

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
AT CHATTANOOGA

FILED

2010 AUG 13 P 2:12

ROY L. DENTON,
Plaintiff

v.

STEVE RIEVLEY,
in his individual capacity
Defendant

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Case No. 1:07-CV-211

U.S. DISTRICT COURT
EASTERN DIST. TENN.

Chief Judge Curtis L. Collier
Clerk

JURY DEMAND

MOTION IN LIMINE TO DISQUALIFY ATTORNEY RONALD D. WELLS
AS COUNSEL FOR DEFENDANT STEVE RIEVLEY
AND
SUPPORTING MEMORANDUM OF LAW

Comes the Plaintiff, Roy L. Denton, *pro se*, pursuant to *Canon 3.7 of the Tennessee Rules of Professional Conduct*, and moves this Honorable Court to disqualify Ronald D. Wells as counsel for Defendant Steve Rievley, in support of which motion the Plaintiff would show as follows:

1. That Ronald D. Wells, who is counsel of record and an attorney with Robinson, Smith & Wells, specifically will be listed as a witness on the Defendant's Final Witness List.
2. That in addition to being a necessary witness for the plaintiff, Ronald D. Wells is likewise a material witness for Defendant Steve Rievley. Defendant Rievley has provided to this court, and the plaintiff, an assortment of allegations, statements, events, responses and testimony, that appear to be contradictory with what the Defendant Rievley's attorney, Ronald D. Wells has presented on Mr. Rievley's behalf

MEMORANDUM OF LAW

Ronald D. Wells, *co-attorney* for the Defendant Steve Rievley, has previously been noticed by the plaintiff Roy L. Denton, that he will be listed as a potential witness and added to the plaintiff's final witness list. Therefore, Ronald D. Wells, should be disqualified from representing Steve Rievley at trial because by serving as an advocate at a trial in which the Plaintiff Roy L. Denton has listed Ronald D. Wells, co-counsel of record for Defendant Steve Rievley, as a necessary witness, the attorney Mr. Wells would be in violation of this Court's ethical rules. The Eastern District of Tennessee has adopted the Tennessee Rules of Professional Conduct as the rules of professional conduct of this Court. *See* E.D. TN. LR 83.6.

Canon 3.7 of the Tennessee Rules of Professional Conduct provides as follows:

(a) A lawyer shall not act as an 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 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 RPC 1.7 or RPC 1.9.

Tenn. Sup. Ct. Rule 8, Canon 3.7 (2004)

The discovery issues and Federal Rules of Civil Procedure Rule 26 disclosure problems created as a result of the attorney-client privilege in light of this tactical decision are self-evident. Comment 2 to Canon 3.7 highlights the potential for juror confusion and prejudice to the opposing party when an attorney for one of the parties serves as both a witness and an advocate at trial:

The opposing party has a proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify 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 an analysis of the proof.

Tenn. Sup. Ct. Rule 8, Canon 3.7 (2004), Comment 2.

Mr. Wells, with the knowledge of, and now an official filed Notice of that he will be placed on the plaintiff's witness list as a potential witness, Mr. Wells should have already withdrawn from his role as trial counsel in this case, but has failed to do so.

Pursuant to Canon 3.7, *supra*, "when an attorney foresees before trial that he ought to be called as a witness to testify as to disputed issues on behalf of his client, the attorney should withdraw from the trial of the case." *Whalley Dev. Corp. v. First Citizens Bancshares, Inc.*, 834 S.W.2d 328, 330 (Tenn. Ct. App. 1992). The *Whalley* Court further opined that such practice "should only be permitted under the most exceptional circumstances." *Whalley*, 834 S.W.2d at 330. No such exceptional circumstances are present in the instant case. As Mr. Wells is privy to the fact that Mr. Denton told him long in advance that he was going to be placed on the plaintiff's witness list as a potential witness, and Mr. Wells has additionally secured the assistance of an associate firm attorney E. Bonnie Dickson, who has already made appearance for the defendant in this cause and serves as a co-counsel of record, along with Mr. Wells.

Moreover, the purpose of Canon 3.7 is threefold. The Rule serves to prevent:

1) the possibility that, in addressing the jury, the lawyer will appear to vouch for his own credibility; 2) the unfair and difficult situation which arises when an opposing counsel has to cross-examine a lawyer-adversary and seek to impeach his credibility; and 3) the appearance of impropriety created, *i.e.*, the likely implication that the testifying lawyer may well be distorting the truth for the sake of his client.

Nisus Corp. v. Perma-Chink Systems, Inc., 2005 WL 6112992 (E.D.Tenn. May 27, 2005)

The Tennessee Court of Appeals in *Whalley* further expanded on the ethical dilemmas implicated when a lawyer is placed in the untenable position of serving as both witness and advocate:

If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Whalley, 834 S.W.2d at 330-31 (emphasis added).

As the record shows, a jury trial was had in this lawsuit where Mr. Denton found himself testifying as a witness for, as well as advocating his own case as a pro se litigant and “*held to the same strict standards of that of an attorney*”. As the record also reflects, the first jury trial in this lawsuit resulted in a “*Hopelessly Deadlocked Jury*”. Accordingly, with advance knowledge of him being named as the plaintiff’s potential witness, again, Mr. Wells should have already voluntarily withdrawn from his representation of Steve Rievley in this litigation.

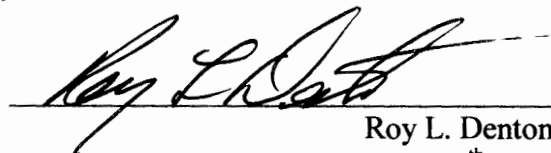
Finally, Sixth Circuit authority supports the disqualification of Mr. Wells as a means of safeguarding the judicial process. See *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704 (6th Cir. 1982). In *General Mill Supply Co.*, the United States Court of Appeals for the Sixth Circuit opined that, “The public interest demands a seemly and efficient use of judicial resources towards the just, speedy, and inexpensive remedy spoken for in Fed. R. Civ. P. 1. ... The court should *sua sponte* raise ethical problems involving danger to a just, speedy, and inexpensive remedy, even if the parties do not.” *Id.* at 711-12.

Given the potential for the testimony of Mr. Wells to conflict with that of the Defendant Steve Rievley, it is plausible Mr. Wells, who is retained co-counsel for Defendant Rievley, may be placed in the untenable position of arguing his own credibility, which may be material to his case. Calling Mr. Wells credibility into question, particularly in regard to issues that materially

affect Defendant Rievley's position in this case, would undermine the integrity of the evidence presented to the fact-finder.

WHEREFORE, pursuant to Canon 3.7 of the Tennessee Rules of Professional Conduct, Plaintiff Roy L. Denton respectfully moves the Court to disqualify Ronald D. Wells, as trial counsel for Defendant Steve Rievley.

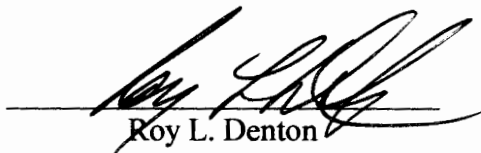
Respectfully submitted this 13th day of August, 2010



Roy L. Denton
120 6th Ave.
Dayton, TN 37321
423-285-5581

CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this document has been served upon all parties of interest in this cause by placing an exact copy of same in the U.S. Mail addressed to such parties, with sufficient postage thereon to carry same to its destination, on this 13th day of August, 2009.



Roy L. Denton

Copy mailed to:

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