

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
JACK E. MUNDELL, JR., and)	
NAN D. MUNDELL,)	CASE NO. BK91-80898
)	
DEBTOR)	A93-8148
)	
ROPER & SONS MORTUARY, INC.,)	
)	CH. 7
Plaintiff)	
vs.)	
)	
NAN MUNDELL,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on May 5, 1994, on the Motion by Plaintiff to Disqualify Attorney Leonard Dunker. Appearing on behalf of plaintiff was Joel G. Lonowski of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., Lincoln, Nebraska. Appearing on behalf of defendant was Leonard Dunker of Lincoln, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (I).

Background

This adversary proceeding was filed on July 9, 1993, by Roper & Sons Mortuary, Inc. (the plaintiff) to determine whether its claim is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). The plaintiff alleges that the debtor, Nan D. Mundell, entered into a written contract with the plaintiff to furnish funeral services for her late mother, that she affirmatively represented to the plaintiff that she was capable of repaying this debtor, and that she knew at that time the debt could not be repaid because she had previously filed for Chapter 13 bankruptcy protection and was subject to turning over all of her disposable income to the Chapter 13 Trustee for distribution to her prepetition creditors.

The debtor and her husband filed a joint petition for Chapter 13 bankruptcy relief on April 22, 1991. A Chapter 13 plan was confirmed on September 16, 1991. On or about May 27, 1992, the debtor's mother passed away, and the debtor entered into the above-described contract with the plaintiff. After entering into this

contract, the debtor and her husband converted their case into a Chapter 7 case and scheduled the plaintiff's debt as an unsecured claim. The Chapter 7 trustee has filed a report with the Court stating that this case is a no-asset case.

A trial was scheduled for May 5 and 6, 1994, to determine the dischargeability of the plaintiff's claim. On April 15, 1994, the plaintiff filed a Motion to Disqualify Attorney. The plaintiff takes the position that the debtor's attorney should be disqualified in this case because the attorney will be called as a witness in the trial and ethical rules prohibit an attorney from both testifying as a witness at a trial and acting as an attorney.

The attorney is the debtor's father and the husband of the debtor's deceased mother, for whom the funeral services were procured. The plaintiff alleges that the attorney advised the debtor to enter into the contract to pay for the funeral expenses because the attorney could not afford to pay the funeral expenses and that he knew the debtor could discharge the debt by converting the Chapter 13 case into a Chapter 7 case.

The debtor's attorney resists the plaintiff's motion. The attorney states that the debtor took care of the funeral arrangements because he was not capable of making the funeral arrangements for his late wife and that, before the case was converted, the debtor tried in good faith to pay the installment payments on the claim. The attorney further states that he does not believe that he should be disqualified because his testimony would not relate to a contested matter in this case and that the debtor would suffer a substantial hardship if he is disqualified.

Discussion & Decision

Attorneys admitted to practice before Nebraska courts must adhere to the Code of Professional Conduct. In this case, the issue is whether the debtor's attorney will violate Disciplinary Rule [hereinafter DR] 5-102 if he is not disqualified from representing the debtor. DR 5-102 states:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it [is] obvious that he ... ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial ..., except that he may continue the representation and he ... may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after under taking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he ... may be called as a witness other than on behalf of his client, he may

continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Code of Professional Responsibility DR 5-102 (Neb. 1993).

The exceptions to disqualification, which are set forth at DR 5-101(B) state that an attorney who is called as a witness may continue representing the client:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer ... to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Code of Professional Responsibility DR 5-101(B)(1) - (4) (Neb. 1993). See also **Code of Professional Responsibility Canon 5 (Neb. 1993).**

The Nebraska Supreme Court warns against attorneys acting as both advocates for a client and as witnesses:

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If the lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Nebraska State Bar Association v. Neumeister, 234 Neb. 47, 55-56, 449 N.W.2d 17 (1989) (quoting **Code of Professional Conduct** EC 5-9). The general rule in Nebraska is that "[i]t is against sound principles of professional ethics for one who knows that he is to be called as a material witness in a case to appear as attorney therein. Id. at 56; Sinnett v. Albert, 188 Neb. 176, 180, 195 N.W.2d 506 (1972).

In the Eighth Circuit, when deciding motions to disqualify attorneys, district courts are encouraged to strictly enforce the Code of Professional Responsibility. Central Milk Producers Coop. v. Sentry Food Servs., Inc., 573 F.2d 988, 933 (8th Cir. 1978). In the District of Nebraska, the duty to enforce and foster ethics in the legal profession extends to bankruptcy cases and adversary proceedings through Neb. R. Bankr. P. 1001(c)(1).

In this case, the debtor's attorney must be disqualified. The funeral services which were performed benefitted the attorney as much as they benefitted the debtor. Even though the debtor was the only party to sign the contract, the attorney is not a disinterested party. Since the allegations suggest that the debtor knowingly signed the contract while having no intention of paying the money back and that the attorney was a participant in this scheme, the attorney is an interested party whose representation of the debtor could be detrimental to the debtor because his own culpability will be at issue in this trial.

At trial, the plaintiff has the right to sequester witnesses other than the debtor. If the father is permitted to remain as the attorney for the debtor and is a witness, the evidentiary process could become controlled by the attorney and not by the objective testimony of the witnesses. He could not be sequestered. Even if he could be sequestered, his client could not be required to participate without the attorney present. It might be difficult for the attorney to testify objectively and truthfully regarding the circumstances of the claim and then turn around and advocate only the facts beneficial to debtor.

The attorney believes that his role as a witness will fall into one of the exceptions to disqualification set forth at DR 5-101(B)(1) - (4). However, none of these exceptions apply in this case. First, the attorney is being called as a witness for the plaintiff. Therefore, DR 5-102(B) applies in this case, and this disciplinary rule does not refer to the exceptions in DR 5-101(B)(1) - (4). The attorney is disqualified from representing the debtor because it is apparent that his testimony is or may be prejudicial to the client. Counsel for the plaintiff has stated that he intends to use the attorney's testimony to show the financial situation of the attorney and to show that he had a personal interest in having this debt discharged. Such evidence, if credible, could be prejudicial to the debtor.

Alternatively, even if the attorney is called on behalf of his client and DR 5-102(A) applies, as well as the exceptions stated at DR 5-101(B)(1) -(4), the debtor's attorney is disqualified because his role as a witness is not within the exceptions listed. The testimony definitely relates to a contested matter and the motive of the debtor, and the attorney's role in the affair is central to whether the debt will be found dischargeable or not.

Second, the testimony given by the attorney in this case will relate to more than mere formalities. It is possible that the plaintiff will offer substantial evidence concerning the alleged scheme and the attorney's role. Counsel for the plaintiff has already stated that the attorney will not turn over his financial information to the plaintiff, so it is apparent that there is a certain degree of disagreement between the parties which prevents the parties from stipulating to the facts. Not only does this show that the testimony of the attorney concerns a contested issue, but it also shows that the testimony goes beyond technical or foundational information.

Third, the testimony does not relate to the nature and value of the legal services rendered. As previously stated, the testimony is central to the issue of the case itself and does not relate to the legal services performed for the debtor, but to the interest of the attorney in obtaining funeral services for his wife, and allegedly helping his daughter avoid paying for such services.

Fourth, disqualification will not work a substantial hardship on the debtor. The debtor's attorney stated that the debtor will not be able to afford a new attorney if he is disqualified. After reviewing the debtor's bankruptcy file, it is apparent that the debtor is capable of paying for a new attorney. In fact, during the Chapter 13 plan, her father was paid an attorney's fee that is comparable to the fees charged by other attorneys for similar Chapter 13 cases. The debtors have no secured claims, except an automobile lease. Therefore, even if the funeral claim is nondischargeable, with their income and with the Chapter 7 discharge of all other obligations, she should be able to afford to pay an attorney for a one-day trial.

Advisory Opinion 93-6, which is an opinion from the Advisory Committee of the Nebraska State Bar Association and was submitted by the attorney to support his position, instead appears to support the finding that the attorney may not represent the debtor. The Advisory Opinion is distinguish-able from the attorney's situation in the case because it addresses whether an attorney may represent his or her law firm if the attorney will be called as a witness. The Advisory Opinion found that an attorney who represents his or her law firm is not disqualified because the attorney has not accepted "employment" because the firm is in effect representing itself. In the alternative, the Committee opined that an attorney

whose testimony relates only to cumulative or uncontested matters is permitted to testify and serve as counsel. Neither of these two situations exist in this case.

Conclusion

The attorney for the debtor is disqualified from representing the debtor in the adversary proceeding because such representation would violate Nebraska's Code of Professional Responsibility. Witnesses in trials are generally not permitted to act as an advocate for a party in the case, especially when the witness has a separate interest in the trial.

Clerk shall schedule trial no sooner than August 1, 1994.

Separate journal entry to be entered.

DATED: June 1, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

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NAN MUNDELL,)	
)	DATE: June 1, 1994
<u>Defendant(s)</u>)	HEARING DATE: May 5,
)	1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion by Plaintiff to Disqualify Attorney-Leonard Dunker.

APPEARANCES

Joel Lonowski, Attorney for plaintiff
Leonard Dunker, Attorney for defendant

IT IS ORDERED:

The attorney for the debtor is disqualified from representing the debtor in the adversary proceeding because such representation would violate Nebraska's Code of Professional Responsibility. See Memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.