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IN THE COURT OF COMMON PLEAS OF THE 12TH JUDICIAL DISTRICT
DAUPHIN COUNTY, PENNSYLVANIA

U.S. Law Shield of Pennsylvania,	:	2015-cv-255
Ex rel. Todd Hoover; and Justin J. McShane,	:	
Plaintiffs	:	Civil Action – Equity
v.	:	
City of Harrisburg; Mayor Eric Papenfuse;	:	Jury Trial Demanded
Wanda Williams, Sandra Reid,	:	
Brad Koplinski, Ben Alatt, Jeff Baltimore,	:	
Susan Wilson, Shamaine Daniels,	:	
Harrisburg City Council Members; and	:	
Chief of Police Thomas Carter,	:	
Defendants	:	

Emergency Motion-
Defendants' Motion to Disqualify Plaintiffs' Counsel and Law Firm

All Defendants ask this Court to disqualify Plaintiffs' counsel and their law firm:

1. Attorneys Justin McShane and Michael Giaramita of the McShane Law Firm filed this lawsuit on behalf of Plaintiffs. Attorney McShane is also a Plaintiff.
2. Attorney-Plaintiff McShane's representation is clearly improper as he will also have to testify in this case.

3. Defendants file this as an emergency motion under the Local Rules due to the impending hearing on the Plaintiffs' motion for a preliminary injunction (scheduled before Judge Dowling for tomorrow morning, Friday, February 6th at 9 a.m.) and due to Plaintiffs' attempts to schedule depositions.

4. Plaintiffs filed their motion while both undersigned counsel were at an out-of-state conference, not returning to the office until Monday, February 2nd. Undersigned counsel was unable to meet with the Defendants until last night (for the Council members) and this afternoon (for the Mayor and Chief of Police).

5. Due to these time constraints, Defendants have e-mailed the text of the motions to Plaintiffs' counsel today, but cannot wait for concurrence. Accordingly, Defendants certify that they believe that Plaintiffs will oppose this motion.

6. Pennsylvania Rule of Professional Conduct 3.7(a) provides:

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

(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.

7. None of these exceptions apply. Defendants vigorously contest Attorney-Plaintiff McShane's interests at stake and claimed need to violate the reasonable ordinances passed by Harrisburg.

8. Attorney-Plaintiff McShane's testimony will not relate to his legal services, but rather to his "right" to violate the Harrisburg ordinances.

9. Nor would disqualification work any hardship. This case is in its infancy, and Plaintiffs could obtain other counsel. Indeed, Defendants simultaneously seek a stay of the case as the statute on which Plaintiffs rely for standing and attorney fees is subject to a Commonwealth Court original action challenging its constitutionality under the Single Subject Rule.

10. The Explanatory Comment provides:

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.

Pa. R. Prof. C. 3.7, Explanatory Comment ¶ 1.

11. Such is the case here. Attorney-Plaintiff McShane's advocacy and testimony will overlap and create confusion causing the Court, jury, and counsel to guess as to when he's providing legal argument and when he's providing testimony:

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.

Pa. R. Prof. C. 3.7, Explanatory Comment ¶ 2.

12. While Defendants are unaware of any Pennsylvania authority on this novel question (whether an attorney-party can represent themselves *pro se*), this Court can take guidance from federal courts that have addressed similar situations.

13. The Eastern District Court of Pennsylvania recognized a *pro se* exception to Rule 3.7. However, the Court also held that a *pro se* attorney-party cannot represent other parties to the litigation. *See Elec. Lab. Supply Co. v. Motorola, Inc.*, No. CIV. 88-4494, 1990 WL 96202, at *3 (E.D. Pa. July 3, 1990) (*pro se* defendant cannot represent other defendants because plaintiffs need to be able to cross-examine every defendant).

14. Another U.S. District Court has reached an identical result applying these principles. *Justin F. v. Maloney*, No. 3:04-CV-1149, 2004 WL 3078811, at *1 (D. Conn. Dec. 21, 2004) (“As a witness in the case, Mr. Frey cannot also serve as an advocate for another.”).

15. The reasoning of these cases applies equally here. While Attorney-Plaintiff McShane may be able to represent himself *pro se*, he may not represent the other Plaintiffs.

16. The question of whether this ethical dilemma imputes to the entire McShane Firm turns on whether Attorney-Plaintiff McShane’s representation creates a conflict of interest. Defendants believe that it does.

17. Once again, Defendants are not aware of any state law on rather unique legal question, but Defendants have found persuasive federal law. In *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1089-90 & n.9 (3d Cir. 1976), the

Third Circuit recognized that an attorney-plaintiff had a conflict of interest in a class action due to the fact that the attorney-plaintiff would have to testify and due to the possibility of a fee dispute.

18. As in *Kramer*, Attorney-Plaintiff McShane will have to testify in this case. Further, there is also the possibility of a fee dispute as Plaintiffs seek an attorney fee award for the work performed by the McShane Firm. It is not hard to imagine a scenario where the other Plaintiffs would be inclined to accept a no-money-exchanged or reduced-fee settlement to achieve a desired result whereas Attorney-Plaintiff McShane has a financial incentive to fight the case out (as fees continue to build throughout the case).

19. But this Court need not spend too much time wondering where McShane's allegiances lie. He has made those clear and publicized them:

McShane said he also plans to sue for attorney and legal fees, which is allowed under the new law. ***He would not commit to dropping the lawsuit if the city repeals its ordinances. ...***

Harrisburg could take a serious financial "hit" by the lawsuit, McShane said, adding that the city will determine the extent of the hit through the lengths it chooses to defend the gun ordinances.

"Major financial hit' looming for Harrisburg, says legal defense group suing over firearm ordinances," Patriot News, Jan. 13, 2015 (Ex. A and available at www.pennlive.com/midstate/index.ssf/2015/01/harrisburg_sued_gun_ordinances.html) (emphasis added).

20. Attorney-Plaintiff McShane's outspoken desire is "take a serious financial hit" out on the City. More importantly than that, he stated that he would

not agree to end the case *even if* Harrisburg repealed all of the challenged ordinances. Attorney-Plaintiff McShane’s express desire for a big pay day directly conflicts with his clients’ express desire to end the law they challenge and to assert their “rights”. *See* Pennsylvania Rule of Professional Conduct 1.7(a)(2) (concurrent conflict of interest exist where “there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer.”).

21. Because Attorney-Plaintiff McShane has a conflict of interest, his disqualification is imputed to the entire firm under Rule of Professional Conduct 1.10.

22. Defendants do not believe that oral argument or an evidentiary hearing are necessary for resolution of this motion, but defer to this Court as to whether this Court would like testimony or oral argument on the matter.

23. Discovery is not necessary for the resolution of this motion.

For these reasons, All Defendants respectfully request this Honorable Court disqualify Attorney McShane and the McShane Firm.

Respectfully submitted,

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Attorneys for Defendants

Dated: February 5, 2015

Certification of Counsel

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Attorneys for Defendants

Dated: February 5, 2015

Certificate of Service

I certify that on February 5, 2015, I served a true and correct copy of this filing via U.S. First Class mail, postage prepaid, and by e-mail addressed as follows:

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