STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
FAMILY COURT DIVISION
CASE TYPE: 04: DISSOLUTION WITH CHILDREN

In Re the Marriage of:

S. K. H.,

Petitioner,

and

J. E. F.,

Respondent.

PETITIONER'S MEMORANDUM WITH REGARD TO DISQUALIFICATION OF COUNSEL

SYNOPSIS

The Judgment and Decree filed in this matter on 3 August 2000 granted Petitioner sole physical custody of the minor children of the parties. In March of 2005, Respondent filed an ex parte motion seeking temporary physical custody of the children. In November of 2005, Petitioner took leave from her employment under the FMLA to care for the mental health needs of the children. Petitioner's employer took retaliatory action against her and Petitioner was unemployed for nine months. The combination of loss of income and legal fees resulted in Petitioner's losing her home to foreclosure.

Following an evidentiary hearing, the court entered an order on 26 July 2006 awarding sole physical custody of the children to Respondent. In March of 2007, Petitioner served Respondent with an Order to Show Cause and Notice of Motion and Motion for Contempt, based on Respondent's non-compliance with multiple provisions of this Court's order of 26 July 2006. Respondent's attorney failed to appear for the show cause hearing. Subsequently, following a telephone hearing, the parties stipulated to the appointment of a custody evaluator with power to bind the parties to her recommendations, and an order was entered thereupon on 8 June 2007.

On 27 July 2008, the custody evaluator placed H. with Petitioner and E. with Respondent. On 29 December 2008, the Guardian ad Litem requested the Court immediately award custody of E. to Petitioner for educational and psychological neglect. Following a telephone hearing, the Court Found E. was endangered and entered an order granting Petitioner sole physical custody on 27 January 2009.

ARGUMENT

1. The right to counsel of one's own choosing is a constitutional matter of due process.

As early as 1932, the Supreme Court of the United States held that the right to counsel of one's own choosing and employ is not confined to criminal matters subject to the Sixth Amendment, but also exists in civil cases as a matter of due process, derived from the Fifth and Fourteenth Amendments. "If in any case, civil of criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. State of Alabama,* 287 U.S. 45, 69 (1932). "[T]he Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment due process." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117 (5th Cir. 1980), *cert. denied,* 449 U.S. 820 (1980). "[T]he right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement." *Id.* at 1118. "Parties normally have the right to counsel of their choice, so long as the counsel satisfy required bar admissions . . ." *Cole v. U.S. Dist. Court for Dist. of Idaho,* 366 F.3d 813, 817 (9th Cir. 2004). One writer has noted that the relative silence of the Constitution on the right to counsel in civil matters stems from the already firm establishment of that right in English law. "Because English practice had recognized the right to retain civil counsel, there was no need to reaffirm the prerogative." Note, "The Right to Counsel in Civil Litigation", 66 Colum.L.Rev. 1322, 1327 (1966).

The First Amendment right to freedom of association is implicated in the choice of counsel as well. The Fifth Circuit, in a disqualification case, held that "these rights are important ones and will yield only to an overriding public interest." *In re Gopman,* 531 F.2d 262, 268 (5th Cir. 1976). "[O]ne of the most important associational freedoms that a person may have [is] the right to choose one's own lawyer." *Kusch v. Ballard*, 645 So. 2d 1035, 1036 (Fla. App. 4th Dist., 1994) (Farmer, J., concurring). Disqualification "serves to destroy a relationship by depriving a party of representation of their own choosing." *Freeman v. Chicago Musical Instrument Co.,* 689 F.2d 715, 722 (7th Cir. 1982). It "separates the client from his chosen counsel, causes delay, and may subject both the client and the disqualified lawyer to significant economic hardship." *Jenson v. Touche Ross,* 335 N.W.2d 720, 722 (1983). "The attorney is the client's choice. Disqualification is wasteful and time-consuming." *Board of Education of New York City v. Nyquist,* 590 F.2d 1241, 1247 (2nd Cir. 1979).

2. Disqualification is a drastic remedy and should only be utilized when no other options exist.

Disqualification is "a drastic measure which courts should hesitate to impose except when absolutely necessary." *Jenson,* 335 N.W.2d at 721. "It is well settled that disqualification of a party's chosen counsel is (1) a harsh and drastic remedy, (2) should be resorted to sparingly, and (3) must find its basis in counsel's violation of some rule of law or breach of the Code of Professional Responsibility resulting in an unfair advantage." *Kusch*, 645 So. 2d at 1040 (Stevenson, J., concurring in part and dissenting in part). "[D]isqualification is warranted only rarely in cases where there is neither a serious question as to counsel's ability to act as a zealous and effective advocate for the client … nor a substantial possibility of an unfair advantage to the current client because of counsel's prior representation of the opposing party … Except in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available." *Koller*

v. Richardson-Merrell, Inc., 737 F.2d 1038, 1056 (D.C. Cir. 1984). "The decision to disqualify an attorney chosen by a party to represent him in a lawsuit is of serious concern and the court's inherent power to do so should only be exercised where the integrity of the adversary process is threatened. Even then, the court should not act 'unless the offending attorney's conduct threatens to taint the underlying trial' with serious ethical violation." *Federal Deposit Ins. Corp. v. Amundson,* 682 F.Supp. 981, 987 (D. Minn. 1988), citing *Beck v. Board of Regents of the State of Kansas,* 568 F. Supp. 1107, 1110 (D. Kan. 1983). "[A]n order granting disqualification seriously disrupts the progress of the litigation and decisively sullies the reputation of the affected attorney." *Fleischer v. Phillips,* 264 F.2d 515, 517 (2nd Cir. 1959), *cert. denied,* 359 U.S. 1002 (1959).

3. Motions for disqualification are subject to strict scrutiny.

"Because of the potential for abuse by opposing counsel, disqualification motions should be subjected to particularly strict judicial scrutiny." *Harker v. C.I.R.,* 82 F.3d 806, 808 (8th Cir. 1996) Motions for disqualification "should be viewed with extreme caution for they can be misused as techniques of harassment." *Freeman v. Chicago Musical Instrument Co.,* 689 F.2d at 722.

4. Rule 3.7(a) only applies to advocacy at trial.

By its plain language, the operation of Rule 3.7(a) is limited to advocacy *at trial.* Writing in the September 6, 1999 issue of *Minnesota Lawyer,* Martin A. Cole, then Senior Assistant Director and now Director of the Office of Lawyers Professional Responsibility, called this an "often-misunderstood aspect of Rule 3.7" and wrote that "[v]irtually all authorities agree that even a lawyer who knows he is likely to be a necessary witness at trial is not prohibited from handling that matter throughout investigation, discovery and settlement negotiations, with

client consent. *See, e.g., ABA Inf. Op. 89-1529* (1989)*; Pa. Ethics Op. 96-15* (1996)." "Lawyer-As-Witness Rule Often Misunderstood," retrieved from http://www.mncourts.gov/lprb/fc99/fc090699.html.

Accordingly, counsel's present objection to your writer's representation of Petitioner on the grounds of Rule 3.7(a) is barred by the plain language of the rule.

5. Respondent has not met his burden for securing an evidentiary hearing.

Not only is this matter not ripe for adjudication because we are not at trial, but there is no certainty that a trial will be held, because Respondent has not met his burden for securing an evidentiary hearing. Whether or not to allow an evidentiary hearing lies within the discretion of the Court and the Court's decision will not be disturbed absent an abuse of discretion. *Geibe v. Geibe,* 571 N.W.2d 774, 777 (Ct. App. 1997). The party seeking an evidentiary hearing must submit an affidavit asserting facts which, if true, would support modification. *Id.* The allegations in the affidavit must be supported by specific, credible evidence. *Axford v. Axford,* 402 N.W.2d 143, 145 (Ct. App. 1987); *see also Smith v. Smith,* 508 N.W.2d 222, 227 (Ct. App. 1993).

Respondent has alleged no facts at all, let alone facts supported by specific, credible evidence.[1] "[B]are allegations and conclusory pronouncements" do not suffice to support an argument, *Woodruff v. State,* 608 N.W.2d 881 (2000). The reports of the custody evaluator and Guardian ad Litem lend no support to Respondent's allegations and tend to discredit them. If the party seeking an evidentiary hearing does not meet their burden, the Court need not grant an evidentiary hearing. *Roehrdanz v. Roehrdanz,* 438 N.W.2d 687, 690 (Ct. App. 1989), *review denied* (June 21, 1989).

6. Rule 3.7(a) applies to a lawyer who is likely to be a "necessary witness."

[1] Petitioner's first complaint to the Office of Lawyers Professional Responsibility, which is attached, cites several instances in which Mr. A. has knowingly presented unsubstantiated allegations and half-truths to the Court as "facts."

Even had Respondent met his burden of proof with regard to an evidentiary hearing, Minn. R. Prof. Conduct 3.7(a) only prohibits a lawyer from acting "as advocate at trial in which the lawyer is likely to be a necessary witness." A necessary witness is one "who has crucial information in his possession which must be divulged" at trial. *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp.,* 546 F.2d 530, 539 n. 21 (3d Cir. 1976), *cert. denied,* 430 U.S. 984 (1977).

While allowing that such a disqualification might be legal, the Minnesota Supreme Court has never actually upheld a disqualification on the basis of Rule 3.7. The Court has spoken time and again, however, about the abuse of this rule. In *Humphrey ex. rel. State v. McLaren,* the Court held that "[t]o be disqualified, an attorney's testimony must be 'necessary.' Simply to assert that the attorney will be called as a witness, a too-frequent trial tactic, is not enough." 402 N.W.2d 535, 541 (1987). The Court specifically excluded circumstances where the attorney's testimony would be merely cumulative, or where the testimony was available from other sources, including other witnesses or documents admissible as evidence. *Id.* In 1982 the Court found that

> The rule does not … contemplate that a party can force the disqualification of his opponent's attorney simply by calling him as a witness or stating that he intends to call him as a witness. This is made clear by a note to DR 5-102(B) in the official amended text of the Code of Professional Responsibility, citing *Galarowicz v. Ward,* 119 Utah 611, 620, 230 P.2d 576, 580 (Utah 1951), which states that this rule "was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel."

State v. Fratzke, 325 N.W.2d 10, 11 (1982). The *Galarowicz* court wrote that an attorney's familiarity with a matter should not be cause for disqualification: "There surely should be no great harm in a lawyer knowing something about the subject matter of his law-suit or concerning which he is questioning a witness." 230 P.2d at 580.

7. Should this matter proceed to trial, Respondent should be required to prove that counsel is a necessary witness by offering specific, credible evidence.

The case law provides no bright-line test for determining when counsel is a "necessary witness." However, a simple assertion that a party will be called as a witness is insufficient. ¶6, *supra.* "The party purporting to name opposing counsel as a witness must make a showing stronger than the one that would prompt voluntary withdrawal by an attorney who recognizes herself as a necessary fact witness on behalf of her own client." *In re Southern Kitchens, Inc.,* 218 B.R. 471, 474 (Bankr. Minn. 1998). The threshold standard for securing an evidentiary hearing in a custody matter is the assertion of facts supported by specific, credible evidence which, if true, would support modification. ¶5*, supra.* Should this matter be set for an evidentiary hearing, and should Respondent maintain his contention that your writer is a necessary witness, the standard of proof should be similar.

8. Should Respondent show that counsel is a necessary witness, Respondent would be required to show that the testimony desired is not barred by the testimonial privilege.

"A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent…" Minn. Stat. § 595.02 subd. 1(a). Your writer is not a party to this action and is not on trial. Any testimony sought by Respondent from your writer, whether for purposes of proof or impeachment, would almost certainly be testimony against his wife, and therefore barred.[2]

9. Disqualification would work substantial hardship on Petitioner.

Even if Rule 3.7 were applicable to the current facts, Rule 3.7(a)(3) provides an exception when the client would suffer "substantial hardship" if the attorney were disqualified. In the instant case, the conduct of Respondent's counsel has made this litigation extremely

[2] Likewise, should Respondent seek to use testimony of Petitioner in regard to some supposed aspect of your writer's conduct, that testimony would be barred as well.

expensive.[345] On 24 February, Petitioner served counsel for Respondent with a motion for sanctions under Minn. Stat. § 549.211 for various false statements made to the tribunal. Pursuant to the statute, counsel has until 17 March to correct those statements before the motion may be filed with the Court and set for hearing. Additionally, Respondent has continued to collect substantial child support even while Petitioner was unemployed and both children were living with her.

Petitioner has already lost a home, a job, and been forced into Chapter 7 bankruptcy as a direct consequence of these proceedings. Continuing to pay an attorney is impossible for Petitioner. Should the Court remove your writer, Petitioner would be forced to proceed without counsel unless the Court orders Respondent to pay Petitioner's legal fees. Respondent is under no such constraints. Respondent's mother testified at the evidentiary hearing in this matter that she pays his legal fees and owns his home and his car.

The notes to Rule 3.7 suggest that, even in the unlikely case that a lawyer is a necessary witness and does, in fact, testify at trial, the Court is to apply a "balancing test" before disqualifying that lawyer:

[3] The manner in which Respondent's counsel has conducted himself in this matter reflects a pattern of conduct dating at least to 2002. *A. v. A.,* 2002 MN 950 (Ct. App. 2002, *review denied,* 2002 MN 1493). We cite this matter not out of *Schadenfreude,* but to demonstrate that counsel has a long history of bad faith dealings by presenting "red herrings" as a way of increasing the length and cost of litigation, and ask the Court to take judicial notice of this decision. The severity of the sanctions levied ($75,000) and the strong language used by the Court ("'contributed unnecessarily and significantly to the length and expense of this proceeding' by filing numerous, repetitive, and unfounded motions for relief" and "the district court noted that it has had no other family law matter before it that has required such significant court involvement and in this case, it is due to [appellant's] conduct") suggests conduct so egregious as to shock the conscience. We also note that Mr. A. was not disqualified from representing himself in that family law manner, which involved minor children. From the perspective of substantive due process, there is no difference between Mr. A. representing himself and your writer representing Petitioner. The disadvantages to the opposing party are precisely the same.

[4] See Petitioner's first complaint to the Office of Lawyers Professional Responsibility, attached. Petitioner's complaint is still being investigated.

[5] See Petitioner's second complaint to the Office of Lawyers Professional Responsibility and the Director's determination, attached. The Director suggested Petitioner might seek civil remedies against Mr. A..

> The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation…. [P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

Even if 1) your writer were found to be a necessary witness **and** 2) your writer's testimony were not excluded by the testimonial privilege **and** 3) your writer were to actually testify, it seems unlikely that the tribunal would be misled by the testimony. We also cannot conceive of circumstances under which your writer's testimony, *combined with service as Petitioner's counsel,* would prejudice Respondent's rights.

10. The circumstances under which Minnesota courts have upheld disqualification are limited to conflicts of interest.

The only disqualifications of counsel that have been upheld in Minnesota case law are those involving conflicts of interest. *See, e.g., Jenson v. Touche Ross,* 335 N.W.2d 720 (1983). In this respect, Minnesota is similar to most jurisdictions:

> Motions to disqualify opposing counsel, an increasingly popular litigation tactic, raise difficult questions of legal ethics. Courts have settled upon three distinct and well-established standards in an effort to accommodate the often competing demands of clients, attorneys, the judicial system, and the general public. First, an attorney's disqualification is required if he simultaneously represents clients with "adverse interests." Second, disqualification is required if an attorney represents a client whose interests are adverse to those of a former client in a matter "substantially related" to that former representation. Third, a former government lawyer who enters private practice—the so-called "revolving door" attorney—must be disqualified from participation in any matter over which he had "substantial responsibility" while a public servant.

Aaron Meyer Lampert, "Disqualification of Counsel: Adverse Interests and Revolving Doors," *Columbia Law Review,* Vol. 81, No. 1 (Jan. 1981), pp. 199-216. The Second Circuit has written that

> [W]ith rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client, or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9 … we believe that unless an attorney's conduct tends to "taint the underlying trial" by disturbing the balance of the presentations in one of the two ways indicated above, courts should be quite hesitant to disqualify an attorney.

Nyquist, 590 F.2d at 1246, internal citations omitted.

There are no applications of Rule 1.7 or Rule 1.9 in this matter. In order for a conflict of interest to be found under Rule 1.7, the lawyer's effectiveness in advocating for the client must be compromised or reduced by the conflict. Writing in the November 6, 2006 issue of *Minnesota Lawyer,* Craig D. Klausing, Senior Assistant Director of the Office of Lawyers Professional Responsibility notes that the conflict of interest rules are often misunderstood in this regard:

> Nonlawyers in particular, but lawyers as well, get tripped up on the distinction between having a conflict of interest versus having a "special" interest in a matter…
>
> What many lay people, and some lawyers, seem to forget when evaluating conflicts is the most basic element, the conflict. They perceive any interest the lawyer may have beyond the normal professional interest as a conflict of interest.
>
> However, that is not the case. Rule 1.7 of the MRPC deals with conflicts of interest and provides that a lawyer shall not represent a client if the representation involves a "concurrent conflict of interest." A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client, or, there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer… In other words, what is required is an interest that limits the lawyer's ability to represent the client.

"When it comes to conflicts, not all interests are created equal," retrieved from http://www.courts.state.mn.us/lprb/fc06/fc110606.html.

However, the Minnesota Supreme Court has adopted a considerably stricter test for whether a conflict of interest warrants disqualification. The threshold test is whether there is "a substantial, relevant relationship or overlap between the subject matters of the two representations." *Jenson,* 335 N.W.2d at 731. Because there has not been any representation other than the present one implicated in this matter, the conflict of interest rules cannot apply.

11. The appearance of impropriety would not be cause for disqualification.

Before 1985, when Minnesota adopted the Minnesota Rules of Professional Conduct, a cause existed to discipline an attorney for the "appearance of impropriety." *See, e.g., State of Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979); *Fred Weber, Inc. v. Shell Oil Co.,* 566 F.2d 602 (8th Cir. 1977). The new rules "do not incorporate the Model Code's appearance-of-impropriety standard," *Harker v. C.I.R.,* 82 F.3d at 809, and therefore "*Dean Foods* is not relevant in determining the applicable law in Minnesota." *Cook v. City of Columbia Heights,* 945. F.Supp. 183 (D. Minn. 1996). Even if your writer's representation of Petitioner appeared improper, which we unequivocally deny, that would not constitute grounds for the drastic sanction of disqualification.

12. Respondent's request for Rule 3.7 disqualification is made in bad faith.

The record shows that Respondent sent correspondence to the Court on 26 February 2009, 5 February 2009, 26 January 2009, and 20 January 2009, seeking to have your writer disqualified in this matter. In his 26 February letter he mentions your writer's representation in the related expedited process matter, and in his 26 January letter he asserts that your writer is not counsel of record in that matter. Respondent has been aware since 25 June 2008 that your writer was counsel of record in the expedited process matter, and appeared at a hearing with

your writer in that matter. Not until just now has Respondent raised the Rule 3.7 issue. This suggests strongly that Respondent's motivation has nothing to do with Rule 3.7.[6]

13. Respondent was offered multiple opportunities to avoid this substitution.

Petitioner has made repeated efforts to settle this matter without further litigation. Scott Martin, Esq., Petitioner's former counsel, made multiple attempts over the course of several months to arrange negotiated agreements with Respondent with regard to the matters of custody and child support. Mr. A. ignored all of Mr. Martin's communications. Finally, Mr. Martin advised Mr. A. several times that, were he to continue to ignore Mr. Martin's calls, letters and faxes, your writer would be substituted as attorney of record in this matter. Mr. A. continued to ignore those communications, and the substitution of counsel followed.

14. Even if this representation violated a Rule of Professional Conduct, disqualification is not a preferred remedy.

"Prohibitions contained in the Professional Responsibility Code against attorneys acting as witnesses are not exclusionary rules. The only sanction they provide is discipline of the attorney who violates them." *Matter of Estate of Arend,* 373 N.W.2d 338, 343 (Ct. App. 1985). Paragraph 20 of the Preamble to the Rules of Professional Conduct states

> Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, **violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.** The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, **does not imply that an antagonist in a collateral proceeding or transaction has standing** to seek enforcement of the rule (emphasis supplied).

[6] See footnote 2.

This suggests that the conduct of Respondent's counsel in pressing this question is ethically more problematic than is your writer's representation of Petitioner.

In *Kusch v. Ballard*, Judge Farmer wrote

> I should first admit straightaway to a certain distaste for the practice of judges disqualifying lawyers for parties in civil cases. There has never been a persuasive theoretical basis demonstrated to my satisfaction for such an extraordinary remedy. Nothing in any constitutional provision, statute or rule of practice or procedure purports to repose such a power in civil trial judges … Indeed the rules governing conflicts of interest and termination of representation by attorneys are so detailed and extensive that the absence of a specific authority for judges to disqualify them should lead one properly to view these rules as deliberately withholding from trial judges that power.

645 So. 2d at 1036 (Fla. App. 4th Dist., 1994) (Farmer, J., concurring).

15. Disqualification of counsel is a sanction which may only be imposed after notice and a hearing.

Even if Minnesota law permitted disqualification of counsel for reasons other than Rule 3.7 and the conflict of interest rules, the reasons would have to be sufficiently specific to allow counsel a reasonable opportunity to respond to the specific grounds. "It is axiomatic that procedural due process requires notice of the grounds for, and possible types of, sanctions." *Cole,* 366 F.3d at 821. "The charge must be known before the proceedings commence." *In re Ruffalo,* 390 U.S. 544, 551 (1968). Without such notice, "'[s]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation.'" *Id.*, citing *In re Ruffalo,* 370 F.2d 447, 462 (6th Cir. 1966)(Edwards, J., dissenting).

16. The circumstances of this representation are not extraordinary and do not require remedy.

We are cognizant of the concerns of the Court, raised at the telephonic conference on 4 March, which do not lie within the purview of Rule 3.7. However, we respectfully submit that those concerns do not present cause for disqualification under any existing Minnesota law and are not sufficiently specific to survive a procedural due process challenge. If there were

something legally or ethically questionable about a lawyer representing a family member in any sort of proceeding, one would expect to find case law or disciplinary reports about those circumstances. "Absent some showing—beyond the metaphysical— that there is some public interest or some wrong either committed or hidden, this Court opts in favor of the client's free selection of a competent attorney … the conjuring of an apparition will not trigger a response injurious to the attorney-client bond." *Amundson,* 682 F.Supp. at 987.

CONCLUSION

A civil litigant has a constitutional right to counsel of their own choosing, and only a compelling government interest justifies interference with that right. Rule 3.7(a) only applies to advocacy at trial. This matter is not in trial, has not been set for trial, and is not likely to be set for trial based on the evidence presented so far. Even were this matter at trial, Rule 3.7(a) only applies to a lawyer who is a necessary witness. The Minnesota Supreme Court has never upheld a Rule 3.7 disqualification. The use of this rule as a trial tactic is precluded and that, in order to be necessary, the testimony of the lawyer must not be cumulative and must not be available from any other source. Should this matter be set for an evidentiary hearing, Respondent should be required to prove the applicability of Rule 3.7(a) by specific, credible evidence, and must prove the inapplicability of Minn. Stat. § 595.02 subd. 1(a). Even if Rule 3.7(a) should be found applicable in this matter after a hearing is set, the disqualification of Petitioner's counsel would represent a substantial hardship to Petitioner. Even if Rule 3.7(a) were implicated in this matter, it would not follow that the Court should take any action based on the supposed violation. Respondent's challenge to your writer's representation pursuant to Rule 3.7 is not made in good faith. None of the other facts and circumstances of this matter present cause for disqualification under Minnesota law.

LAW OFFICES OF MICHAEL D H. PLC

Dated: _____ _____

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ACKNOWLEDGEMENT

The undersigned acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded under Minn. Stat. § 549.211 to the party against whom the allegations in this pleading are asserted.

_____
Michael D. H.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules