STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1774

Stephanie A. Boldt,
Respondent,

vs.

Margaret Burns,
Appellant,

and

Professional Administration Corporation, et al.,
Nominal Defendants,

and

Stephanie A. Boldt,
individually and on behalf of Professional Administration Corporation, et al.,
Plaintiff,

vs.

Mahoney & Hagberg, n/k/a Mahoney & Emerson, a Professional Association, et al.,
Defendants.

Filed September 23, 2008
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-03-016797; 27-CV-04-017027

Sean A. Shiff, Skolnick & Shiff, P.A., 2100 Rand Tower, 527 Marquette Avenue South, Minneapolis, MN 55402 (for respondents)

Jill M. Waite, 2856 Humboldt Avenue South, Suite 3, Minneapolis, MN 55408 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal challenging an order disqualifying an attorney from acting on behalf of appellant, appellant argues that the district court erred when it disqualified the attorney under Minn. R. Prof. Conduct 3.7(a) without providing a fact-specific analysis and based on speculation that he was likely to be a necessary witness. We affirm.

FACTS

The Parties

Respondent Stephanie Boldt alleges that she and appellant Margaret Burns were equal owners of Professional Administration Corporation (PAC), which was incorporated in 1994, and that they agreed to equally split PAC's profits. Appellant is the daughter of Michael Mahoney, a partner in the law firm of Mahoney & Hagberg, PA, (M&H), and respondent is the daughter of Steven Hagberg, previously an M&H partner. Under a 1997 contract, PAC agreed to provide office support to M&H. The contract states that M&H "shall pay PAC a monthly management fee equal to twenty-five percent (25%) of [the law firm's] revenues . . . ." Factual disputes exist as to whether Mahoney drafted the contract and whether he knew about the management-fee clause.

In 2000, the Minnesota Secretary of State dissolved PAC for failing to file its annual registrations. Respondent alleges that in 2001, respondent, appellant, and a third owner formed Professional Administration L.L.C. (PAL). Respondent stated in an affidavit that the parties treated PAL as a successor entity to PAC, that PAL acquired and used PAC's assets, and that PAL retained and continued to employ PAC's employees without hiring them.

Underlying Lawsuits

In 2003, M&H received a large settlement from two cases, *Johnson v. City of Minneapolis* and *Siegel v. City of Minneapolis*, which were ultimately consolidated and decided by the Minnesota Supreme Court in 2003. *Johnson v. City of Minneapolis*, 667 N.W.2d 109 (Minn. 2003). In an October 23, 2003 order, the district court sealed all documents filed in the *Siegel* matter. It also appears that the district court may have sealed the files in the *Johnson* matter, although no copy of the order appears in the record. *See Boldt v. Burns*, No. A06-642 (Minn. App. Apr. 10, 2007).

Boldt v. Burns

In September 2003, respondent initiated an action against appellant, PAC, and PAL, alleging that she was owed money as a partner of PAC and PAL. In July 2004, respondent filed an amended complaint requesting damages and declaratory and equitable relief. In October 2004, respondent also began a separate action against M&H and Mahoney. In December 2004, the district court consolidated both cases for pretrial motions and, in April 2005, consolidated them for all purposes.

Respondent alleges that PAC/PAL is entitled to a share of the contingency fees earned by the law firm in *Johnson* and *Siegel*. Three potential witnesses assert that Mahoney acknowledged M&H's obligation to pay PAC/Pal 25% of M&H's revenues from those cases. In May 2006, the district court modified the prior order sealing documents from *Johnson* and *Siegel*, to permit disclosure to the extent required in connection with the current case. This court affirmed. *Boldt v. Burns*, No. A06-642 (Minn. App. Apr. 10, 2007).

By order filed July 18, 2007, the district court granted attorney Alan Maclin's motion to withdraw as counsel for appellant. The district court also concluded that Mahoney is likely to be a significant witness in this case. Under Minn. R. Prof. Cond. 3.7(a), the district court prohibited Mahoney from acting as a lawyer for appellant, PAC, or PAL in this lawsuit.[1] This appeal followed.

D E C I S I O N

The parties dispute whether the de novo or abuse-of-discretion standard of review applies to attorney disqualification. The supreme court has applied the clearly-erroneous standard of review to factual findings underlying an attorney disqualification.[2] *Prod. Credit Ass'n of Mankato v. Buckentin*, 410 N.W.2d 820, 822 (Minn. 1987) (reviewing

[1] Appellant asserts that the district court disqualified Mahoney without prior notice. But by letter to Mahoney and counsel for respondent, dated July 6, 2007, the district court expressed concern as to whether Mahoney could act as counsel for PAC/PAL when he was almost certain to be a witness in the case.

[2] Appellant, in her reply brief, cites *Ross v. Ross*, 477 N.W.2d 753, 755-56 (Minn. App. 1991), and *Griese v. Kamp*, 666 N.W.2d 404 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003), to argue that a decision based on affidavits is reviewed de novo. *Ross* and *Griese* are not on point because the issue in those cases was whether the evidence was sufficient to establish a prima facie case.

findings regarding existence of attorney-client relationship for clear error). But the supreme court also explained in *Buckentin* that "to ensure uniform application of the rules of lawyer conduct, by necessity, this court must retain the final independent interpretive authority to define the scope and application of those rules." *Id.* at 823.

"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; . . . or (3) disqualification of the lawyer would work substantial hardship on the client." Minn. R. Prof. Cond. 3.7(a). The rule requires balancing the client's interests against those of the tribunal and the opposing party. Minn. R. Prof. Cond. 3.7(a) cmt 4.

> 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. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

Id.

The district court found:

> Mr. Mahoney is likely to be a significant witness in these cases. He likely was substantially responsible for drafting the PAC and PAL business documentation. He was also likely the principal drafter of the Mahoney & Hagberg business documentation, and has had custody of the records of that association, and the alleged successor entities, for a number of years. Mr. Hagberg apparently intends to offer testimony concerning conversations he had with Mr. Mahoney relevant to these cases, and Mr. Mahoney will likely want to testify in reply. [Appellant] is Mr. Mahoney's

> daughter and has been officing at the law firm and has been furnishing services to the law firm. Mahoney wants to represent her, too. [Respondent] will likely testify about negotiations and agreements she made with [appellant], and Mahoney will likely be involved directly and indirectly in these matters. It could be additionally confusing to a jury and to the trial process to permit Mahoney to create additional attorney-client confusion by representation of [appellant], and also testifying about [appellant-respondent] communications.

The district court also found that Mahoney had extensive knowledge of the facts involved in respondent's lawsuits against appellant and M&H, although the extent of his testimony remained to be determined due to his assertion of privilege claims.

Appellant argues that there was an insufficient showing that Mahoney is a necessary witness. Rule 3.7(a) prohibits an attorney from "undertaking an engagement where he or she is likely to be a material fact witness at trial." *In re S. Kitchens, Inc.*, 216 B.R. 819, 833-34 (Bankr. D. Minn. 1998).

> If the evidence sought to be elicited from the attorney-witness can be produced in some other effective way, it may be that the attorney is not necessary as a witness. If the lawyer's testimony is merely cumulative, or quite peripheral, or already contained in a document admissible as an exhibit, ordinarily the lawyer is not a necessary witness and need not recuse as trial counsel.

Humphrey ex rel. State v. McLaren, 402 N.W.2d 535, 541 (Minn. 1987).

Appellant argues that because the district court sua sponte disqualified Mahoney, "there are no affidavits or attachments from which the Trial Court may draw to support its Findings of Fact." But by the time the district court disqualified Mahoney, the parties had submitted considerable evidence in connection with the summary-judgment and other motions. The district court order specifically refers to three depositions of Mahoney and

a deposition of appellant, and excerpts from those depositions are attached to the district court's order. The district court's findings are supported by evidence in the record and are not clearly erroneous.

Material facts as to which Mahoney is likely to testify at trial include whether he drafted the 1997 contract for PAC to provide services to M&H; whether the parties discontinued following the contract provision that M&H pay PAC/PAL 25% of M&H's revenues; whether Mahoney advised respondent and appellant regarding the formation of PAL, which is relevant to respondent's claim that PAL's records were later revised to purport to exclude respondent as an owner and backdated to make them appear to have been signed at the time of PAL's formation; whether Mahoney was involved in redrafting PAL's corporate records; and whether Mahoney acknowledged M&H's continuing obligation to pay PAC/PAL 25% of M&H's revenues, including those earned from *Johnson* and *Siegel*. Mahoney's likely testimony goes to the central issue in the case, the amount of money, if any, respondent is owed for services provided by PAC/PAL, and the facts regarding which he is likely to testify are contested. Because Mahoney has firsthand knowledge of relevant, disputed facts, there is not an alternative, effective way to produce the evidence.

Appellant argues that the district court failed to balance the equities when disqualifying Mahoney from representing appellant, PAC, and PAL. Appellant argues that she cannot afford to hire a new attorney to replace Maclin, but the record does not indicate that appellant made any attempt to submit evidence supporting this contention. "On appeal, a party cannot complain about a district court's failure to rule in her favor

when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question." *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). Having raised the issue of financial hardship, appellant should have submitted evidence substantiating her claim.

Appellant argues that respondent waived the disqualification issue by acquiescing in Mahoney's representation for more than four years. This argument is based on a distorted interpretation of the record. Respondent began the lawsuit against appellant, PAC, and PAL in September 2003. On October 14, 2003, attorney Thomas P. Malone filed a certificate of representation stating that he was the lawyer representing appellant, PAC, and PAL. A May 13, 2004 motion to assign the case lists Malone and Edward P. Sheu as the attorneys for appellant, PAC, and PAL. In September 2004, Malone signed appellant's answer and counterclaim and PAC and PAL's separate answer and counterclaim. In November 2004, respondent filed a motion to consolidate the lawsuit against Burns, PAC, and PAL with the lawsuit against M&H and Mahoney. Summary-judgment motion papers, filed in December 2004, are signed by Malone and Laura Gurney as the attorneys for appellant, PAC, and PAL. Mahoney and Julianne L. Emerson are also listed in the signature block but did not sign the motion papers. The December 13, 2004 order consolidating the two cases for pretrial motions identifies Mahoney and Malone as attorneys for the defendants but does not indicate whether Mahoney is representing all defendants. The first clear indication in the record that Mahoney was acting as appellant's attorney is appellant's January 18, 2005 amended

answer and counterclaim, which Mahoney signed. But the answer and counterclaim were also signed by Malone, and Malone did not file a notice of withdrawal until March 13, 2006.

On June 8, 2006, less than three months after Malone filed the notice of withdrawal, Maclin filed a notice of appearance on behalf of appellant, PAC, and PAL. The notice of appearance lists the law firm, Mahoney and Foster, but not Mahoney individually, as co-counsel, creating the impression that Maclin replaced Malone as counsel for appellant, PAC, and PAL. Maclin did not attempt to withdraw until filing a notice of withdrawal on June 25, 2007. The notice states that Maclin is withdrawing "as one of the attorneys of record" for appellant, PAC, and PAL and that Thomas Foster will continue as counsel for those parties and all other defendants. This statement gives the impression that even at this late date, appellant, PAC, and PAL were not relying on Mahoney as counsel. It was not until July 5, 2007, in Maclin's amended notice of withdrawal, that Mahoney was identified as counsel for appellant, PAC, and PAL. But even the notice did not officially substitute Mahoney for Maclin because the district court was unwilling to let Maclin withdraw, and Maclin had to file a motion to withdraw. The record does not support appellant's argument that respondent acquiesced in Mahoney's representation of appellant, PAC, and PAL.

Appellant argues that the district court erred in failing to consider ways to eliminate potential juror confusion about Mahoney's role. Appellant cites the concern about potential abuse of disqualification by using it as a litigation tactic. But here the court sua sponte disqualified Mahoney. Although Mahoney will continue to act pro se,

allowing him to represent all defendants would tend to lend greater weight to his testimony. The district court did not err in disqualifying appellant from acting as an attorney on behalf of appellant.

Affirmed.