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The Lawyer-Witness Rule: What It Is & 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, assisted one of your firm's clients two years ago in negotiating and drafting a contract with one of its suppliers. Your partner was present during some of the negotiating sessions, but the president of your firm's client took the lead in actually working through the contract with the supplier. The contract is now in dispute between the client and the supplier, with the dispute turning on the interpretation of a particular phrase in the contract and what the parties intended with that term. The client's position in the dispute is consistent with the negotiating history your partner recalls. The client's president is still with the company and is available to testify about the disputed phrase. Your partner asks you to handle the case. In your first 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 of the case before it 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. On this second point, we'll also look at an important change which

took place in Washington's lawyer-witness rule with the 2006 amendments to the Rules of Professional Conduct.

What It Is

The lawyer-witness rule has been around for a long time. In fact, it was one of the original Canons of Professional Ethics adopted by the American Bar Association in 1908. Over the years, its form has changed and it is now found in RPC 3.7 in both the Washington version and its ABA Model Rule counterpart. Both when the Canons were adopted nearly 100 years ago and today, the rule generally prevents a lawyer from being an advocate before the jury and a witness before it at the same time.¹ Comment 2 to our RPC 3.7 summarizes the rationale for generally prohibiting these dual roles:

“The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. 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 also recognizes four practical exceptions to the lawyer-witness rule.

First, RPC 3.7(a)(1) allows a lawyer to be both an advocate and a witness where the testimony will be on an uncontested matter. In that instance, Comment 3 to our version of the rule notes that “the ambiguities in the dual role are purely theoretical.” Presumably, the parties could also address the evidence through a stipulation rather than having the lawyer testify.

Second, RPC 3.7(a)(2) also allows a lawyer to testify concerning the nature and value of legal services provided in the case. In that situation, Comment 3 to our rule observes that “permitting lawyers to testify avoids the need for a second trial with new counsel . . . [and] . . . in such a situation the judge has firsthand knowledge of the matter . . . [and] there is less dependence on the adversary process to test the credibility of the testimony.” The simple fact that an attorney fee claim is included in the remedies sought, therefore, will not generally trigger the lawyer-witness rule.

Third, RPC 3.7(a)(3) creates a “hardship” exception where “disqualification would work a substantial hardship on the client[.]” For example, this exception might be triggered if the trial lawyer’s testimony could not be anticipated and the issue arose in the middle of a trial. Comment 4 to our rule notes that the trial judge is in the best position to make the call on whether this exception should apply. Comment 4 also cautions, however, that reasonable foreseeability is a primary factor in balancing the equities involved.

Fourth, RPC 3.7(a)(4) permits trial counsel to remain where the opposing party called the lawyer and the court rules that the lawyer may continue to handle the trial. Comment 8 to RPC 3.7 counsels that the lawyer-witness rule is not intended to be used inappropriately as a strategic litigation tactic and, therefore, vests the trial judge with the authority to allow the lawyer to continue in this circumstance.

RPC 3.7 as amended in 2006 and its accompanying comments are all available on the ethics page of WSBA's website at www.wsba.org/lawyers/ethics. In addition to the RPCs, potential lawyer-witnesses also need to check the rules of the particular court before which they will be appearing. Both Washington Civil Rule 43(g) and U.S. District Court Local Civil Rule 43(k) in the Western District, for example, generally prohibit trial counsel from being witnesses for their clients "on the merits" without court approval.

What It Isn't

RPC 3.7 is not a rule of either unqualified or absolute disqualification in three important senses.

First, under the terms of the rule, the lawyer must be a "necessary" witness. Washington's appellate courts have found that to be a "necessary" witness a party seeking a lawyer's disqualification "must show that the attorney will provide material evidence unobtainable elsewhere." *State v. Schmitt*, 124 Wn. App. 662, 667, 102 P.3d 856 (2004), citing *Pub. Util. Dist. No. 1 v. Int'l Ins.*

Co., 124 Wn.2d 789, 812, 881 P.2d 1020 (1994). In the same vein, simply the *possibility* of a lawyer being a witness is not sufficient to warrant disqualification. See *Barbee v. The Luong Firm*, 126 Wn. App. 148, 159-60, 107 P.3d 762 (2005).

Second, even if a lawyer is precluded from being trial counsel by the rule, RPC 3.7 does not prohibit the lawyer from assisting on other aspects of the case, such as a summary judgment motion or an appeal. In *In re PPA Products Liability Litigation*, 2006 WL 2473484 (W.D. Wash. Aug. 28, 2006) at *1 (unpublished), for example, the court found that the lawyer-witness rule did not prevent a lawyer from working on a summary judgment motion. Similarly, the Court of Appeals in *Oltman v. Holland America Line USA, Inc.*, 136 Wn. App. 110, 117 n.9, 148 P.3d 1050 (2006), noted that routine declarations authenticating uncontested materials in support of motions do not trigger disqualification by the lawyer-witness rule. Rather, RPC 3.7 is focused on the trial, where the lawyer's dual roles as advocate and witness intersect in a way that the rule is designed to prevent.

Finally, and in an important change under the 2006 amendments, even if a firm lawyer will be a witness at trial, that does not necessarily disqualify the lawyer's *firm* from trying the case through other firm lawyers. RPC 3.7(b) (and accompanying Comments 5-7) now permits a lawyer-witness's firm to handle a trial (through other lawyers at the firm) as long as the lawyer-witness's testimony will be consistent with the client's position (and, therefore, no conflict exists).²

This represents a major shift in Washington's approach to RPC 3.7, which formerly barred all firm lawyers from trying a case (subject to the exceptions discussed above) if a firm member was going to be a witness at trial.

Summing Up

To return to our opening example, the law firm should not be disqualified. The business lawyer's evidence can be obtained elsewhere and the testimony is being taken during a discovery deposition rather than a trial. More fundamentally, however, even if the business lawyer will eventually be a trial witness, the business lawyer's testimony is consistent with the client's position and the case will be tried by another one of the firm's lawyers. In short, although the lawyer-witness rule is an important rule of law firm disqualification, the 2006 amendments to RPC 3.7 have narrowed considerably the situations in which it will apply.

ABOUT THE AUTHOR

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¹ WSBA Formal Ethics Opinion 182 (1989) finds that the lawyer-witness rule does not apply to a lawyer representing himself or herself *pro se*.

² *State v. Schmitt*, 124 Wn. App. at 667-69, summarizes case law applying this aspect of the lawyer-witness rule to prosecutors' offices.