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**Lawyer as Witness:
What the Court of Appeals Said about RPC 3.7**

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Division I of the Washington Court of Appeals recently analyzed the lawyer-witness rule, RPC 3.7. RPC 3.7(a) generally prohibits a lawyer from “act[ing] as advocate at a trial in which the lawyer is likely to be a necessary witness[.]” *Bridgen v. Windermere Real Estate Co.*, 2019 WL 2273506 (Wn. App. May 28, 2019) (unpublished), addressed the standard for whether a lawyer is a “necessary” witness and, consequently, is subject to disqualification.

Bridgen was set against the backdrop of a residential real estate transaction and a subsequent dispute. The plaintiff-purchaser advanced a number of claims against the seller and the seller’s real estate broker revolving around the central contention that the house involved had not been remodeled under the direction of a prominent local architect as advertised. The plaintiff was represented in the lawsuit by her longtime lawyer, who was also a personal friend and business partner. The defendants filed a motion to disqualify the plaintiff’s lawyer under the lawyer-witness rule. They asserted that the plaintiff’s lawyer was a witness to some of the events underlying the transaction involved. The plaintiff and her lawyer responded with declarations focusing on the plaintiff’s understanding when she purchased the property and the fact that plaintiff was the sole purchaser.

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The trial court disqualified the lawyer. The plaintiff then sought discretionary review. Although the trial court did not enter findings of fact or conclusions of law, the Court of Appeals found that the record was sufficient for it to evaluate the trial court's decision. The Court of Appeals then reversed the trial court.

The Court of Appeals noted that the Washington Supreme Court in *Public Utility District No. 1 of Klickitat County v. International Insurance Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994), articulated a three-part test for determining whether a lawyer should be disqualified as a "necessary" witness under RPC 3.7(a):

"In *PUD No. 1*, our Supreme Court established the showing required for disqualification under RPC 3.7: (1) "the attorney will give evidence material to the determination of the issues being litigated," (2) "the evidence is unobtainable elsewhere," and (3) "the testimony is or may be prejudicial to the testifying attorney's client." 2019 WL 2273506 at *2 (citation omitted).

The Court of Appeals concluded that, largely because it was the plaintiff rather than her lawyer who was the central witness on the extent to which she relied on statements about the local architect's involvement in the remodeling project, the trial court erred in disqualifying the lawyer and reversed.

RPC 3.7(a) is a rule of personal disqualification from being an advocate at a trial in which the lawyer will also be a witness (subject to relatively narrow exceptions outlined in the rule, such as testifying on an uncontested issue). Comment 2 to RPC 3.7 explains the rationale for the rule: it is intended to prevent confusion on the part of the jury over the role of the lawyer involved. Because it is a rule of personal disqualification, other lawyers at the same law firm can normally handle the trial instead.

In *Bridgen*, the lawyer involved was apparently a solo practitioner and, therefore, the trial court's order amounted to a law firm disqualification. Ordinarily, however, a lawyer-witness' firm will only be disqualified if, under RPC 3.7(b), the firm lawyer's testimony will be adverse to the client the firm is representing. In that instance, disqualification results from the conflict involved.

ABOUT THE AUTHOR

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