

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 106

WCC No. 9406-7066

EDWIN A. TAYLOR

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer.

ORDER DISQUALIFYING PETITIONER'S COUNSEL

Summary: An important witness in this matter has accused claimant's counsel of bullying her into signing a false affidavit regarding whether or not claimant told her he faked his industrial accident. The witness contradicted the affidavit at a later deposition. The insurer's fraud defense to the claim relies in large part on the witness's testimony. *Sua sponte*, the Court raised the question whether claimant's counsel should be disqualified from acting as her counsel at trial.

Held: The Workers' Compensation Court has inherent authority to disallow testimony, disqualify an attorney, and impose other procedural safeguards necessary to preserve the integrity of the fact-finding process. It may do so *sua sponte*. Even though an attorney is otherwise competent to testify, it is generally considered a serious breach of professional etiquette and detrimental to the orderly administration of justice for an attorney to take the stand in a case he is trying. The attorney who testifies diminishes his effectiveness as an advocate as well as his effectiveness as a witness. Under Montana Rule of Professional Conduct 3.7, a lawyer shall not act as advocate at a trial in which he is likely to be a necessary witness unless the testimony relates to an uncontested issue, the testimony relates to the nature and value of legal services rendered in the case, or disqualification would work substantial hardship on the client. However, a lawyer may ordinarily act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to testify. Here, claimant's counsel is disqualified from acting as claimant's attorney at trial, though he may represent him pretrial, and may sit at counsel table at trial and give advice to counsel conducting the proceeding.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Professional Conduct: Rule 3.7. Under Montana Rule of Professional Conduct 3.7, a lawyer shall not act as advocate at a trial in which he is likely to be a necessary witness unless the testimony relates to an uncontested issue, the testimony relates to the nature and value of legal services rendered in the case, or disqualification would work substantial hardship on the client. However, a lawyer may ordinarily act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to testify. Here, where claimant's counsel obtained an affidavit from a crucial witness, and that witness has recanted the contents of the affidavit and accused counsel of bullying her into its signature, claimant's counsel is disqualified from acting as claimant's attorney at trial, though he may represent him pretrial, and may sit at counsel table at trial and give advice to counsel conducting the proceeding.

Attorneys: Disqualification. Where claimant's counsel obtained an affidavit from a crucial witness to whether claimant faked his claimed accident, and that witness has recanted the contents of the affidavit and accused counsel of bullying her into its signature, counsel is disqualified from acting as claimant's attorney at trial, though he may represent him pretrial, and may sit at counsel table at trial and give advice to other counsel from his firm conducting the proceeding.

Attorneys: Rules of Professional Conduct. Under Montana Rule of Professional Conduct 3.7, a lawyer shall not act as advocate at a trial in which he is likely to be a necessary witness unless the testimony relates to an uncontested issue, the testimony relates to the nature and value of legal services rendered in the case, or disqualification would work substantial hardship on the client. However, a lawyer may ordinarily act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to testify. Here, where claimant's counsel obtained an affidavit from a crucial witness, and that witness has recanted the contents of the affidavit and accused counsel of bullying her into its signature, claimant's counsel is disqualified from acting as claimant's attorney at trial, though he may represent him pretrial, and may sit at counsel table at trial and give advice to counsel conducting the proceeding.

A show cause hearing was held November 29, 1994, in Helena, Montana, to determine whether claimant's counsel, Mr. Bernard J. Everett, should be disqualified from representing the petitioner in this proceeding.

The possibility of disqualification was raised sua sponte by the Court after it became clear that Mr. Everett will be a witness in this case and that his testimony will involve a key, controverted issue. Ms. Elizabeth Larain, one of the key witnesses against petitioner, has

accused Mr. Everett of bullying her into signing a false affidavit in which she retracted much of her expected testimony against petitioner. The affidavit will undoubtedly be used to impeach Ms. Larain. Thus, the circumstances of its preparation and execution are also relevant to her credibility. Mr. Everett vigorously disputes the accusations made by Ms. Larain and is expected to testify in rebuttal. Ultimately, the Court will have to determine Ms. Larain's credibility and, incidentally, Mr. Everett's credibility.

Ms. Larain's testimony in this case is neither peripheral nor unimportant. She testified at deposition that petitioner told her he had faked the industrial accident which is at issue herein. (Larain Dep. at 17-18.) Relying in large part on Ms. Larain's testimony, the State Fund has raised an affirmative defense of fraud in its response to the petition. The fraud defense is the central issue in this case.

Mr. Everett has indicated that another attorney from his law firm will act as co-counsel during trial and that his co-counsel will examine both Ms. Larain and himself. He urges that this is sufficient and that his disqualification would work a substantial hardship on his client. In an affidavit, Mr. Taylor states that Mr. Everett has worked without compensation and that he has no money to pay him. He also points out that Mr. Everett has spent a great deal of time in this case, amassing hundreds of documents and taking numerous depositions. Mr. Taylor has a great deal of confidence in Mr. Everett.

In matters such as this, the Court has inherent authority to disallow testimony, disqualify the attorney, and impose any other procedural safeguards necessary to preserve the integrity of the fact-finding process, and it may do so sua sponte. ***Cottonwood Estates v. Paradise Builders***, 624 P.2d 296, 302 (Ariz. 1981). "Even though the attorney is otherwise competent to testify, it is generally considered a serious breach of professional etiquette and detrimental to the orderly administration of justice for an attorney to take the stand in a case he is trying." *Id.* at 299. Other courts have noted that "[t]he attorney who testifies diminishes his effectiveness as advocate as well as his effectiveness as a witness." *Id.*; accord ***Comden v. Superior Court Las Angeles County***, 576 P.2d 971, 973 (1978).

The Montana Rules of Professional Conduct contain a specific provision governing attorneys who appear as witnesses. Rule 3.7 provides:

LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except 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.

Under the rule the attorney must be disqualified unless one of the three exceptions is met. In this case, exceptions (1) and (2) do not apply. Therefore, unless disqualification would work a "substantial hardship" on Mr. Taylor, the rule requires the disqualification of Mr. Everett.

Mr. Everett has already acknowledged that he must involve another member of his firm in the trial of this case. That attorney's participation would at minimum extend to the cross-examination of Ms. Larain, the examination of Mr. Everett, **and argument of the case**. It would be wholly inappropriate for Mr. Everett to both testify and then argue his own and Ms. Lorain's credibility, and it is difficult to imagine how argument could be neatly divided up between two lawyers in this particular case. Therefore, co-counsel will have to be intimately familiar with the case.

In light of the inevitable participation of other counsel in the trial of this matter, disqualification of Mr. Everett is unlikely to create an undue hardship on Mr. Taylor. Disqualification does not extend to other members of Mr. Everett's firm, and there is ample time for another member of the firm to familiarize himself or herself with this case. It does not appear to the Court that there is anything unique in this case which would make Mr. Everett's personal participation at trial essential.

The potential for hardship can be further reduced by permitting Mr. Everett to continue to participate in depositions. Most of the depositions have already been taken and the Court sees no harm in permitting Mr. Everett to complete the discovery phase of the case.

Based on the foregoing discussion,

IT IS HEREBY ORDERED that Bernard J. Everett is disqualified from representing the petitioner at the trial of this matter. The disqualification does not extend to other members or associates of Mr. Everett's firm. It also does not preclude Mr. Everett from continuing to represent Mr. Taylor in pretrial matters, including discovery. Finally, it does not preclude Mr. Everett from sitting at counsel table at trial and assisting new counsel, so long as he does not speak as an advocate on behalf of petitioner.

Dated in Helena, Montana, this 30th day of November, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

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c: Mr. Bernard J. Everett
Mr. Oliver H. Goe