

MICHAEL D. LANDIS,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 99-01098
	:	
ROBERT J. STEPPE, JR., and	:	CIVIL ACTION - LAW
LEROY L. & JOAN M. WALTERS,	:	
his wife,	:	
	:	
Defendants	:	MOTION FOR DISQUALIFICATION

**Date: June 27, 2001**

**OPINION and ORDER**

Before the Court is Attorney, Marc Drier’s Motion For Disqualification of opposing counsel, John C. Youngman Jr. Mr. Drier’s contention is that Mr. Youngman must be disqualified as Defendant’s counsel because he has represented both in a substantially related matter, and now the Defendants have adverse positions.

The Rules of Professional Conduct state: “A lawyer shall not represent a client if the representation of that client will be directly adverse to another client...” Rules Of Professional Conduct 1.7. Mr. Youngman represents only Mr. and Mrs. Walters in this matter. Therefore, Mr. Youngman’s representation of his clients cannot be directly adverse to the other Defendant’s, with whom he does not represent, and Rule 1.7 does not apply in this particular case.

However, if Mr. Youngman is going to be called as a ‘Necessary Witness’ in this case, Rule 3.7(a) will be applicable, and Mr. Youngman shall not act as an advocate for Mr. and Mrs. Walters at trial. The only applicable exception to Rule 3.7(a), where Mr. Youngman may still represent his client, is 3.7(a)(3). This Rule states: “A lawyer shall not act

as advocate at a trial in which the lawyer is likely to be a necessary witness except where disqualification of the lawyer would work substantial hardship on the client.” *Id.*

In *Fassett v. Liberty Mutual Insurance Company*, 1987 WL 45067, (E.D.Pa.), defendant moved to disqualify plaintiff’s attorney (Slota) under the Model Code of Professional Responsibility because Slota was a necessary witness for plaintiff. Slota was subsequently disqualified as counsel because, “if a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness.” *Fassett* at 3. “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.” *Id.* *Fassett* goes on to say that, if an attorney has to make a choice as to testifying to assist a client, or continuing representation, the attorney should choose in favor of testifying. *Id.*<sup>1</sup>

Our case is analogous in that Mr. Youngman may be called as a ‘necessary witness,’ albeit for the defense. If that time does arrive, based on the Court’s decision in *Fassett*, Mr. Youngman will be disqualified as Counsel if he does not first disqualify himself.

Another reason for the disqualification is that if called, Mr. Youngman’s personal credibility will be inserted into the case making his advocacy, particularly in closing, a matter of personal interest. This in turn could be prejudicial to his clients and/or one of the other parties.

Furthermore, Mr. Youngman is discouraged from arguing the Rule 3.7(a)(3) exception of “substantial hardship.” “The mere fact that an attorney has spent great time and

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<sup>1</sup> *Fassett* is a Memorandum and Opinion, however, each point from *Fassett* stated above can be found in either DR 5-102 (A), or the following cases: *International Business Machine Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978); *Kalmanovitz v. G. Heileman Brewing Co.*, 610 F.Supp. 1319, 1326 (D.Del.1985): (citing *Universal Athletic Sales Co. v. American Gym Recreational & Athletic Equipment Corp.*, 546 F.2d 530).

resources in preparing for the case is insufficient to bring him within the ‘substantial hardship’ exception.” *Kalmanovitz v. Heileman Brewing Co.*, 610 F.Supp. 1319, 1326 (D. Del. 1985).<sup>2</sup> Additionally, the trial date is set for September, giving Mr. Youngman ample time to make arrangements for additional counsel for his clients, at least on a stand by basis.

Finally, both parties should be aware that under the Pennsylvania Rules of Disciplinary Enforcement and the holding in *Office Of Disciplinary Counsel v. Valentino* 730 A.2d 479 (1999), that the Judge should report an attorney to the Disciplinary Board for any violations of the ethical rules.

### **ORDER**

For the foregoing reasons, Plaintiff’s Motion for Disqualification is denied. However, if Mr. Youngman is determined to be a ‘necessary witness’ for any party, then under Rule 1.6 (d) of the Rules of Professional Conduct, Mr. Youngman should terminate his representation or will be disqualified.

BY THE COURT:

William S. Kieser, Judge

cc: Marc Drier, Esquire  
John C. Youngman, Jr., Esquire  
Judges  
Suzanne R. Lovecchio, Law Clerk  
Gary L. Weber, Esquire (Lycoming Reporter)

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<sup>2</sup> Citing *Universal Athletic Sales Co. v. American Gym Recreational & Athletic Equipment Corp.*, 546 F.2d 530.