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Informal Opinion 89-1529
Witness-Lawyer Participating In Pre-Trial Proceedings

Core Terms

lawyer, trial, client, advocate, pre-trial, witness, representation, serve, firm, testimony, prohibited, permit, contested issue, lawyer-witness, consult, testify, represent, conflict, proceed, disqualify, motion, professional responsibility, client consent, party

Text

A lawyer who anticipates testifying as a witness on a contested issue at a trial may represent a party in discovery and other pre-trial proceedings provided the client consents after consultation and the lawyer reasonably believes that the representation will not be adversely affected by the lawyer's own interest in the expected testimony.

The Committee is asked whether under the Model Rules of Professional Conduct (1983, amended 1989) a lawyer who is likely to be a necessary witness on a contested matter at a trial nevertheless may represent a party in discovery, preliminary motions and other pre-trial proceedings.

Model Rule 3.7 ("Lawyer as Witness") provides:

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services 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 Rule 1.7 or Rule 1.9.

The rationale for prohibiting a lawyer from serving as advocate and witness to a contested issue at a trial is based on the inconsistent requirements of the two roles. As explained in the Comment to Rule 3.7:

The opposing party has proper objection where the combination of roles may prejudice the party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while the advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or an analysis of proof.

This Committee previously has applied this rationale and concluded that neither Model Rule 3.7 nor the predecessor Model Code of Professional Responsibility (1969, amended 1980) (DRs 5-102(A) and 5-101(B)) prohibited a lawyer who had expected to testify on a contested issue at the trial from arguing an appeal from a summary judgment before being called upon to testify at the trial, "since the lawyer's testimony is not an issue in the appeal. . . ." ABA Informal Opinion 83-1503 (1983). The Committee also stated in Opinion 83-1503 in the context of representation before commencement of the actual trial that it "agrees with those courts that hold the lawyer-witness rules should not apply to disqualify a lawyer from serving as an advocate before the lawyer has testified." In the two cases cited with approval in the opinion, the lawyer was permitted by the courts to continue as counsel in pre-trial matters even though disqualified or likely to be disqualified as an advocate at the trial under

Model Code DR 5-102(B) because it was "obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." *See Brotherhood Railway Carmen v. Delpro Co.,* 549 F.Supp. 780, 790 (D.C.Del. 1982) (disqualification at trial likely, but pre-trial representation permitted), and *Morell, Inc. v. Federated Department Stores, Inc.,* 450 F. Supp. 127, 131 (S.D.N.Y. 1978) (all lawyers in firm disqualified as trial advocates, but pre-trial representation permitted).

The Committee continues to be of the opinion that the primary test to be applied is whether the lawyer-witness's testimony involves a contested issue in the proceeding at which the lawyer proposes to serve as advocate. There are a number of reasons for applying this test and permitting the lawyer-witness to serve as an advocate during the pre-trial stage. First, the necessity to testify may not come about as the case may be settled and not go to trial. Second, even if the case does go to trial, other evidence may be available in place of the lawyer's testimony. Third, a client might choose to forego the testimony of the lawyer because the client prefers to have the lawyer continue to serve as advocate at trial. In any event, once there is client consent after consultation (as described below), there is little likelihood of prejudice to either the client or the justice system, particularly since under the Model Rules the lawyer's partner is permitted to assume the role of advocate at the trial. Moreover, the lawyer who is the potential witness may have more knowledge about the facts of the case than any lawyer in the firm, and it would be unfair to the client not to permit that lawyer to participate in pre-trial proceedings. Accordingly, a lawyer may serve as an advocate in taking depositions of witnesses and engaging in other pre-trial discovery as well as in arguing pre-trial motions and appeals from decisions on those motions as long as the other requirements of Rule 3.7 are met.

There are, however, some limitations on pre-trial representation in these circumstances that should be observed. For instance, although Rule 3.7 does not specifically prohibit a lawyer from representing the client at the lawyer's own pre-trial deposition, better practice is that another lawyer serve as counsel to the client at that deposition. Moreover, in circumstances where the lawyer's pre-trial testimony is material to a contested matter that is presented for resolution in a pre-trial motion and the testimony is disputed, the lawyer-witness should not argue the motion without consent of the client after consultation. [1]

Rule 3.7(a)(3) permits a lawyer to serve as advocate at trial and to testify as to a contested issue where "disqualification of the lawyer would work a substantial hardship on the client." However, as noted by the district judge in *Brotherhood Railway Carmen,*participation of the lawyer-witness as an advocate in pre-trial matters does not in itself form a basis for the application of the hardship exception that would permit the lawyer also to serve as advocate at the trial. Accordingly, unless the hardship exception is applicable on other grounds, the lawyer must not serve as an advocate at trial even though the lawyer's participation in pre-trial matters may make it more difficult for another trial advocate to prepare for the trial. It is therefore incumbent upon the lawyer who expects to be a witness on a contested issue at trial and who serves as the lawyer in pre-trial proceedings to have another lawyer ready to serve as advocate for the client at the trial. [2]

There also is the possibility that the lawyer who will be a witness on a contested issue at trial will have a conflict of interest that cannot be waived by the client under Rule 1.7. [3] As the Comment to Rule 3.7 notes:

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[1] The Committee recognizes that the Rule 3.7 prohibition applies specifically to service "as advocate at a trial." The Committee nevertheless believes that the policy behind the prohibition applies to any situation where the lawyer is placed in the position of arguing the lawyer's own veracity to a court or other body, whether in a hearing on a preliminary motion, an appeal or other proceeding.

[2] Under Model Rule 3.7(b), the advocate at trial may be in the same law firm as the lawyer-witness in contrast to the predecessor Model Code, under which the entire law firm of the lawyer-witness would be disqualified as a result of the broad sweep of DR 5-105(D). The Committee construes the prohibition in Rule 3.7(b) against a lawyer-witness acting as "advocate at a trial" as forbidding active participation as a trial lawyer, including presenting evidence and argument, and not as prohibiting assistance to the lawyer who serves as the active trial advocate, such as might be furnished by a nonlawyer who also is a witness.

[3] Rule 1.7(b) provides:

For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also. [4] As soon as the lawyer becomes aware that a conflict of interest exists, the lawyer and the law firm must withdraw from representing the client under Model Rule 1.16. If the conflict is apparent from the beginning, the representation must be declined.

Where the lawyer is likely to be a necessary witness on a contested issue at the trial, client consent after consultation [5] must be obtained. The effect of potential withdrawal at trial (required under Rule 3.7) after handling the pre-trial proceedings must be explained fully so that the client may elect to have the lawyer who is to be trial advocate also handle pretrial matters to assure greater efficiency and continuity of representation at lower cost. The existence of potential conflicts of interest also must be fully explored with the client at the outset and, where appropriate, express client consent to the representation must be obtained. Although it is often advantageous to the client to have the lawyer who also will testify handle pre-trial matters, it is up to the client to weigh the advantages against the disadvantages after being fully informed and to make the final decision as to the representation. See Rule 1.16(a).

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 750 North Lake Shore Drive, 11th Floor, Chicago, Illinois 60611 Telephone (312) 988-5301 CHAIR: M. Peter Moser, Baltimore, MD [] Helaine Barnett, New York, NY [] William J. Brennan III, Princeton, NJ [] Michael Franck, Lansing, MI [] Daniel T. Goyette, Louisville, KY [] David B. Isbell, Washington, DC [] Richard H. Sinkfield, Atlanta, GA [] William F. Womble, Winston-Salem, NC [] CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel

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(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

[4] Rule 1.10(a) provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

[5] The meaning of "consultation" is given in the Terminology Section of the Model Rules:

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.