

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

AL HUTTON and
DOUG WHORTON,

Plaintiffs,

vs.

CITY OF FAIRBANKS;
CHIEF DANIEL P. HOFFMAN; and
DEPUTY CHIEF BRAD JOHNSON,
each in his individual and
official capacity,

Defendants.

Case No. 4:08-cv-0029-RRB

**ORDER RE MOTION TO
DISQUALIFY JOE EVANS
AND VACATING HEARING**

This matter arises from a Complaint filed by Al Hutton and Doug Whorton, both police officers employed by the City of Fairbanks. Plaintiffs allege adverse employment actions taken against them by the Chief of Police and Deputy Chief.

Joe Evans represents the "individual defendants" in this case (Chief Daniel Hoffman and Deputy Chief Brad Johnson). Defendant, City of Fairbanks, is represented by separate counsel. Plaintiffs complain that Joe Evans is named specifically in the Complaint as a witness, and that therefore he cannot serve as

counsel to any defendant in this matter under Alaska Professional Rule of Conduct 3.7, which reads:

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 except when:

(1) the testimony relates to an uncontested issue;

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

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

(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.

According to Plaintiffs, Joe Evans served as an "investigator" in to the hostile work environment allegations against his current client, Brad Johnson, at the request of the Mayor. He issued a written report. Plaintiffs say they expect to depose him and will place him on their witness list. Plaintiffs argue Joe Evans was the only investigator into Johnson's conduct.

Defendants argue that Joe Evans should not be disqualified from representing the individual Defendants at this juncture for several reasons. First, Rule 3.7 prohibits a lawyer from acting as an advocate *at trial*. Defendants argue that this case is far from trial and suggest that it will never go to trial. Plaintiffs also argue that in the unlikely event that any claim survives to trial, and if Joe Evans is deemed a "necessary witness"

at that time (a point they also dispute), he can recuse himself at that time and the individual Defendants can be represented by counsel for the City.

The Court agrees with Defendants that it is premature, under Alaska Rule of Professional Conduct 3.7, to require Mr. Evans to recuse himself. The rule clearly states that an attorney cannot act as an advocate *at trial* when he is a necessary witness. This matter is still in the discovery process. However, the Court also agrees that Defendants should not be permitted to stall this matter at a later date because Mr. Evans must recuse himself just prior to trial. Given that counsel for the City of Fairbanks has expressed a willingness to represent all Defendants in that circumstance, unnecessary delay at a later date is unlikely.

Accordingly, the Motion to Disqualify Joe Evans **at Docket 14** is **DENIED** without prejudice. The oral argument scheduled for Friday, December 12, 2008, is **VACATED**.

ENTERED this 17th day of December, 2008.

/S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE