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MOTION TO DISQUALIFY? DENIED!

The Fourth Court of Appeals, in San Antonio, Texas, recently decided a mandamus proceeding which dealt with one party's motion to disqualify the opposing party's counsel. *In re: Florinda G. Garza (04-11-00835-CV)*.

BACKGROUND

The mandamus proceeding arose out of a suit filed by Narciso R. Garza for the partition of property in Starr County, Texas. Crisanta G. Garza signed a gift deed on June 28, 1995, which granted her son, Leonel, sole ownership of the property. In 2000, Leonel passed away and his interest in the property was left to his wife, Florinda G. Garza. However, in the partition suit Narciso asserted that he was gifted a $\frac{1}{4}$ interest in the property in a 1980 warranty deed.

Narciso filed a motion to disqualify Florinda's counsel, Fela B. Olivarez and Roy Garza, because Fela notarized the 1995 gift deed. Also, Fela and Roy were the only other persons in the room when Crisanta signed the gift deed. At the hearing on the motion, Narciso argued that, under Rule 3.08 of the Texas Rules of Professional Conduct, Fela and Roy were witnesses necessary to establish an essential fact of Florinda's case. The trial court disqualified both Fela and Roy. In the petition for writ of mandamus filed with the Fourth Court of Appeals, Florinda only challenged the trial court's disqualification of Fela.

ANALYSIS

The Court noted that disqualification of counsel is a severe remedy because it can cause immediate harm by depriving a party of its chosen counsel and disrupting court proceedings. *In re Sanders*, 153 S.W.3d 54, 57 (Tex. 2004). Further, the party moving for disqualification must establish with specificity a violation of one or more of the disciplinary rules. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990). Mere allegations of unethical conduct or evidence showing only a remote possibility of a violation of the disciplinary rules are not sufficient to merit disqualification. *Sanders*, 153 S.W.3d at 57.

The Court indicated that Rule 3.08 has been recognized by courts to provide guidelines relevant to disqualification determination. It explained that the rule provides that a lawyer shall not continue employment as an advocate before a tribunal in a 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:

- the testimony relates to an uncontested issue;
- 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 of the testimony;
- the testimony relates to the nature and value of legal services rendered in the case;
- a lawyer is a party to the action and is appearing pro se; or
- 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. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a).

The Court noted that the fact that a lawyer serves as both an advocate and a witness does not, standing alone, compel disqualification. *Sanders*, 153 S.W.3d at 57. Further, disqualification is inappropriate under Rule 3.08 when opposing counsel merely announces their intention to call the attorney as a fact witness without establishing both the genuine need for the attorney's testimony and that the testimony goes to an essential fact. *In the Int. of A.M.*, 974 S.W.2d 857, 864 (Tex. App. – San Antonio 1998, no pet.). Further, it is important that the party moving for disqualification show the opposing lawyer's dual roles as attorney and witness will cause the moving party actual prejudice. *Sanders*, 153 S.W.3d at 57.

The Court cautioned that, without these limitations, the rule could be improperly employed “as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice.” TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt. 10 (stating that a lawyer “should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness”).

The Court held that Narciso had the burden to show that Fela's testimony was necessary. Narciso planned to argue the 1995 gift deed was signed by Crisanta under suspicious circum-

stances. He further claimed in the motion to disqualify that Fela notarized the deed and that Roy and Fela were the only persons present (other than Crisanta) when the deed was signed. At the hearing, Narciso's attorney argued that he would have to amend his petition to put into question the validity 1995 deed, but nothing in the record indicated that this was ever done. Since Roy and Fela were present when the deed was signed, Narciso asserted that Roy and Fela were fact witnesses and that allowing them to remain as witnesses and attorneys would create confusion for the jury.

The Court of Appeals concluded that Fela's testimony was not shown to be necessary. Also, Fela would not have been disqualified from representing Florinda simply because she was the notary. *See Sandoval, 308 S.W.3d at 34.* The Court further noted that although Narciso argued there were questions concerning the validity of the deed, he failed to explain why other sources (such as Roy's testimony) were insufficient to establish those facts.

DON'T PUT THE CART BEFORE THE HORSE

The Fourth Court of Appeals held that the trial court erred in granting Narciso's motion to disqualify Fela Olivarez as attorney for Florinda because his attorney failed to establish (1) a genuine need for the attorney's testimony and (2) that the testimony went to an essential fact at issue at the time of the motion to disqualify.

Before counsel embarks on a motion to disqualify, it needs to make sure that their pleadings are in line with their forthcoming arguments. Even if opposing counsel establishes a genuine need for the attorney's testimony (despite other evidence), their assertion that the testimony will go to an essential fact may fall on deaf ears if that essential fact is not supported by the pleadings. Counsel, and their client promoting the use of disqualification of counsel as a tactical weapon, should be aware of the risks and increased costs, if their argument is premature or unsupported by the pleadings.



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