IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HENRY V. KROKOSKY, JR.,

Plaintiff,

OPINION AND ORDER

v. 03-C-0078-C

UNITED STAFF UNION,

Defendant.

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This is a civil action for injunctive relief in which plaintiff Henry Krokosky Jr. alleges that defendant United Staff Union has refused to disclose an itemized billing statement it paid in July 2002 for services rendered by Nola Cross, a lawyer. Plaintiff contends that defendant's refusal violates the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531, and § 431 in particular. Jurisdiction is present under 28 U.S.C. § 1331 and 29 U.S.C. § 431(c).

Presently before the court is defendant's motion to disqualify plaintiff's counsel, Roger Palek. Defendant argues that disqualification is warranted on two grounds: Palek will be a necessary witness at trial and he has a personal interest in the outcome of the litigation

above and beyond receiving a fee for his legal services.

I conclude that defendant has failed to show any necessity for disqualifying Palek. Defendant has not shown why it would it need to question Palek about his own motivation for seeking production of the billing statement when the only question is whether plaintiff has shown just cause for his request. As for disqualifying Palek because he has the same personal interest in the outcome of the litigation as plaintiff does, defendant has not cited any ethical rule that requires disqualification of a lawyer in that circumstance.

For the sole purpose of deciding this motion, I find that the parties do not dispute the following facts.

FACTUAL BACKGROUND

Plaintiff Henry Krokosky and his attorney, Roger Palek, are members of defendant United Staff Union. Defendant United Staff Union is the exclusive bargaining agent for professional and clerical employees of the Wisconsin Education Association Council, the Wisconsin Education Association Council-Fox Valley and the United Employers Association.

Plaintiff and Palek work for the Wisconsin Education Association Council-Fox Valley, as does Debbie Armitage. Sometime in 2001, Armitage filed a sexual harassment complaint against plaintiff and Palek. Defendant hired a lawyer, Nola Cross, to investigate the complaint, which she did from July 2001 to April 2002. At the completion of the

investigation, plaintiff's employer sent warning letters to plaintiff, Palek and Armitage. None of the three took the matter further.

Plaintiff believes that the hiring of outside counsel violated defendant's policy against hiring outside counsel for members. He looked for the itemization of Cross's legal services on defendant's LM-2 report for 2001, but found no disbursements for the bill in the year ending August 31, 2001. He was unable to find the LM-2 report for 2002. He learned later that the union had paid Cross $12,906.61 in legal fees, including $6300 pertaining to the Armitage matter. He does not believe that defendant's board approved the bill.

On December 2, 2002, plaintiff made the following request for a copy of Cross's bill via email to Deb Byers, defendant's treasurer:

> I would like to receive a copy of the legal bill that was recently submitted by Nola Cross. I believe that USU Policy #16 and Sec. 431 Report of Labor Organizations, part (c), of the Landrum-Griffin Act covers this request.

Aff. of Fred Andrist, dkt. #8, at Exh. F. On December 13, 2002, Byers emailed plaintiff and Palek the following response:

> Thank you for the further information, Roger. Here is an update. According to the e-mail you sent me, a member must have "just cause to request to examine any books, records and accounts necessary . . ." in order for me to make available the information requested. Therefore, I need a reason to satisfy you[r] request.

Id. at Exh. G. At some point, defendant told plaintiff the amount it had paid to Cross. At a later union meeting, plaintiff moved to compel production of the bill. His motion was

defeated by a vote of 11-8. He alleges in his complaint that he cannot "ensure the accuracy" of the bill without examining the itemized charges and that he needs the bill to fulfill his fiduciary obligations to his employer, Wisconsin Education Association Council-Fox Valley, to determine whether defendant breached its duty of fair representation to him and to learn why the bill was not listed on the LM-2 report for the same financial year.

Fred Andrist is defendant's vice president. Before this action began, Palek asked Andrist on several occasions for copies of Cross's bill. On December 16, 2002, Palek emailed Byers as follows:

> . . . I have asked Anne [Boley, current president of defendant] for an explanation of why attorney fees were paid for Ms. Armitage. She has not provided an explanation. If you have nothing to hide than [sic] quit wasting money trying to hide things and just disclose it. . . I will ask you again for the supporting documents and remind you that as a USU officer I understand your denial to be an action on behalf of the USU. I am confident a judge will find the USU's behavior between representing Ms. Armitage and myself to constitute just cause to release them.

Id. at Exh. A.

On January 6, 2003, Palek emailed Andrist as follows:

> . . . There are two reasons to see the attorney bills. The first is because I want to. An ethical union that has nothing to hide should NEVER be afraid to open every single dime of their expenditures to any member at any time. That is my philosophy as a 20 year union advocate. It is abominable to me to have my union act in such an unethical manner by trying to hide this from em. It shouldn't matter if I want to throw the whole damn thing away as soon as you give it to me. The second is more practical. The USU leadership hired this attorney in an apparent attempt to represent Ms. Armitage's interests. That was their decision and I think it was incorrect and made with malice. However, even worse, they did not provide any

> balance and instead took an adversarial position to my interests. That was wrong morally and legally. Due to the attorney being incompetent and unethical she exacerbated the problem. She should not have received a penny for the unethical means in which she represented the USU. . . .

Id. at Exh. E.

> On January 9, 2003, Palek emailed Boley a message entitled "Final Request."
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> . . . President Boley and previous President Davis have refused to disclose how, why and under what authority the use of an attorney and payment of attorney fees on behalf of USU member Armitage was made. Former President Davis refused similar or any representation for USU member Palek until after complaint by Armitage had been made, investigated, and discipline imposed. President Boley and previous President Davis have refused to disclose how, why and under what authority the use of an attorney on behalf of USU member Palek was denied. To date USU has not expended any funds on behalf of Palek . . . .

Id. at Exh. C.

> On February 19, 2003, Palek sent the following message to Andrist:
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> . . . Keep in mind that the adversarial environment was created when Anne [Boley] and John Carl [Davis, former president] spent this money inappropriately and against both Henry [Krokowsky] and [my] interests without ever speaking to us. That is when the adversarial nature started and this is simply a culmination of their actions and continued refusal to acknowledge that the actions were taken. The USU can have a chance to respond to the factual allegations raised in the complaint in their answer and depositions. . . .

Id. at Exh. B.

> Plaintiff hired Palek as his attorney on January 26, 2003.

OPINION

Although the merits of plaintiff's suit are not before the court at this time, it is helpful to begin with some background on the statute under which he is suing, in order to put the motion for disqualification in context. 29 U.S.C. § 431(b) requires labor unions to file financial statements (known as LM-2 reports) with the government each year. Section 431(c) requires labor unions to make the information in the report available to all its members and to permit them to examine any books, records, and accounts necessary to verify such reports "for just cause." Members may sue in federal court to enforce their right to examine the records.

Courts have interpreted the just cause requirement as necessitating a showing by the union member of anything in the report that would be enough to cause a reasonable union member to make further inquiry, Fruit & Vegetable Packers and Warehousemen Local 760 v. Morley, 378 F.2d 738 (9th Cir. 1967), such as "an apparently sudden, significant and unexplained change" in a report. Mallick v. International Brotherhood of Electrical Workers, 749 F.2d 771, 783 (D.C. Cir. 1984). The Court of Appeals for the Seventh Circuit has held that the requirement can be met with a showing "that the union member had some reasonable basis to question the accuracy of the LM-2 or the documents on which it was based, or that information in the LM-2 has inspired reasonable questions about the way union funds were handled." Kinslow v. American Postal Workers Union, Chicago, 222

F.3d 269, 274 (7th Cir. 2000). The union member has the burden of showing just cause and the duty to make the showing to the union before invoking the judicial process. Morley, 378 F.2d at 742 & 743.

Turning to the issue of disqualification, I begin with the Wisconsin rules on professional conduct. In determining a challenge to legal representation, federal courts look to state rules, in this case, the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys. See, e.g., Diettrich v. Northwest Airlines, Inc., 168 F.3d 961, 964 (7th Cir. 1999) (common practice for federal courts to apply state rules of professional conduct). The Wisconsin rule is that when a lawyer is necessary as a witness at trial, he must disqualify himself as an advocate, except in a few specific instances. 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
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> (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.

The Wisconsin rules say nothing about disqualification if a lawyer has a personal stake in the outcome of the case. The closest they come is in SCR 20:1.7, Conflicts of Interest: General Rule, which prohibits a lawyer from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, . . ." According to the Comment, this rule is directed at the situation in which "a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." It is not directed to the situation in which the interests of plaintiff and his attorney coincide. If defendant is concerned that Palek's interest in the controversy might cause him to take steps that advance the cause rather than produce the best outcome for plaintiff, the supreme court's rules address those concerns in other ways. SCR 20:1.4 requires communication with the client; SCR 20:1.2 requires compliance with the client's decisions concerning the objectives of representation.

Defendant has cited no rule or case law supporting its position that a lawyer may be disqualified because he has a personal stake in the outcome. It has not explained how Palek's relationship to plaintiff in this case is any different in nature or degree from a lawyer's relationship to her client in a contingency fee case. In the absence of any such a showing, I see no reason to disqualify Palek on this ground.

As for defendant's argument that Palek must be disqualified because he will be a witness in the case, defendant has not persuaded me that Palek's testimony would be necessary, desirable or relevant. The sole question in this case is whether *plaintiff* has made a request sufficient to require defendant to produce certain documents for plaintiff's inspection. That question turns on what plaintiff said to defendant or what Palek said on plaintiff's behalf after he became plaintiff's attorney on January 26, 2003.

Defendant says that Palek's testimony will be critical to showing the falsity of the reasons plaintiff gives in his amended complaint for wanting to see Cross's bill. Defendant does not explain why the allegations of the complaint are even relevant until plaintiff establishes that he made a proper request to see the records in dispute. "[T]he union has a right to have the just cause presented to it before the judicial process is invoked." Morley, 378 F.2d at 743. The just cause need not be in writing; "[i]t is sufficient if . . . the union officers in charge of the records sought to be examined know, or should know, that the requesting member has just cause to seek examination." Id. On the present record, it would be difficult to find that plaintiff has met this requirement. The only request from plaintiff that is in the record is his email of December 2, 2002, in which he asked for a copy of Cross's bill without offering any reason for the request. So far as the record shows, he never responded to Byers's request for more information. (I note, however, that plaintiff alleges in ¶ 18 of his amended omplaint that he "complied" with Byers's request.) Palek did not

become plaintiff's attorney until January 26, 2003. Before then, any communications he made to defendant were made on his own and not as attorney for plaintiff. It appears that the only communication he sent to defendant after January 26, 2003, was one in which he accused Boley and Davis of creating an "adversarial environment."

Apparently, defendant believes that the allegations of the amended complaint are relevant to determining the existence of just cause. That is the only explanation for their expressed desire for a chance to show that those allegations are false. (Defendant has not cited any case holding that a union should have an opportunity to prove that the reasons that a requester makes in support of a § 431 request are not true. However, for the purpose of deciding this motion, I will assume that false reasons cannot constitute "just cause" (at least if the fact that the reasons are false demonstrates the requester's intent to harass the union in some way). Before reaching the issue of falsity, however, it would be necessary to find that at least one of the reasons plaintiff alleges would constitute just cause on its face. If that happens, defendant will be able to cross-examine plaintiff at length about the factual basis for his alleged reasons. For example, it can ask him why he made no attempt to show just cause in his December 2, 2002 email when he asked for the records and whether at the time he made his request he had in mind the reasons he alleged later in his amended complaint. It can ask him about his involvement in the underlying incident and about his actual motives for the request, given his presumed interest in attacking the union's decision

to hire counsel to look into Armitage's complaint against him. This should be more than sufficient for the union to prove up its defense, if it is a valid one. Any incremental value to defendant in calling Palek does not outweigh plaintiff's interest in having representation by the counsel of his choice.

ORDER

IT IS ORDERED that defendant United Staff Union's motion to disqualify plaintiff's counsel Roger Palek is DENIED.

Entered this 21st day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge