¹⁰ *Motion to Dismiss Complaint Objecting to Discharge and Memorandum in Support* ("Motion to Dismiss," Doc. 9)

ceeding. Even if the Court were to disqualify Mr. Borowski as trial counsel, that disqualification would likely not apply to all members of Mr. Borowski's firm, as Plaintiff requests.

Finally, another attorney with an unrelated firm has now appeared as co-counsel for Defendant.¹¹ With that appearance, it is probable that any potential disqualification of Mr. Borowski from trial would not cause delay or prejudice to Plaintiff.

For the reasons stated, it is

ORDERED:

1. The *Motion to Disqualify Counsel* (Doc. 12) is DENIED without prejudice to the issue being raised at a later time.
2. The hearing on the Motion, currently scheduled for Tuesday, December 17, 2019 is CANCELED.

DONE and ORDERED on December 13, 2019.



KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

cc: All interested parties.

Attorney for Plaintiff is directed to serve a copy of this Order on interested parties and file a certificate of service within three (3) business days of entry of this Order.

¹¹ Attorney J. Steven Ford, of the firm Wilson, Harrel, Farrington, Ford, Wilson, Spain & Parsons, P.A. has filed an appearance as co-counsel for Debtor in this proceeding. *Notice of Appearance*, Doc. 21.