

District Court of Appeal of Florida, Third District.
Ugo COLUMBO, Petitioner,

v.

Dora PUIG, Respondent.

No. 99-2086.

Dec. 8, 1999.

In real estate salesperson's action against her former employer and others for, inter alia, breach of contract, salesperson moved to disqualify employer's counsel. The Circuit Court, Dade County, Thomas S. Wilson, J., granted salesperson's motion. Employer appealed. The District Court of Appeal held that: (1) fact that counsel might be called as trial witness did not preclude him from acting as advocate at pre-trial proceedings; (2) employee's alleged view of counsel as employee's "boss" did not present legal or ethical basis for counsel's disqualification; and (3) fact that counsel spoke with employee before employee brought action did not require disqualification.

Certiorari granted, order quashed, remanded with directions.

West Headnotes

[1] Attorney and Client 45 ↪22

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k22 k. Acting in Different Capacities; Counsel as Witness. Most Cited Cases

"At a trial," as used in rule of professional conduct which provides that lawyer shall not act as advocate "at a trial" in which lawyer is likely to be necessary witness on behalf of client, did not encompass pre-trial or post-trial proceedings, and thus, did not preclude counsel from conducting pre-trial deposition, even if it were likely that counsel would be called as witness at trial. West's F.S.A. Bar Rule 4-3.7.

[2] Attorney and Client 45 ↪21.10

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k20 Representing Adverse Interests

45k21.10 k. Disclosure, Waiver, or Consent. Most Cited Cases

If the client consents after consultation, a lawyer is permitted to continue representation where the lawyer's own interests could affect his representation of the client. West's F.S.A. Bar Rule 4-1.7.

[3] Attorney and Client 45 ↪21.5(1)

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k20 Representing Adverse Interests

45k21.5 Particular Cases and Problems

45k21.5(1) k. In General. Most Cited Cases

Fact that employee who sued her former employer for breach of contract viewed employer's counsel as employee's "boss" did not present legal or ethical basis for counsel's disqualification.

[4] Attorney and Client 45 ↪21.5(1)

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k20 Representing Adverse Interests

45k21.5 Particular Cases and Problems

45k21.5(1) k. In General. Most Cited Cases

Fact that employer's counsel spoke with employee before employee sued employer for breach of contract did not provide basis for counsel's disqualification, despite claim that counsel possessed special knowledge he would use to employee's disadvantage; communication was placed on record, and disqualification of counsel for investigating prior to actual filing of lawsuit would hinder counsel's practice of investigating any potential case for his client.

***1107** Samuel I. Burstyn, Miami; De la O & Marko and Miguel de la O and Tom Rebull, Miami, for petitioner.

Ferrell SchultzCarter Fertel and Martin Greenbaum and Michael J. Schlesinger, Miami, for respondent.

Before JORGENSEN, LEVY, and GREEN, JJ.

PER CURIAM.

Ugo Columbo petitions for a writ of certiorari claiming his counsel was erroneously disqualified from representing him. We grant the petition and quash the order under review.

In the underlying lawsuit, Dora Puig sued Colombo for breach of contract, defamation, and intentional infliction of emotional distress. Colombo retained Burstyn as one of his lawyers for this lawsuit. Burstyn intended to depose Puig; Puig objected and moved to disqualify Burstyn. Puig alleged that she would call Burstyn as a witness, that he had an ownership interest in one of the co-defendants, that she perceived him as her employer^{FN1} and that he possessed special knowledge he would use to her disadvantage. The trial court granted Puig's motion to disqualify Burstyn from representing Colombo at Puig's deposition and at the trial. Colombo then filed this petition for Writ of Certiorari.

FN1. Puig worked for Colombo and his company as a real estate salesperson. On behalf of the company, Burstyn interviewed Puig, in the presence of a court reporter, as part of the company's internal investigation into Puig's real estate activities.

[1] The trial court erred in disqualifying Burstyn from deposing Puig. According to Puig, Burstyn will likely be a necessary witness at trial. Rule 4-3.7 of the Rules of Professional Conduct provides 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." The key words here are "at a trial." Therefore, it follows that a lawyer may act as an advocate at pre-trial (before the start of the trial) and post-trial (after the judgment is rendered) proceedings. *See also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 89-1529 (1989) (lawyer may take depositions of witnesses and engage in other pre-trial proceedings as long as other requirements of the Rules are met).

In a similar case to this one, a plaintiff in a defamation action sought to disqualify an entire law firm where one attorney would be called as a witness in the trial. *Fleitman v. McPherson*, 691 So.2d 37 (Fla. 1st DCA 1997). The *Fleitman* court allowed the disqualification of the one attorney but only from participation at trial. *Id.* at 38. The court permitted the attorney to participate in proceedings up

until the trial and proceedings after the trial. *Id.* Likewise here, Burstyn should be permitted to represent Columbo in any proceedings before trial and after trial without running afoul of the Rules of Professional Conduct.

[2] [3] [4] Puig's remaining arguments for disqualification do not sway us from this position. Burstyn's ownership interest in a co-defendant does not prejudice Puig. While this financial interest could possibly impair Burstyn's loyalty to Columbo, his client, Columbo has not objected to Burstyn's continued representation. If the client consents after consultation, Rule 4-1.7 permits a lawyer to continue representation where the lawyer's own interests could affect his representation of the client. Puig's view of Burstyn as her boss does not present a legal or ethical basis for disqualification; if this were so, an attorney could never represent herself in any action involving an employee (for example, worker's compensation or unemployment compensation hearings). Burstyn did speak with Puig prior to the initiation of the lawsuit; however, this is not special knowledge possessed only by Burstyn. The communication was placed on record. *1108 Additionally, to disqualify Burstyn for investigating prior to the actual filing of the lawsuit would hinder a lawyer's practice of investigating any potential case for his client.

For the above reasons, we grant the petition and direct the trial court to allow Burstyn to participate in pre-trial, including Puig's deposition, and post-trial proceedings of this cause.

CERTIORARI GRANTED; ORDER QUASHED;
REMANDED WITH DIRECTIONS.

Fla.App. 3 Dist., 1999.

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745 So.2d 1106, 24 Fla. L. Weekly D2705

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