

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

LEN K. FURMAN, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 JAN CARY FURMAN, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Case No. 2D17-2239

Opinion filed January 5, 2018.

Petition for Writ of Certiorari to the Circuit  
Court for Sarasota County; Donna Padar  
Berlin, Judge.

Mark W. Lord, Sarasota, for Petitioner.

Jordan L. Wallach of Jordan L. Wallach,  
P.A., Sarasota, for Respondent.

BLACK, Judge.

Len Furman, the Husband, seeks certiorari review of the circuit court's  
order disqualifying his attorney from representing him in pending dissolution  
proceedings based on the attorney's involvement in drafting the prenuptial agreement at

issue below. We grant the petition for writ of certiorari and quash the order disqualifying the Husband's attorney.

The initial motion to disqualify was filed by Jan Furman, the Wife, on February 5, 2010. The motion alleged that the Husband's attorney was involved in drafting the prenuptial agreement and would be a "material witness" in the case, but the motion did not otherwise allege a basis for the disqualification. The Wife's counsel subsequently withdrew from the case on September 1, 2010, without scheduling the motion to disqualify for a hearing. Almost five years later, the Wife's former counsel filed a notice of appearance, and on December 29, 2016, almost seven years after the initial motion was filed, the Wife filed a "renewed motion to disqualify." The 2016 motion alleged not only that the Husband's attorney prepared the agreement and would be a "material witness," it also alleged that the Husband's attorney "has a personal interest in ensuring that the prenuptial agreement" is upheld and enforced; that the attorney's "independent, professional judgment will suffer material interference by his own personal interest in ensuring the prenuptial agreement is upheld"; that the attorney's "testimony may violate his own duty to the Husband to provide the Husband with diligent and competent representation"; and that the attorney's representation of the Husband violates rules 4-1.7 and 4-3.7 of the Florida Rules of Professional Conduct. Following a hearing, the circuit court granted the renewed motion to disqualify. The order contains no findings and directs that the Husband shall obtain alternate counsel with no conditions, limitations, or qualifications.

"Disqualification of counsel is 'an extraordinary remedy that should be used most sparingly.'" Bon Secours-Maria Manor Nursing Care Ctr., Inc. v. Seaman,

959 So. 2d 774, 775 (Fla. 2d DCA 2007) (quoting Akrey v. Kindred Nursing Ctrs. E., L.L.C., 837 So. 2d 1142, 1144 (Fla. 2d DCA 2003)). As such, "review of an order of disqualification by certiorari is appropriate, and a reviewing court may grant the writ where the petitioner can demonstrate that the order disqualifying counsel departed from the essential requirements of law." Id. (citing Akrey, 837 So. 2d at 1144); accord Lieberman v. Lieberman, 160 So. 3d 73, 74 (Fla. 4th DCA 2014). "[B]ecause 'an order disqualifying counsel denies the right to choose one's counsel and works a material injury that cannot be remedied on appeal,' " the jurisdictional requirements for certiorari review are met. Alto Constr. Co. v. Flagler Constr. Equip., LLC, 22 So. 3d 726, 727 (Fla. 2d DCA 2009) (quoting AlliedSignal Recovery Tr. v. AlliedSignal, Inc., 934 So. 2d 675, 677 (Fla. 2d DCA 2006)). We must therefore determine whether the circuit court departed from the essential requirements of law.

The Husband argues that by requiring "full disqualification" of his attorney and by ruling on the motion "without an evidentiary basis to do so," the circuit court departed from the essential requirements of law. Because the Husband's argument focuses on the latter, we begin with the argument that the court granted the unsworn motion without holding an evidentiary hearing or otherwise having an evidentiary basis to grant the motion.

"[T]he Florida Rules of Professional Conduct provide the standard for determining whether counsel should be disqualified in a given case." Young v. Achenbauch, 136 So. 3d 575, 580 (Fla. 2014) (citing State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991)). Here, the Wife has identified rules 4-1.7 and 4-3.7 as the applicable rules of professional conduct.

Rule 4-1.7 is the conflict of interest rule. It appears that the Wife contends that the Husband's attorney would be in violation of rule 4-1.7(a)(2) if he continues to represent the Husband: "[A] lawyer must not represent a client if . . . there is a substantial risk that the representation of 1 or more clients will be materially limited by . . . a personal interest of the lawyer." Rule 4-1.7 also states, however, that

[n]otwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

R. Regulating Fla. Bar 4-1.7(b); see also R. Regulating Fla. Bar 4-1.7, cmt. ("A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.").

Rule 4-3.7 governs lawyers as witnesses and provides, in pertinent part:

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

(1) the testimony relates to an uncontested issue;

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

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

R. Regulating Fla. Bar. 4-3.7(a).

The circuit court's first task in deciding the motion for disqualification was to determine whether the Wife had shown—via competent evidence—that the Husband's attorney's representation would be materially limited by the attorney's personal interest or that the attorney would be a witness on behalf of the Husband as to a contested issue. Neither the original motion nor the renewed motion for disqualification was sworn. There were no attachments to the motions, such as affidavits. Although the appendices provided to this court do not contain a transcript of the hearing held on the renewed motion to disqualify, the Wife does not dispute the Husband's statement that no evidence was provided to the circuit court;<sup>1</sup> rather, the Wife contends that "the only 'fact' which the Wife relies upon to support disqualification is that [c]ounsel for the Husband was responsible for the drafting and execution of the parties' antenuptial agreement" and that such fact is undisputed. The Wife contends that her affirmative defenses, as well as her counter-petition for dissolution, allege that the prenuptial agreement attached to the Husband's petition for dissolution is not the same document executed by the Wife and that the prenuptial agreement was procured

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<sup>1</sup>In response to this court's order for supplementation of the Husband's appendix with the hearing transcript, the Husband advised that a court reporter was not present for the hearing.

by "fraud, duress, undue influence or coercion." The Husband contends that his attorney was not present for the execution of the prenuptial agreement and that his attorney has no knowledge of the alleged "fraud, duress, undue influence or coercion."

The Wife's affirmative defenses and counter-petition are unverified. She presented no evidence as to how the Husband's attorney's testimony will support her claims or how it will be in conflict with his client's interests. See Bon Secours-Maria Manor, 959 So. 2d at 777 (quashing disqualification order where movant "did not offer any testimony, affidavits, or other evidence in support of her motion"); Strawcutter v. Strawcutter, 101 So. 3d 417, 419 (Fla. 5th DCA 2012) (granting writ of certiorari where, as to "the husband's first basis for disqualification, the hearing only involved argument from the attorneys; the husband did not present any evidence demonstrating that [the law firm] retained by the wife] became privy to any privileged communications").

Moreover, the Husband does not intend to call his attorney as a witness; rather, it is the Wife who intends to call the Husband's attorney as a witness. Cf. R. Regulating Fla. Bar 4-3.7 (stating that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client" (emphasis added)). "The Rules Regulating The Florida Bar do not mandate an attorney's automatic disqualification when he or she is called to testify by an opposing party." Alto Constr. Co., 22 So. 3d at 727-28 (citing AlliedSignal Recovery Tr., 934 So. 2d at 680). "The requirement that a lawyer withdraw when he expects to be a witness was not intended to permit an opposing party to call him as a witness and disqualify him from serving as counsel." AlliedSignal Recovery Tr., 934 So. 2d at 680; accord Steinberg v. Winn-Dixie Stores, Inc., 121 So. 3d 622, 625 (Fla. 4th DCA 2013). "A conflict requiring

disqualification, however, could arise if an opposing party called trial counsel as a witness and counsel's testimony was adverse to the client's position." Steinberg, 121 So. 3d at 625.

Nonetheless, the Wife has not shown that the Husband's attorney's testimony "would be adverse" to the Husband's "factual assertions or account of events." See Alto Constr. Co., 22 So. 3d at 728; see also AlliedSignal Recovery Tr., 934 So. 2d at 680 ("AlliedSignal, however, made no showing that [the Trust's attorney] would give any testimony 'sufficiently adverse to the factual allegations or account of events offered on behalf of the [Trust].'" (second alteration in original)); Therriault v. Berghmans, 788 So. 2d 1119, 1120 (Fla. 2d DCA 2001) (granting writ of certiorari and concluding that disqualification was "premature" where attorney had not "been deposed as to what his testimony [would] be" as to the matter at issue); Steinberg, 121 So. 3d at 625 (granting petition for writ of certiorari where movant failed to prove that opposing party's attorney's testimony would be "sufficiently adverse" to the position of the opposing party to warrant disqualification); cf. Singer Island Ltd. v. Budget Constr. Co., 714 So. 2d 651, 652 (Fla. 4th DCA 1998) (holding that trial court properly denied motion to disqualify where movant only showed a mere possibility that disqualification may be necessary and counsel had not been deposed to determine if his testimony would support a motion to disqualify).

The circuit court departed from the essential requirements of law by relying on an unsworn motion, unsworn allegations, and counsel's argument as its only basis for the entry of an order of disqualification. See Bon Secours-Maria Manor, 959 So. 2d at 780; see also Akrey, 837 So. 2d at 1146 (quashing disqualification order

where "the trial court departed from the essential requirements of law by reaching its conclusion without conducting an evidentiary hearing" (quoting Simon DeBartolo Grp., Inc. v. Bratley, 741 So. 2d 1254, 1254 (Fla. 1st DCA 1999))).

The circuit court also departed from the essential requirements of law by disqualifying counsel without limiting the order to the trial, if one is held. Rule 4-3.7 specifically refers to trial, and a trial court departs from the requirements of law where it fails to narrow the disqualification to only the necessary proceedings. See, e.g., KMS Rest. Corp. v. Searcy, Denney, Scarola, Barnhart & Shipley P.A., 107 So. 3d 552, 552 (Fla. 4th DCA 2013) ("The trial court's order departs from the essential requirements of law because it is not limited to disqualifying counsel from representing KMS at trial. The fact that counsel will be a material witness does not preclude him from participating in proceedings before and after trial." (citations omitted)); Graves v. Lapi, 834 So. 2d 359, 360 (Fla. 4th DCA 2003) (granting certiorari in part where "the order was too broad in not limiting the disqualification to trial advocacy").

Accordingly, we grant the petition for writ of certiorari and quash the order disqualifying the Husband's attorney.

Petition granted; order quashed.

CASANUEVA and BADALAMENTI, JJ., Concur.