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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

8 AL HUTTON )  
9 And DOUG WHORTON )  
10 )  
11 Plaintiffs, )  
12 vs. )  
13 )  
14 CITY OF FAIRBANKS, )  
15 CHIEF DANIEL P. HOFFMAN and )  
16 DEPUTY CHIEF BRAD JOHNSON, )  
17 each in his individual and )  
18 official capacity, )  
19 )  
20 Defendants. ) Case No. 4:08-CV-00029 (RRB)

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**MOTION TO DISQUALIFY JOE EVANS**

27 Plaintiffs Doug Whorton and Al Hutton move to disqualify Joe Evans as an  
28 attorney representing the individual Defendants in this case. Joe Evans is named  
29 specifically in the Complaint as a witness, and despite multiple discussions with Mr.  
30 Evans, he entered an appearance on behalf of the defendants and has participated  
31 in the defense of this case, demonstrating that he has no intention of withdrawing.  
32 Plaintiffs do not bring this motion lightly, but lesser efforts have failed.

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## FACTUAL BACKGROUND

In Plaintiff's complaint, Joe Evans' name appears in three separate factual paragraphs: 33, 34, and 37. In early 2008, Joe Evans performed an investigation into the allegations of "hostile work environment" leveled against his current client, Brad Johnson, at the request of the Mayor. Mr. Evans was not acting as an attorney, but as an investigator. He issued a written report. Plaintiffs expect to take Mr. Evans' deposition, and will place him on their witness list. This fact was communicated to Mr. Evans prior to his entry of appearance in the case. See Ex. A, e-mail dated July 2008.

## LEGAL ARGUMENT

12 Alaska Prof. R. Conduct 3.7 states:

13 Rule 3.7. Lawyer as Witness.

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

- 15 (1) the testimony relates to an uncontested issue;
- 16 (2) the testimony relates to the nature and value of legal services rendered in the case; or
- 17 (3) disqualification of the lawyer would work substantial hardship on the client.

18 (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.

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20 Emphasis added. The provision is mandatory, not permissive. None of the  
21 exceptions applies in this case.  
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1 Under the standard set in *Munn v. Bristol Bay Housing Authority*, 777 P.2d  
2 188 (Alaska 1989),<sup>1</sup> the testimony of Joe Evans will be required and even  
3 "indispensable." *Id.* at 197. Joe Evans was the only investigator into Defendant  
4 Brad Johnson's conduct. Mr. Evans conducted interviews and his testimony  
5 thereon could be central to the underlying case, and cannot be obtained  
6 elsewhere. Joe Evans was not added to the Plaintiffs' witness list on a whim or for  
7 tactical reasons. He is a legitimate witness, who was added to the complaint prior  
8 to the knowledge of his representation.

9  
10 If allowed to remain as an advocate in this case, Mr. Evans would be placed  
11 into the "unseemly position of arguing his own credibility to the jury."<sup>2</sup> *See Mannhalt*  
12 *v. Reed*, 847 F.2d 576, 581 (9<sup>th</sup> Cir. 1988), citing from the Washington State RPC  
13 3.7. He may very well be called as a trial witness, and would then be required to  
14 step down as an attorney. His continued presence in this case does not move the  
15 case forward, and could very well impede the proceedings later. There is no  
16

17  
18 <sup>1</sup> The case was decided upon the former ethics rule Disciplinary Rule 5-102. The cases cited refer to  
ethics rule 3.7 that are similar, if not identical, to the current Alaska Rule 3.7.

19 <sup>2</sup> See also, Alaska Bar Association Ethics Opinion 86-5 "Withdrawal of an Attorney when Attorney is a  
Potential Witness in the Case He is Handling." The opinion was decided under the Disciplinary Rules,  
but it's general proposition is still true:  
20

21 A lawyer's ability to exercise independent judgment is obviously placed in a compromising  
position if the lawyer's duty as an advocate becomes intermingled with his role as a witness  
in the same proceeding. *Williams v. District Court*, 700 P.2d 549, 553 (Colo. 1985). The  
22 duty of a lawyer as an advocate is to represent his client zealously within the bounds of the  
law. Canon 7, Model Code of Professional Responsibility. The responsibility of a witness,  
23 on the other hand, is to testify objectively to facts within the witness' knowledge. A lawyer  
who intermingles the functions of advocate and witness diminishes his effectiveness in both  
24 roles. *See Williams*, 700 P.2d at 553; *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*,  
624 P.2d 296, 299-300 (Ariz. 1981). Any attack upon the lawyer's credibility as witness will  
25 necessarily have a detrimental impact upon the lawyer's credibility as advocate. *See also*  
ABA Informal Opinion 1446 (February 3, 1980); Alaska Bar Ethics Opinion No. 85-3  
26 (August 23, 1985).

1 suggestion that another attorney cannot be hired to represent the individual  
2 defendants in this case.

3 Even if Mr. Evans objects to the disqualification, this court should disqualify  
4 him anyway. The district court generally must control the professional conduct of  
5 attorneys who practice before it. *See, e.g., Optyl Eyewear Fashion Int'l Corp. v.*  
6 *Style Cos., Ltd.*, 760 F.2d 1045, 1047-48 (9th Cir. 1985); *Trust Crop. Of Montana v.*  
7 *Piper Aircraft Corp.*, 701 F.2d 85 (9<sup>th</sup> Cir. 1983). This court's decision will not be  
8 overturned if there is a sound basis therefore. *Gas-A-Tron of Arizona v. Union Oil*  
9 *Co. of California*, 534 F.2d 1322 1325 (9<sup>th</sup> Cir. 1976) *cert denied* 429 U.S. 861  
10 (1976). The regulation of attorney appearing before a district court will be  
11 disturbed on review only if the court abuses its discretion. *Id.*

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13 The court should exercise its sound discretion and disqualify Joe Evans as  
14 an attorney in this case.

15 DATED AT Anchorage, Alaska this 24<sup>th</sup> day of October 2008.

16  
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19 Attorneys for Plaintiff

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Certificate of Service

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I hereby certify that on October 24, 2008  
a copy of the foregoing document was served  
electronically on Howard S. Trickey and Joe Evans.

s/ Linda J. Johnson

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