In the United States Bankruptcy Court

for the Northern District of Iowa

FRED H. ELLING JR. and SHARON ELLING *Debtor(s).*	Bankruptcy No. 84-05066 Chapter
HAMPTON STATE BANK *Plaintiff(s)* vs. FRED H. ELLING JR. and SHARON ELLING *Defendant(s)*	Adversary No. 86-0363M

MEMORANDUM OF DECISION AND ORDER RE: MOTION TO DISQUALIFY

The matter before the Court is a motion by Plaintiff Hampton State Bank that John H. Neiman and the law firm of Neiman, Neiman, Stone & Spelling, P.C. be disqualified from representing Debtors Fred H. Elling, Jr. and Sharon K. Elling in this proceeding. The motion was made at an adversary hearing held March 14 and 15, 1988 in Mason City, Iowa. The matter was submitted to the undersigned for consideration on May 26, 1988 when counsel For Debtors withdrew their request for an evidentiary hearing. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

I.

Hampton State Bank (Bank) filed a complaint against Fred H. Elling, Jr. and Sharon Elling (Debtors) on August 29, 1986 seeking denial of discharge of Debtors under 11 U.S.C. §§ 727(a)(2)(B) and 727 (a)(4)(A). Trial was scheduled for March 14, 1988 in Mason City, Iowa. Both parties filed pre-trial statements and both listed John Neiman, counsel for Debtors, as a possible witness. At trial, Mr. Neiman did not conduct the Debtors' case. Rather, an associate with his law firm did so, The Court accepted testimony of all witnesses except Mr. Neiman; Both parties were ordered to inform the Court of their position on whether Mr. Neiman's entire law firm had to withdraw as counsel for Debtors. The trial was adjourned and the parties were given thirty days to respond.

Bank advocates that Mr. Neiman, as well as members of his firm, should be disqualified since Mr. Neiman is to be a witness for Debtors. Debtors respond that a withdrawal of John Neiman and his law firm would cause a substantial hardship on Debtors and that litigation can be conducted in fairness if Mr. Neiman testifies and another member of his firm handles the trial.

II.

Professional standards for Iowa attorneys have been established by the Iowa Supreme Court.[(1)]

Disciplinary Rule (DR) 5-102(A) provides (emphasis added):

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(C)(1) through (4).

As noted, DR 5-102(A) incorporates by reference DR 5-101(C)(1) through (4) which provides:

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If 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 to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Debtors' counsel argues that DR 5-101(C)(4) provides the requisite exception which would allow a member of Mr. Neiman's firm to continue representation of the Debtors even though Mr. Neiman must withdraw as counsel since he will be called as a witness. The rules, however, should not be mechanically applied in disposing of motions to disqualify counsel. U.S., ex rel. Sheldon Electric Co. v. Blackhawk Heating and Plumbing Co., 423 F. Supp. 486, 489 (S.D. N.Y. 1976); see also Optyl Eyewear Fashion International Corp. v. Style Companies, LTD., 760 F.2d 1045, 1049 (9th Cir. 1985). "The court's task is to examine for itself the ends sought to be furthered by the Code provisions invoked, together with the question whether disqualification in a case before it would further those ends." Blackhawk Heating and Plumbing Co., 423 F. Supp. at 489 (see citations therein).

Debtors' arguments that the exception provided in DR 5-102(c)(4) allows Neiman's firm to continue representing them are not persuasive.

There is no rule of evidence which absolutely excludes the testimony of a lawyer on behalf of his client. United States v. Hyman, 649 F.2d 204, 211 (4th Cir. 1980). However, courts are especially reluctant to allow lawyers to be called as witnesses in trials in which they are an advocate and judicial discretion is generally exercised to prevent testimony by an advocate in favor of the party whom he represents. Gajewski v. United States, 321 F.2d 261, 268 (8th Cir. 1963). The two major policy reasons[(2)]

for refusing to allow an attorney to testify are, first, that the public's respect for and confidence in the legal profession will be diminished by the lay belief that attorneys may distort the truth for the benefit of their clients. The second major policy reason is the somewhat contradictory fear that the members

of a jury will be unduly impressed by the weight of an attorney's testimony. Hyman, 649 F.2d at 211 (citing VT Wigmore on Evidence § 1911 (Chadbourne Rev. 1976 at 775 and 780)).

Attention must also be given to the argument that allowing an attorney-witness or his firm to continue to serve as counsel may be unfair to the opponent. As the court in International Electronics Corporation v. Flanzer, 527 F.2d 1288, 1293 (2nd Cir. 1975) stated, "It is difficult, indeed, to cross examine a witness who is also an adversary counsel concerning matters of fact, and, more particularly, on matters impeaching his credibility, within the bounds of propriety and courtesy owed to professional colleagues." Id.

> Where doubt may becloud the public's view of the ethics of the legal profession and thus impugn the integrity of the judicial process, it is the responsibility of the court to insure that the standards of ethics remain high. [Citations omitted.] In a non-jury case, this is perhaps the most compelling reason for disqualification.

Blackhawk Heating and Plumbing Co., 423 F. Supp. at 488-89.

Further, as noted by the American Bar Association Committee on Professional Ethics, "a client's cause is best served by having the testimony from the witness not subject to impeachment for interest in the outcome of the trial . . . . Accordingly, the Code generally requires a lawyer who ought to be a witness for the client [to] fulfill that function and [to] not diminish the value of his prospective testimony by also being the client's trial advocate." Id. at 489 (quoting ABA Comm. on Professional Ethics, Opinions, No. 339, pp. 3-4 (1975)).

Other courts have recognized Circumstances under which an associate may be substituted as counsel for an attorney who has withdrawn because he is needed as a witness. See Bickford v. John E. Mitchell Co., 595 F.2d 540, 544 (10th Cir. 1979)(co-counsel permitted to be called as expert where (1) he had not previously participated in the trial; (2) he withdrew before being allowed to take the stand; and (3) trial was to the court not a jury); United States v. Vereen, 429 F.2d 713, 715 (D.C. Cir. 1970)(where testimony not available from other sources, appropriate solution was for the attorney-witness to withdraw without delaying the trial and have an associate substitute as counsel). However, an attorney who assumes the burden of a witness while representing his client in a lawsuit does so at a very great detriment to the credibility of his testimony. Lau Aauyew v. Dulles, 257 F.2d 744, 746-47 (9th Cir. 1958).

Here, Debtors' counsel argue that Neiman's testimony will establish that Debtors did not possess the requisite fraudulent intent necessary under § 727 because they were acting on advice of counsel when preparing their schedules and petitions. Neiman's anticipated testimony, therefore, does not relate solely to an uncontested matter, it does not relate to a mere formality nor is there reason to believe that there will be no other evidence in opposition to his testimony, and his testimony will go beyond identification of the nature and value of the services he rendered on behalf of Debtors. Therefore, the first three exceptions provided in DR 5-101(c) are not met.

The fourth exception is also not met. Debtors' have failed to show that the inability of Neiman's firm to continue representing them would work a substantial hardship on them because of the distinctive value of this firm's services in this particular proceeding. While substitution of counsel may delay resolution of Bank's complaint, it is a consequence which the Court and the parties must now endure; inconvenience alone cannot usurp ethical standards.[(3)]

See Blackhawk Heating and Plumbing Co., 423 F. Supp. at 489. Moreover, "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate." Iowa Code of Professional Responsibility for Lawyers, Fthical Consideration 5-10; United States v. Reeder, 614 F.2d 1179, 1186 (8th Cir. 1980).

Accordingly, Bank's Motion for disqualification of Neiman's law firm because Neiman is to be called as a witness will be granted.

ORDER

IT IS HEREBY ORDERED that Plaintiff Hampton State Bank's motion that John H. Neiman and the law firm of Neiman, Neiman, Stone & Spelling, P.C. be disqualified from further representation of Debtors Fred H. Elling, Jr. and Sharon K. Elling in this proceeding is granted.

SO ORDERED THIS 27TH DAY OF 1988.

William L. Edmonds
Chief Bankruptcy Judge

- Filed Stamped 5/27/88

In the United States District Court

for the Northern District of Iowa

Central Division

FRED H. ELLING JR. and SHARON ELLING	Bankruptcy No. 84-05066
Debtor(s).	Chapter
HAMPTON STATE BANK	Adversary No. 86-0363M
Plaintiff(s)	No. Misc. 89-3007
vs.	
FRED H. ELLING JR. and SHARON ELLING	
Defendant(s)	

ORDER

This matter is before the court on debtors/defendants' motion to reinstate law firm of Neiman, Neiman, Stone & Spellman, P.C. to represent debtors, filed October 18, 1989. The court notes

debtors/defendants' amendment and statement in support of motion to reinstate, filed October 26, 1989.

In an order dated May 27, 1988, the bankruptcy court[4] granted plaintiff's motion to disqualify John H. Neiman and the law firm of Neiman, Neiman, Stone & Spelling, P.C. from representing the debtors/defendants in the bankruptcy proceeding. The reason for this disqualification was that Mr. Neiman should have been, and apparently was, a witness for debtors/defendants. See Iowa Code of Professional Responsiblity for Lawyers DR 5-102(A); 5-101(C)(4). Debtors/defendants did not and have not appealed this decision to disqualify. However, the decision of the bankruptcy court on the merits has been appealed.

On appeal, debtors/defendants seek to have the Neiman, Neiman, Stone& Spelling, P.C. law firm reinstated. Specifically, debtors/defendants seek to have attorney Carol A. Wendl, a representative'of that firm, reinstated as counsel. From debtors/defendants' filings, it is unclear whether Mr. Neiman's testimony before the bankruptcy court will be implicated in any way by the issues appealed to this court. One of the objectives of the disciplinary rule is to prevent an attorney from arguing his own credibility to the factfinder. Thus, the court cannot determine the merits of debtors/defendants' motion to reinstate counsel. Accordingly, the court shall reserve ruling on the motion to reinstate and shall allow the parties time to file with this court the requisite information as to whether the testimony Mr. Neiman gave will be relevant, directly or indirectly, to this appeal.

ORDER

Accordingly, It Is Ordered:

1. Ruling is reserved on debtors/defendants' motion to reinstate law firm, filed October 18, 1989, and amended on October 26, 1989.

2. Debtors/defendants shall have up to and including fourteen (14) days from the date of this order in which to make any filing they deem appropriate informing this court whether Mr. Neiman's testimony will be relevant, directly or indirectly, to this appeal.

3. Plaintiff shall have up to and including ten (10) days after such filing in which to respond to any statements debtors/defendants may make.

Done and ordered this 28TH day of November, 1989.

David R. Hansen, Judge
UNITED STATES DISTRICT COURT

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1. Neither the Federal District Court for the Northern District of Iowa nor the Federal Bankruptcy Court for the Northern District of Iowa have established by Local Rule that Iowa Supreme Court's Code of Professional Responsibility applies to attorneys practicing before them. However, without discussion, the Eighth Circuit Court of Appeals recognized Iowa's standards in Nassar v. Sissel, 792 F.2d 119, 122 (8th Cir. 1986).

2. The policy reasons behind the withdrawal of counsel when he may serve as a witness are embodied in the Iowa Code of Professional Responsibility for Lawyers, Ethical Consideration 5-9 which provides:

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an 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.

3. Parties are cautioned against using this decision as a license to file motions for disqualification in order to delay the proceedings or to "elbow opposing counsel out of the litigation for tactical reasons." In re Abbotts Dairies of Pennsylvania, Inc., 61 B.R. 156, 159 (Bankr. E.D. Pa. 1986)(quoting Cottonwood Estate v. Paradise Builders, 128 Ariz. 99, 628 P.2d 296, 302 (1981) (en banc)); Optyl Eyewear Fashion International Corp. v. Style Companies, Ltd., 760 F.2d 1045, 1050 (9th Cir. 1985). Because there is potential for abuse, disqualification motions will be subject to strict judicial scrutiny. Optyl Eyewear Fashion International Corp., 760 F.2d at 1050.

4. The Honorable William J. Edmonds, Bankruptcy Judge for the Northern District of Iowa