

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRYAN GEORGE, et al.,)
)
 Plaintiffs,)
)
 vs.) CIVIL ACTION No. 99-6130
)
 WAUSAU INSURANCE CO., et al.,)
)
 Defendants.)

MEMORANDUM

Padova, J. March , 2000

This matter arises on Plaintiffs' Motion to Disqualify Counsel, filed February 3, 2000. Defendant filed a Memorandum in Opposition on February 15, 2000. For the reasons that follow, the Court will deny this Motion.

I. BACKGROUND

Plaintiffs filed this action on December 2, 1999, invoking the Court's diversity jurisdiction. See 28 U.S.C. §1332 (1999). Plaintiffs, Mr. and Mrs. Bryan George, allege that they were involved in an automobile accident on April 5, 1996. Defendant Wausau Insurance Company (“Wausau”) insured the vehicle Plaintiffs were driving. Mr. Joseph A. Daly, of the firm Kelly, McLaughlin & Foster, represented Defendant Wausau in this underlying action.

Plaintiffs bring three counts against three Defendants: Wausau, James M. Durst, and Jim Durst and Associates, Inc. In Count I, Plaintiffs allege that Defendant Wausau, through its investigators and counsel, acted in bad faith in handling Plaintiffs' claim for underinsured motorist benefits. In Count II, Plaintiffs bring a claim against Wausau, and its investigator, Defendants James M. Durst and Jim Durst & Associates, Inc., for intentional infliction of emotional distress. Finally,

Plaintiff bring a third Count against all defendants for invasion of their right to privacy. Neither Mr. Daly nor his law firm is a party to the instant action.

II. DISCUSSION

A district court derives the power to disqualify an attorney “from its inherent authority to supervise the professional conduct of attorneys appearing before it.” United States v. Miller, 624 F.2d 1198, 1201 (3d Cir.1980); see also In re Corn Derivatives Antitrust Litig., 748 F.2d 157, 160 (3d Cir.1984)(same). Nevertheless, motions to disqualify are not favored. Hamilton v. Merrill Lynch, 645 F.Supp. 60, 61 (E.D. Pa. 1986). This principle recognizes the longstanding tradition that a party's choice of counsel is entitled to substantial deference. Id. “At the same time the court has a duty to assure that attorneys observe the ethical obligations set forth in the ABA Code of Professional Responsibility.” Id. The local rules of this Court incorporate the rules of professional conduct adopted by the Supreme Court of Pennsylvania. See E.D.Pa.R. 14(IV)(B). Violations of these rules, however, do not necessarily provide grounds for disqualification. See Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1284 (Pa. 1992).

Thus, a court should disqualify an attorney:

only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule. It should consider the ends that the disciplinary rule is designed to serve and any countervailing policies, such as permitting a litigant to retain the counsel of her choice and enabling attorneys to practice without excessive restrictions.

Commonwealth Insurance Co. v. Graphiz Hot Line, Inc., 808 F.Supp. 1200, (E.D. Pa. 1992)(citing United States v. Miller, 624 F.2d 1198, 1201 (3d Cir.1980)). While the Court resolves any doubts in favor of disqualification, “it is the burden of the party arguing for disqualification to demonstrate clearly that continuing representation would be impermissible.” Id. (internal citations and quotation marks omitted).

Plaintiffs seek to disqualify Mr. Daly, and his law firm Kelly, McLaughlin & Foster as counsel for Defendant Wausau Insurance Company (“Wausau”). Plaintiffs assert that Mr. Daly's representation violates Pennsylvania Rule of Professional Conduct (“PRPC”) 3.7 (barring representation where lawyer is likely to be a necessary witness). Furthermore, Plaintiff argues that because “many members of the firm may be called as witnesses,” Kelly, McLaughlin & Foster should be disqualified.

Rule 3.7 of the Pennsylvania Rules of Professional Conduct provides:

- (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.

This rule serves to separate the role of an attorney as an advocate from the role as witness:

A witness is required to give testimony 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 analysis of the proof.

Pa. R. Prof. Cond. 3.7 cmt. This rule, however, only bars representation at trial. An attorney may continue to represent a client in an action in which he will be called as a witness up to the actual trial in the case. Lebovic v. Nigro, Civ. A. No. 96-319, 1997 WL 83735 (E.D. Pa. Feb. 26, 1997); accord Rounick v. Fireman's Fund Ins. Co. of Wisconsin, Civ. A. No. 95-7086, 1996 WL 269495 (E.D. Pa. May 20, 1996); Electronic Laboratory Supply Co., Inc v. Motorola, Inc., Civ. A. No. 88-4494, 1990 WL 96202 (E.D. Pa. July 3, 1990). Wausau states that Mr. Daly will not act as trial counsel. Rather,

Mr. William C. Foster will appear on its behalf at trial. Accordingly, the Court finds no basis for barring Mr. Daly from continuing to represent Wausau in all pretrial matters.

Plaintiffs' reliance on Brennan v. Independence Blue Cross, 949 F.Supp. 305 (E.D. Pa. 1996), is misplaced. Unlike the instant case, Brennan involved counsel's representation of another client in an action against a former client. In Brennan, the plaintiffs had a underlying medical malpractice claim against a hospital. As part of that action, the plaintiffs' counsel agreed to represent the insurer on its subrogation claim in the medical malpractice claim. Counsel obtained subrogation monies on the insurer's behalf. Counsel then, on behalf of the same plaintiffs, filed a separate lawsuit against his former client, the insurer, seeking payment of future medical benefits. Id. at 306-08. The court concluded that the current representation by counsel against his former client presented a conflict of interest. Id. at 308. Because the plaintiffs' interests were materially adverse to those of the former client, the court disqualified counsel from representation of the plaintiffs. Id. at 309. Accordingly, Brennan does not support Plaintiffs' request to disqualify Mr. Daly.

With respect to Kelly, McLaughlin & Foster, nothing in the rules of conduct prohibit the law firm from representing Wausau at trial. Indeed, Rule 3.7 specifically provides that another lawyer in the same firm may appear as trial counsel unless such representation presents a conflict of interest. Unlike Brennan, the instant case does not pose a conflict of interest for the firm. Here, the firm represented Wausau in the prior benefits' claim. The firm's continued representation of Wausau is not “directly adverse” to another client, Pa. R. Prof. Cond. 1.7, nor has the firm undertaken representation of a new client whose interests are “materially adverse” to a former client. Pa. R. Prof. Cond. 1.9.

In accordance with the foregoing, the Court will deny Plaintiffs' Motion to Disqualify. An appropriate Order follows.

