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2007

Whitney Williams v. Joshua Daniel Madson : Brief of Appellant

Utah Court of Appeals

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Rose Blakelock; Attorney for Petitioner/Appellee.
Ronald Madson; Madson & Madson; Attorney for Respondent/Appellant.

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IN THE UTAH COURT OF APPEALS

WHITNEY WILLIAMS, Petitioner/Appellee, v. JOSHUA DANIEL MADSON Respondent/Appellant	Trial Court Judge: Fred Howard Trial Court No. 004400031 Appellate Court no. 20070394-CA

AMENDED BRIEF OF APPELLANT

Appeal from the Fourth Judicial District Court of Utah, Utah County, the Honorable Fred D. Howard presiding.

Ronald Madson (9230)
Madson & Madson
112 South Main Street
Alpine, UT 84004

Attorney for Respondent/Appellant

Rose Blakelock (6183)
75 South 300 W
Provo, UT 84601

Attorney for Petitioner/Appellee

FILED
UTAH APPELLATE COURTS
DEC 13 2007

IN THE UTAH COURT OF APPEALS

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112 South Main Street
Alpine, UT 84004

Attorney for Respondent/Appellant

Rose Blakelock (6183)
75 South 300 W
Provo, UT 84601

Attorney for Petitioner/Appellee

LIST OF ALL PARTIES

Joshua Madson, Respondent/Appellant

Whitney Williams, Petitioner/Appellee

TABLE OF CONTENTS

LIST OF ALL PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES/STANDARDS OF REVIEW 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE LAW ON DISQUALIFICATION OF COUNSEL AS TO TIMELINESS 5

II. THE MOTION TO DISQUALIFY WAS UNTIMELY AND COUNSEL SHOULD BE REINSTATED FOR TRIAL 7

III. THE DISQUALIFICATION OF COUNSEL UNDER URCP 3.7 IS CORRECTIBLE ERROR BECAUSE SUCH DISQUALIFICATION WOULD WORK A SUBSTANTIAL HARDSHIP OF THE CLIENT 8

IV. REQUEST TO REMAND AND AWARD ATTORNEY FEES 8

CONCLUSION 10

ADDENDUM A: Court Docket

ADDENDUM B: Judge Howard's Order on Respondent's Objection to Commissioner Patton

ADDENDUM C: Commissioner Patton's Recommendation and Order Granting Motion to Disqualify

ADDENDUM D: Relevant Statutes and Rules

Utah Code Annotated Section 78-2a-3(2)(h)

Utah Rules Professional Conduct 3.7

ADDENDUM E: Case Law

D.J. Investment Group, LLC v. Dae/Westbrook LLC, 113 P.3d 525 (Utah App. 2005)

D.J. Investment Group, LLC v. Dae/Westbrook LLC, 147 P.3d 414 (Utah 2006)

Zions First National Bank v. Barbara Jensen Interior, Inc., 781 P.2d 478 (Utah App. 1989)

TABLE OF AUTHORITIES

CASES CITED

Page(s)

D.J. Investment Group, LLC v. Dae/Westbrook LLC, 113 P.3d 525 (Utah App. 2005) 5, 6, 7

D.J. Investment Group, LLC v. Dae/Westbrook LLC, 147 P.3d 414 (Utah 2006) 5

Zions First National Bank v. Barbara Jensen Interior, Inc., 781 P.2d 478 (Utah App. 1989) 5, 6

STATUTES

Utah Code Annotated Section 78-2a-3(2)(h) 1

OTHER AUTHORITIES

Utah Rules of Professional Conduct 3.7 ..... 1, 3, 4, 6, 8, 10, 11

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over the appeal pursuant to U.C.A. §78-2a-3(2)(h). Addendum D.

STATEMENT OF ISSUES/STANDARDS OF REVIEW

Whether the trial court erred in disqualifying opposing counsel as to trial when the party seeking the disqualification knew of the potential problem or conflict for sixteen (16) months before bringing a motion to disqualify said counsel and failed to "immediately file" and "diligently pursue" her case. The standard of review for this issue is correction of error.

Whether the trial court erred in applying URPC 3.7 to disqualify an opposing counsel as to trial when requiring counsel to withdraw would cause a "serious hardship" to respondent and would, thereby, cause serious prejudice to the Respondent. The standard of review for this issue is correction of error.

STATEMENT OF THE CASE

The parties herein were divorced on January 5, 2005. On September 2, 2005, the Petitioner/Appellee (Williams) filed a Petition with this court seeking to modify the decree of divorce. The Respondent/Appellant (Madson) retained as his counsel Ronald R. Madson who filed an Answer to the Petition in September of 2005 and as the file reflects, for the next one year and three month the parties engaged in extensive litigation and discovery. See Addendum A. Counsel for Madson scheduled the depositions of

Williams and her husband for December 6th and 7th, 2006. Just days before those scheduled depositions, counsel for Williams filed a motion to disqualify Ronald R. Madson as counsel for Madson. Said motion was filed on November 21, 2006---one year and three months after Ronald R. Madson appeared as counsel for Mr. Madson. See Addendum 1. The hearing as to Williams' motion to disqualify Madson's counsel was heard before the Commissioner on January 3, 2007. See Addendum C.

Madson timely filed his objection to said ruling by the Commissioner on January 10, 2007 and on April 2, 2007, the Honorable Fred D. Howard heard said objection and specifically ruled that Madson's counsel was reinstated as counsel in all capacities except as trial counsel. See Addendum B.

STATEMENT OF FACTS

The parties herein were divorced on January 5, 2005. On September 2, 2005, the Petitioner/Appellee (Williams) filed a Petition with this court seeking to modify the decree of divorce. The Respondent/Appellant (Madson) retained as his counsel Ronald R. Madson who filed an Answer to the Petition in September of 2005 and as the file reflects, for the next one year and three month the parties engaged in extensive litigation and discovery. See Addendum A. Counsel for Madson scheduled the depositions of Williams and her husband for December 6th and 7th, 2006. Just days before those scheduled depositions, counsel for Williams filed a motion to disqualify Ronald R. Madson as counsel for Madson. Said motion was filed on November 21, 2006---one year and three months after Ronald R. Madson appeared as counsel for Mr. Madson. See

Addendum A. The hearing as to Williams' motion to disqualify Madson's counsel was heard before the Commissioner on January 3, 2007. The findings of the Commissioner at said hearing are attached hereto as Addendum C. In short, the Commissioner found:

1. That URPC 3.7 could be expanded to include disqualification of a counsel prior to trial as well as being an "advocate at trial." Paragraph 5, Addendum C.
2. That while any affidavits or involvement by counsel for Madson prior to the motion to disqualify would not be a sufficient basis to disqualify him as counsel in this case, the categorical denial of said counsel as to the falsity of the statements made by Williams in her efforts to disqualify him as counsel (16 months after the counsel had been representing Madson) made said counsel a witness as to the "whether or not Petitioner is telling the truth," See Addendum C.

Madson timely filed his objection to said ruling by the Commissioner on January 10, 2007 and on April 2, 2007, the Honorable Fred Howard heard said objection and specifically ruled,

> *"Excepting the ruling prohibiting Mr. Ronald R. Madson in appearing as counsel at trial, the Respondent's Objection to the Commissioner's recommendations are sustained and Mr. Ronald R. Madson may, in all other capacities, act as counsel for the Respondent."* See Addendum B.

In making said ruling said Court <u>specifically found</u>:

1. *"It was over sixteen (16) months after learning of a potential problem or conflict before Petitioner filed her Motion to Disqualify."* Paragraph A, Addendum B.
2. *"Thereby, Petitioner failed to "immediately file" and "diligently pursue" her request for disqualification of Mr. Ronald R. Madson."* Paragraph B, Addendum B.
3. *"Requiring Mr. Ronald R. Madson to withdraw would cause a "serious hardship on Respondent and would, thereby, cause serious prejudice to the Respondent."*Paragraph C, Addendum B.

SUMMARY OF ARGUMENT

It is reversible error, as a matter of current Utah law, to disqualify a party's counsel when the party seeking the disqualification knew of the potential problem or conflict for sixteen (16) months before bringing a motion to disqualify said counsel and failed to "immediately file" and "diligently pursue" her case.

It is also reversible error, as a matter of current Utah law, to disqualify a party's counsel under URPC 3.7 when requiring counsel to withdraw would cause a "serious hardship" to respondent and would, thereby, cause serious prejudice to the Respondent.

ARGUMENT

I. THE LAW ON DISQUALIFICATION OF COUNSEL AS TO TIMELINESS

There are two cases that previously came before this Court that answered this issue now before the Court, namely, *Zions First National Bank v. Barbara Jensen Interiors, Inc.,*781 P.2d 478 (Utah App. 1989*)* (hereinafter referred to as "Zions") and *D.J. Investment Group, LLC v. Dae/Westbrook LLC,* 113 P3d 1022 (Utah App. 2005) (hereinafter referred to as "DJ") and affirmed by the Utah Supreme Court in *D.J. Investment, LLC v. Dae/Westbrook, LLC* 147 P3d 414 (Utah 2006) (referred to as DJ2). See Addendum E.

In *Zions,* the Defendants brought a motion to disqualify opposing counsel seven months after the opposing party's counsel had appeared in the case and only three months after said Defendants claimed to have first learned of the basis for the motion and only one day before a scheduled hearing. Quoting from *Zions* this court expressed its position as to the consequences of a party bringing an "untimely" motion to disqualify an opposing counsel:

"A motion to disqualify counsel must be immediately filed and diligently pursued as soon as the party becomes aware of the basis for disqualification, and it may not be used as a manipulative litigation tactic. See, e.g. <u>*Smith v. Whatcott, 757 F. 2d 1098, 1099-1100 (10th Cir. 1985: Redd v. Shell Oil Co., 518 F. 2d 311, 315 (10th Cir. 1975); Margulies v. Unchurch. 696 P.2d 1195, 1202 (Utah 1985).*</u> *The district court held the Jensen's motion to be untimely because it was filed nearly seven months after Ray,*

*Quinney, & Nebeker appeared as Zion's counsel, and more than three months after the February 10 settlement negotiations." Zions First National Bank v. Barbara Jensen Interiors, Inc.,*781 P.2d 478, 480-81 (Utah App. 1989).

Seventeen years after the *Zions* decision was handed down, this court once again addressed the same issues raised in *Zions* in the *DJ* case, supra. A party brought a motion to disqualify opposing counsel. The district court judge had found that *"the parties were aware that Snuffer* (the counsel they sought to disqualify*) would likely be a necessary witness at least three months prior to fling their motion, if not earlier." D.J. Investment Group, LLC v. Dae/Westbrook LLC,* 113 P3d 1022, 1024 (Utah App. 2005).Having made that determination, this court, citing *Zions,* affirmed the trial court's decision to not exclude *Snuffer* as counsel at trial:

> *"The trial court also found that Westbrook filed its motion in an untimely manner. We agree. A motion to disqualify counsel is untimely when it is not 'immediately filed and diligently pursued as soon as the party becomes aware of the basis for disqualification'* <u>*Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., supra*</u>*." D.J. Investment Group, LLC v. Dae/Westbrook LLC,* 113 P3d 1022, 1024 (Utah App. 2005).

This court further confirmed that at the time of the filing of the lawsuit both parties were aware of Snuffer's participation in the matter at hand and that the purpose of URPC 3.7 is primarily a *"call for self-governance....is designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies....and the purposes of the rules can be subverted when they are invoked by*

opposing parties as procedural weapons." D.J. Investment Group, LLC v. Dae/Westbrook LLC, 113 P3d 1022, 1023 (Utah App. 2005).

II. THE MOTION TO DISQUALIFY WAS UNTIMELY AND COUNSEL SHOULD BE REINSTATED FOR TRIAL

The District Court Judge, Fred Howard, specifically found that Williams, after learning of a potential problem or conflict as to Madson's counsel, waited over sixteen months before filing her motion to disqualify said counsel, *"It was over sixteen (16) months after learning of a potential problem or conflict before Petitioner filed her Motion to Disqualify."* See Paragraph A, Addendum B.

The court further found that Williams failed to "immediately file" and "diligently pursue" her request seeking the disqualification of opposing counsel, *"Thereby, Petitioner failed to "immediately file" and "diligently pursue" her request for disqualification of Mr. Ronald R. Madson."* See Paragraph B Addendum B.

As this Court found in *DJ,* if a motion to disqualify is not immediately filed or diligently pursued it is not timely, *"A motion to disqualify counsel is untimely when it is not 'immediately filed and diligently pursued as soon as the party becomes aware of the basis for disqualification' Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc., supra." D.J. Investment Group, LLC v. Dae/Westbrook LLC,* 113 P3d 1022, 1024 (Utah App. 2005).

Therefore, as a matter of law the motion to disqualify counsel for Mr. Madson is not timely and for this reason is correctible error and should be reversed.

III. THE DISQUALIFICATION OF COUNSEL UNDER URCP 3.7 IS CORRECTIBLE ERROR BECAUSE SUCH DISQUALIFICATION WOULD WORK A SUBSTANTIAL HARDSHIP OF THE CLIENT

The court also found that to require the Madson's counsel be disqualified after such a delay would cause a "serious hardship" and "serious prejudice" to Mr. Madson. Rule 3.7 provides that *"A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."* See Addendum D. The Rule, however, provides for an exception when *"disqualification of the lawyer would work substantial hardship on the client."* In this matter before the court, the District Court judge specifically found that *"Requiring Mr. Ronald R. Madson to withdraw would cause a "serious hardship on Respondent and would, thereby, cause serious prejudice to the Respondent."*Paragraph C, Addendum B.

Based upon Rule 3.7, this finding is a clear exception to the rule that a lawyer should be disqualified when he is likely to be a necessary witness. Therefore, the decision to disqualify Madson's counsel is reversible error.

IV. REQUEST TO REMAND AND AWARD ATTORNEY FEES

If this court reverses the District Court's decision that bars Mr. Madson' counsel from representing his client at trial, then this Appellant/Respondent is further requesting that this Court direct the District Court to hold a hearing to consider awarding Madson his attorney fees and costs in having to defend himself from what this appellant considers an extremely manipulative litigation tactic that was brought in bad faith by Williams and her counsel.

The District Court Judge need not make any determination at this time as to the veracity or falseness of the allegations made by Williams in her motion(s) to have Mr. Madson's counsel disqualified in order to make a determination that the timing and the nature of the allegations independently demonstrate the motion was brought in bad faith and for purposes for which it was not intended.

A careful reading of the Motion to Disqualify and the Response to the same reveals:

1. That Williams and her counsel knew fully of the matters which they alleged were the basis for disqualifying Madson's counsel even prior to filing their original complaint with this court;

2. That Williams and her counsel allowed Madson's counsel to represent him in a very litigious case for over sixteen months before bringing the Motion to Disqualify his counsel;

3. That Williams through counsel persistently and in bad faith asserted procedural tactics to prevent any depositions being taken by Madson from August of 2006 through October of 2006. Then in November of 2006, Williams filed a motion to disqualify Madson's counsel which motion was incrementally amended to add new allegations as to matters that occurred well before this present litigation ever commenced---all in an effort to derail any depositions from occurring in this case.

4. That if the district court is allowed to examine the allegations made for the basis of the motion to disqualify, then this appellant contends that not only will the court find that they allegations were matters that were known prior to the litigation

commencing, but that the allegations were false and fabricated and presented to the court in such a way to intentionally deceive this court.

For the reasons above, if this court rules, as a matter of law, that given the findings of this court William's motion to disqualify Madson's counsel at trial should be reversed, then this Appellant is further requesting that this Court instruct the district court judge to hold a hearing to consider whether the Appellant should be awarded attorney fees and costs in having to overcome a motion to disqualify that Madson argues was brought in bad faith under the circumstances.

CONCLUSION

Utah Law is clear that when a motion to disqualify is not immediately filed and diligently pursued then it is not timely and fails. Furthermore, even when such motion is timely, serious hardship is an exception to Rule 3.7. After a hearing, Judge Howard specifically found:

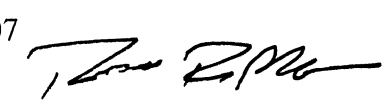
1. *"It was over sixteen (16) months after learning of a potential problem or conflict before Petitioner filed her Motion to Disqualify."* Paragraph A, Addendum B.
2. *"Thereby, Petitioner failed to "immediately file" and "diligently pursue" her request for disqualification of Mr. Ronald R. Madson."* Paragraph B Addendum B.

3. *"Requiring Mr. Ronald R. Madson to withdraw would cause a "serious hardship on Respondent and would, thereby, cause serious prejudice to the Respondent."* Paragraph C, Addendum B.

These are the only factual findings in the court below that are before this court. Based on said findings the court below properly reinstated counsel for Madson, but chose to prevent his counsel from representing him at trial. Madson brings this Appeal arguing that based on those findings of fact, the precedence of Utah case law, common sense, justice and equity, his counsel should not, after having now represented him for twenty-one (21) months and counting, be disqualified as his trial counsel if in fact this case proceeds to trial. Judge Howards decision to disqualify Madson's counsel is clear error given the that the Motion to Disqualify was untimely and even if timely would impose a substantial hardship on the client thus falling in the exception clause to Rule 3.7.

Moreover, this appellant, if successful, is further requesting that this court specifically remand this matter to the District Court Judge to determine if under the circumstances the appellant should be awarded his costs and attorney fees in having to overcome a motion he contends was brought in bad faith.

Dated this 12 day of December, 2007

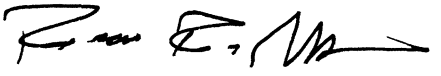


Ronald R. Madson, Esq.
Attorney for Respondent/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of December, 2007, a true and correct copy of the foregoing AMENDED BRIEF OF APPELLANT, was mailed, first class postage prepaid, to the following:

Rosemond Blakelock, Esq.
75 South 300 West
Provo, Utah 84601



Ronald R. Madson, Esq.

ADDENDUM A

Court Docket

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

WHITNEY WILLIAMS vs. JOSHUA DANIEL MADSON

CASE NUMBER 044400031 Divorce/Annulment

CURRENT ASSIGNED JUDGE
FRED D HOWARD
Division 5

CURRENT ASSIGNED COMMISSIONER
THOMAS PATTON

PARTIES

Petitioner - WHITNEY WILLIAMS
Represented by: ROSEMOND V BLAKELOCK

Respondent - JOSHUA DANIEL MADSON
Represented by: RONALD D WILKINSON
Represented by: RONALD R MADSON

ACCOUNT SUMMARY

TOTAL REVENUE

Amount Due:	231.75
Amount Paid:	231.75
Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: DIVORCE PETN

Amount Due:	95.00
Amount Paid:	95.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: VITAL STATISTICS FEE

Amount Due:	2.00
Amount Paid:	2.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	2.00
Amount Paid:	2.00
Amount Credit:	0.00
Balance:	0.00

CASE NUMBER 044400031 Divorce/Annulment

Amount Due:	5.00
Amount Paid:	5.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	4.75
Amount Paid:	4.75
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	0.75
Amount Paid:	0.75
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.50
Amount Paid:	1.50
Amount Credit:	0.00
Balance:	0.00

CASE NOTE

PROCEEDINGS

01-06-04 Filed: Affidavit
01-07-04 Commissioner THOMAS PATTON assigned.
01-07-04 Filed: Complaint

CASE NUMBER 044400031 Divorce/Annulment

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	2.00
Amount Paid:	2.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: DIVORCE MODIFICATION

Amount Due:	40.00
Amount Paid:	40.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	6.75
Amount Paid:	6.75
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	2.00
Amount Paid:	2.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: MISCELLANEOUS FEE

CASE NUMBER 044400031 Divorce/Annulment

01-07-04 Fee Account created Total Due: 95.00
01-07-04 Fee Account created Total Due: 2.00
01-07-04 DIVORCE PETN Payment Received: 95.00
Note: Code Description: DIVORCE PETN; Code Description: VITAL STATISTICS FEE
01-07-04 VITAL STATISTICS FEE Payment Received: 2.00
01-07-04 Filed: Affidavit of Whitney Williams
01-07-04 Filed: Motion for Order to Show Cause
01-07-04 ORDER TO SHOW CAUSE scheduled on January 15, 2004 at 09:00 AM in Second Floor, Rm 202 with Commissioner PATTON.
01-08-04 Issued: Order to Show Cause
Judge FRED D HOWARD
Hearing Date: January 15, 2004 Time: 09:00
01-13-04 Filed return: Order to Show Cause
Party Served: MADSON, JOSHUA DANIEL
Service Type: Personal
Service Date: January 12, 2004
01-13-04 Filed: Certificate of Service
01-13-04 Filed: Affidavit of Joshua Aker
01-13-04 Filed: Affidavit of Ronald R Madson
01-13-04 Filed: Affidavit of Robyn Williams
01-13-04 Filed: Affidavit of Cynthia Connin
01-13-04 Filed: Affidavit of Nicole Bird
01-14-04 Filed: Affidavit of Joshua Daniel Madson
01-14-04 Filed: Counter Affidavit of Joshua Daniel Madson
01-14-04 Filed: Certificate of Service
01-15-04 Filed return: Summons
Party Served: MADSON, JOSHUA DANIEL
Service Type: Personal
Service Date: January 12, 2004
01-15-04 REVIEW HEARING scheduled on January 30, 2004 at 02:00 PM in Second Floor, Rm 202 with Commissioner PATTON.
01-15-04 Minute Entry - Minutes for Order to Show Cause
Commissioner: THOMAS PATTON
Clerk: leilanip
PRESENT

Plaintiff(s): WHITNEY WILLIAMS
Plaintiff's Attorney(s): ROSEMOND BLAKELOCK
Attorney for the Respondent: J GRANT MOODY
Respondent(s): JOSHUA DANIEL MADSON
Video
Tape Number: 046004 Tape Count: 0944

HEARING

Ms. Blakelock addresses the Court.

CASE NUMBER 044400031 Divorce/Annulment

Mr. Moody requests more time to speak with Counsel and the Parties.
The Court holds an in-chambers conference with Counsel.
COUNT: 1047
The Court resumes session with all Parties present and ready to proceed. The Court reviews the content of the in-chambers conference.
Ms. Blakelock addresses the Court stating the stipulation of the Parties. The Parties agree to the stipulation.
The Court approves the stipulation as presented and schedules this matter for review.
REVIEW HEARING is scheduled.
Date: 01/30/2004
Time: 02:00 p.m.
Location: Second Floor, Rm 202
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON

01-30-04 Minute Entry - Minutes for Review Hearing
Commissioner: THOMAS PATTON
Clerk: joyc
PRESENT

Plaintiff(s): WHITNEY WILLIAMS
Plaintiff's Attorney(s): ROSEMOND BLAKELOCK
Attorney for the Respondent: J GRANT MOODY
Respondent(s): JOSHUA DANIEL MADSON
Video
Tape Number: 036007 Tape Count: 2:12

HEARING

Ms. Blakelock addresses the Court and states the parties have reached a written stipulation. The parties also agree that, if necessary, they both are willing to attend mediation.
Both parties accept, agree and are bound by the written in stipulation in open court.
Ms. Blakelock to prepare the order.

01-30-04 Filed: Stipulation in re: Temporary Orders
02-26-04 Filed order: Order On Stipulation In RE: January 30, 2004 Hearing
Judge FRED D HOWARD
Signed February 26, 2004
02-27-04 Filed: Notice of Entry of Order on Stipulation in re: January 30, 2004 Hearing
10-18-04 Filed: Affidavit Of Jurisdiction And Grounds

10-18-04 Filed: Certificate of Completion for Divorce Education Program (Whitney Williams 6/9/04)
10-18-04 Filed: Child Support Obligation Worksheet Required Location Information (Filed)
11-03-04 Judge GARY D STOTT assigned.
11-05-04 Filed: Certificate of Completion of Shared Parenting Course for Divorcing Parents (Joshua)
11-09-04 Filed order: MINUTE ENTRY (return of unsigned decree and findings of fact and conclusions of law with Rosemond Blakelock, ATP, copy of minute entry)
Judge GARY D STOTT
Signed November 09, 2004
11-15-04 Filed: Stipulation
12-21-04 Filed: Stipulation to Enter Decree Nunc Pro Tunc
12-21-04 Filed: Motion for Order Nunc Pro Tunc
12-30-04 Filed order: Order Granting Motion to Enter Decree Nunc Pro Tunc
Judge GARY D STOTT
Signed December 30, 2004
12-31-04 Judge ANTHONY W. SCHOFIELD assigned.
01-06-05 Filed: Notice of Entry of Order Granting Motion to Enter Decree Nunc Pro Tunc
01-12-05 Filed order: Findings of Fact and Conclusions of Law
Judge ANTHONY W. SCHOFIELD
Signed January 12, 2005
01-20-05 Judgment #1 Entered
01-20-05 Filed judgment: Decree of Divorce
Judge ANTHONY W. SCHOFIELD
Signed January 12, 2005
01-20-05 Case Disposition is Judgment
Disposition Judge is ANTHONY W. SCHOFIELD
01-24-05 Note: Certificate of Divorce sent to the Bureau of Vital Records
02-01-05 Filed: Notice of Entry of Decree of Divorce and the Findings of Fact and Conclusions of Law
05-02-05 Fee Account created Total Due: 2.00
05-02-05 COPY FEE Payment Received: 2.00
Note: 029
08-26-05 Fee Account created Total Due: 2.00
08-26-05 COPY FEE Payment Received: 2.00
09-02-05 Filed: Verified Complaint for Modification of Decree of Divorce in re: Custody
09-02-05 Fee Account created Total Due: 40.00
09-02-05 DIVORCE MODIFICATION Payment Received: 40.00
Note: Code Description: DIVORCE MODIFICATION
09-13-05 Filed return: Constable's Proof Of Service (On Summons)
Party Served: MADSON, JOSHUA DANIEL
Service Type: Personal
Service Date: September 07, 2005

09-26-05 Filed: Answer to Verified Complaint for Modification of Decree of Divorce and Request for Attorney Fees
JOSHUA DANIEL MADSON
September 26, 2005
09-30-05 Fee Account created Total Due: 6.75
09-30-05 COPY FEE Payment Received: 6.75
Note: 7.00 cash tendered.
10-25-05 Filed: Motion in Support of Order for Custody Evaluator
Filed by: BLAKELOCK, ROSEMOND
11-07-05 Filed: Memorandum In Objection To Motion In Support Of Order For Custody Evaluation
11-07-05 Filed: Affidavit Of Joshua Daniel Madson
11-10-05 Filed: Request For Oral Arguments, In Re: Motion In Support Of Order For Custody Evaluator
11-16-05 Filed: Motion To Dismiss Or In The Alternative Motion For Summary Judgment Or In The Alternative Motion To Stay Until Petitioner Proves Substantial Change In Circumstances
11-16-05 Filed: Ex Parte Request For Over-Length Brief
12-05-05 Filed: Response to Motion to Dismiss
12-05-05 SCHELDING CONFERENCE scheduled on January 03, 2006 at 10:00 AM in Third floor, Rm 303 with Commissioner PATTON.
12-05-05 Notice - NOTICE for Case 044400031 ID 9214917
SCHELDING CONFERENCE is scheduled.
Date: 01/03/2006
Time: 10:00 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON
12-05-05 Notice - NOTICE for Case 044400031 ID 9214928
SCHELDING CONFERENCE is scheduled.
Date: 1/3/2006
Time: 10:00 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON

All parties and their counsel are required to attend. Failure to appear may result in a default being entered and judgment being granted.

Failure to appear at Pretrial may result in the Court striking your pleadings and entering judgment by default.
12-05-05 SCHELDING CONFERENCE scheduled on January 03, 2006 at 10:00 AM in Third floor, Rm 303 with Commissioner PATTON.
12-05-05 SCHELDING CONFERENCE Cancelled.

Reason: Counsel's request.

12-05-05 Notice - NOTICE for Case 044400031 ID 9214945
SCDING CONF & ORAL ARGUMENT.
Date: 01/05/2006
Time: 10:00 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON
The reason for the change is Counsel's request.
All parties and their counsel are required to attend. Failure to appear may result in a default being entered and judgment being granted.
12-05-05 SCDING CONF & ORAL ARGUMENT rescheduled on January 05, 2006 at 10:00 AM Reason: Counsel's request..
12-05-05 Filed: Request for Oral Arguments in Re: Motion to Dismiss Motion for Summary Judgment or in the Alternative Motion to Stay
12-13-05 Filed: Reply to Petitioner's Opposition to Motion to Dismiss
12-28-05 Filed: Answer to Respondent's First Request for Admissions
WHITNEY WILLIAMS
December 28, 2005
12-30-05 SCDING CONF & ORAL ARGUMENT scheduled on January 10, 2006 at 02:00 PM in Third floor, Rm 303 with Commissioner PATTON.
01-09-06 ORAL ARGUMENT scheduled on January 10, 2006 at 02:00 PM in Fourth floor, Rm 401 with Judge SCHOFIELD.
01-10-06 Minute Entry - Minutes for ORAL ARGUMENT
Judge: ANTHONY W. SCHOFIELD
Clerk: jennyc
PRESENT

Plaintiff(s): WHITNEY WILLIAMS
Plaintiff's Attorney(s): ROSEMOND V BLAKELOCK
Attorney for the Respondent: RONALD R MADSON
Respondent(s): JOSHUA DANIEL MADSON
Audio
Tape Number: 06-03 401 Tape Count: 2:47-3:37

HEARING

COUNT: 2:47
This matter comes before the court for oral argument. Mr. Madson addresses his motion. Ms. Blakelock addresses. Mr. Madson responds.
COUNT: 3:14
Court is in recess.

COUNT: 3:29
Court reconvenes. The petition is dismissed. An amended petition

may be filed within 30 days. Mr. Madson will prepare an appropriate order.

01-10-06 Minute Entry - Minutes for SCHED CONF/ORAL ARG
Commissioner: THOMAS PATTON
Clerk: robynk
PRESENT

Plaintiff's Attorney(s): ROSEMOND V BLAKELOCK
Audio
Tape Number: 05 40 303 Tape Count: 3:47-3:49

HEARING

TAPE: 05 40 303 COUNT: 3:47-3:49
Ms Blakelock appears in the courtroom and states that matters have been resolved, regarding the Scheduling Conference and Oral Arguments, before Judge Schofield. The court strikes this matter from today's calendar.

01-12-06 Fee Account created Total Due: 10.00
01-12-06 AUDIO TAPE COPY Payment Received: 10.00
Note: #008
01-13-06 Filed: Request for Video/Audio Record
01-17-06 Filed: Proposed Order Certificate of Mailing
01-25-06 Filed return: Certificate of Service by Mail (Amended Verified Complain for Modification of Decree of Divorce in re: Custody)
Party Served: MADSON, JOSHUA DANIEL
Service Type: Mail
Service Date: January 24, 2006
01-25-06 Filed: Amended Verified Complain for Modification of Decree of Divorce in re: Custody
01-31-06 Filed order: Order
Judge ANTHONY W. SCHOFIELD
Signed January 31, 2006
02-06-06 Filed return: Constable's Proof Of Service (For Subpoena Duces Tecum)
Party Served: Provo Police
Service Type: Personal
Service Date: January 05, 2006
02-06-06 Filed: Motion to Dismiss or in the Alternative Motion to Stay Until Petitioner Proves Substantial Change of Circumstances and Request for Attorney Fees
02-06-06 Filed: Request for Oral Arguments, in Re: Motion to Dismiss or in the Alternative Motion to Stay
02-09-06 Filed: Answers to Respondent's First Request for Admissions to Petitioner

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02-13-06 Filed: Response To Motion To Dismiss And Response To Motion To Stay and Request For Attorney's Fees
02-13-06 Filed: Request For Oral Arguments On Motion To Dismiss And

Request For Oral Arguments On Request For Custody Evaluator
02-14-06 Notice - NOTICE for Case 044400031 ID 9264899
ORAL ARGUMENT is scheduled.
Date: 03/17/2006
Time: 10:45 a.m.
Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Judge: ANTHONY W. SCHOFIELD

This matter is being scheduled for 45 minute oral arguments at the request of Mr. Madson.
02-14-06 ORAL ARGUMENT scheduled on March 17, 2006 at 10:45 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.
02-23-06 Filed: Reply to Petitioner's Opposition to Motion to Dismiss
03-14-06 Filed return: Certificate of Mailing
Party Served: Ronald Madsen
Service Type: Mail
Service Date: March 09, 2006
03-14-06 Filed return: Certificate of Mailing
Party Served: Clark Session
Service Type: Mail
Service Date: March 09, 2006
03-17-06 Fee Account created Total Due: 10.00
03-17-06 AUDIO TAPE COPY Payment Received: 10.00
03-17-06 Judge FRED D HOWARD assigned.
03-17-06 Filed: Minute Entry- Recusal
03-17-06 Minute Entry - Minutes for ORAL ARGUMENT
Commissioner:
03-20-06 Filed return: Amended Certificate of Mailing of Petitioner's Answers to Respondent's First Request for Production of Documents
Party Served: Ronald Madson
Service Type: Mail
Service Date: March 17, 2006
03-20-06 Filed: Faxed Letter from Ronald Madson
03-22-06 Filed: Tape Request Completed
03-22-06 Fee Account created Total Due: 10.00
03-22-06 AUDIO TAPE COPY Payment Received: 10.00
Note: #019
03-27-06 Filed: Motion for Clarification and Motion to Amend
04-10-06 Filed: Response to Motion for Clarification and Motion to Amend
04-10-06 Filed: Notice to Submit on Motion for Custody Evaluator
04-11-06 Notice - NOTICE for Case 044400031 ID 9307634
ORAL ARGUMENT is scheduled.

CASE NUMBER 044400031 Divorce/Annulment

Date: 06/07/2006
Time: 02:30 p.m.
Location: Second Floor, Rm 202
FOURTH DISTRICT COURT

125 N 100 W
PROVO, UT 84601
Before Judge: FRED D HOWARD

The Court has set aside one (1) hour to hear oral argument on the following motions:

1. Respondent's Motion to Dismiss or in the Alternative Motion to Stay Until Petitioner Proves Substantial Change of Circumstances and Request for Attorney Fees

2. Respondent's Motion for Clarification and Motion to Amend

3. Petitioner's Motoin for Custody Evaluator

04-11-06 ORAL ARGUMENT scheduled on June 07, 2006 at 02:30 PM in Second Floor, Rm 202 with Judge HOWARD.
04-19-06 Filed: Response to Notice to Submit on MOoion for Custody Evaluator
06-07-06 Minute Entry - Minutes for ORAL ARGUMENT
Judge: FRED D HOWARD
Clerk: sherylc
PRESENT

Plaintiff's Attorney(s): ROSEMOND V BLAKELOCK
Attorney for the Respondent: RONALD R MADSON
Respondent(s): JOSHUA DANIEL MADSON
Audio
Tape Number: 06-10-202 Tape Count: 2:37-3:30

HEARING

TAPE: 06-10-202 COUNT: 2:37-3:30
Mr. Joshua Madson appears. Counsel make their appearance and give arguments on the motions before the court. Counsel submit.
The court finds as stated. Motion For Clarification & Motion To Amend - The court cannot clarifiy. Motion In Support Of Custody Evaluator - The court advises and encourages to mediate. Motion To Dismiss - denied.
Ms. Blakelock is to prepare the Order (court states that Legal Standard, in not addressed at this time and is reserved)
06-09-06 Filed: Request for Rehearing and Reconsideration of Motion to Dismiss & Request for Specific Findings as to Motion [to] Dismiss

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06-20-06 Filed: Motion to Compel Discovery & Motion for Evidentiary Ruling
07-20-06 Filed: Request for Oral Arguments in Re Motion to Compel and Motion for Evidentiary Ruling
08-01-06 Filed: Notice to Submit for Decision in Re: Motion for

Rehearing of Motion to Dismiss & Moiton for Specific Findings
08-01-06 Filed: Notice to Submit for Decision in Re: Motion to Compel Discovery & Motion for Evidentiary Ruling
08-03-06 Filed: Objection to Notice to Submit and Objection to Motion to Compel Discovery
08-07-06 Filed: Reply to Objection to Notice to Submit and Motion to Compel
08-08-06 Filed: Motion To Continue Depositions Of Ned Williams And Robyn Williams
08-14-06 Filed: Opposition to Motion to Continue
08-16-06 Notice - NOTICE for Case 044400031 ID 9402549
TELEPHONE CONFERENCE is scheduled.
Date: 09/01/2006
Time: 12:00 p.m.
Location: Second Floor, Rm 202
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Judge: FRED D HOWARD

The Court has set aside 15 minutes to discuss the status of Respondent's Motion to Compel Discovery. The court clerk will initiate the call.
08-16-06 TELEPHONE CONFERENCE scheduled on September 01, 2006 at 12:00 PM in Second Floor, Rm 202 with Judge HOWARD.
08-18-06 Filed return: Certificate of Service by Mail
Party Served: Ronald Madsen
Service Type: Mail
Service Date: August 18, 2006
08-21-06 Filed: Supplemental Response to Interrogatories and Request for Production of Documents
08-24-06 Filed order: Ruling Re: Motion to Compel [granted] and for Evidentiary Hearing [denied]
Judge FRED D HOWARD
Signed August 24, 2006
08-24-06 Filed order: Ruling Re: Request for Rehearing and Reconsideration of Motion to Dismiss [denied]
Judge FRED D HOWARD
Signed August 24, 2006
09-01-06 Minute Entry - Minutes for TELEPHONE CONFERENCE
Judge: FRED D HOWARD
Clerk: miket
TELEPHONE CONFERENCE
PRESENT

CASE NUMBER 044400031 Divorce/Annulment

Plaintiff's Attorney(s): ROSEMOND V BLAKELOCK
Attorney for the Respondent: RONALD R MADSON
Audio
Tape Number: 06-14-202 Tape Count: 12:18-12:23

HEARING

Counsel address the Court as to the award of attorney's fees as related to Respondent's Motion to Compel. The Court defers all awards of attorney's fees until the completion of the case.

09-12-06 Filed order: Ruling Re: Lack of Mailing Certificate
Judge FRED D HOWARD
Signed September 12, 2006

10-02-06 Filed order: Order
Judge FRED D HOWARD
Signed September 29, 2006

10-27-06 Filed: Affidavit of Emily B Rowley

11-01-06 Fee Account created Total Due: 2.00

11-01-06 COPY FEE Payment Received: 2.00

11-21-06 Filed: Motion to Disqualify Ronald R. Madson as Counsel for Respondent and Motion to Stay All Proceedings Until A Ruling is Issued Regarding the Motion Disqualify

11-21-06 Filed: Memorandum in Support of Motion to Disqualify R. Madson as Counsel for Respondent and Motion to Stay All Proceedings Until a Ruling is Issued Regarding the Motion Disqualify

11-30-06 Filed: Respondent's Rule 26 (a) Initial Disclosures

11-30-06 Filed: Opposition To Petitioner's Motion To Disqualify Counsel and Motion To Stay Proceedings & Respondent's Countermotion For Entry Of Discovery Order Pursuant to URCP 26(f)(3) & Alternatively Request For Scheduling & Management Conference

12-04-06 Filed: Request for Phone Conference, In Re: Motion to Strike Depositions and Motion for Expedited Ruling

12-04-06 Filed: Motion to Strike Depositions and Motion for Expedited Ruling

12-05-06 ORAL ARGUMENT scheduled on December 06, 2006 at 10:00 AM in Third floor, Rm 303 with Commissioner PATTON.

12-05-06 Minute Entry - Minutes for TELEPHONE CONFERENCE
Commissioner: THOMAS PATTON
Clerk: emilyp
TELEPHONE CONFERENCE
PRESENT

Plaintiff's Attorney(s): ROSEMOND V BLAKELOCK
Attorney for the Respondent: RONALD R MADSON
Audio

Printed: 10/08/07 14:19:49 Page 13

CASE NUMBER 044400031 Divorce/Annulment

HEARING

This matter comes before the Court on Petitioners Request for a telephone conference. Both counsel present argument. The Court stays the December 6, 2006 deposition and schedules Oral Argument

at 10:00 a.m. on December 6, 2006.
The Court reserves the Respondent's fees and costs at this time. Both counsel should come prepared to argue the Motion to Disqualify and then the Motion to Strike Depositions.
ORAL ARGUMENT is scheduled.
Date: 12/06/2006
Time: 10:00 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON
12-05-06 Filed: Second Request for Expedited Telephone Conference in Re Motion to Strike Depositions and Motion for Expedited Ruling
12-06-06 MTN TO DISQUALIFY ORAL ARG scheduled on January 03, 2007 at 02:00 PM in Third floor, Rm 303 with Commissioner PATTON.
12-06-06 TELEPHONE CONF/ DEPOSITIONS T scheduled on January 04, 2007 at 11:00 AM in Third floor, Rm 303 with Commissioner PATTON.
12-06-06 PHONE CONF/ DEPOSITIONS STAT scheduled on January 10, 2007 at 11:00 AM in Third floor, Rm 303 with Commissioner PATTON.
12-06-06 FINAL PRETRIAL scheduled on February 22, 2007 at 02:00 PM in Third floor, Rm 303 with Commissioner PATTON.
12-06-06 Minute Entry - Minutes for ORAL ARGUMENT/ MTN TO DISQUA
Commissioner: THOMAS PATTON
Clerk: emilyp
PRESENT

Plaintiff(s): WHITNEY WILLIAMS
Plaintiff's Attorney(s): ROSEMOND V BLAKELOCK
Attorney for the Respondent: RONALD R MADSON
Respondent(s): JOSHUA DANIEL MADSON
Audio
Tape Number: 06-27-303 Tape Count: 10:06-11:04

HEARING

TAPE: 06-27-303 COUNT: 10:06
Both parties are present and represented by counsel. Each counsel state their version of the status of this case. Ms. Blakelock present her argument. Mr. Madsen responds. The Court continues

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the Motion to Dismqualify. The Court instrusts Ms. Blakelock to supplement her pladings and states every allegation she is claiming. Mr. Madsen is instructed to file a respose. The Court questions Mr. Madsen as his previolusly filed February 6 affidavit. The Court sites Rule 1.7(a))2).
The Court notes that the order from January 6, 2006 hearing does not have a mailing certificate attached. The court finds that the Respondent is not prejudice if this Court continues the scheduled

deposition for tomorrow. This Court specifically
authorizes Mr. Madsen to do telephone depositions from Hawaii.
This court expects the parties and the attorney's to conduct
themselves civilly during depositions. This Court will schedule
telephone conferences on January 4 and January 10, 2007
both at 11:00 a.m. Ms. Blakelock will supplement her pleadings by
December 13, 2006 and Mr. Madsen will respond by December 22, 2006.
This Court continues the oral argument on the Motion to Disqualify
on January 3, 2007 @ 2:00 p.m.
By the end of January 2007 this court expects both counsel to
contact eachother as to what discovery is still needed. This
matter is set for a final pretrial on February 22, 2007 @ 2:00 p.m.
Ms. Blakelock is instructed to complete
her initial disclosures by end of December 2006. Mr. Madsen is
instructed to prepare the appropraite order.
MTN TO DISQUALIFY ORAL ARG is scheduled.
Date: 01/03/2007
Time: 02:00 p.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON

TELEPHONE CONF/ DEPOSITIONS T.
Date: 01/04/2007
Time: 11:00 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON

PHONE CONF/ DEPOSITIONS STAT.
Date: 01/10/2007
Time: 11:00 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON

FINAL PRETRIAL.
Date: 02/22/2007
Time: 02:00 p.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON

Audio
Tape Number: 07-01-303

HEARING

TAPE: 07-01-303 This matter is stricken.
01-04-07 Note: CD picked up by Rose Blakelock
01-04-07 Fee Account created Total Due: 4.75
01-04-07 COPY FEE Payment Received: 4.75
01-04-07 Fee Account created Total Due: 10.00
01-04-07 AUDIO TAPE COPY Payment Received: 10.00
01-09-07 Filed: Petitioner's Initial Disclosures
01-09-07 Filed order: Order 12/6/06
Judge STEVEN L. HANSEN
Signed January 09, 2007
01-10-07 Filed: Notice of Appearance (J. D. Madson for Respondent)
01-10-07 Filed: Objection to Commissioner's Ruling of January 3, 2007
01-23-07 Filed return: Certificate of Mailing of Petitioner's Answers to Respondent Third Set of Request for Admissions to Joshua Madson
Party Served: J. Madson
Service Type: Mail
Service Date: January 23, 2007
01-29-07 Filed: Verified Response to Objection to Commissioner's Ruling of January 3, 2007
02-01-07 Filed: Reply to Response to Objection to Commissioner's Ruling of January 3,2007
02-01-07 Filed: Notice to Submit for Decision in Re: Objection to Commissioner Ruling of January 3, 2007 Expedited Request
02-01-07 Filed return: Certificate Of Mailing
Party Served: MADSON, JOSHUA DANIEL
Service Type: Mail
Service Date: January 31, 2007
02-02-07 Filed: Notice of Deposition to Whitney Williams
02-02-07 Filed: Notice of Deposition to Whitney Williams
02-02-07 Filed order: Recommndation and Order Granting Motion to Disqualify Ronald R. Madson as Counsel for Respondent

CASE NUMBER 044400031 Divorce/Annulment

Judge FRED D HOWARD
Signed February 02, 2007
02-05-07 Filed: Appearance of Counsel and Reqeust for Extension of Discovery Deadlines
02-07-07 Notice - NOTICE for Case 044400031 ID 9534345
OBJECTION TO RECOMMENDATION is scheduled.
Date: 02/21/2007
Time: 11:00 a.m.
Location: Second Floor, Rm 202
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

12-07-06 Filed: Request For Copy Of Video/ Audio Record (already picked up)
12-07-06 Fee Account created Total Due: 10.00
12-07-06 AUDIO TAPE COPY Payment Received: 10.00
Note: rec num 030
12-11-06 Fee Account created Total Due: 5.00
12-11-06 MISCELLANEOUS FEE Payment Received: 5.00
Note: MISCELLANEOUS FEE, rec num 006
12-13-06 Filed: Affidavit Of Petitioner In Support Of Motion To Disqualify Ronald R. Madson As Counsel For Respondent
12-13-06 Filed: Affidavit Of Marissa Robert
12-14-06 Filed: Proposed Order Certeificat of Mailing
12-19-06 Filed: Amended Affidavit of Petitioner in Support of Motion to Disqualify Ronald R. Madson as Counsel for Respondent
12-22-06 Filed: Response to Affidavit of Petitioner in Re: Motion to Disqualify Respondent's Counsel & Request for Attorney Fees and Costs
01-03-07 Minute Entry - Minutes for MTN TO DISQUALIFY & ORAL ARG
Commissioner: THOMAS PATTON
Clerk: robynk
PRESENT

Petitioner's Attorney: ROSEMOND V BLAKELOCK
Petitioner(s): WHITNEY WILLIAMS
Attorney for the Respondent: RONALD R MADSON
Respondent(s): JOSHUA DANIEL MADSON
Audio
Tape Number: 07 01 303 Tape Count: 2:14-3:14

HEARING

TAPE: 07 01 303 COUNT: 2:14-3:14
This matter comes before the Court for Oral Argument on a Motion To Disqualify. Both parties are present and represented by counsel. Ms Blakelock presents her argument and notes that a written custody evaluation is complete. Mr Ronald Madson responds. The Court takes this matter under advisement at 2:32:17. Court resumes at 2:50:02. The Court notes that they have primarily

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considered the needs of the minor child, in reaching their decision. The Court refers to Elmer vs. Elmer, a Utah Supreme Court
Decision from 1989. The Court then refers to the introductory paragraph of the parties' Decree. The law, as stated, presumes that a litigant has the right to choose the attorney of their choice, and that presumption would apply even to today.
The Court finds that if there was a sufficient basis to disqualify Mr Ronald Madson, prior to trial, the Court would be able to disqualify him. The Court is relying on DJ Investment Group vs.

Before Judge: FRED D HOWARD

The Court has set aside 30 minutes to hear oral argument on Respondent's Objection to Commissioner's Ruling of January 3, 2007.

02-07-07 OBJECTION TO RECOMMENDATION scheduled on February 21, 2007 at 11:00 AM in Second Floor, Rm 202 with Judge HOWARD.

02-07-07 Filed: Notice Of Entry Of Recommendation And Order Granting Motion To Disqualify Ronald R. Madson As Counsel For Respondent

02-16-07 OBJECTION TO RECOMMENDATION scheduled on April 02, 2007 at 09:00 AM in Second Floor, Rm 202 with Judge HOWARD.

02-16-07 Filed: Motion For Continuance And Request For Expedited Ruling
Filed by: MADSON, JOSHUA DANIEL

02-22-07 Minute Entry - Minutes for Pretrial Conference
Commissioner: THOMAS PATTON
Clerk: emilyp
PRESENT

Petitioner's Attorney: ROSEMOND V BLAKELOCK
Attorney for the Respondent: RONALD D WILKINSON
Audio
Tape Number: 07-05-303 Tape Count: 2:51-2:52

HEARING

TAPE: 07-05-303 COUNT: 2:51-2
Both counsel are present and agree to continue this matter to April 19, 2007 @ 2:00 p.m.
PRETRIAL CONFERENCE.
Date: 04/19/2007
Time: 02:00 p.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON

CASE NUMBER 044400031 Divorce/Annulment

02-23-07 Filed: Notice of Continuance to 4/2/07

02-26-07 PRETRIAL CONFERENCE scheduled on April 19, 2007 at 02:00 PM in Third floor, Rm 303 with Commissioner PATTON.

03-01-07 Filed: Notice Of Pre-Trial Scheduling Conference (Scheduled 4/19/07)

03-23-07 Filed return: Certificate Of Service Of Respondent's Answer To Petitioner's Interrogatories And Request For Production Of Documents (Mailed To R Blakelock)
Party Served: WILLIAMS, WHITNEY
Service Type: Mail
Service Date: March 21, 2007

04-02-07 Minute Entry - Minutes for ORAL ARGUMENT
Judge: FRED D HOWARD

Clerk: miket
PRESENT

Petitioner's Attorney: ROSEMOND V BLAKELOCK
Attorney for the Respondent: RONALD D WILKINSON
Respondent(s): JOSHUA DANIEL MADSON
Audio
Tape Number: 07-5-202 Tape Count: 9:12-9:36

HEARING

Counsel address the Court as to Respondent's Objection to Commissioner's Ruling of January 3, 2007. The Court sustains the objection and overturns the Commissioner's ruling to disqualify Ronald R. Madson as counsel for Respondent.
Mr. Wilkinson is to prepare the order.

04-19-07 Notice - NOTICE for Case 044400031 ID 9591331
PRETRIAL CONFERENCE.
Date: 05/10/2007
Time: 02:00 p.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON
The reason for the change is Counsel stipulated.
Failure to appear at Pretrial may result in the Court striking your pleadings and entering judgment by default.

04-19-07 PRETRIAL CONFERENCE rescheduled on May 10, 2007 at 02:00 PM
Reason: Counsel stipulated..

05-01-07 Filed order: Order
Judge FRED D HOWARD
Signed May 01, 2007

05-01-07 Fee Account created Total Due: 10.00

05-01-07 AUDIO TAPE COPY Payment Received: 10.00
Note: rec # 015

05-04-07 Fee Account created Total Due: 0.75

05-04-07 COPY FEE Payment Received: 0.75
Note: 1.00 cash tendered. 0.25 change given.

05-07-07 Filed: Audio Request for Ron Madson Assigned to Hansen's Team

05-09-07 Filed: Request For Copy Of Video/ Audio Record - receipted

05-14-07 Filed: Request for Order to Produce Military Records
Filed by: MADSON, JOSHUA DANIEL

05-16-07 Filed: Notice of Entry of Order

05-21-07 Filed: Notice of Filing of Petition to Appeal From Interlocutory Order

05-29-07 Filed: Copy of Letter from Court of Appeals dated 5-24-07 -- Petition for Interlocutory Appeal has been filed with Court of

Appeals (20070394)
06-06-07 Filed: Notice to Submit For Decision
06-21-07 Filed: Letter from Court of Appeals dated 6-20-07 w/attached Order -- Petition for Permission to Appeal from Interlocutory is Granted
06-28-07 Filed: Notice That No Transcripts Are Required by Respondent/Appellant Pursuant to URAP 11
07-12-07 Filed: Receipt of Requested Audio from Hearing Dated 1/3/07
07-12-07 Fee Account created Total Due: 10.00
07-12-07 AUDIO TAPE COPY Payment Received: 10.00
Note: Record #001
07-12-07 Note: CD picked up by C. Brown.
07-19-07 Filed: Clerk's Certificate
07-19-07 Filed: Clerk's Certificate of Transcript
07-19-07 Filed: Judgment Roll and Index
07-19-07 Note: Record Index sent to Utah Supreme Court via state mail tracking #55500042673
08-08-07 Filed: Motion to Compel
Filed by: MADSON, JOSHUA DANIEL
08-30-07 Filed: Notice to Submit for Expedited Decision in Re: Motion to Compel & Attorney Fees
09-04-07 Filed: Motion to Continue Depositions Due to Conflict of Schedule
Filed by: WILLIAMS, WHITNEY
09-04-07 Filed: Response to Notice to Submit for Expedited Decision
WHITNEY WILLIAMS

09-04-07 Filed: Response to Motion to Compel
WHITNEY WILLIAMS

09-04-07 Filed: Motion to Stay All Proceedings, Including Discovery, Until Interlocutory Appeal Process in Completed at the Utah Court of Appeals
Filed by: WILLIAMS, WHITNEY
09-06-07 Filed order: Ruling Denying Motion to Compel Discovery

CASE NUMBER 044400031 Divorce/Annulment

Judge FRED D HOWARD
Signed September 05, 2007
09-10-07 Filed: Motion to Compel Discovery
Filed by: MADSON, JOSHUA DANIEL
09-10-07 Filed: Response To Motion To Continue Depositions
09-10-07 Filed: Reply To Response To Respondents' Notice To Submit Motion To Compel For Expeditied Decision
09-10-07 Filed: Reply To Petitioner's Opposition ToRespondent's Motion To Compel
09-14-07 Filed: Opposition to Motion to Stay All Proceedings, Including Discovery Until Interlocutory Appeal Process Is Completed at the Court of Appeals
09-17-07 Filed: Notice to Submit And Request For Expedited Ruling Or Phone Conference With The Court
09-20-07 Filed order: Ruling Re: Petitioner's Motion to Stay All

Proceedings [denied]
Judge FRED D HOWARD
Signed September 20, 2007

09-20-07 Filed: Response to Notice to Submit and Request for Expedited Ruling in Re: Motion to Stay All Proceedings

09-24-07 Fee Account created Total Due: 1.50

09-24-07 COPY FEE Payment Received: 1.50

09-27-07 Filed return: Certificate of Hand Delivery
Party Served: MADSON, RONALD R
Service Type: Personal
Service Date: September 27, 2007

10-01-07 Filed: Notice to Submit For Expedited Decision In Re: Motion To Compel & Attorney Fees

10-04-07 Filed order: Ruling Re: Respondent's Motion to Compel Discovery [granted]
Judge FRED D HOWARD
Signed October 04, 2007

ADDENDUM B

Judge Howard's Order on Respondent's Objection to Commissioner Patton

FILED
Fourth Judicial District Court
of Utah County, State of Utah
5/1/07 Deputy

Ron D. Wilkinson (5558)
The Heritage Building
815 East 800 South
Orem, UT 84097
Telephone: (801) 225-6040
Facsimile: (801) 225-6041
Co-counsel for Respondent

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH

WHITNEY WILLIAMS, Petitioner, v. JOSHUA DANIEL MADSON, Respondent.	ORDER Case No.: 044400031 Judge Fred D. Howard Div. 5 Commissioner: Thomas R. Patton

On the second (2nd) day of April 2007, this matter came before the Honorable Fred D. Howard for hearing on Respondent's Objection to the Commissioner's "Recommendation and Order Granting Motion to Disqualify Ronald R. Madson as Counsel for Respondent." After hearing argument and proffer from both parties and after carefully reviewing the court file and Utah law, this Court orders as follows:

1. Excepting the ruling prohibiting Mr. Ronald R. Madson in appearing as counsel at trial, the Respondent's Objection to the Commissioner's

recommendations are sustained and Mr. Ronald R. Madson may, in all other capacities, act as counsel for Respondent.

2. In making said ruling, this Court specifically finds as follows:

   A. It was over sixteen (16) months after learning of a potential problem or conflict before Petitioner filed her Motion to Disqualify.

   B. Thereby, Petitioner failed to "immediately file" and "diligently pursue" her request for disqualification of Mr. Ronald R. Madson.

   C. Requiring Mr. Ronald R. Madson to withdraw would cause a "serious hardship" on Respondent and would, thereby, cause serious prejudice to the Respondent.

3. Wherefore, there are no restrictions placed upon Mr. Ronald R. Madson representing Respondent and he is fully able to continue his representation of the Respondent, excepting advocating at trial.

DATED this 1 day of ~~April~~ May 2007.

HONORABLE FRED D. HOWARD

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT • UTAH COUNTY

ADDENDUM C

Commissioner Patton's Recommendation and Order Granting Motion to Disqualify

Fourth Judicial District Court
of Utah County, State of Utah
FEB 02 2007
Deputy

ROSEMOND G. BLAKELOCK #6183
Attorney for Petitioner
75 South 300 West
Provo, Utah 84601
Telephone: (801) 379-0700
Facsimile: (801) 379-0701

COPY

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

125 North 100 West, Provo, Utah 84601

WHITNEY WILLIAMS, Petitioner, v. JOSHUA DANIEL MADSON, Respondent.	* * * * * * * * * *	**RECOMMENDATION AND ORDER GRANTING MOTION TO DISQUALIFY RONALD R. MADSON AS COUNSEL FOR RESPONDENT** Case No. Commissioner Thomas Patton Division 6

This matter came on for oral arguments on January 3, 2007, before the Honorable Thomas Patton. Present was the Petitioner and her counsel, Rosemond Blakelock. The Respondent was present and represented by counsel, Ronald R. Madson. The Court heard the arguments and proffers of both counsel, examined the file and the contents therein and deeming itself to be fully informed the in the circumstances, recommends and orders as follows:

RECOMMENDATION AND ORDER DISQUALIFYING RONALD MADSON AS COUNSEL FOR RESPONDENT

1. The Court finds that it primarily considered the needs of Luke, when examining the Motion to Disqualify Ronald Madson, as counsel for Respondent.

2. The minor child in this matter is barely four years old. The Court cites to Elmer v. Elmer 776 P.2d 599 (Utah Supreme Ct. 1989). Elmer states, at page 605, that when there is a claim of change of circumstances in custody cases that the trial court may also examine the issue of the best interests and general welfare of a minor child. The Court may also wish to examine the issues of stability and continuity of care that exists, in relation to the minor child.

3. The Court finds that, pursuant to Elmer, the trial court may wish to take evidence and testimony that predates the date upon which the Decree of Divorce was entered in this matter. The Court finds that the rights of the minor child outweigh the rights of either party.

4. The Court finds that a litigant has a right to choose who their attorney will be. In this matter, the paternal grandfather has been the attorney for the Respondent. The Respondent is the father of the minor child.

5. The Court finds that a lawyer can be disqualified at a time prior to trial in a matter. Ronald R. Madson may be disqualified prior to trial, if there is a sufficient basis to disqualify Ronald R. Madson. In reaching this conclusion the Court relies on the case of D. J. Investment Group, LLC v. Dae Westbrook, LLC 113 P.3d 1022 (Ut. Ct. App. 2005). In examining the case, the Court finds that it is clear that a lawyer can be disqualified prior to trial. In examining the issue, the court finds that Rule 3.7, Lawyer as a Witness, was the applicable Rule, in this matter. The Court finds that in the examination of Rule 3.7, that the Comments to Rule 3.7, of the Annotated Rules of Rules of Professional Conduct states as follows:

"Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between lawyer and client. The opposing party has a proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof".

6. The Court finds the examination of the Rule is important because the comments attempt to explain why Rule 3.7 is in place.

7. The court should not be forced to determine if the lawyer is arguing an advocate, or is testifying on personal knowledge. While the attorney may advocate for his client, he may not testify on personal knowledge. When that occurs, then the Court is forced to determine if the lawyer is in fact credible.

8. At the prior hearing in this matter, the Court indicated that Ronald R. Madson had filed numerous affidavits with the court, regarding the Petitioner and the Respondent. The affidavits filed by Ronald Madson in case number 044400031 would not be sufficient to disqualify Ronald Madson from going forward as the attorney for the Respondent. The Court did not rely on those affidavits previously filed in case number 044400031.

9. In case number 034402607, which is a Protective Order action, attorney J. Grant Moody, on behalf of Respondent, filed an affidavit from Ronald R. Madson, which was dated January 13, 2004. Ronald R. Madson signed the affidavit. Although much of the affidavit deals with a discussion of finances, the court does not find enough information in that affidavit to disqualify Ronald Madson. The combination of those affidavits, as mentioned above, would not be enough to disqualify Ronald R. Madson.

10. The Court finds that it is the job of Petitioner to show that there is a justifiable reason to exclude Ronald R. Madson as counsel for the Respondent. The Court must determine if Ronald R.

Madson is a witness, if he has made himself a witness, or if Ronald R. Madson's credibility been placed at issue. If that occurs then Ronald R. Madson may be disqualified as counsel for Respondent. In that regard, Ronald R. Madson has filed a document with the court on December 22, 2006 entitled Response to Affidavit of Petitioner, in Re: Motion To Disqualify Respondent's Counsel and Request for Attorney's Fees and Costs.

10. The Court finds that the document was well written, for the most part, and very helpful. Then, there is a section/heading in the document, which was drafted and signed by Ronald R. Madson, entitled "Responses to Specific Allegations". The Court finds that in the document, everything up to that point, if that is all that were submitted, would not be enough to disqualify Ronald R. Madson.

11. However, Ronald R. Madson states, in the section entitled "Response to Specific Allegations" as follows: "For clarity sake and for purposes of this Motion to disqualify I affirm that I have had no contact, made no effort to contact, had no communication with the Petitioner since January 14, 2004 (a full year before the divorce and nearly three years ago), and other than being in court and pleading which are before the court."

12. The Court finds that statement is clearly a statement made by Ronald R. Madson, who is the paternal grandfather of the minor child and that the statement was made on the record, for the court to consider, in determining a ruling on this motion. It was signed by Mr. Ronald R. Madson and not supported by an affidavit from the Respondent. The father/Respondent in this matter did not submit a signed affidavit to the Court on December 22, 2007 in response to the Motion of the Petitioner.

13. Ronald R. Madson submitted the document after the court had clearly indicated, at the last hearing, the court would be looking at averments of counsel in order to determine if Rule 3.7 was to be applied by the court in this matter.

14. Then, further on in the same document, under the heading "Two Post Divorce Allegations", (the court notes the pages are not numbered) at the bottom of a page following that heading, where there is a number 2, Ronald R. Madson states "Working backwards, there is an allegation of my following the Petitioner on December 24, 2005. I did not. I was home that day and frankly, I have no idea where the Petitioner was or even if she was in town that day. Again, this is pure fabrication. I have no interest in having any contact now or in the future with the Petitioner and in fact our of pure fear we have to try to avoid any contact."

15. The Court finds it interesting that Ronald R. Madson used the term "we" to detail his allegation that he and the Respondent had to avoid contact with the Petitioner.

16. Then, in the same document, under the heading "Incidents Alleged A Year or More Before The Divorce", Ronald R. Madson states, on the next page, beginning of first full paragraph:

"Later Ms. Blakelock stated the kicking in the door incident was December 3rd and she had the police report right in front of her. Where was that report? Where is that incident in the Petitioner's affidavit."

17. The Court finds that statement to be a statement of an attorney who is advocating for his client. However, Ronald R. Madson then jumps and changes his status to that of a witness and states: "The closest may be when I changed the locks on the apartment my son was staying at which apartment I owned and with his permission and for obvious reasons. Id did not even come in through the door, let alone kick it."

18. Paragraph 7, written by Ronald R. Madson, goes on to state: "I came to the apartment, met with the police and Petitioner left. I stayed the whole night with my son and did not go to her boyfriend's apartment and I am certain if they imagined I did go there, another call to the police would have

occurred. For background look at the police report for that night and note what the police officer said."

19. On the following page, at paragraph 10, Ronald R. Madson states: "I categorically deny ever threatening the Petitioner with litigation".

20. If you go through the pleading as filed by Ronald R. Madson, it is clear that Ronald R. Madson jumps back and forth, from that of a witness, to that of an advocate for his son, the Respondent. That is the very actions and activities that Rule 3.7 is intended to prevent and stop.

21. In addition, even at the hearing on January 3, 2007 before the Court, during the process of oral arguments, Ronald R. Madson made a point of stating and informing the court, that he, (Ronald R. Madson), had been a member of the Nevada State Bar, where he had practiced for 20 years. Ronald R. Madson informed the Court that he had never had a complaint filed against him, while practicing in Nevada.

22. Clearly, these statements were an attempt to bolster Ronald R. Madson's credibility with the court.

23. The Court finds specifically that the trial court may be very interested in finding out whether or not Petitioner is telling the truth.

24. The Court finds it will be critical to this case to determine Petitioner's credibility.

25. The Court finds that Ronald R. Madson's testimony, in regard to Petitioner's credibility, may be critical.

26. The Court cannot determine at this time which party is telling the truth - Ronald R. Madson, or the Petitioner.

27. The Court finds that it may be critical to the minor child for the trial court to make such a determination. The Court finds that the documents supplied by Ronald R. Madson, in the Response to Affidavit of Petitioner in Re: Motion to Disqualify Respondent's Counsel and Request for Attorney's Fees and Costs, filed on December 22, 2006, clearly violates the purpose of the Rule 3.7 and also forces the Court to try to determine if Ronald R. Madson is an advocate, or a witness.

28. For all the foregoing reasons, Ronald R. Madson is hereby disqualified from appearing in court on behalf of the Respondent. Ronald R. Madson is hereby disqualified from taking depositions in this case. Ronald R. Madson is hereby disqualified from appearing at trial as anything but a witness.

29. Ronald R. Madson shall be permitted to assist the Respondent in completing research and he may be permitted to

assist the Respondent, or his counsel, in the preparation of documents.

Dated and signed this 2 day of ~~January~~ Feb 2007.

BY THE COURT:

Commissioner Thomas Patton

District Court Judge

By Attorney for Petitioner

STAMP USED AT DIRECTION OF JUDGE

ADDENDUM D

Relevant Statutes and Rules

Utah Code Annotated Section 78-2a-3(2)(h)

Utah Rules Professional Conduct 3.7

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court 1988

78-2a 3 Court of Appeals jurisdiction

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary

(a) to carry into effect its judgments, orders and decrees, or

(b) in aid of its jurisdiction

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer,

(b) appeals from the district court review of

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies, and

(ii) a challenge to agency action under Section 63 46a 12 1,

(c) appeals from the juvenile courts,

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony,

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony,

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony,

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony,

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity,

(i) appeals from the Utah Military Court, and

(j) cases transferred to the Court of Appeals from the Supreme Court

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings 2001

78-2a-4. Review of actions by Supreme Court

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court 1986

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state 1986

78-2a-6 Appellate Mediation Office — Protected records and information — Governmental immunity.

(1) Unless a more restrictive rule of court is adopted pursuant to Subsection 63 2-201(3)(b), information and records relating to any matter on appeal received or generated by the Chief Appellate Mediator or other staff of the Appellate Mediation Office as a result of any party's participation or lack of participation in the settlement program shall be maintained as protected records pursuant to Subsections 63 2 304(16), (17), (18), and (33)

(2) In addition to the access restrictions on protected records provided in Section 63-2-202, the information and records may not be disclosed to judges, staff or employees of any court of this state

(3) The Chief Appellate Mediator may disclose statistical and other demographic information as may be necessary and useful to report on the status and to allow supervision and oversight of the Appellate Mediation Office

(4) When acting as mediators, the Chief Appellate Mediator and other professional staff of the Appellate Mediation Office shall be immune from liability pursuant to Title 63, Chapter 30, Utah Governmental Immunity Act

(5) Pursuant to Utah Constitution, Article VIII, Section 4, the Supreme Court may exercise overall supervision of the Appellate Mediation Office as part of the appellate process 2002

CHAPTER 3

DISTRICT COURTS

Section

78-3 1 to 78 3-2 Repealed

78-3-3 Term of judges — Vacancy

78-3-4 Jurisdiction — Appeals

78-3-5 Repealed

78 3-6 Terms — Minimum of once quarterly

78-3-7 to 78 3-11 Repealed

78-3-11 5 State District Court Administrative System

78-3-12 Repealed

78-3-12 5 Costs of system

78-3-13 Repealed

78-3 13 4 Transfer of court operating responsibilities — Facilities — Staff — Budget

78 3 13 5, 78-3-14 Repealed

78-3 14 2 District court case management

78-3 14 5 Allocation of district court fees and forfeitures

78-3-15 to 78 3-17 Repealed

78-3-17 5 Application of savings accruing to counties

78-3-18 Judicial Administration Act — Short title

78-3 19 Purpose of act

78 3 20 Definitions

78-3 21 Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports

78 3 21 5 Data bases for judicial boards

78-3-22 Presiding officer — Compensation — Duties

78 3 23 Administrator of the courts — Appointment — Qualifications — Salary

78-3-24 Court administrator — Powers, duties, and responsibilities

78-3-25 Assistants for administrator of the courts — Appointment of trial court executives

78 3-26 Courts to provide information and statistical data to administrator of the courts

78 3 27 Annual judicial conference

78-3 28 Repealed

78-3-29 Presiding judge — Associate presiding judge — Election — Term — Compensation — Powers — Duties

78 3 30 Duties of the clerk of the district court

78-3-31 Court commissioners — Qualifications — Appointment — Functions governed by rule

78-3-1 to 78-3-2. Repealed 1971, 1981, 1988

Rule 3.7. Lawyer as Witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(a)(1) the testimony relates to an uncontested issue;

(a)(2) the testimony relates to the nature and value of legal services rendered in the case; or

(a)(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] 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. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (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 Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer= s disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client= s informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client= s consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying

lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

ADDENDUM E

Case Law

D.J. Investment Group, LLC v. Dae/Westbrook LLC, 113 P.3d 525 (Utah App. 2005)

D.J. Investment Group, LLC v. Dae/Westbrook LLC, 147 P.3d 414 (Utah 2006)

Zions First National Bank v. Barbara Jensen Interior, Inc., 781 P.2d 478 (Utah App. 1989)

Court of Appeals of Utah.
D.J. INVESTMENT GROUP, L.L.C., a Utah limited liability company, Plaintiff and Appellee,
v.
DAE/WESTBROOK, L.L.C., a Delaware limited liability company; Draper City, a municipal corporation; and John Does 1 to 15, Defendant and Appellant.
No. 20040340-CA.

May 5, 2005.

Background: One limited liability company (L.L.C.) entered settlement negotiations with another L.L.C. which resulted in dismissal of prior suit. Plaintiff L.L.C. brought suit three years after defendant L.L.C. rescinded the agreement. Plaintiff sought to disqualify defendant's attorney, who participated in the original settlement agreement, on grounds he was a necessary witness. The Fourth District Court, Provo Department, Lynn W. Davis, J., denied the motion, and plaintiff filed interlocutory appeal.

Holding: The Court of Appeals, Billings, P.J., held that plaintiff was not entitled to disqualification of defendant's attorney.
Affirmed.

West Headnotes

[1] Appeal and Error ⚷949
30k949 Most Cited Cases
The standard of review generally for decisions relating to attorney disqualification is abuse of discretion, unless the court is called upon to resolve solely a legal or ethical issue.

[2] Appeal and Error ⚷949
30k949 Most Cited Cases
Where the trial court's ruling denying disqualification of an attorney incorporates both questions of fact and law, reviewing court applies an abuse of discretion standard.

[3] Attorney and Client ⚷22
45k22 Most Cited Cases
In determining whether an attorney should be disqualified on the grounds that he was a likely necessary witness, the trial court is required to balance the client's interests with those of the opposing party; however, even if there is risk of prejudice to the opposing party, due regard must be given to the effect of disqualification on the lawyer's client. Rules of Prof.Conduct, Rule 3.7.

[4] Attorney and Client ⚷22
45k22 Most Cited Cases
Plaintiff was not entitled to disqualification of defendant's attorney, on grounds that the attorney, who negotiated on behalf of defendant in reaching settlement, which was later rescinded by defendant and resulted in underlying lawsuit, was likely a necessary witness in the lawsuit; plaintiff failed to timely file its motion and it knew that attorney participated in negotiations at time of filing suit, lawsuit was filed three years prior to filing motion, since filing the parties had vigorously litigated a number of issued and had engaged in a substantial amount of work, and defendant would face substantial hardship if forced to retain new counsel. Rules of Prof.Conduct, Rule 3.7.

[5] Attorney and Client ⚷21.20
45k21.20 Most Cited Cases
A motion to disqualify counsel is untimely when it is not immediately filed and diligently pursued as soon as the party becomes aware of the basis for disqualification.

***1022** Richard W. Casey, Steven G. Crockett, and Evelyn J. Furse, Bendinger, Crockett, Peterson, Greenwo, Salt Lake City, for Appellant.

Denver C. Snuffer Jr., Nelson, Snuffer, Dahle & Poulsen, Sandy, for Appellee.

Before BILLINGS, P.J., BENCH, Associate P.J., and ORME, J.

MEMORANDUM DECISION
BILLINGS, Presiding Judge:

¶ 1 Appellant DAE/Westbrook, L.L.C. (Westbrook) [FN1] argues that the trial court erred by denying its

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Motion to Disqualify Denver C. Snuffer Jr. and the law firm Nelson, Snuffer, Dahle & Poulsen, P.C. (collectively Snuffer). We affirm.

FN1. Since filing its Motion to Disqualify, Westbrook has changed its name to Sun-Crest, L.L.C.

***1023** ¶ 2 On November 16, 2000, the parties entered into a settlement agreement, which dismissed D.J. Investment Group, L.L.C.'s (D.J.) lawsuit against Westbrook. Snuffer, attorney for D.J., was involved in the negotiations leading to the settlement agreement. On May 7, 2001, D.J. rescinded the settlement agreement and filed suit against Westbrook. Nearly three years later, Westbrook filed a Motion to Disqualify Snuffer, relying primarily on Utah Rule of Professional Conduct 3.7. The trial court denied the Motion to Disqualify, and Westbrook subsequently filed this interlocutory appeal.

[1][2] ¶ 3 The standard of review generally for decisions relating to disqualification is abuse of discretion, unless the court is called upon to resolve solely a legal or ethical issue. *See Houghton v. Department of Health*, 962 P.2d 58, 61 (Utah 1998) (holding that because no issues of fact were presented to the trial court, "to the extent this [c]ourt has a special interest in administering the law governing attorney ethical rules, a trial court's discretion is limited"). In contrast, "[w]here courts are called upon to resolve numerous factual disputes, and the quantity of less tangible factors implicating the trial court's decision is large, a trial court is naturally in a better position to consider and weigh all those circumstances in their application to the legal standard at issue." *Id.* (citing *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994)). The trial court's ruling incorporates both questions of fact and law, and thus we apply an abuse of discretion standard. *See Margulies v. Upchurch*, 696 P.2d 1195, 1200 (Utah 1985) (where the trial court's findings involve "mixed questions of fact and law .... the proper standard of review ... is the abuse of discretion standard").

[3] ¶ 4 Westbrook argues that the trial court erred by finding that Snuffer's disqualification would work substantial hardship on D.J. and by not balancing the interests of the parties. [FN2] According to rule 3.7, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where ... [d]isqualification of the lawyer *would work substantial hardship on the client*." Utah R. Prof'l Conduct 3.7(a) (emphasis added). In determining whether an attorney should be disqualified on the grounds contemplated by rule 3.7, the trial court is required to balance the client's interests with those of the opposing party. *See* Utah R. Prof'l Conduct 3.7 cmt. However, even if there is risk of prejudice to the opposing party, "due regard must be given to the effect of disqualification on the *lawyer's client*." *Id.* (emphasis added). [FN3]

FN2. Westbrook also argues that the trial court erred by failing to determine whether Snuffer was a necessary witness. However, it was not essential that the trial court determine whether Snuffer was a "necessary witness" under rule 3.7 of the Utah Rules of Professional Conduct because, even if it had, the hardship exception would have compelled the same result: Snuffer's disqualification would force undue hardship upon D.J.

FN3. When issues of professional discretion arise, the Utah Rules of Professional Conduct call for self-governance. In particular, the rules state,

Violation of a[r]ule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached. The [r]ules 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 [r]ules can be subverted when they are invoked by opposing parties as procedural weapons.

Utah R. Prof'l Conduct Scope.

[4] ¶ 5 Here, the trial court weighed the interests of the parties and found that D.J. would face substantial hardship in both time and money if forced to hire new counsel at such a late stage of discovery. Specifically, the court noted that

[t]he case at bar was filed in May of 2001, almost

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three years ago, and since that time the parties have vigorously litigated an extraordinary number of legal issues. The [c]ourt also notes that the parties have conducted a significant amount of discovery in connection with this litigation. Most, if not all, of the key witnesses have been deposed and written discovery has been sent out and answered by both parties. All things considered, the parties have engaged in a substantial amount of work. Indeed, the [c]ourt file now fills seven exceptionally thick folders and addresses some very complex legal issues. ***1024** The [c]lerk of the [c]ourt has just opened the eighth file. Under these circumstances, the [c]ourt doubts another attorney could be brought up to speed in this matter and recognizes that such an effort would require D.J. to expend an exorbitant amount of time and money.

[5] ¶ 6 The trial court also found that Westbrook filed its motion in an untimely manner. We agree. A motion to disqualify counsel is untimely when it is not "immediately filed and *diligently pursued as soon as the party becomes aware* of the basis for disqualification." *Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 480-81 (Utah Ct.App.1989) (emphasis added) (holding that the defendants' motion to disqualify counsel was untimely because it was filed three months after it learned of the representation, and one day before the opponent's motion to compel settlement was scheduled for hearing). Here the parties were aware that Snuffer would likely be a necessary witness at least three months prior to filing their motion, if not earlier. [FN4] Thus, had Westbrook timely filed its motion, it could have significantly reduced D.J.'s costs of retaining and bringing new counsel up to speed.

FN4. At the time the underlying lawsuit was filed, both parties were aware of Snuffer's participation in the settlement agreement. Likewise, the parties were aware of Snuffer's participation from the arguments presented for and against D.J.'s Motion for Summary Judgment. Moreover, even if Westbrook did not believe that Snuffer was a necessary witness until the trial court indicated parole evidence would be taken in regard to the settlement agreement, Westbrook failed to file its Motion to Disqualify until three months later.

¶ 7 Because D.J. would face substantial hardship if forced to retain new counsel at this late stage and Westbrook's motion to disqualify Snuffer was untimely, we hold that the trial court properly denied Westbrook's motion. Accordingly, we affirm.

¶ 8 WE CONCUR: RUSSELL W. BENCH, Associate Presiding Judge, and GREGORY K. ORME, Judge.

113 P.3d 1022, 525 Utah Adv. Rep. 5, 2007 UT App 207

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H
D.J. Investment Group, L.L.C. v. DAE/Westbrook, L.L.C.
Utah,2006.

Supreme Court of Utah.
D.J. INVESTMENT GROUP, L.L.C., a Utah limited liability company, Plaintiff and Respondent,
v.
DAE/WESTBROOK, L.L.C., a Delaware limited liability company; Draper City, a municipal corporation; John Does 1 through 15, Defendants and Petitioners.
No. 20050495.

Oct. 20, 2006.

Background: In action brought by plaintiff limited liability company (LLC) against defendant LLC for trespass, the parties negotiated a settlement, and plaintiff dismissed the suit. Later, plaintiff brought action seeking to rescind the settlement agreement and to assert multiple claims against defendant. Defendant brought motion to disqualify plaintiff's counsel under advocate-witness rule. The Fourth District Court, Provo Department, Lynn W. Davis, J., denied the motion, and plaintiff filed interlocutory appeal. The Court of Appeals, 113 P.3d 1022, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Durrant, J., held that:

(1) trial court was not required to expressly consider interests of tribunal, because those interests substantially overlapped with parties' interests;

(2) trial court's determination was entitled to broad deference; and

(3) trial court did not abuse its discretion in determining that disqualification of counsel would cause substantial hardship, as exception to advocate-witness rule.

Affirmed.
West Headnotes
[1] Certiorari 73 ⚷64(1)

73 Certiorari
73II Proceedings and Determination
73k63 Review
73k64 Scope and Extent in General
73k64(1) k. In General. Most Cited Cases
On certiorari, the Supreme Court reviews for correctness the decision of the Court of Appeals, not the decision of the District Court.

[2] Attorney and Client 45 ⚷22

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k22 k. Acting in Different Capacities; Counsel as Witness. Most Cited Cases
The substantial hardship exception to the general rule that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness requires a balancing of the hardship that a lawyer's disqualification would cause to the lawyer's client against the prejudice that the opposing party would suffer if the lawyer were to act as an advocate-witness at trial, and such balancing also calls for consideration of the interests of the tribunal. Rules of Prof.Conduct, Rule 3.7(a)(3) & comment (2004).

[3] Courts 106 ⚷85(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business

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106k85 Operation and Effect of Rules
106k85(2) k. Construction and Application of Rules in General. Most Cited Cases
While advisory committee comments to rules adopted by the Supreme Court are not authoritative, the Supreme Court gives them great weight.

[4] Courts 106 ⚷85(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k85 Operation and Effect of Rules
106k85(2) k. Construction and Application of Rules in General. Most Cited Cases
The Supreme Court generally considers advisory committee comments to rules adopted by the Supreme Court as a fairly reliable indicator of the Supreme Court's intent in adopting the rules because the comments to the rules were available to the Supreme Court at the time of their adoption.

[5] Attorney and Client 45 ⚷22

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k22 k. Acting in Different Capacities; Counsel as Witness. Most Cited Cases
Interests of tribunal, regarding disqualification of counsel for plaintiff limited liability company (LLC) under advocate-witness rule, substantially overlapped with interests of parties, and, thus, trial court was not required to expressly consider interests of tribunal when applying balancing test for substantial hardship exception to advocate-witness rule, in action in which plaintiff LLC sought to rescind settlement agreement with defendant LLC in plaintiff's trespass action and defendant sought to disqualify plaintiff's counsel as necessary witness regarding meaning of ambiguous provision of settlement agreement; tribunal's interests overlapped with defendant's interest in avoiding jury confusion and plaintiff's interest in avoiding difficulties associated with bringing new counsel up to speed late in a case. Rules of Prof.Conduct, Rule 3.7(a)(3) & comment (2004).

[6] Appeal and Error 30 ⚷949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases
The mixed question of fact and law, regarding whether the district court appropriately applied, to the facts before it, the substantial hardship exception to the advocate-witness rule, is reviewed under a deferential abuse of discretion standard, with the appellate court giving broad deference to the trial court's determination. Rules of Prof.Conduct, Rule 3.7(a)(3) & comment.

[7] Appeal and Error 30 ⚷842(9)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(9) k. Mixed Questions of Law and Fact. Most Cited Cases
Appellate court selects standard of review, for mixed question of fact and law, from a spectrum of deference, by weighing the following factors: (1) degree of variety and complexity in facts to which legal rule is to be applied; (2) degree to which trial court's application of legal rule relies on "facts" observed by trial judge such as witness's appearance and demeanor, which are relevant to application of the law but which cannot be adequately reflected in record available to appellate courts; and (3) other policy reasons that weigh for or against granting discretion to trial courts.

[8] Trial 388 ⚷395(5)

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k395 Sufficiency in General
388k395(5) k. Ultimate or Evidentiary Facts. Most Cited Cases

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Where written findings of fact are required, a trial court need not resolve every conflicting evidentiary issue; rather, the trial court's factual findings must be articulated with sufficient detail so that the basis of the ultimate conclusion can be understood.

[9] Attorney and Client 45 ⚷22

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k22 k. Acting in Different Capacities; Counsel as Witness. Most Cited Cases
Trial court did not abuse its discretion in determining that disqualification of counsel for plaintiff limited liability company (LLC) would cause substantial hardship, as exception to advocate-witness rule, in new action in which plaintiff LLC sought to rescind settlement agreement with defendant LLC in plaintiff's trespass action and defendant sought to disqualify plaintiff's counsel as necessary witness regarding meaning of ambiguous provision of settlement agreement; case involved complex legal issues, parties had conducted significant amount of discovery in two and one-half years since new action had been filed, bringing new counsel up to speed would be expensive to plaintiff and would cause delay, and defendant could have reasonably foreseen that plaintiff's counsel would be necessary witness yet defendant's disqualification motion was untimely. Rules of Prof.Conduct, Rule 3.7(a)(3) & comment (2004).

[10] Attorney and Client 45 ⚷21.20

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k21.20 k. Disqualification Proceedings; Standing. Most Cited Cases
A delay in filing a motion to disqualify counsel or in notifying opposing counsel that a motion to disqualify is likely raises concerns that the party who delays may be using the motion as a manipulative litigation tactic. Rules of Prof.Conduct, Preamble (Scope).

[11] Attorney and Client 45 ⚷22

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k22 k. Acting in Different Capacities; Counsel as Witness. Most Cited Cases
The timeliness of the motion to disqualify counsel is relevant to the balancing test for the substantial hardship exception to the advocate-witness rule. Rules of Prof.Conduct, Rule 3.7(a)(3) & comment.

[12] Attorney and Client 45 ⚷22

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k22 k. Acting in Different Capacities; Counsel as Witness. Most Cited Cases
Substantial hardship exception to advocate-witness rule does not require potential hardship to client to be unique or of a nonmonetary nature. Rules of Prof.Conduct, Rule 3.7(a)(3) & comment.

***416** Denver C. Snuffer, Jr., Sandy, for plaintiff.
Richard W. Casey, John H. Bogart, Evelyn J. Furse, Nicole A. Skolout, Salt Lake City, for defendants.

On Certiorari to the Utah Court of Appeals
DURRANT, Justice:

¶ 1Rule 3.7(a) of the Utah Rules of Professional Conduct generally prohibits a lawyer from "act[ing] as [an] advocate at a trial in which the lawyer is likely to be a necessary witness," but provides an exception where disqualification of the lawyer would "work substantial hardship on the client." [FN1] In this interlocutory appeal, we granted certiorari on a single question incorporating two issues: (1) whether the substantial hardship exception requires courts to balance the interests of the client with the interests of the opposing party and the tribunal, and (2) whether the substantial hardship exception was properly applied in this case.

FN1. Utah R. Prof'l Conduct 3.7(a).

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¶ 2 Defendant DAE/Westbrook, L.L.C., now known as SunCrest, L.L.C. ("SunCrest") moved under rule 3.7(a) to disqualify lawyer Denver C. Snuffer from representing plaintiff D.J. Investment Group, L.L.C. ("D.J.") at trial, alleging that Snuffer's actions have made him a necessary witness in this case. The district court found that the disqualification of Snuffer would cause substantial hardship to D.J. and denied the motion. SunCrest filed an interlocutory appeal, and the court of appeals affirmed. SunCrest argues that the court of appeals applied the wrong legal test for substantial hardship and that it erred in affirming because the district court did not conduct an appropriate balancing of interests in determining that Snuffer's disqualification would cause substantial hardship to D.J. We conclude that the substantial hardship exception requires a balancing of interests consistent with the advisory committee's comment to rule 3.7, that an appropriate balancing was conducted, and that the court of appeals correctly held that the district court did not abuse its discretion when it found that the substantial hardship exception applied to the facts of this case. We therefore affirm.

¶ 3 Although the present lawsuit between neighboring landowners D.J. and SunCrest has a complex factual history, we discuss only those facts necessary to consider SunCrest's appeal from the denial of its motion to disqualify opposing counsel Denver Snuffer. SunCrest seeks to disqualify Snuffer and his firm, Nelson, Snuffer, Dahle & Poulsen, P.C., from representing D.J. as an advocate at trial based on Snuffer's involvement in a November 16, 2000 settlement agreement ("the Agreement") between SunCrest and D.J. that is now a subject of dispute in the present case.

¶ 4 The Agreement was intended to resolve an October 2000 lawsuit brought by D.J. against SunCrest for an alleged trespass. In provision 14 of the Agreement, SunCrest promised to allow D.J. to use a "Southerly Roadway" that would be built across property belonging to third party Micron Technology, Inc. ("Micron"). In return, D.J. agreed to dismiss its prior lawsuit and to allow SunCrest to use an access road that SunCrest had built over D.J.'s property. Snuffer acted as D.J.'s lawyer at all times during these events and has continued to represent D.J. through the present proceedings. The extent of his involvement in negotiating the November 2000 Agreement is disputed.

¶ 5 A short time after the parties signed the Agreement, the dispute between the parties was rekindled. According to the district court, " [d]espite [SunCrest's] representations that it had secured the necessary easements to construct the Southerly Roadway, the rights to these easements may not have been obtained and [SunCrest] is now preparing to build the Southerly Highway along a different route that does not provide D.J. with [its desired] access to State Road 92." On May 7, 2001, D.J. filed the present lawsuit. It seeks to rescind the Agreement and brings multiple claims against SunCrest.

¶ 6 On February 19, 2004, over two and one-half years after D.J. filed its complaint, SunCrest moved pursuant to rule 3.7 of the Utah Rules of Professional Conduct to disqualify Snuffer from representing D.J. at trial, arguing that Snuffer is a necessary witness in the case. SunCrest alleges that Snuffer played an important role in drafting provision 14 of the Agreement regarding the Southerly Highway and that his testimony regarding the intent of the parties will be crucial. In turn, D.J. argues that Snuffer was not present when provision 14 was drafted and disputes Snuffer's value as a witness. The district court determined that Snuffer was involved in many of the negotiation sessions regarding the November 2000 Settlement Agreement and that he advised David Mast, the manager and primary member of D.J., on matters related to the negotiations, but the court did not resolve the dispute of fact regarding Snuffer's involvement in negotiating and drafting provision 14.

¶ 7 Upon hearing oral arguments on SunCrest's motion to disqualify Snuffer, the district court issued a written ruling declining to disqualify Snuffer and his firm from representing D.J. at trial. It reasoned that it need not determine whether

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Snuffer was likely to be a necessary witness because his disqualification would cause substantial hardship to D.J. and thus fell within the exception provided by rule 3.7(a)(3). After noting that it had weighed the interests of the two parties in accordance with the comments to rule 3.7, the district court stated,

[T]he parties have conducted a significant amount of discovery in connection with this litigation. Most, if not all, of the key witnesses have been deposed and written discovery has been sent out and answered by both parties. All things considered, the parties have engaged in a substantial amount of work. Indeed, the Court file now fills seven exceptionally thick folders and addresses some very complex legal issues. The Clerk of the Court has just opened the eighth file. Under these circumstances, the Court doubts that another attorney could be brought up to speed in this matter and recognizes that such an effort would require D.J. to expend an exorbitant amount of time and money.

The district court continued, "Furthermore, this court believes that [SunCrest] could have significantly reduced the costs of bringing new counsel up to speed if [SunCrest] had filed its Motion to Disqualify Denver ***418** Snuffer in a more timely fashion." It then devoted four paragraphs to the timeliness of SunCrest's motion to disqualify. Ultimately, the district court concluded, "Because disqualifying Denver Snuffer from the case at bar would result in significant financial and tactical prejudice to D.J., and in light of [SunCrest's] untimely filing of its Motion to Disqualify, this Court rejects [SunCrest's] motion and declines to disqualify Denver Snuffer from this litigation."

¶ 8 On the issue of timeliness, SunCrest has asserted that its motion was timely because the district court did not rule that parol evidence of the parties' intent regarding provision 14 would be necessary until November 17, 2003, when the district court denied D.J.'s motion for summary judgment. SunCrest explains that, prior to that time, it believed that the terms of provision 14 were unambiguous and that there would therefore be no need for Snuffer's testimony regarding the parties' intent. But the district court found that, at minimum, SunCrest's argument established that there was a three month delay before it filed the motion to disqualify. Further, the district court found that SunCrest was placed on notice that D.J. intended to rely on parol evidence when D.J. filed its motion for summary judgment on December 20, 2002, and that D.J.'s reliance on parol evidence " became abundantly clear" at oral argument on August 27, 2003. It also noted that "[SunCrest's] own pleadings intimate that [SunCrest] has ' reasonably foreseen,' since the initiation of this litigation[,] that Snuffer might be called as a witness in the case at bar."

¶ 9 SunCrest filed an interlocutory appeal of the denial of its motion to disqualify Snuffer with the court of appeals, arguing that the district court erred in not properly balancing the interests of the parties. [FN2] The court of appeals affirmed, holding that the district court applied the correct balancing standard and did not abuse its discretion in deciding that the interests weighed against disqualifying Snuffer.[FN3] It also affirmed on the separate ground of untimeliness.[FN4] We granted certiorari to decide whether the court of appeals properly interpreted and applied rule 3.7(a)(3)'s substantial hardship exception. We have jurisdiction pursuant to Utah Code section 78-2-2(3)(j), (5).

FN2. *D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C.,* 2005 UT App 207, ¶ 4, 113 P.3d 1022.

FN3. *Id.* ¶¶ 3, 5, 7.

FN4. *Id.* ¶¶ 6-7.

[1] ¶ 10 On certiorari, we review for correctness the decision of the court of appeals, not the decision of the district court.[FN5] In this case, we review for correctness the court of appeals' interpretation of rule 3.7(a) as well as the court of appeals' selection of the standard of review and its application of that standard to the district court's substantial hardship analysis.

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FN5. *State v. Brake,* 2004 UT 95, ¶ 11, 103 P.3d 699.

¶ 11Rule 3.7(a) of the Utah Rules of Professional Conduct states, "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: ... (a)(3) disqualification of the lawyer would work substantial hardship on the client." SunCrest argues that Snuffer is a necessary witness who should be disqualified in accordance with rule 3.7(a) and that we should therefore reverse the decision of the court of appeals. It asserts that the court of appeals did not correctly review the district court's conclusion that Snuffer's disqualification would cause substantial hardship to D.J. because the court of appeals did not require proper consideration of SunCrest's interests and the interests of the district court. In addressing SunCrest's arguments, we consider, first, whether the substantial hardship exception of rule 3.7(a)(3) requires courts to balance the interests of the client with the interests of the opposing party and tribunal, and, second, whether the court of appeals properly affirmed the district court's conclusion that the substantial hardship exception applies in this case.

I. THE SUBSTANTIAL HARDSHIP EXCEPTION REQUIRES A BALANCING OF INTERESTS CONSISTENT WITH THE ADVISORY COMMITTEE'S COMMENT TO

[2] ¶ 12 We initially hold that both the court of appeals and the district court were correct in concluding that the substantial hardship exception of rule 3.7(a)(3) requires a balancing of the hardship that a lawyer's disqualification would cause to the lawyer's client against the prejudice that the opposing party would suffer if the lawyer were to act as an advocate-witness at trial. In addition, we recognize that new revisions to the advisory committee's note to rule 3.7 have clarified that the balancing contemplated by the substantial hardship exception also calls for consideration of the interests of the tribunal, but we conclude that these revisions do not undermine the balancing of interests conducted by the district court in this case.

¶ 13Rule 3.7(a)(3) provides an exception to the advocate-witness prohibition where " disqualification of the lawyer would work substantial hardship on the client," but its plain language does not indicate how much hardship may be imposed on a client before the hardship becomes "substantial." [FN6] Although the term "substantial" is, by nature, inexact and leaves the district court significant discretion, the advisory committee's comment to rule 3.7 provides some factors that the district court should consider before deciding whether the hardship in a case is "substantial." [FN7] As amended on November 1, 2005, the advisory committee's note to rule 3.7 states that the substantial hardship exception contained in rule 3.7(a)(3)"recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party." [FN8] The comment further explains,

FN6. Utah R. Prof'l Conduct 3.7(a)(3).

FN7. Utah R. Prof'l Conduct 3.7 advisory committee's comment.

FN8. *Id.*

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 a 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.[FN9]

FN9. *Id.*

[3][4] ¶ 14 While advisory committee comments to rules adopted by this court are not "authoritative," we give them "great weight." [FN10] We generally

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consider the comments a fairly reliable indicator of our intent in adopting the rules because the comments to the rules were available to this court at the time of their adoption.[FN11] In this particular case, where revisions to the advisory committee's comment to rule 3.7 were recently approved by this court, the advisory committee's comment carries even greater weight. We therefore conclude that, when determining whether the hardship to a client caused by disqualification of the client's lawyer is " substantial," and thus provides an exception to rule 3.7(a)(3)'s prohibition against acting in the dual role of advocate-witness, the courts should conduct a balancing of interests that is consistent with the comment to rule 3.7.

FN10. *Burns v. State,* 2006 UT 14, ¶ 18 n. 6, 133 P.3d 370 (discussing the weight of the advisory committee's notes to the Utah Rules of Evidence); *see also Featherstone v. Schaerrer,* 2001 UT 86, ¶ 23, 34 P.3d 194 (citing "the official comment" to rule 4.2 of the Utah Rules of Professional Conduct).

FN11. *Burns,* 2006 UT 14, ¶ 18 n. 6, 133 P.3d 370.

[5] ¶ 15 Our analysis thus far provides a simple prospective rule for courts applying the substantial hardship exception. However, for the purposes of this case, which was decided before our November 1, 2005 amendments to the comment, we must also consider whether the amendments indicate that the district court applied the wrong legal standard. Pursuant to the prior version of the advisory committee's comment to rule 3.7 of ***420** the Utah Rules of Professional Conduct,[FN12] the district court expressly balanced the interests of the client against the interests of the opposing party to determine whether the hardship to the client was " substantial" but did not discuss the interests of the tribunal.[FN13] SunCrest argues that the district court's omission of the tribunal's interest was a legal error. We disagree.

FN12. *See* Utah R. Prof'l. Conduct 3.7 advisory committee's comment (2005) (amended Nov. 1, 2005) ("[P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether 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.").

FN13. *D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C.,* 2005 UT App 207, ¶ 4, 113 P.3d 1022.

¶ 16 We view the addition of the tribunal's interest as a refinement granting additional discretion to the tribunal in conducting the substantial hardship balancing. Our November 2005 amendments to the advisory committee's comment to rule 3.7 leave the core balancing test intact and do not add any new factors. Instead, it indicates that the factors that are relevant to whether the opposing party is likely to suffer prejudice are also relevant to determining whether the "tribunal is likely to be misled." [FN14] Under the revised comment, there is significant overlap between the interests of the tribunal and the interests of the parties. For example, in this case, SunCrest argues that the district court has an interest in avoiding the frequent intervention needed to remedy the jury confusion that naturally results when a lawyer acts as both an advocate and a witness in the same trial. But we note that the district court may also have an interest in avoiding the delay and confusion that results when new counsel is introduced late into a complex case. These interests overlap with SunCrest's interest in avoiding jury confusion and with D.J.'s interest in avoiding the difficulties associated with bringing new counsel up to speed late in a case. Ultimately, the revised comment to rule 3.7 gives the district

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court the power to decide which interests are stronger and to factor its own interests into the balancing.

FN14. *See* Utah R. Prof'l Conduct 3.7 advisory committee's comment.

¶ 17 In sum, we recognize that separate consideration of the interests of the tribunal under the revised advisory committee's comment to rule 3.7 may more clearly account for the broader impact of a lawyer's involvement or disqualification. But because of the substantial overlap between the interests of the court and the parties and the revised comment's effect of resting more discretion in the trial court, we conclude that express consideration of the tribunal's interest is not indispensable to the balancing in this case. Given that the district court applied the substantial hardship analysis described by the comment to rule 3.7 prior to the 2005 amendments, it did not err by balancing only the interests of the parties.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT DISQUALIFICATION OF SNUFFER WOULD CAUSE SUBSTANTIAL HARDSHIP TO D.J.

¶ 18 Having determined that the court of appeals correctly interpreted the substantial hardship exception of rule 3.7, we now proceed to answer the second part of the question on certiorari; namely, whether the court of appeals properly upheld the district court's application of rule 3.7(a)'s substantial hardship exception. We hold that it did. Our analysis on this point requires two steps. We will first consider whether the court of appeals appropriately selected the deferential abuse of discretion standard of review that it applied to the district court's decision. Because we conclude that it did, we will then consider whether the court of appeals correctly applied this standard in reviewing the district court's determination that Snuffer's disqualification would cause substantial hardship to D.J.

*421 *A. The Court of Appeals Properly Applied a Deferential Standard of Review to the District Court's Substantial Hardship Determination*

[6] ¶ 19 The court of appeals stated that it gave the district court "some deference" in its application of the substantial hardship exception to the facts of this case, and it reviewed the district court's substantial hardship analysis under an "abuse of discretion" standard of review.[FN15] SunCrest argues that the district court failed to consider SunCrest's interests and that this failure constituted a mistake of law that the court of appeals should have reviewed for correctness rather than for an abuse of discretion. We hold that the court of appeals properly applied a deferential abuse of discretion standard, though the deference given to the district court's substantial hardship determination should be characterized as "broad deference" rather than "some deference."

FN15. *D.J. Inv. Group, L.L.C.,* 2005 UT App 207, ¶ 3, 113 P.3d 1022.

¶ 20 Because the district court stated that it had balanced the interests of both parties as required by the advisory committee's comment to rule 3.7, we have already concluded that the district court did not make a mistake of law regarding the legal standard to be applied, as SunCrest contends. The question we now consider is a mixed question of fact and law-whether the district court appropriately applied the substantial hardship exception to the facts before it.

[7] ¶ 21 To select the appropriate standard of review for this mixed question, we turn to the three-factor test described in *State v. Levin.*[FN16] Under that test, we select a standard of review from along a spectrum of deference by weighing the following factors:

FN16. 2006 UT 50, ¶ 25, 144 P.3d 1096.

(1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the

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legal rule relies on "facts" observed by the trial judge such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts; and (3) other policy reasons that weigh for or against granting discretion to trial courts.[FN17]

FN17. *Id.* (internal quotation marks omitted).

¶ 22 These factors weigh in favor of granting broad deference to a district court's application of the substantial hardship exception. First, the facts involved in district courts' substantial hardship determinations are " 'so complex and varying that no rule adequately addressing the relevance of all these facts can be spelled out.' " [FN18] Although the advisory committee comment to rule 3.7 gives helpful guidance in the form of factors that are relevant to determining whether a lawyer's dual role as an advocate-witness would ordinarily harm the interests of the opposing party or tribunal, these factors are generally open-ended and leave much discretion to the district court.[FN19] Even when factors demonstrating prejudice are present, the comment instructs that the district court must give " due regard ... to the effect of disqualification on the lawyer's client." [FN20]

FN18. *Id.* ¶ 28, 144 P.3d 1096 (quoting *State v. Pena,* 869 P.2d 932, 939 (1994)).

FN19. *See* Utah R. Prof'l Conduct 3.7 advisory committee's comment ("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 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.").

FN20. *Id.*

¶ 23 Second, the substantial hardship inquiry relies on observations made by the district court regarding the proceeding and the parties before it that cannot adequately be reflected in the record. The district court is intimately connected with its own interests in the case and has special knowledge of other relevant facts, including the nature of the case, the importance and probable tenor ***422** of the lawyer's testimony, and the effect that disqualification would have on the lawyer's client. The district court is also in a better position to understand whether either of the parties should have foreseen that the lawyer would become a necessary witness and whether this tends to show that the hardship to the client should be discounted or that the motion to disqualify is motivated by gamesmanship.

¶ 24 Third, policy considerations weigh in favor of granting additional deference. In *Houghton v. Department of Health,*[FN21] we said that "[t]rial courts are usually given broad discretion in controlling the conduct of attorneys in matters before the court" and that "their discretion extends to deciding whether disqualification is a proper sanction after a finding of an ethical violation." [FN22] But we also held that "to the extent this court has a special interest in administering the law governing attorney ethical rules, a trial court's discretion is limited." [FN23]

FN21. 962 P.2d 58 (Utah 1998), *overruled on other grounds by Ark. Dep't of Health & Human Servs. v. Ahlborn,* 547 U.S. 268, 126 S.Ct. 1752, 1756, 164 L.Ed.2d 459 (2006).

FN22. *Id.* at 61; *see also Featherstone v. Schaerrer,* 2001 UT 86, ¶ 30 n. 7, 34 P.3d 194 ("It is within [courts'] broad discretion to control the conduct of attorneys in matters before the court, especially where factual assessments are necessary to the determination of such

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tribunal.[FN27] The fourth factor considers the effect that the lawyer's disqualification will have on the client and specifies that "due regard must be given" to this effect even if there is risk of prejudice to the opposing party.[FN28] Finally, the fifth factor states, "It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." [FN29]

FN26. Utah R. Prof'l Conduct 3.7 advisory committee's comment.

FN27. *Id.* ("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.").

FN28. *Id.*

FN29. *Id.*

¶ 30 In applying the substantial hardship exception to the facts of this case, the district court focused its analysis on the fourth and fifth factors mentioned in the comment. The district court first discussed the complexity and length of the litigation, the size of the record filed with the court, and the expense and time that would be required for D.J. to bring new trial counsel into the case-all of which are relevant to the hardship imposed on D.J. The court then discussed SunCrest's culpability in contributing to D.J.'s hardship by failing to file its motion to disqualify Snuffer earlier in the parties' preparations for trial. The district court observed that " [SunCrest's] own pleadings intimate that [SunCrest] has 'reasonably foreseen,' since the initiation of this litigation[,] that Snuffer might be called as a witness in the case at bar." Ultimately, the court concluded, "Because disqualifying Denver Snuffer from the case at bar would result in significant financial and tactical prejudice to D.J., and in light of [SunCrest's] untimely filing of its Motion to Disqualify, this Court rejects [SunCrest's] motion and declines to disqualify Denver Snuffer from this litigation."

¶ 31 The text and structure of this analysis show that the district court considered the facts that it found in connection with the fourth and fifth factors from the advisory committee comment to rule 3.7 -the hardship caused to the lawyer's client and the ability of the parties to foresee the necessity of the lawyer's testimony-to define the parties' respective interests in this case. It is true, as SunCrest points out, that the district court did not explicitly make findings with regard to the first three factors that are listed in the advisory committee's comment to rule 3.7 as relevant to the opposing party's interests. But it is apparent from the district court's analysis that it considered the fifth factor, foreseeability, to be the factor most relevant to its assessment of SunCrest's interests. We do not assume that the district court ignored the factors from the comment to rule 3.7 that it did not explicitly address. Instead, we assume that the court discussed those factors it considered important to the result. In sum, we hold that the district court articulated its factual findings "with sufficient detail so that the basis of the ultimate conclusion can be understood." [FN30]

FN30. *Consolidation Coal Co.,* **886** P.2d at 521.

[9] ¶ 32 Having established that the district court's findings regarding the parties interests were sufficiently articulated, we turn to consider whether the district court abused its discretion in weighing these factors***424** with respect to the substantial hardship exception. We conclude that it did not. As we discussed above, the advisory committee's comment to rule 3.7 does not indicate how the factors should be weighed together, and it leaves much discretion to the district court to determine whether a lawyer should be disqualified.[FN31] Furthermore, the district court's interpretation of the factors in the context of this case appears to be quite reasonable.

FN31. *See supra* ¶¶ 22-25.

[10][11] ¶ 33 A delay in filing a motion to disqualify counsel or in notifying opposing counsel

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that a motion to disqualify is likely raises concerns that the party who delays may be using the motion as a manipulative litigation tactic.[FN32] This concern naturally enters into the balancing of interests and is addressed, in part, by the " foreseeability" factor from the advisory committee's comment to rule 3.7.[FN33] In *Zions First National Bank v. Barbara Jensen Interiors, Inc.*,[FN34] the court of appeals stated that "[a] motion to disqualify counsel must be immediately filed and diligently pursued as soon as the party becomes aware of the basis for disqualification, and it may not be used as a manipulative litigation tactic." [FN35] Thus, the timeliness of the motion to disqualify is relevant to the balancing regardless of whether it also constitutes a separate ground for rejecting the motion to disqualify.

FN32. *See* Utah R. Prof'l Conduct scope (" [T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."); *see also Zions First Nat'l Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 480-81 (Utah Ct.App.1989) ("A motion to disqualify ... may not be used as a manipulative litigation tactic.").

FN33. Utah R. Prof'l Conduct 3.7 advisory committee's comment.

FN34. 781 P.2d at 480-81.

FN35. *Id.*

¶ 34 Ultimately, it appears that the district court concluded that SunCrest's culpability in filing an untimely motion was the factor most relevant to the weight of its interests and that, given SunCrest's weak claim to prejudice, the hardship to D.J. was significant enough for the substantial hardship exception to apply in this case. In so finding, the district court was acting within its broad discretion to control the conduct of the attorneys in a matter before the court.

¶ 35 SunCrest offers three arguments in further support of its claim that the district court failed to adequately factor SunCrest's interests into the balancing test, none of which is persuasive. First, SunCrest claims that the district court erred because it simply assumed that Snuffer's testimony was necessary under rule 3.7 rather than making a specific factual finding to that effect. SunCrest argues that, by doing so, the court inevitably gave too little weight to SunCrest's interests, which depend in part on "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." We do not agree. The district court advanced judicial economy in the face of a complex factual dispute by making only those findings that were dispositive to its balancing of interests and assuming that other facts favored SunCrest.

[12] ¶ 36 Second, SunCrest argues that monetary hardship should never be sufficient to support a finding of "substantial hardship." However, there is nothing in the language of rule 3.7 that requires the potential hardship to the client to be unique or of a nonmonetary nature, only "substantial." [FN36]

FN36. Utah R. Prof'l Conduct 3.7 advisory committee's comment.

¶ 37 Third, SunCrest argues that the district court misunderstood the scope of the disqualification required by rule 3.7 and that this misunderstanding led the district court to ascribe too much weight to D.J.'s interests. Although SunCrest is likely correct that rule 3.7 would not require a lawyer to be disqualified from the case altogether, but only from acting as trial counsel, [FN37] the district court's written decision contains no discussion***425** of the extent of the disqualification required by rule 3.7, and the decision gives no indication that the district court misinterpreted the extent of Snuffer's disqualification when it weighed the interests of the parties.

FN37. *See* Utah R. Prof'l Conduct 3.7(a) (" A lawyer shall not act *as advocate* at a trial in which the lawyer is likely to be a necessary witness unless ... [(3)]

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disqualification of the lawyer would work substantial hardship on the client." (emphasis added)).

¶ 38 Furthermore, we note that in this case the district court based its assessment of the hardship to D.J. on the significant time and expense required to introduce a new lawyer into this complex case and on the tactical disadvantage that Snuffer's disqualification would cause to D.J. Because D.J. would not be able to avoid designating new trial counsel if Snuffer were disqualified, D.J. would suffer very similar hardships regardless of the extent of Snuffer's disqualification. In sum, we hold that the court of appeals correctly concluded both that the district court's decision contained adequate findings to support its substantial hardship determination and that the district court did not abuse its discretion in finding that D.J. would suffer substantial hardship if Snuffer were disqualified.

¶ 39 Although rule 3.7 of the Utah Rules of Professional Conduct generally prohibits a lawyer from acting as both an advocate and a witness at the same trial, that rule provides an exception where the client would suffer "substantial hardship" as a result of the lawyer's disqualification. We hold that the " substantial hardship exception" requires a balancing of interests as described in the advisory committee comment to rule 3.7 of the Utah Rules of Professional Conduct, but that the court of appeals did not err in following the prior version of rule 3.7 's advisory committee's comment in this case. Furthermore, we conclude that the district court's substantial hardship determination is a mixed question of fact and law that implicates the district court's broad discretion to control the conduct of the lawyers before it. We therefore give significant deference to the district court's substantial hardship determination. Finally, we hold that the court of appeals correctly concluded that the district court did not abuse its discretion when it weighed the interests of the parties and decided that, in light of SunCrest's delay in filing the motion to disqualify and the financial and tactical hardship that would be suffered by D.J. if Snuffer were disqualified, the substantial hardship exception applied in this case. We therefore affirm.

¶ 40 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.

Utah,2006.
D.J. Investment Group, L.L.C. v. Dae/Westbrook, L.L.C.
147 P.3d 414, 563 Utah Adv. Rep. 16, 2006 UT 62

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Court of Appeals of Utah.
ZIONS FIRST NATIONAL BANK, a national association, Plaintiff and Respondent,
v.
BARBARA JENSEN INTERIORS, INC., Lowell N. Jensen, and Barbara W. Jensen,
Defendants and Appellants.
No. 880207-CA.

Oct. 6, 1989.

In bank's suit against maker and guarantors of promissory note, the Third District Court, Salt Lake County, Raymond S. Uno, J., granted bank's motion to compel settlement and denied obligors' motion to disqualify bank's legal counsel. Obligors appealed from both rulings. The Court of Appeals, Orme, J., held that: (1) trial court did not abuse its discretion in granting bank's motion to compel settlement, and (2) obligors' motion to disqualify bank's counsel was untimely.

Affirmed.

Davidson, J., concurred and filed opinion.

Bench, J., concurred and dissented and filed opinion.

West Headnotes

[1] **Compromise and Settlement ⚷2**
89k2 Most Cited Cases
(Formerly 89k1)

[1] **Compromise and Settlement ⚷21**
89k21 Most Cited Cases
Voluntary settlement of legal dispute is favored by law and, under certain circumstances, settlement agreement may be summarily enforced as executory accord.

[2] **Appeal and Error ⚷1126**
30k1126 Most Cited Cases
Appellate court will affirm granting of motion to compel settlement if record establishes binding agreement and if excuse for nonperformance is comparatively unsubstantial.

[3] **Compromise and Settlement ⚷23(3)**
89k23(3) Most Cited Cases
Finding that defendants orally agreed to settlement of lawsuit, entitling plaintiff to summary enforcement of that agreement, was supported by affidavit of plaintiff's representative stating unequivocally that parties had reached agreement, that terms of agreement were summarized and repeated for parties by plaintiff's attorney, and that representative observed defendants agree to terms of agreement.

[4] **Compromise and Settlement ⚷5(3)**
89k5(3) Most Cited Cases
Law does not require that settlement agreements be written to be enforceable.

[5] **Attorney and Client ⚷21.20**
45k21.20 Most Cited Cases
Motion to disqualify counsel must be immediately filed and diligently pursued as soon as party becomes aware of basis for disqualification, and it may not be used as manipulative litigation tactic.

[6] **Attorney and Client ⚷21.20**
45k21.20 Most Cited Cases
Defendants' motion to disqualify plaintiff's counsel was untimely, and thus properly denied, where filed nearly seven months after law firm appeared as plaintiff's counsel, more than three months after defendants claimed to have first learned of basis for motion, and one day before scheduled hearing on plaintiff's motion to compel settlement.

***478** Charles C. Brown, Jeffrey B. Brown, and Budge W. Call, Salt Lake City, for defendants and appellants.

***479** James S. Jardine and Rick L. Rose, Salt Lake City, for plaintiff and respondent.

Before DAVIDSON, BENCH and ORME, JJ.

ORME, Judge:

Defendants Barbara Jensen Interiors, Inc., Lowell N. Jensen, and Barbara W. Jensen ("the Jensens") appeal

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from the trial court's order granting plaintiff Zions First National Bank's motion to compel settlement and denying the Jensens' motion to disqualify Zions' legal counsel. We affirm.

FACTS

In June of 1986, Zions Bank filed this action against Barbara Jensen Interiors, Inc. to collect on a promissory note. Lowell and Barbara Jensen were also named as defendants as they had personally guarantied the note. Zions Bank arranged to depose the Jensens at the law offices of Ray, Quinney & Nebeker, Zions' substitute counsel in this matter, on February 10, 1987. The Jensens and their attorney attended the scheduled depositions, but settlement negotiations began instead. According to Zions, these negotiations culminated in settlement. However, as the Jensens see it, the parties only agreed that Zions' attorney would prepare certain documents setting forth a proposed settlement. In any event, the Jensens' depositions were not taken.

On February 18, 1987, Zions' attorney delivered the settlement documents he had prepared to the Jensens' attorney. Despite repeated requests by Zions' attorney, the Jensens refused to sign the documents, ultimately contending that no firm settlement had been reached during the February 10 negotiations. On April 13, 1987, Zions filed a motion to compel settlement, along with the affidavit of Donald M. Bennett, an employee of Zions who participated in the settlement negotiations as Zions' representative.

On May 20, 1987, several months after Ray, Quinney & Nebeker had first appeared as Zions' legal counsel and only one day before Zions' motion to compel settlement was to be heard, the Jensens filed a motion to disqualify the law firm from its representation of Zions in this action. The Jensens filed an affidavit stating that an attorney at Ray, Quinney & Nebeker had represented them in several matters between 1979 and 1983.

After a hearing at which both parties' motions were argued, the district court granted Zions' motion to compel settlement, concluding that the record established an oral settlement had been reached and agreed to by both parties during the February 10 negotiations. The court also noted that, consistent with a settlement having been reached, the Jensens' depositions were cancelled and the trial date stricken by Zions. The court also denied the Jensens' motion to disqualify Zions' legal counsel, holding the motion was untimely because it had been filed more than three months after the Jensens claimed to have first learned of the basis for their motion. The court further held the motion lacked substantive merit as Ray, Quinney & Nebeker had ceased its representation of the Jensens by December 1983, and the substance of the prior representations was unrelated to the present action. The Jensens appeal both decisions.

MOTION TO COMPEL SETTLEMENT

[1][2] Voluntary settlement of legal disputes is favored by the law and, under certain circumstances, a settlement agreement may be summarily enforced as an executory accord. *See* Mascaro v. Davis, 741 P.2d 938, 942 (Utah 1987). "The decision of a trial court to summarily enforce a settlement agreement will not be reversed on appeal unless it is shown that there was an abuse of discretion." *Id.* at 942 n. 11. Thus, we affirm the granting of a motion to compel settlement if the record establishes a binding agreement and "the excuse for nonperformance is comparatively unsubstantial." Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 609 (Utah 1979). *See also, e.g.,* Murray v. State, 737 P.2d 1000, 1000-01 (Utah 1987); Robinson v. Department of Natural Resources, 620 P.2d 519, 520 (Utah 1980).

***480** [3] The Jensens claim their affidavit demonstrates they did not assent to an oral settlement during the February 10 negotiations and thus, at a minimum, the issue should have been submitted to a jury. However, our review of the Jensens' affidavit does not convince us that the district court abused its discretion in granting Zions' motion. In their affidavit, the Jensens state:

> At the time of [the February 10 negotiations], *we believed* that no firm settlement was reached; rather, *we understood* that terms of the settlement were to be prepared by counsel for [Zions] and put in writing to be signed by us, if we were in agreement to the terms as set forth in writing....
>
> Since the time [of] said discussions, we have decided not to enter into any settlement agreement

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and for that reason have refused to sign any settlement agreement.

In contrast, Donald Bennett's affidavit states unequivocally that after negotiating for over one hour, Zions and the Jensens reached an agreement, the terms of which were summarized and repeated for the parties by Zions' attorney. Bennett further states that he, in his capacity as Zions' representative, agreed to the settlement and "observed [the Jensens] agree to the terms of the settlement agreement." The Jensens' affidavit wholly fails to identify any statements made or actions taken by them at the time of the negotiations which would contradict Bennett's claim that the Jensens' agreed to the settlement that had been negotiated. Rather, the Jensens' affidavit merely identifies their unsubstantiated and entirely unilateral "understanding" and "beliefs" as to the legal effect of these discussions and their actions. On the record before us, it appears that these "understandings" were the Jensens' private thoughts and were not expressed to Zions.

> It is well established in the law that unexpressed intentions do not affect the validity of a contract.... "The apparent mutual assent of the parties ... must be gathered by the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of its words and acts."

Jaramillo v. Farmers Ins. Group, 669 P.2d 1231, 1233 (Utah 1983) (quoting *Allen v. Bissinger & Co.*, 62 Utah 226, 219 P. 539, 541-42 (1923)).

[4] Accordingly, if the Jensens did not wish to settle this dispute, they should have clearly expressed such an intention during the settlement conference which was held in lieu of their depositions. Had they done so, they would have been in a position to defeat summary enforcement of the settlement through an affidavit identifying the specific statements and actions they had taken to communicate to Zions their decision not to accept the settlement offer at that time. Absent such information, and given only the Jensens' unexplained conclusion as to their otherwise undisclosed beliefs, Bennett's statement that the Jensens actually agreed to the settlement stands uncontroverted. Accordingly, we cannot say the trial court abused its discretion in compelling the settlement. [FN1]

FN1. Our decision in *Brown v. Brown*, 744 P.2d 333 (Utah Ct.App.1987), does not require a different result. Although some discussion in that opinion may tend to imply that settlement agreements must be in the form of a written stipulation to be enforceable, that opinion's focus on the requirements for a valid court stipulation, Statute of Frauds implications, and a dispute about the authority of one party's attorney to bind the party to the settlement, all serve to distinguish that case from the instant one. In any event, Utah law simply does not require settlement agreements to be written to be enforceable. *See, e.g.*, *Murray v. State*, 737 P.2d 1000, 1001 (Utah 1987) ("The fact that plaintiffs had not yet signed a written [settlement] agreement is of no legal consequence. It is a basic and longstanding principle of contract law that [settlement] agreements are enforceable even though there is neither a written memor[i]alization of that agreement nor the signatures of the parties, unless specifically required by the statute of frauds."). *See also* *Kukla v. National Distillers Prods. Co.*, 483 F.2d 619, 621 (6th Cir.1973) (a settlement agreement is binding even if it has not been reduced to writing).

MOTION TO DISQUALIFY COUNSEL

[5][6] A motion to disqualify counsel must be immediately filed and diligently pursued as soon as the party becomes ***481** aware of the basis for disqualification, and it may not be used as a manipulative litigation tactic. *See, e.g.*, *Smith v. Whatcott*, 757 F.2d 1098, 1099-1100 (10th Cir.1985); *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir.1975); *Margulies v. Upchurch*, 696 P.2d 1195, 1202 (Utah 1985). The district court held the Jensens' motion to be untimely because it was filed nearly seven months after Ray, Quinney & Nebeker appeared as Zions' counsel, and more than three months after the February 10 settlement negotiations. The Jensens claim the basis for disqualification remained unknown to them until well

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into the course of this litigation, but admittedly learned of the asserted basis no later than the February 10 settlement negotiations, at which time the Jensens recalled having been in the Ray, Quinney & Nebeker office building previously to visit their former attorney. [FN2] However, the motion was filed three months later, and one day before Zions' motion to compel settlement was scheduled to be heard. We agree with the district court that under these circumstances, the Jensens' motion to disqualify counsel was untimely.

FN2. Claiming not to remember the name of one's former law firm but to recognize its office interior may seem disingenuous at first blush. The Jensens involvement with interior design, however, may well explain this oddity.

CONCLUSION

We affirm both the grant of Zions' motion to compel settlement and the denial of the Jensens' motion to disqualify counsel.

DAVIDSON, Judge (concurring):

I concur in the main opinion but I write separately to express a concern about the rules contained in the Code of Judicial Administration. As pointed out in the dissent, rule 4-504(8) of the Code of Judicial Administration states:

> No orders, judgments or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

This rule was formerly a rule of practice in the courts and was therefore not afforded the full enforcement of a rule of civil procedure. Since the rule has now been elevated into the Code of Judicial Administration, it is now entitled to enforcement equal to that given other rules. However, if this rule is strictly followed and enforced, the way the law is applied will be dramatically changed and in this case, at least, other existing law is ignored. I am unwilling to slavishly follow the rule at issue in the face of evidence showing a stipulation entered into by the parties but not agreed to in writing. Other oral agreements are enforceable when the evidence establishes their existence. So too should oral stipulations be enforced when the evidence shows their existence.

BENCH, Judge (concurring and dissenting):

I concur in the main opinion's treatment of the Jensens' motion to disqualify Zions's legal counsel. I dissent from my colleagues' analysis of Zions's motion to compel settlement. I believe the trial court's grant of that motion was an abuse of discretion.

Our Code of Judicial Administration, rule 4-504(8) provides as follows:

> No orders, judgments or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

In *Brown v. Brown*, 744 P.2d 333 (Utah Ct.App.1987), this court applied the predecessor to rule 4-504(8) [FN1] and expressly held that settlement agreements must be in the ***482** form of a written stipulation to be enforceable. I believe *Brown* is indistinguishable from the instant case.

FN1. Previously, rule 4.5(b) of the Rules of Practice in the District Courts and Circuit Courts provided that

No orders, judgments or decrees upon stipulation shall be signed or entered unless such stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk, provided that the stipulation may be made orally in open court.

The only exception to the rule that settlement agreements must be in writing is where the parties concede the existence of an agreement. *See, e.g., Murray v. State*, 737 P.2d 1000, 1001 (Utah 1987) (conceded at oral argument). [FN2] Throughout the instant case, the Jensens have consistently denied that an agreement was ever reached.

FN2. Where an agreement is admitted but not written, an evidentiary hearing may be necessary to determine the terms of the

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> agreement. *See Brown*, 744 P.2d at 337 n. 3 (Orme, J., dissenting). *See also Kukla v. National Distillers Prods. Co.*, 483 F.2d 619 (6th Cir.1973) (if the existence or the terms of a settlement agreement are in dispute, it is improper for the court to enforce the alleged agreement without an evidentiary hearing).

In view of the clear language of rule 4-504(8) and our decision in *Brown*, I would reverse the order compelling settlement and remand the case for trial.

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