IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOY A. WEBER,

Plaintiff,

v.

DAVID M. McDORMAN and STATE COLLECTION SERVICE, INC.,

Defendants.

ORDER

00-C-0381-C

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Defendants have moved to disqualify plaintiff's lawyer Briane F. Pagel, Jr. and Pagel Law Office pursuant to Wisconsin Supreme Court Rules of Professional Conduct for Attorneys 20:3.7(a) (1999), because defendants intend to call Pagel as a witness. Because I find that Briane F. Pagel, Jr. has personal knowledge relevant to this case, I will grant defendants' motion to disqualify him as plaintiff's counsel.

FACTUAL BACKGROUND

During 1999, plaintiff contracted for services from Madison Gas & Electric. At the end of the contract, plaintiff owed a balance that was past due. In February 2000, defendant State

Collection Service, Inc. contacted plaintiff, indicating that it had authority to collect the debt and negotiate on behalf of Madison Gas & Electric. During February 2000, defendant State Collection Service, Inc. and plaintiff negotiated and may have reached an agreement that plaintiff would pay $50 each month until her debt was paid and defendant State Collection Service, Inc. would take no further action against her. Plaintiff's attorney Briane F. Pagel, Jr. participated in these negotiations.

Plaintiff made $50 payments to defendant State Collection Service, Inc. in February and March 2000. On March 29, 2000, defendant David M. McDorman notified plaintiff that Madison Gas & Electric had authorized a lawsuit against her to collect the past-due amount and on May 3, 2000, defendant State Collection Service, Inc. filed suit against plaintiff. On May 30, 2000, plaintiff filed this suit against defendants State Collection Service, Inc. and McDorman alleging that defendants violated the Federal Fair Debt Collection Practices Act and Wisconsin Consumer Act when they refused to honor the payment plan agreement that she alleges she made with defendant State Collection Service, Inc. and which this defendant denies.

OPINION

It is common practice for federal courts to apply state rules of professional conduct. See, e.g., Diettrich v. Northwest Airlines, Inc. 168 F.3d 961, 964 (7th Cir. 1999). The Wisconsin

Supreme Court Rules of Professional Conduct for Attorneys govern in this court.

A. Necessary

The Wisconsin rule is that when a lawyer is necessary as a witness at trial, he should disqualify himself as an advocate. See State v. Foy, 557 N.W.2d 494, 500, 206 Wis. 2d 629, 646 (1996); see also Estate of Elvers, 179 N.W.2d 881, 884, 48 Wis. 2d 17, 23 (1970). The roles of lawyer and witness are incompatible. "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." Supreme Court Rule 20:3.7 comment. Rule 20:3.7 reads in pertinent part:

> 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 where:
> (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.

Plaintiff's attorney participated in the negotiations between plaintiff and defendants in an attempt to reach an agreement regarding plaintiff's debt. Defendants are now denying that the negotiations ended in an oral contract. As a result, Pagel is a necessary witness because he has personal knowledge about the contested agreement. See Estate of Elvers, 179 N.W.2d at 885, 48 Wis. 2d at 22 (having witnessed will, a lawyer's continued involvement in case after will was contested was inappropriate). Plaintiff contends that her lawyer is not necessary; that any evidence he could provide is only duplicative because defendants have other witnesses who

participated in the negotiations. Although other people may have information about the negotiations, plaintiff has not pointed to anyone who is not aligned with defendants and participated in the negotiations. Plaintiff cannot have her cake and eat it too. Plaintiff has filed suit against defendants alleging that they violated an oral contract. She cannot now deny them a witness who has information relevant to the formation of that contract.

None of the exceptions to Rule 20:3.7 enable Pagel to act as an advocate in this case. The testimony of plaintiff's attorney is relevant to one of the central, contested issues in the case: whether a payment plan agreement was reached between the parties. His testimony does not relate to the nature and value of legal services. Although plaintiff contends that excluding Pagel as counsel may increase the cost of litigation, this is not a sufficient basis on which to establish that disqualification of Pagel will lead to substantial hardship on plaintiff. Therefore, because plaintiff's attorney is a necessary witness, his continuation as an advocate is inappropriate.

B. Admissibility of Pagel's Testimony

Plaintiff contends that defendants' motion should be denied because Pagel cannot be called as a witness to testify about settlement negotiations because Fed. R. Evid. 408 bars such testimony. This is an odd argument for her to make when her lawsuit is based upon defendants' alleged failure to abide by the terms of the alleged settlement. Rule 408 reads in pertinent part:

> Evidence of . . . attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Rule 408 is aimed at excluding evidence of attempts at settlement that could be used to prove a debtor's admission of responsibility or a creditor's concession. See Fed. R. Evid. 408 advisory committee's note; see also, e.g., Carney v. American University, 151 F.3d 1090 (D.C. Cir. 1998) (although settlement correspondence is not admissible to prove liability, it is admissible for other purposes). Rule 408 is not applicable in this case because the negotiations did not deal with a contested debt amount. Instead, Pagel is necessary as a witness to determine *whether* an agreement was reached during settlement negotiations focusing on how plaintiff was going to pay her *admitted* debt to Madison Gas & Electric. During the negotiations, plaintiff did not contest that she owed a specific amount to Madison Gas & Electric; instead she was attempting to establish a payment plan for that amount. Because the testimony of plaintiff's attorney is necessary and is not barred by Rule 408, the motion to disqualify him as plaintiff's lawyer will be granted.

ORDER

IT IS ORDERED that the motion of defendants David M. McDorman and State Collection Service, Inc. to disqualify plaintiff's attorney Briane F. Pagel, Jr. is GRANTED.

Entered this 11th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB

District Judge