Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-005545 04/13/2026

HONORABLE DAVID MCDOWELL

CLERK OF THE COURT
A. Patel
Deputy

SHEILA JANISCH

FRANK M FOX

v.

SCOTTSDALE MOUNTAIN COMMUNITY ASSOCIATION, et al.

CHARLES H OLDHAM

BILL DUBE
NO ADDRESS ON RECORD
YURI ELLIS
NO ADDRESS ON RECORD
TOM MCVAY
NO ADDRESS ON RECORD
LONNIE MUTO
NO ADDRESS ON RECORD
JUDGE MCDOWELL

RULING ON MOTION TO DISQUALIFY TOM MCVAY AS COUNSEL

Pending before the Court is Sheila Janisch's February 2, 2026 *Plaintiff's Emergency Motion to Disqualify Tom McVay as Counsel;* her February 13, 2023 *Plaintiff's Amended Emergency Motion to Disqualify Tom McVay as Counsel;* the March 4, 2026 *Defendants' Response in Opposition to Plaintiff's Amended Motion to Disqualify Tom McVay;* and the March 21, 2026 *Plaintiff's Reply in Support of Motion to Disqualify Tom McVay.*[1]

[1] The document entitled *Plaintiff's Reply in Support of Motion to Disqualify Tom McVay* actually does not address the request to disqualify Mr. McVay or the *Response* filed by Defendants. It states, in its opening paragraph, "Plaintiff Sheila Janisch, through counsel, submits this notice of supplemental authority concerning the ongoing discovery dispute involving subpoenas issued to Continental Casualty Company and LaBarre/Oksnee Insurance."

While denominated as an "emergency" motion, the only indication that an emergency exists was a deposition had been scheduled; however, the deposition deadline in the January 29, 2026 scheduling order did not expire for another three months. The Court found nothing emergent about the motion and addressed it after briefing (pursuant to the schedule provided in the Rules) was complete.

Plaintiff argues that Tom McVay is acting as personal counsel for Lonnie Muto, one of the Board members, he serves on the Board of the Association, and he provides legal advice to the Board. Plaintiff seeks to have Mr. McVay disqualified to act as counsel for the Board and Mr. Muto pursuant to Ethical Rule 3.7 and 1.7.

Arizona Ethical Rule 1.7 provides:

ER 1.7. Conflict of Interest: Current Clients

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing, and:
>
> > (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; and
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

After that opening paragraphs it addressed the ability to obtain discovery of an insurance claim file. The Court disregarded the *Reply* as irrelevant to the issues raised in the motion to disqualify.

> (c) A lawyer may not represent a party in asserting a claim against another party represented by a firm if the same person or entity holds an ownership interest, directly or indirectly, of 10 percent or more, or has managerial authority comparable to that of a partner, in the lawyer's firm and the other firm.

Ms. Janisch has not alleged that she is a present or former client of Mr. McVay. She fails to establish how she has standing to challenge Mr. McVay's ability to serve as counsel for Mr. Muto or the Board as well as serve as a Board member. Whether representing Mr. Muto and the Board poses a conflict of interest for Mr. McVay is an issue to be resolved between Mr. McVay, Mr. Muto, the Board, and the Bar Association. Nothing in this rule or any authority cited by Ms. Janisch gives this Court the authority under ER 1.7 to remove Mr. McVay as counsel.

Ethical Rule 3.7 provides,

ER 3.7. Lawyer as Witness

> (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 services rendered in the case; or
> > (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by ER 1.7 or ER 1.9.

Ms. Janisch argues Mr. McVay cannot participate as counsel at a deposition or provide advice to the Association at meetings because doing so is acting as an advocate. While that may be true, the Rule is more narrow than Ms. Janisch's reading. This Rule expressly states that a lawyer cannot act as an advocate AT TRIAL. Nothing in the Court's record indicates Mr. McVay intends to act as an advocate at trial. In fact, Mr. McVay has not appeared for any party in this litigation. Further, there is nothing in the Rule that requires that disqualification need occur during the discovery phase of the case well before any trial is set and Plaintiff cites no case law, Rule, or authority supporting her position that disqualification need occur so far in advance of trial, particularly when the issues at trial have not been determined.

The parties and Mr. McVay must also realize that Mr. McVay is serving in multiple roles in this case and while his legal advice to Mr. Muto and the Board may be subject to a privilege, his own

actions as a Board member may be unprivileged. Some of Plaintiff's concerns appear to ignore that Mr. McVay has multiple roles and seem to presume that Mr. McVay will refuse to answer questions about his own actions.

Plaintiff raises issues related to the anticipated assertion of privilege at Mr. McVay's deposition. Whether Mr. McVay asserts privilege is not a basis for disqualification under any Rule, case law, or authority cited by Plaintiff. Further the Court will not prophylactically address privilege issues until one is asserted and the attorney asserting the privilege has an opportunity to advise the Court about the nature and extent of the privilege.

Plaintiff also argues Mr. McVay acting as counsel for the Board of Directors violates A.R.S. §10-3860. However, other than stating there is a breach of fiduciary duty, she fails to explain how or how a purported breach necessitates this Court removing Mr. McVay as its counsel.

She also asserts that Mr. McVay's actions as counsel for Mr. Muto and the Board "violates the integrity of the judicial process and prejudices her right to a fair trial". But she fails to make any argument or supply any facts to support that statement. It should be noted, again, that Mr. McVay is not trial counsel.

Finally, Ms. Janisch argues that Mr. McVay's continued representation of Mr. Muto and the Board creates an appearance of impropriety requiring his removal. Plaintiff argues *Gomez v. Superior Court*, 149 Ariz. 223 (1986) requires Mr. McVay's removal. The Court disagrees. Not only is *Gomez* factually dissimilar (because in *Gomez* the attorney was acting as trial counsel), the Court in *Gomez* stated, "… an appearance of impropriety should be enough to cause an attorney to closely scrutinize his conduct. It does not necessarily follow that it must disqualify him in every case. Where the conflict is so remote that there is insufficient appearance of wrongdoing, disqualification is not required." (citations omitted). *Id* at 226.

The *Gom*ez Court also stated,

> We also view with suspicion motions by opposing counsel to disqualify a party's attorney based upon conflict of interest or appearance of impropriety and we have indicated the matters a court must consider when ruling upon a motion to disqualify opposing counsel.
>
> We believe that the court, when considering a motion for disqualification based upon the appearance of impropriety, should consider the following: (1) whether the motion is being made for the purposes of harassing the defendant, (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least

> damaging possible under the circumstances, and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation.

Id at 226 quoting *Alexander v. Superior Court,* 141 Ariz. 157, 165 (1984).

Ms. Janisch states this attempt to remove another attorney from this case is not for the purpose of harassment but is to prevent a "material witness from acting as a legal gatekeeper of his own alleged misconduct." This argument is unpersuasive. Initially whether Mr. McVay is removed as counsel or not, he still has an obligation to protect client confidences and may still assert the attorney/client privilege if the questions posed concern his relationship with the Board or Mr. Muto. Second, whether he is removed as counsel or not he can be deposed. Third he can be deposed about his personal actions which are likely not subject to a privilege. Finally, this argument is made before any deposition was taken and before any effort was made by Mr. McVay or the Association's counsel to prevent, limit, or preclude his testimony.

Ms. Janisch argues she will suffer "inarticulable damage" because if Mr. McVay is present during depositions he could "coach witnesses or block inquiries into his own [actions]." Mr. McVay has been identified as personal counsel for Mr. Muto and as counsel for the Board. He does not represent the Board members (other than Mr. Muto) related to their personal actions. Attorneys are expected to comply with the ethical rules. *A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, Preamble*. The Court expects that no lawyer would tamper with witness testimony and no lawyer would prevent a witness from answering questions during a deposition unless a justified privilege exists. While the Court understands that Plaintiff is trying to plan for any possible scenario, the Court cannot evaluate damages based upon possibilities.

Ms. Janisch argues removing Mr. McVay is the least damaging alternative. The Court disagrees. Plaintiff appears to be jumping at shadows because no deposition has occurred, no testimony has been blocked, no witness has indicated he/she was coached to avoid testifying or to hide evidence, etc.

Ms. Janisch argues public suspicion is extreme because Mr. McVay purportedly participated in the creation of a letter sent to the homeowners in the subdivision. She also argues that "discovery fraud" has occurred which undermines public confidence. Ms. Janisch provided no proof to this Court that Mr. McVay was acting as counsel for anyone when he purportedly participated in creation of the letter and she has provided no proof that any discovery fraud has occurred. Other than her unsupported statement that public suspicion exists, nothing in the material submitted to this Court indicates that anyone other than Ms. Janisch and her counsel are suspicious.

IT IS ORDERED denying Plaintiff's *Motion to Disqualify Tom McVay as Counsel.*

Defendant seeks sanctions against Plaintiff for having to respond to this Motion. The Court notes this motion was filed before the Court issued the following warning in the March 10, 2026 Order:

> Defendant seeks sanctions against Plaintiff based upon this renewed motion. The Court will not impose sanctions at this time, but the point at which sanctions will be imposed has arrived. The Court has issued plenty of warnings about the need to submit evidence to support allegations made, the necessity of citing cases that actually exist and support the position for which they are cited, adhering to the Civil Rules, and avoiding hyperbole, accusation, and innuendo. Future motions or filings which fail to heed the Court's warnings will result in sanctions.

The Court denies Defendant's request for sanctions related to the Motion to Disqualify Tom McVay, but to ensure it is clear to both parties, any motion filed after March 10, 2026 which does not contain sufficient evidence to support the allegations, contains incorrect citations, does not contain citations to authority, does not follow the civil rules, or which contains hyperbole, accusations, and innuendo about improper conduct WILL result in sanctions.