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Two-Dimensional Disqualification: The Lawyer-Witness Rule

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The lawyer-witness rule, RPC 3.7, has been around for a long time. In fact, an earlier version was one of the original ABA Canons of Professional Ethics adopted in 1908. At the same time, it remains a frequently misunderstood rule. Although RPC 3.7 can ripen into a rule of law-firm disqualification, it is more often limited to the personal disqualification of a lawyer-witness. But, even the latter is not absolute and there are several exceptions.

In this column, we'll first examine the circumstances when a lawyer-witness is personally disqualified and the scope of that disqualification. Next, we'll survey the exceptions. Finally, we'll discuss situations when a lawyer's personal disqualification ripens into a disqualification of the lawyer's entire law firm.

PERSONAL DISQUALIFICATION

RPC 3.7(a) prohibits a lawyer from "act[ing] as advocate at a trial in which the lawyer is likely to be a necessary witness[.]" The Washington rule is patterned on the corresponding ABA Model Rule and in terms of personal disqualification has remained relatively unchanged since Washington adopted the ABA Model Rules in 1985.

As the text of the rule suggests, the personal disqualification element is limited to being trial counsel in a case in which the lawyer will be a trial witness. Comment 2 to RPC 3.7 explains the rationale underlying this personal disqualification: “[T]he trier of fact may be confused or misled by a lawyer serving as both advocate and witness.” The Washington Supreme Court in *In re Pfefer*, 182 Wn.2d 716, 725-26, 344 P.3d 1200 (2015), noted that the rule also applies in other trial-like proceedings such as arbitrations and administrative hearings. Civil Rule 43(g) contains a similar prohibition specific to civil jury trials.

Because the personal disqualification is limited to being trial counsel, another lawyer at the same firm could handle the trial—as long as the nature of the lawyer-witness’ testimony is not adverse to the law firm’s client creating a conflict under RPC 1.7(a)(2). Further, a lawyer-witness generally remains able to participate in other aspects of a case. In *In re PPA Products Liability Litigation*, 2006 WL 2473484 (W.D. Wash. Aug. 28, 2006) (unpublished), and *Snohomish County v. Allied World National Assurance Company*, 276 F. Supp. 3d 1046, 1065-66 (W.D. Wash. 2017), for example, the federal district court in Seattle found that the lawyer-witness rule did not apply to summary judgment proceedings.

To be personally disqualified from acting as trial counsel, a lawyer must be, in the vernacular of the rule, a “necessary” witness. The Washington Supreme Court set a relatively high bar in this regard in *Public Utility Dist. No. 1 of Klickitat County v. International Insurance Company*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994):

“When an attorney is to be called . . . , a motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere[.]” (Citation omitted.)

The federal district courts for the Western and Eastern Districts of Washington have used this same standard in, respectively, *Microsoft Corp. v. Immersion Corp.*, 2008 WL 682246 (W.D. Wash. March 7, 2008) (unpublished), and *Tonasket v. Sargent*, 2011 WL 13090760 (E.D. Wash. July 7, 2011) (unpublished).

In *State v. Schmitt*, 124 Wn. App. 662, 666-67, 102 P.3d 856 (2004), the Court of Appeals noted that the burden of demonstrating that a lawyer is a “necessary” witness is on the party seeking the lawyer’s disqualification. Further, the Court of Appeals explained in *Barbee v. Luong Firm, P.L.L.C.*, 126 Wn. App. 148, 159-60, 107 P.3d 762 (2005), that the mere possibility that a lawyer will be a witness is not sufficient to invoke the remedy of personal disqualification. In *State*

v. Sanchez, 171 Wn. App. 518, 546, 288 P.3d 351 (2012), the Court of Appeals also found that a lawyer was not a “necessary” witness when the information involved could be obtained through another readily available source.

THE EXCEPTIONS

RPC 3.7 includes four practical exceptions.

First, RPC 3.7(a)(1) permits a lawyer to be both an advocate at trial and a witness on an uncontested matter. Comment 3 to RPC 3.7 notes in this regard that “if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical.” In *State v. Tolias*, 135 Wn.2d 133, 137, 954 P.2d 907 (1998), for example, the Washington Supreme Court concluded that a lawyer’s personal disqualification was not required when the lawyer’s testimony on uncontested facts was introduced through a stipulation.

Second, RPC 3.7(a)(2) allows a lawyer to testify about the nature and value of legal services provided in the case. Comment 3 to RPC 3.7 observes that “where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with a new lawyer to resolve that issue.” The federal district court in Seattle extended this exception to related cases in which attorney fees were at issue in *Aecon Bldgs., Inc. v. Zurich North America*,

2008 WL 2940599 (W.D. Wash. July 24, 2008) (unpublished), and *American Safety Casualty Insurance Company v. Happy Acres Enterprises Co., Inc.*, 2017 WL 279616 (W.D. Wash. Jan. 20, 2017) (unpublished).

Third, RPC 3.7(a)(3) creates a “hardship” exception. This exception might be triggered, for example, if the trial lawyer’s testimony could not be anticipated and the issue arose in the middle of a trial. Comment 4 to RPC 3.7 notes that the trial judge is in the best position to assess whether this exception applies. Comment 4 also cautions, however, that reasonable foreseeability is a primary factor in balancing the equities involved. In *Lease Crutcher Lewis WA, LLC v. National Union Fire Insurance of Pittsburg*, 2010 WL 11527179 (W.D. Wash. Sept. 27, 2010) (unpublished), for example, the court denied a motion to disqualify counsel, filed shortly before trial, where it appeared that the potential lawyer-witnesses would not add materially to the evidence, their involvement had been known for some time, and their disqualification would work a substantial hardship on their client.

Fourth, RPC 3.7(a)(4) permits trial counsel to remain when 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 stresses that the lawyer-witness rule is not intended to be used inappropriately as a litigation tactic and “[p]aragraph (a)(4) is

intended to confer discretion on the tribunal in determining whether disqualification is truly warranted[.]” In *Adams v. New York Life Insurance Company*, 2008 WL 11338298 (E.D. Wash. Dec. 10, 2008) (unpublished), for example, the court concluded that a defendant’s contention shortly before trial that it intended to call plaintiff’s trial counsel was simply a litigation tactic, and the court advised that it would allow the lawyer to remain under RPC 3.7(a)(4) even if the defendant persisted in its effort to call the lawyer at trial.

FIRM DISQUALIFICATION

When RPC 3.7 was adopted in Washington in 1985, a lawyer’s personal disqualification as a witness was imputed to the lawyer’s firm as a whole. In 2006, however, RPC 3.7 was amended to remove this automatic firm disqualification.

Instead, firm disqualification under RPC 3.7(b) now turns on whether the lawyer-witness’ testimony creates a conflict for the firm as a whole under RPCs 1.7 or 1.9, which govern, respectively, current and former client conflicts. This situation ordinarily arises when a lawyer-witness’ testimony will be materially adverse to the client the lawyer’s firm is representing in the matter concerned. By way of illustration, a firm business lawyer who negotiated a contract for a client, and whose testimony at a subsequent trial over the meaning of a key term will

support the opposing party, creates a disqualifying conflict for the lawyer's firm as a whole.

Although Comment 6 to RPC 3.7 suggests that a firm lawyer-witness conflict may be waivable in some circumstances, the practical barriers to meeting the conflict waiver standards in this context usually mean that the firm must withdraw. In *State v. O'Neil*, 198 Wn. App. 537, 547, 393 P.3d 1238 (2017), the court discusses a firm lawyer-witness conflict as resulting in "obligatory disqualification." Although *O'Neil* was a narrow holding on unusual facts where the potential testifying lawyer was supervised by the defendant's trial lawyer, it illustrates the unpredictable practical barriers that can impede an effective waiver. In short, if a lawyer's testimony ripens to the level of a conflict for the firm as a whole, the most likely practical outcome is that the firm is "out."

ABOUT THE AUTHOR

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