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United States District Court,
S.D. New York.

M.K.B., O.P., L.W., M.A., Marieme Diongue, M.E., P.E., Anna Fedosenko, A.I., L.A.M., L.M., Denise Thomas, and J.Z., on their own behalf, and on behalf of their minor children and all others similar situated, Plaintiffs,
v.
Verna EGGLESTON, as Commissioner of the New York City Human Resources Administration; Robert Doar, as Commissioner of the New York State Office of Temporary and Disability Assistance; and Antonia C. Novello, as Commissioner of the New York State Department of Health, Defendants.

No. 05 Civ. 10446(JSR). | Feb. 24, 2006.

Opinion

MEMORANDUM ORDER

RAKOFF, J.

***1** By Memorandum Order dated February 15, 2006, the Court denied the motion of defendant Verna Eggleston (the "City Defendant"), joined, in certain respects, by defendants Doar and Novello, to disqualify plaintiffs' counsel, as well as various paralegal assistants and interns in plaintiffs' counsel's firms, and to prohibit Reena Ganju, Esq., who represented some of plaintiffs in prior, related actions, from testifying in this action. City Defendant now moves for reconsideration, arguing that the Court's Memorandum Order cited to a prior version of Disciplinary Rule 5-102 (the New York "advocate-witness" rule), *see* Memorandum Order at 2-3,[1] since replaced by the version codified at 22 N.Y.C.R.R. § 1200.21 (2006).[2]

[1] The version cited by the Court provides,
(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial....
(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns that or it is obvious that he or a lawyer in his firm 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.

[2] The current version of the rule in New York provides,
(a) A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify:
(1) If the testimony will relate solely to an uncontested issue.
(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 or the lawyer's firm to the client.
(4) As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as a counsel in the particular case.
(b) Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.
(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal, except that the lawyer may continue as an advocate on issues of fact and may testify in the circumstances enumerated in paragraphs (a)(1) through (4) of this section.
(d) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

The Court is grateful to counsel for alerting the Court to this oversight (which the Court has now corrected through an Erratum issued today), but the differences between the two versions, insofar as City Defendant's motion to disqualify is concerned, are immaterial. Indeed, in every respect here relevant, the current version *relaxes* the restraints on advocates serving as witnesses. Specifically, the current version only prohibits a lawyer who is

testifying on the lawyer's client's behalf from serving as an *"advocate on issues of fact," id.* § 1200.21(a) & (c) (emphasis added), and only when the lawyer will be called as a witness *"on a significant issue," id.* § 1200.21(a)-(d) (emphasis added). Moreover, the current version enumerates several exceptions to the general prohibition on the testimony of advocates on their client's behalf, *see* 22 N.Y.C.R.R. § 1200.21(a)(1)-(4), one of which allows a lawyer to act as an advocate and testify "as to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as a counsel in the particular case," *id.* § 1200.21(a)(4).

Accordingly, there is no reason for the Court to revisit its ruling of February 15. City Defendant argues again that Ms. Ganju should be disqualified from testifying because, while employed as a lawyer at Sanctuary for Families, she represented named plaintiffs before the New York City Human Resources Administration and at their Fair Hearing tribunals. But it remains the case that the current version of Disciplinary Rule 5-102 is inapplicable to Ms. Ganju, who has not, and will not, advocate on plaintiffs' behalf in this matter; nor does her testifying here implicate any of the considerations underlying the advocate-witness rule, *see Ramey v. Dist. 141 Int'l Ass'n of Machinists & Aerospace Workers,* 378 F.3d 269, 282 (2d Cir.2004). Since it is further clear to the Court that neither party will be prejudiced by Ms. Ganju's testimony, the Court abides by its earlier ruling refusing to disqualify Ms. Ganju from testifying. Therefore, for the reasons articulated in the Court's prior Memorandum Order, there is no reason to disqualify plaintiffs' counsel or paralegal assistants and interns in plaintiffs' counsel's firms.

***2** Accordingly, City Defendant's motion for reconsideration is hereby denied.

SO ORDERED.