

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION**

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**IN RE**

**DAVID R. BLURTON and  
VIRGINIA E. BLURTON,**

**CASE NUMBER 99-11909**

**Debtors.**

**Chapter 7**

**TEXTRON FINANCIAL CORPORATION,**

**Plaintiff,**

**v.**

**Adv. Pro. No. 99-5315**

**DAVID R. BLURTON,**

**Defendant.**

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**MEMORANDUM OPINION AND ORDER RE  
MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL**

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The Court conducted a hearing on the debtor's Motion to Disqualify Plaintiff's Counsel on February 23, 2000. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

**I. FINDINGS OF FACT**

On September 20, 1999, the plaintiff, Textron Financial Corporation, ("Textron"), initiated the instant adversary proceeding by filing a dischargeability complaint against the debtor, Steven R. Blurton, ("Blurton"). Textron alleged in said complaint that Blurton had wrongfully concealed certain collateral from Textron and, therefore, Blurton's debt to Textron should be excepted from discharge under 11 U.S.C. §§ 523(a)(2), (4) and (6) and 727(a)(6) and (7). Textron's attorney in this matter was listed as Robert C. Goodrich, Jr., ("Goodrich").

Nine days after filing this adversary proceeding, Goodrich executed an "Affidavit of Complaint in the General Sessions Court of Haywood County" against Blurton. In said affidavit, Goodrich alleged the same facts as in the dischargeability complaint, namely that Blurton was "removing or is concealing or has removed or concealed these items with intent to hinder Textron's enforcement of its lien." On

December 28, 1999, Goodrich testified in the General Sessions Court of Haywood County at a preliminary hearing regarding the affidavit he filed against Blurton in September.

In response to Goodrich’s General Sessions testimony, the debtor filed a “Motion to Disqualify Plaintiff’s Counsel” on February 26, 2000. The debtor’s motion alleges that, in testifying before the General Sessions Court of Haywood County, Goodrich “has elected to make himself a witness in said criminal action” and that “[i]f said criminal case is tried before a jury, Robert C. Goodrich, Jr., will necessarily be a fact witness.” The motion goes on to allege that “since the allegations of the complaint in the present case arise out of the above facts identified in the criminal complaint . . . , Attorney Goodrich will necessarily be a witness in the present case.” As a result of these circumstances, the debtor alleges that the Court should disqualify Goodrich from representing the plaintiff in this adversary proceeding. Chief among the debtor’s claims for disqualification is the allegation that “if Robert C. Goodrich, Jr., is not disqualified, it would leave Debtor in the awkward position of being deposed by the very same individual who has sworn out a criminal complaint against him. Simple fairness should preclude such a situation.”

Goodrich filed an objection to the debtor’s “Motion to Disqualify” on February 16, 2000. In support of his objection to the “Motion to Disqualify,” Goodrich cited Tennessee Supreme Court Rule 8, Disciplinary Rules 5-101 and 102 (hereinafter referred to as “DR 5-101 and DR 5-102”).

## **II. CONCLUSIONS OF LAW**

DR 5-102 is entitled “Withdrawal as Counsel When the Lawyer Becomes a Witness,” and provides as follows:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the lawyer’s firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial and the firm, if any, shall not continue representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in the lawyer’s firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the lawyer’s firm may be called as a witness 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.

TN S.Ct. Rules, Rule 8, Code of Prof. Resp., DR 5-102.

DR 5-101(B) provides:

(B) A lawyer shall not accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or a lawyer in the lawyer’s firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in the lawyer’s firm may testify:

- (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 or the lawyer’s firm 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 the lawyers’ firm as counsel in the particular case.

TN S.Ct. Rules, Rule 8, Code of Prof. Resp., DR 5-102(B).

Tennessee Courts which have interpreted DR 5-102 and DR 5-101 have set forth some rather definitive rules regarding an attorney’s role as witness. In the case of *Coakley v. Daniels*, 840 S.W.2d 367 (Tenn. Ct. App. 1992), the Court of Appeals stated “[t]he purpose of DR 5-102 is not to protect adversaries from the opposing party’s attorney but is to protect the attorney’s client in the event his attorney’s testimony is needed at trial.” *Id.* at 371. The Court of Criminal Appeals, in the case of *State v. Browning*, 666 S.W.2d 80 (Tenn. Crim. App. 1983), has held that “[w]here a lawyer is employed by a party in a case, and is called as a witness by the other party, he is under no obligation to withdraw until ‘it is apparent’ that his testimony is or may be prejudicial to his client.” *Id.* at 87. Whether or not an attorney should be allowed to testify in a specific case is left to the sound discretion of the trial court. *State v. Baker*, 931 S.W.2d 232, 238 (Tenn. Crim. App. 1996).

Although Tennessee does not have any specific rules which prohibit an attorney from testifying in a trial in which he is also serving as advocate, several courts warn that it is a practice which should be allowed only in the most exceptional circumstances. *Whalley Develop. Corp. v. First Citizens Bancshares, Inc.*, 834 S.W.2d 328, 331 (Tenn. Ct. App. 1992); *Bowman v. State*, 598 S.W.2d 809, 810 (Tenn. Crim. App. 1980); *State v. Webster*, 688 S.W.2d 460, 463 (Tenn. Crim. App. 1984). Despite this warning against allowing attorneys to act as both witness and advocate, Judge Koch, in a concurring opinion in the unpublished Court of Appeals case of *Baker v. Baker* (1989), stated that disqualification is a severe action which should not be taken lightly by a court:

The courts have a broad range of options available to insulate trials from ethical taint. Disqualification of an attorney is the most drastic option. *Schiessle v. Stephens*, 717 F.2d 417, 420 (7<sup>th</sup> Cir. 1983); *Ross v. Great Atl. & Pac. Tea Co.*, 447 F.Supp. 406, 409 (S.D.N.Y. 1978); *Hannon v. Watt*, 147 Ill.App.3d 456, 497 N.E.2d 1307, 1311 (1986). Disqualification petitions are too often filed for tactical reasons, and when ordered, disqualification invariably delays the litigation, increases its cost to both parties, and denies clients of their right to counsel of choice. Thus, courts should be considerably reluctant to disqualify counsel and should do so only when no other practical alternative exists. *Board of Educ. v. Nyquist*, 590 F.2d 1241,1246 (2d Cir. 1979); *Williams v. Trans World Airlines, Inc.*, 588 F.Supp. at 1046.

*Hilton v. Crawford*, 1991 WL 261872 (Tenn. Ct. App. 1991).

In consideration of the above authorities, the Court finds that disqualification of Goodrich at this time is inappropriate. The Court was unable to find any statute, rule or case which prohibits an attorney who may or may not be called as a witness in a trial from completing pre-trial work, such as discovery. Mindful of Judge Koch’s warnings about the severity of disqualification, the Court also finds that it is too early to consider disqualification. The case may be settled prior to trial. It may turn out that there is no need for Goodrich to testify. Or, the Court may find that Goodrich’s testimony in no way prejudices his client. Until such time as it becomes definitive that Goodrich will testify and until such time as the Court knows what Goodrich’s testimony will concern, there is simply no circumstance that the Court can find upon which to base disqualification.

Despite this refusal to disqualify Goodrich at this time, however, the Court would like to caution Goodrich to be mindful of the fact that DR 5-102 is designed to protect his client. Throughout the remainder of this case, Goodrich should be constantly balancing the effect his role as a potential witness may have on his client. Ethical Consideration 9, from the Tennessee Code of Professional Responsibility, provides excellent guidance in this instance:

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a 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.

Should it become apparent to Goodrich that he is, or will be, in some way prejudicing his client by

serving as a witness, he should terminate his role as Textron’s advocate.

**III. ORDER**

It is therefore **ORDERED** that Motion to Disqualify Plaintiff’s Counsel is **DENIED**.

**It is so ordered.**

**By the Court,**

**G. Harvey Boswell  
United States Bankruptcy Judge**

**Date: March 10, 2000**