

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-092936

12/01/2021

HONORABLE RODRICK COFFEY

CLERK OF THE COURT
K. Tiero
Deputy

SILVERTON DEER VILLAGE HOMEOWNERS ASSOCIATION INC MARK W WALDRON

v.

JANET DEFINE

MICHAEL S DEFINE

HAVEN LEE DOVE
CHAD M GALLACHER
SCOTT B HUMBLE
JUDGE COFFEY

MINUTE ENTRY

The Court has considered Defendant/Counterclaimant/Third-Party Defendant, Janet DeFine's ("DeFine") Motion to Disqualify Counsel for Counterdefendant Silverton Deer Valley Homeowners Association; and Third-Party Defendants Maxwell & Morgan, P.C. ("M&M") and Silverton Deer Village Homeowners Association, Inc.'s ("Plaintiff") Response to that Motion. No reply was filed and the deadline for filing a reply has expired.

As a preliminary matter, the Court notes that the original Plaintiff in this case is Silverton Deer *Village* Homeowners Association, Inc. But, DeFine's "Counterclaim" asserts claims against Silverton Deer *Valley* Homeowners Association, Inc. Based upon those pleadings, it does not appear that DeFine's "Counterclaim" actually named the Plaintiff as a Counterdefendant and instead names a separate entity, which may not even exist. As such, if it exists, Silverton Deer *Valley* Homeowners Association, Inc. should have been designated as a Third-Party Defendant rather than a Counterdefendant. Curiously, despite Plaintiff not even being listed as a party to the Counterclaim, Plaintiff filed an Answer to the Counterclaim anyway. The Court strongly

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encourages counsel to confer about this important issue and work together to determine how to best address it.

In the pending Motion, DeFine seeks to disqualify M&M as counsel for the entity that she designated as a Counterdefendant. M&M and Plaintiff oppose the Motion.

E.R. 3.7(a) of the Rules of the Supreme Court of Arizona provides:

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.

Comment 4 to that Rule states:

[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. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in ERs 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

“Only in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent.” *Alexander v. Superior Court In & For Maricopa Cty.*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984). The moving party bears the burden of showing “sufficient reason why an attorney should be disqualified from representing his client.” *Id.* Moreover,

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The prejudice requirement of DR 5-102(B) [the former version of E.R. 3.7(a)] works to preclude the folly of an attorney giving testimony detrimental to the interest he is advocating as well as to prevent opposing counsel from contriving some tactical need for calling the attorney thereby triggering disqualification. To call for the disqualification of opposing counsel for delay or other tactical reasons, in the absence of prejudice to either side, is a practice which will not be tolerated. *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 104–05, 624 P.2d 296, 301–02 (1981) (internal citations omitted).

The Court does not believe that DeFine has met her burden of proving that the disqualification of M&M is warranted. Additionally, disqualifying Plaintiff's counsel would be prejudicial to Plaintiff. And, because M&M is a party to this case and it is representing itself, lawyers from M&M will be participating in the trial as counsel of record regardless of whether they are permitted to represent Plaintiff. Thus, disqualifying M&M as Plaintiff's counsel would not eliminate the scenario in which an M&M attorney is testifying in the case while other M&M attorneys are acting as counsel for a party in the case.

IT IS ORDERED denying DeFine's Motion to Disqualify Counsel.