

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TERRY MCCARTY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 3:12-CV-3852-B
	§	
ALLEN L. ADKINS & ASSOCIATES,	§	
P.C.,	§	
	§	
Defendant.	§	

ORDER GRANTING DEFENDANT’S MOTION TO DISQUALIFY

Before the Court is Defendant’s Motion to Disqualify Dennis McCarty as Counsel for Plaintiff (doc. 17). The Defendant maintains that attorney McCarty must be disqualified from representing Plaintiff because McCarty is a material witness to the facts underlying this suit. After a hearing on the matter, the Court agrees with the Defendant. Accordingly, for the reasons stated on the record during the hearing and summarized below, the Motion is **GRANTED** and attorney Dennis McCarty is disqualified from any further representation of Plaintiff Terry McCarty in this action.

“Depriving a party of the right to be represented by the attorney of his or her choice is a penalty that must not be imposed without careful consideration.” *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1313 (5th Cir.1995). When addressing a motion to disqualify counsel, a district court has inherent authority “to determine who may practice before [it] and to regulate the conduct of those who do.” *United States v. Roark*, 288 Fed. Appx. 182, 186 (5th Cir. 2008) (quoting *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir.1976)). A “[d]istrict [c]ourt is *obliged* to take measures against unethical conduct occurring in connection with any proceeding before it.” *In re Am. Airlines, Inc.*,

972 F.2d 605, 611 (5th Cir. 1992). “The proscription against an attorney serving as both an advocate and a witness in the same litigation is a long standing ethical rule.” *U.S. Fire Ins. Co.*, 50 F.3d at 1311. Such a proscription is justified because “(1) the lawyer may be a less effective witness because he is more easily impeachable for interest; (2) opposing counsel may be inhibited in challenging the credibility of a lawyer who also appears as an advocate; (3) a lawyer-witness must argue his own credibility; and (4), while the role of a witness is to objectively relate facts, the role of an advocate is to advance his client's cause.” *Id.* There also may be an appearance of impropriety when an attorney testifies on behalf of his client. *Id.* The norms embodied in the Texas Disciplinary Rules of Professional Conduct (“Texas Rules”),¹ the American Bar Association Model Rules of Professional

¹ Texas Rule 3.08, Lawyer as Witness, provides:

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's 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;
- (3) the testimony relates to the nature and value of legal services rendered in the case;
- (4) the lawyer is a party to the action and is appearing pro se; or
- (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Conduct (“Model Rules”),² and the ABA Model Code of Professional Responsibility (“Model Code”)³ are relevant to the Court’s inquiry in ruling on disqualification motions. *U.S. Fire Ins. Co.*, 50 F.3d at 1312.

Here, based on the briefing and the arguments at the hearing, it is abundantly clear that attorney Dennis McCarty is directly involved in the events which prompted this suit. As addressed by the Court at the hearing, attorney McCarty, by virtue of his direct involvement in the facts forming the basis of this suit, is necessarily a key - as opposed to an incidental or cumulative - witness in the case. The conversations between attorney Dennis McCarty and Terry McCarty before, during, and after the phone call at the center of this case will necessarily be the subject of discovery, dispositive motions, and trial. Therefore, because Attorney Dennis McCarty is an essential witness in this case and does not qualify under any of the exceptions enumerated in the above-cited ethical

² Model Rule 3.07, Lawyer As Witness, provides:

- a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (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 DR 5-102 of the Model Code provides:

Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) -If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue the representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

(B) -If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

frameworks, he is hereby disqualified from any and all further legal representation of Terry McCarty in this action.

SO ORDERED.

SIGNED: February 20, 2013.



JANE J. BOYLE
UNITED STATES DISTRICT JUDGE