

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHANE M. GATES
Complainant,

v.

SHERIFF RODNEY JACK STRAIN,
ATTORNEY CHARLES M. HUGHES,
ET AL.
Defendants.

* NO. 2:07-CV-06983
*
* CIVIL ACTION: §1983
*
* JUDGE STANWOOD R. DUVAL, JR.
* SECTION: K
*
* MAGISTRATE JUDGE
* JOSEPH C. WILKINSON, JR.
* DIVISION: 2

**DEFENDANT CHARLES M. HUGHES'S MEMORANDUM IN SUPPORT OF
MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL DANIEL G. ABEL**

TO THE HONORABLE DISTRICT COURT:

Attorney-defendant Charles M. Hughes, Jr. respectfully submits this memorandum in support of his Motion to Disqualify Plaintiff's Counsel Daniel G. Abel and would aver as follows in support thereof:

I. SUMMARY OF FACTS

A. The Plaintiff's Theory of the Case: A Violation of Plaintiff's Constitutional Rights

On October 17, 2007, plaintiff Shane Gates filed a *Complaint for Damages Under 42 U.S.C. § 1983, et seq., Under 45 C.F.R. 164.513 (HIPAA), Pendent State Law Claims, and for*

Injunctive Relief to Prevent Bad-Faith Prosecution (Rec. Doc. 1) (hereinafter “Complaint”¹) naming as defendant, among others, Charles M. Hughes, Jr. – counsel for Sheriff Jack Strain of the St. Tammany Sheriff’s Office. In his original and thrice-amended Complaints, plaintiff brings forth claims against Mr. Hughes for alleged violations of plaintiff’s civil and constitutional rights beginning with alleged threats made by Mr. Hughes to plaintiff’s counsel, Mr. Abel, during a pre-litigation conversation that occurred in July 2007. Plaintiff alleges that Mr. Hughes, citing the United States Supreme Court case *Heck v. Humphrey*², threatened to obstruct any civil rights claims plaintiff may have possessed at the time against the St. Tammany Sheriff’s Office by asking the District Attorney to file additional charges of resisting arrest against plaintiff. *See* Second Amended Complaint, p. 2. Plaintiff further alleges that the District Attorney later added the resisting arrest charges that had been threatened by Mr. Hughes “for the express purpose of defeating any civil rights claims Gates might advance.” *Id.* In his Third Amended Complaint (Rec. Doc. 43), plaintiff additionally alleges that Mr. Hughes “instigated and [Assistant District Attorney] Dearing billed out the new charges to cover up the actions of the deputies and the Sheriff’s office and by doing so knowingly and intentionally attempted to and conspire to deprive and to otherwise threaten and induce Gates to give up his rights, including his constitutional and his property rights[.]” *See* Third Amended Complaint, p. 2.

¹ Plaintiff later filed a First Amended Complaint on January 22, 2008 (Rec. Doc. 3), a Second Amended Complaint on March 9, 2008 (Rec. Doc. 36), and a Third Amended Complaint on March 17, 2008 (Rec. Doc. 43).

² *Heck v. Humphrey*, 512 U.S. 477 (1994), is a seminal case decided by the U.S. Supreme Court which held that if there is no favorable termination of a criminal conviction or reversal of a case, a plaintiff cannot bring a 42 U.S.C. section 1983 claim because the civil case would be inconsistent with the criminal case.

Significantly, plaintiff's civil rights allegations against Mr. Hughes are based entirely upon Mr. Abel's personal account of the pre-lawsuit conversation that occurred between him and Mr. Hughes in 2007. Mr. Abel, thus, would be required to provide personal testimony at trial as a necessary witness in support of plaintiff's allegations. Plaintiff alleges the following against Mr. Hughes, relevantly:

63. When attorney Abel had met with attorney Hughes to discuss the deputies's (sic) constitutional violations and Gates's civil rights claims, Hughes expressly stated that he would call, or would have the Sheriff call the District Attorney and have him file *resisting arrest* charges against Gates, and those charges would prevent Gates's attempt to advance any such constitutional and civil rights action. Hughes specifically noted that the same charges of resisting arrest were used to stop the 42 U.S.C. § 1983 claims of a young woman who counsel later discovered was Holly Ray Bush and the resisting arrest charges would have the same effect for any civil rights claims brought by Gates. *See* Second Amended Complaint, p. 5.

76. Civil rights counsel for Gates arranged for and met with counsel for the Sheriff, attorney Charles M. Hughes, to discuss the District Attorney's proposal. *Id.* at p. 7.

77. On 24 July 2007 counsel [Daniel Abel] met with Sheriff's attorney defendant Charles M. Hughes, Jr. at 1:30 P.M., at his office in Covington, Louisiana. *Id.*

78. During the discussion of the civil rights issues and the extent of Gates's injuries, Sheriff's attorney Hughes threatened to have the District Attorney file *additional charges of Resisting Arrest* against Gates, in order to obstruct any civil rights claims that Gates might file, citing *Heck v. Humphrey* and related cases. *Id.*

79. Hughes specifically said that he would call or have the Sheriff call the District Attorney and have those charges filed. *Id.*

82. Only three days later, on the trial date of 20 September 2007, the District Attorney recharged Gates—ten months after the original charges were filed—with *resisting arrest*, the exact charges that had been threatened by defendant Hughes for the express purpose of defeating any civil rights claims that Gates might advance. *Id.*

83. These actions [...] violated the constitutional and civil rights of complainant[.] *Id.* (emphases supplied by plaintiff).

Accordingly, a review of plaintiff's original and amended Complaints reveals that the major issue raised by plaintiff in connection with his civil rights claims is the alleged action of Mr. Hughes in "threaten[ing] to have the District Attorney file *additional charges of Resisting Arrest* against Gates, in order to obstruct any civil rights claim that Gates might file, citing *Heck v. Humphrey* and related cases." *Id.* at p. 2 (emphases supplied by plaintiff). As aforesaid, however, the allegations against Mr. Hughes are based entirely upon Mr. Abel's take on the substance of the pre-litigation conversation that occurred between Mr. Abel and Mr. Hughes.

B. The Defendant Hughes's Response: The same Constitution cited by the plaintiff, provides that a victim of a crime has a right to input into the criminal justice system and has a right to have counsel as an advocate for the victim's interests.

Needless to say the defendant Charles Hughes take total exception to Abel's narrative and, believes he did nothing wrong and was merely acting as an advocate for his clients. Mr. Hughes will contest the allegations of fact by the plaintiff and will defend against these allegations based upon the following facts:

1. Mr. Abel, who is related to Gates and may be emotionally attached to Gates, initiated contact with Mr. Hughes, who was totally unaware of the Gates arrest at that time of their discussion.
2. Charles Hughes did not participate in the arrest, nor the investigation of Mr. Gates; he merely acted as an attorney for the Sheriff's Office.

3. During their initial discussion, Mr. Abel referenced the extensive “damages” suffered by Gates and, in effect, was threatening civil action in order to obtain dismissal of the criminal charges against Gates.
4. Mr. Hughes, as attorney for the Sheriff’s Department and its deputies, has a legal obligation to represent his client to the best of his ability setting forth their best interest.
5. As is the case for an attorney for any “victim of a crime,” (i.e. resisting arrest by Mr. Gates) the attorney for the Sheriff’s office may present his client’s case to the prosecuting authority and set forth reasons why there is a basis of prosecution. (In this case, plaintiff Gates who purportedly had high alcohol content readings, led police on a chase at speeds in excess of 100 miles per hour before his arrest and accordingly to Mr. Hughes resisted arrest. Additionally, the initial arrest report reflects that resisting arrest was one of a number of initial charges.)
6. Constitutional rights of any victim of crime include the ability to ensure that the judicial system protects anyone who might be victimized by criminal activity and also to ensure actions are taken to avoid civil litigation by frivolous lawsuits.

The above contentions by Mr. Hughes are totally contrary to plaintiff’s Complaints and the testimony of Mr. Abel.

C. The State Court Proceedings: A Conflict in Testimony

On May 10, 2010, both Mr. Abel and Mr. Hughes appeared in judicial proceedings before the Honorable William J. Crain in the 22nd Judicial District Court of St. Tammany Parish to provide sworn testimony in open court regarding a motion to recuse the district attorney's office filed by counsel for Shane Gates in his state court criminal matter³. Mr. Hughes provided sworn testimony at those proceedings that denied the allegations in plaintiff's Complaints and directly contradicted Mr. Abel's account⁴ of the pre-lawsuit conversation that occurred in 2007.

"Q. In either the telephone conversation, the courthouse meeting or the meeting in your office, did you ever threaten Danny Abel with anything?

A. (Hughes) Never threatened Mr. Abel at all. Every conversation I had with him was very professional, very even keeled. And I could tell that he was very emotionally

³ *State of Louisiana v. Shane Michael Gates*, No. 423508 / 423509, 22nd JDC, Parish of St. Tammany, State of Louisiana.

⁴ "A. --- actually, [Hughes] said I'm going to call the D.A. and have the D.A. charge [Gates] with resisting arrest and that's the end of your civil rights action.

Q. And it happened thereafter?

A. It absolutely happened thereafter[.]"

See Exhibit 1-- Transcript of Proceedings taken before the Hon. William J. Crain on May 10, 2010 in the matter of State of Louisiana v. Shane Michael Gates.

"Q. So the basis of your recusal is because we listened to Chuck Hughes?

A. The basis of the recusal is that -- is that Chuck Hughes said he was going to do this and said and implied --

Q. Do what?

A. That he was going to have Mr. Gates charged with resisting arrest for the specific purpose of killing his civil rights case, and that's what happened."

Id.

invested because his stepson was involved.” (Emphasis added)

See Exhibit 1—Transcript of Proceedings taken before the Hon. William J. Crain on May 10, 2010 in the matter of State of Louisiana v. Shane Michael Gates.

“Q. (Hughes) You specifically told [Abel] you would talk to the District Attorney’s Office about adding the resisting arrest charges?

A. No, I didn’t.

[...]

Q. That’s correct, that you intended that if [Abel] didn’t accept a \$10,000 settlement from you, from your mouth, you told him, you got a \$10,000 settlement, or I will call the District Attorney and I will add some resisting arrest charges.

A. I never made any offer of settlement to Mr. Abel in this case.

Q. I’m not talking offer, I’m talking threats.

A. I never threatened him.

Q. You never threatened that you would have additional charges brought against Shane Gates?

[...]

A. No.” *Id.* (Emphasis added)

Thus, it is undisputed that there is a contested issue regarding the substance of the pre-lawsuit conversation that took place between Mr. Abel and Mr. Hughes. Given there is no admission of such conduct by Mr. Hughes, the only viable evidence of the contested issue would be the personal testimony of plaintiff’s counsel, Mr. Abel, thereby placing Mr. Abel in a conflict situation.

Furthermore, defendant Charles Hughes, intends to add Mr. Danny Abel to the witness list and take his deposition when discovery is allowed.

II. LEGAL DISCUSSION

Rule 3.7 of the ABA Model Rules of Professional Conduct (“ABA Model Rules”) provides that a lawyer may not ordinarily serve as a witness in a case and remain counsel. Specifically, Rule 3.7 of the ABA Model Rules⁵ provides, relevantly:

(a) 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 services⁶ rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.⁷ (Emphasis added)

See ABA Model Rules, Rule 3.7 (2004).

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. *See* ABA Model Rules, Rule 3.7, cmt. (1). The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. *Id.*, cmt. (2). A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain

⁵ Rule 3.7 of the Louisiana Rules of Professional Conduct mirrors the ABA rule.

⁶ The value and amount of legal services are not at issue.

⁷ The disqualification of Mr. Abel would not work a “substantial hardship,” because additional (and lead) counsel of record has now been added to the case on behalf of Gates.

and comment on evidence given by others. *Id.* It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. *Id.*

To protect the tribunal, paragraph (a) of Rule 3.7 prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). *Id.*, cmt. (3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. *Id.* Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. *Id.* Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony. *Id.* Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. *Id.*, cmt. (4). Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. *Id.*

One purpose of the necessary witness rule is to avoid the possible confusion which might result from the jury observing a lawyer act in dual capacities—as witness and advocate. *Droste v. Julien*, 477 F.3d 1030, 1036-37 (8th Cir. 2007). The jury is usually not privy to pretrial proceedings, however, so the rule does not normally disqualify the lawyer from performing pretrial activities; the one exception is when the “pretrial activity includes obtaining evidence

which, if admitted at trial, would reveal the attorney's dual role.” *World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc.*, 866 F.Supp. 1297, 1303 (D.Colo.1994).

As detailed above, there is clearly a contested issue regarding the substance of the pre-litigation conversations held between plaintiff’s counsel and Mr. Hughes in June and July of 2007. Accordingly, and given the nature of the allegations contained in plaintiff’s original and amended Complaints, Mr. Abel is inarguably likely to be a necessary witness as encompassed by Rule 3.7 of the ABA Model Rules. In fact, Mr. Abel’s personal testimony at trial will be essential to plaintiff’s civil rights violation claims against Mr. Hughes. Accordingly, Mr. Abel does not fall within the exceptions contained in paragraphs (a)(1) and (a)(2) of Rule 3.7 necessary to avoid disqualification. Furthermore, Mr. Abel does not fall within the gamut of exception (a)(3) based upon the importance and probable tenor of his testimony, as already reflected in Mr. Abel’s sworn statements in the state court criminal matter, and the probability that Mr. Abel’s testimony will conflict with that of other witnesses.

Ultimately, Mr. Abel’s sworn testimony in the state criminal court proceedings outlined a totally different version of the two meetings between him and Mr. Hughes. Thus, there is a clear issue of credibility inherent in plaintiff’s original and amended Complaints. Given that Mr. Abel is likely to be a necessary witness at the trial of this matter, he should be precluded from proceeding as counsel for Shane Gates pursuant to Rule 3.7 of the ABA Model Rules and relevant law.

CONCLUSION

Plaintiff Shane Gates’s civil rights allegations against Mr. Hughes hinge entirely upon Mr. Abel’s personal account of the two pre-lawsuit conversations that occurred between Mr.

Abel and Mr. Hughes in 2007. Mr. Hughes's sworn testimony, however, directly contests the substance of said pre-trial conversations and denies the allegations in plaintiff's Complaints. Mr. Abel, thus, is both counsel and a necessary witness who would need to provide sworn testimony at trial to carry the burden of proof on plaintiff's allegations against Mr. Hughes. Given the obvious conflict of interest, Mr. Abel should be disqualified as plaintiff's counsel pursuant to ABE Model Rule 3.7 to ensure the integrity of the proceedings and the finality of any verdict.

Respectfully submitted,

**HAILEY, McNAMARA, HALL,
LARMANN & PAPALE, L.L.P.**

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

New Orleans, Louisiana this 26th day of September, 2012.

/s/Richard T. Simmons, Jr.