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The Lawyer-Witness Rule: What It Is and What It Isn't

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Imagine this scenario: You are your firm's trial lawyer. One of your partners, a business lawyer, wrote a contract two years ago for one of your firm's clients. The contract is now the focus of a dispute between the client and a customer. The client's position in the dispute is consistent with the negotiating history your partner recalls. Your partner asks you to handle the case. In your first phone call to opposing counsel, however, the opposing counsel tells you that your firm is disqualified under the lawyer-witness rule because he plans to take your partner's deposition. Are you out before the case has hardly started?

The lawyer-witness rule is sometimes tossed around cavalierly during litigation. In this column, we'll look at what it is and, perhaps more importantly, what it isn't.

What It Is. Oregon's lawyer-witness rule is RPC 3.7. It is similar to its ABA Model Rule counterpart and is drawn from former Oregon DR 5-102. The Oregon State Bar issued an updated interpretive opinion on the lawyer-witness rule in 2005, Formal Ethics Opinion 2005-8, which is available on the OSB's web site at www.osbar.org. Two of the principal appellate decisions discussing and applying the lawyer-witness rule (albeit before the new RPCs were adopted

effective January 1, 2005) are *In re Kinsey*, 294 Or 544, 565-68, 660 P2d 660 (1983), and *In re Kluge*, 335 Or 326, 337-39, 66 P3d 492 (2003).

The lawyer-witness rule is primarily aimed at trial counsel. The rationale for the rule, as expressed in Comment 2 to the ABA Model Rule, is to prevent confusion on the part of the jury by mixing trial counsel's role as an advocate with that of a witness: "A witness is required to testify on the basis of personal knowledge, while an 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 as an analysis of the proof."

RPC 3.7 generally bars a lawyer from acting as trial counsel when the lawyer will be a witness at trial 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; (3) disqualification of the lawyer would work a substantial hardship on the client; or (4) the lawyer is appearing pro se." RPC 3.7 also bars a law firm from further participation in the case when a firm member's testimony will be adverse to its client at trial. The Supreme Court held in *In re Kluge* (335 Or at 337) that a client cannot waive a lawyer-witness conflict. The Supreme Court in *In re Kinsey* (294 Or at 566) also held that a lawyer cannot avoid the impact of the rule by denying the client the lawyer's essential testimony.

What It Isn't. RPC 3.7, however, is not a rule of automatic disqualification. First, as noted, it only prevents a lawyer from acting as trial counsel when the lawyer will be a trial witness (and doesn't otherwise meet one of the exceptions). "RPC 3.7(a) does not prevent a lawyer from assisting in pretrial matters." OSB Formal Ethics Op 2005-8 at 2. Second, if the same evidence can be obtained through other means and the opposing party is attempting to call the lawyer as a tactical ruse to remove the other side's trial counsel, then the lawyer may still be able to act as trial counsel under the "substantial hardship" exception. See Comment 4 to ABA Model Rule 3.7. Finally, even if a law firm lawyer will be a witness at trial, that does not prevent the law firm from trying the case through other firm lawyers as long as the firm member's testimony will be consistent with the client's position.

In our opening example, therefore, the law firm should not be disqualified. Although one of its lawyers will have his deposition taken, that business lawyer's testimony is consistent with the client's position and the case will be tried by another of the firm's lawyers. In short, although the lawyer-witness rule is an important rule of law firm disqualification, the situations where it reaches that result are comparatively narrow.

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