DISQUALIFICATION OF OPPOSING COUNSEL

Under ABA Model Rule 3.7 Lawyer As Witness

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Employment litigators must be cognizant of their ethical obligations to avoid serving as an advocate and, at the same time, becoming a necessary witness at trial. Strategically speaking, the opposing side may avail itself of its state’s advocate-witness rule to disqualify counsel who has been implicated as a necessary witness. Indeed, the advocate-witness rule is applied far more often in the litigation context than in disciplinary proceedings.

I. Model Rule 3.7

Most states have adopted Rule 3.7 of the American Bar Association’s Model Rules of Professional Conduct. Model Rule 3.7 is premised upon the rationale that “[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.”

Comment 1, Model Rule 3.7.

Model Rule 3.7 provides:

RULE 3.7: LAWYER AS WITNESS
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness 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; 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.

Under the advocate-witness rule, “[t]he 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.” Comment 2, Model Rule 3.7.

While most jurisdictions adopted the rule with little or no changes, some, such as Arkansas, the District of Columbia, Florida, Illinois, New Mexico, New York, Ohio, Oregon, South Dakota, Texas, Virginia, and Washington, adopted the rule with significant modifications. See ABA/BNA Lawyers’ Manual on Professional Conduct, 61:501 (listing variations from Model Rule 3.7). California’s current version, “Member as Witness Rule”, Rule 5-210, while similar to ABA Rule 3.7, departs in that it only applies where there is a jury and does not provide the opposing party the power to seek disqualification.\(^1\)

II. Abusive Litigation Tactics

However, as one might expect, Rule 3.7 can encourage abusive litigation tactics where opportunistic parties file disqualification motions to interfere with the opposing side’s choice of counsel. See, e.g., Kalmanovitz v. G. Heileman Brewing Co., 610 F. Supp. 1319 (D. Del. 1985) (motions to disqualify “are often disguised attempts to divest opposing parties of their counsel of choice”), aff’d, 769 F.2d 152 (3d Cir. 1985); Council for Nat'l Register of Health Serv. Providers v. Am. Home Assurance Co., 632 F. Supp. 144 (D.D.C. 1985) (noting potential for tactical abuse of disqualification motions, court held that where lawyer's testimony may be relevant but not necessary, “totality of circumstances,” including client's desires, must be considered); Klupt v. Krongard, 728 A.2d 727 (Md. 1999) (courts “will take a hard look” at disqualification motions out of

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\(^1\) The California State Bar currently is reviewing and revising the Rules of Professional Conduct, including Rule 5-210. The new proposed “Member as Witness” Rule is undergoing public comment and additional revision.
concern that movant will use motion as tactical ploy); see also Optyl Eyewear Fashion Int'l Corp. v. Style Co. Ltd., 760 F.2d 1045 (9th Cir. 1985) (affirming sanctions under 28 U.S.C. §1927 against lawyer whose only basis for moving to disqualify opposing counsel as necessary witness was that counsel had given client legal advice in drafting letter and noting that “drafters [of Model Code] have cautioned that the ethical rules were not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel”).

III. Exceptions to the Witness-Advocate Prohibition

Model Rule 3.7’s advocate-witness rule is not absolute and the rule has several exceptions. Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are “purely theoretical.” Comment 3, ABA Model Rule 3.7. Indeed, according to the ABA/BNA Lawyer’s Manual on Professional Conduct, “Testimony that is cumulative, is obtainable from another source, or relates to the nature and value of the legal services provided will not disqualify the lawyer.”

Paragraph (a)(2) recognizes 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 new counsel to resolve that issue.” Additionally, the comment to the model rule recognizes that, in such a situation the judge has firsthand knowledge of the matter in issue; hence, “there is less dependence on the adversary process to test the credibility of the testimony.”

Ultimately, Paragraph (a)(3) of the Model Rule envisions a balancing test to determine whether disqualification would work a substantial hardship on the client.²

² The current proposed revision to California Rule 5-210 would delete the ABA Model Rule 3.7(a)(3) as it refers to the principal of disqualification.
Comment 4 to the model rules provides some guidance as to the factors the court should consider in applying this test:

Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

Note, however, that some courts permit the lawyer to serve in a pretrial capacity but not testify at trial: *Brotherhood Railway Carmen v. Delpro Co.*, 549 F. Supp. 780, 790 (D. 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).

Additionally, ABA Informal Opinion 89-1529 states that 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: (1) the client consents after consultation; and (2) the lawyer reasonably believes that the representation will not be adversely affected by the lawyer's own interest in the expected testimony. See also Colorado Ethics Op. 78 (revised 1997) (rule permits lawyer who may be necessary witness to continue to represent client “in all litigation roles short of trial advocacy”); Michigan Informal Ethics Op. CI-1118 (1985) (stating “advocate” in context of Rule 3.7 is best defined as person who “participates as a spokesperson for the client in open court” and opining that a lawyer who in his capacity as certified public accountant will be providing expert
testimony in divorce case may also serve as co-counsel to lawyer from another firm); Utah Ethics Op. 04-02 (2004) (if pretrial representation is not forbidden by another rule, lawyer who is necessary witness may represent client in pretrial stage and retain another lawyer to handle trial). Cf. United States v. Berger, 251 F.3d 894, 906 (10th Cir. 2001) (court rule substantially similar to Colorado Rule 3.7 does not disqualify lawyer from arguing appeal).

A court, however, can disqualify a lawyer under the advocate-witness rule even from pre-trial activities if such representation could undermine the purpose of the rule. See Fognani v. Young, 115 P.3d 1268, (Colo. 2005) (noting situations in which trial court may find that counsel's participation in pretrial activity would undermine rule, such as where jury might learn about attorney's dual role from deposition that would be disclosed at trial); and Merrill Lynch Bus. Fin. Servs. v. Nudell, 239 F. Supp.2d 1170 (D. Colo. 2003) (court agrees that disqualification from pretrial matters may be appropriate where that activity “includes obtaining evidence which, if admitted at trial, would reveal the attorney's “dual role”).

IV. Conflicts of Interest

An advocate who may testify at trial must also consider that the dual role may give rise to a conflict of interest. Comment 6 to the Model Rule 1.7 notes that if there is likely to be a substantial conflict between the testimony of the client and the lawyer, a conflict of interest arises, requiring compliance with Model Rule 1.7 (Conflict of Interest: Current Clients). Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9 (Duties to Former Clients). However, under this scenario, an attorney may seek a
waiver of the conflict of interest by the client by obtaining informed consent, confirmed
in writing, as required by Rule 1.7. However, the conflict of interest may be so harmful
to the client that a waiver cannot be obtained. And, if the dual role causes jury confusion
or other prejudice to the opposing side, disqualification is appropriate.

Paragraph (b) of Model Rule 3.7 also acknowledges that a lawyer’s
disqualification under the advocate-witness rule is not imputed to the lawyer’s partners
disqualification of entire firm even though partner in firm would be necessary witness).
Notably, however, the conflict of interest rules can trump Model Rule 3.7.

V. Examples in the Employment Litigation Context

Employment lawyers, whether representing employees or management, can find
themselves implicated as necessary witnesses relating to certain pre-litigation conduct.

In a recent case, EEOC v. Bardon, Inc., 2010 WL 323067 (D.Md. Jan. 19, 2010),
the district court, sua sponte, disqualified defense counsel as a result of his role with the
company’s internal investigation at issue in the case as well as for his involvement with
the termination of the plaintiff-intervenor in this EEOC enforcement action. The district
court noted that defense counsel had interviewed numerous employees as part of the
company’s investigation in response to the plaintiff-intervenor’s workplace complaint,
including interviewing the plaintiff-intervenor while still employed by the defendant
employer. The district court also observed that defense counsel was present, along with
two other managers, when the plaintiff-intervenor was terminated from employment.
Yet, the district court found that defense counsel was a necessary witness because his
testimony was “highly material” and “noncumulative.” The opposing side intended to
call defense counsel regarding the nature and conduct of the company’s internal investigation that he undertook as well as his role in being the primary actor who terminated the plaintiff-intervenor from employment. The district court noted that other witnesses could testify only to “fragmentary” portions of the investigation and the termination meeting, and, as a result, defense counsel’s testimony was “far from cumulative.” The district court also explained that defendant’s counsel either knew, or should have known, from the onset of the litigation, that he would likely be a necessary witness in the case. Ultimately, the district court, despite the hardship imposed on defendant, concluded that disqualification was nonetheless required as the jury would likely be confused and misled and the opposing side may face severe prejudice.

In a racial discrimination case, *Lange v. Orleans Levee District*, 1997 WL 570689 (E.D.La. Sept. 12, 1997), the district court disqualified a plaintiff’s counsel where defendants alleged that he was involved in the incident that led to plaintiff’s discharge from employment. Specifically, defendants asserted that plaintiff and his counsel attempted to force their way into the offices of the Administration Building of the Orleans Levee District and were denied entrance. During this situation, the president of the Levee Board was verbally attacked, and there was an altercation with a police officer working for the Levee Board. Local television crews were present at this situation. Defendants, in the litigation, alleged that plaintiff’s counsel orchestrated this event, hoping the presence of the media would result in his client being able to enter the administration offices and speak with the president of the Levee Board. The district court, in disqualifying plaintiff’s counsel, noted that only plaintiff’s counsel could testify about his contacts with the media, whether he staged the encounter, and why. The district
court also held that there was no substantial hardship on the plaintiff because discovery had not even been taken in the case at the time of the disqualification.

In a wrongful discharge case, *Byrnes v. Jamitkowski*, 557 N.E.2d 79 (Mass. App. 1990), the trial court, before discovery had even commenced, granted the defendant’s motion to disqualify plaintiff’s counsel in a situation where the defendant raised a defense that plaintiff had orally agreed to a severance agreement but refused to follow through with signing the agreement. In response, the plaintiff alleged that his counsel did not have the authority to bind him with respect to the severance agreement at issue. The appellate court reversed, noting that the disqualification order was premature or unnecessary at the time, but cautioned that, once discovery was undertaken, facts could arise requiring disqualification later in the case.

VI. Conclusion

Rule 3.7 is the proverbial trap for the unwary counsel. Attorneys seeking to avoid disqualifications from trial should familiarize themselves with the rule and tailor their counseling and pre-litigation activities accordingly. This will reduce the likelihood they will be disqualified under Model Rule 3.7, thereby shielding their clients from the inherent prejudice of having to change counsel mid-stream.