Louisiana State Bar Association
Rules of Professional Conduct Committee

PUBLIC Opinion 05-RPCC-007[1] November 21, 2005

Lawyer as a Witness

> *A lawyer who is likely to be a witness in a lawsuit may not act as advocate at a trial unless one of four exceptions applies and there is no conflict of interest. However, even if the lawyer is barred from acting as advocate at trial, another attorney in his firm may do so unless precluded due to a conflict of interest. Also, the lawyer-witness is not barred from representing the client prior to trial, but he may do so only with the client's informed consent and only so long as it appears his testimony would not be prejudicial to his client.*

We consider here the ethical concerns that arise under the Louisiana Rules of Professional Conduct (2004) when a lawyer may be a witness at trial. The Committee believes that prudence strongly dictates that a lawyer should seek to avoid undertaking (or, if only discovered later, subsequently withdraw from) representation in any matter in which it becomes clear that the lawyer is likely to be called as a witness at trial. Several reasons counsel against undertaking such representation. Even if permissible as an exception under Rule 3.7—the Rule governing lawyers as advocates at trial—the dual role as advocate and witness may lead to a conflict of interest under Rule 1.7 or Rule 1.9. If there is a conflict, the lawyer is required to have the

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client's informed consent, confirmed in writing [see Rule 1.0(b) and (e)], before testifying. If there is no conflict of interest, the lawyer must still be convinced that the dual roles of witness and advocate will not result in confusion or dilution of either role, especially in a situation involving an impressionable jury. "[O]ur system of justice is subverted if the lawyer who is an advocate for his client assumes the position of a witness who is to provide the court with objective truth and whose credibility should not be championed by himself in his adversary capacity." *Exnicios v. Saunders*, 448 So. 2d 751, 752 (La. App. 4 Cir. 1984). Separation of witnesses also becomes problematic. For these reasons, if the Rule requires disqualification, the client cannot simply waive the requirement even if he would like to do so. See, e.g., *Freeman v. Vicchiarelli*, 827 F. Supp. 300 (D.N.J. 1993).

A. Exceptions to the Prohibition

The Rule provides that a lawyer may not act as an advocate in a trial where he is likely to be called as a necessary witness unless: 1) the testimony relates to an uncontested issue; or 2) the testimony relates to the nature and value of the legal services rendered in that case; or 3) disqualification would work a substantial hardship on the client.[2] The first two of these exceptions does not require explication. Whether disqualification would work a substantial hardship often turns on the length and depth of the attorney's representation. See, e.g., *State v. Robinson*, 874 So. 2d 66 (La. 2004) (In affirming the imposition of the death penalty in this case, the court did not mention Rule 3.7 and did not explicitly consider the prejudice to the defendant

[2] Rule 3.7 of the Louisiana Rules of Professional Conduct (2004) states: "*(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.*"

in having one of his trial counsel involuntarily assume dual roles); *Brown v. Daniel*, 180 F. R. D. 298 (D.S.C. 1998) (complex case on which the firm had worked eight years); *McElroy v. Gaffney*, 529 A. 2d 889 (N.H. 1987) (six years, extensive knowledge of and involvement in the case); compare *Freeman v. Vicchiarelli*, 827 F. Supp. 300 (D.N.J. 1993) (disqualification not substantial hardship when made one month after complaint filed). Increased expense because a new attorney would have to get up to speed in the case is not a *per se* basis for permitting continued representation. See, e.g., *Mentor Lagoons, Inc. v. Teague*, 595 N.E. 2d 392 (Ohio 1991).

In addition to the three exceptions outlined in the Rule, a lawyer-witness may act as an advocate at trial where he is representing himself. *Farrington v. Law Firm of Sessions, Fishman*, 687 So. 2d 997 (La. 1997).

B. Role of the Court

Although violation of this Rule may result in the imposition of disciplinary sanctions, generally the issue arises in the context of a court proceeding. The trial court must determine whether the lawyer is likely to be called as a necessary witness at the trial and, if so, whether one of the exceptions in Rule 3.7(a) applies. It may conduct *voir dire* on the issue and will undoubtedly look to Rule 3.7 for guidance on its ruling. Courts of Appeal generally defer to the trial court's exercise of its discretion on this issue. See, e.g., *Exnicios, supra*.

C. Representation at Trial by Another Member of the Firm

Under Rule 3.7(b), if the lawyer wishes to or is called to testify, there is no *per se* prohibition on another member of the firm acting as advocate at trial for the client unless that person is precluded from doing so by Rule 1.7 or 1.9 (conflict with existing or former client). This was not the case under former DR 5-101, which applied equally to the lawyer-witness and members of his firm. An example of a conflict of interest which may preclude another member of the firm acting as advocate at trial is if the testimony of the lawyer is likely to contradict the testimony of

the client.

D. Pretrial Proceedings

Because the concern of the Rule is to avoid confusion and possible prejudice at trial, there is no general prohibition against a lawyer who is likely to be a necessary witness participating as attorney prior to trial, drafting pleadings, attending depositions and conducting other trial preparation. However, a prerequisite, as well as an exception, exist regarding such pretrial activity:

The prerequisite is that a lawyer who is likely to be called as a necessary witness should consult with the affected client at the beginning of the representation (or as soon as it is apparent that the lawyer is likely to be called as a necessary witness) regarding the limitations of the representation under these circumstances, and should gain the client's informed consent before proceeding further. ABA Informal Ethics Opinion 89-1529 (1989); Rule 1.4 (a) (5).[3] The client should understand that a second lawyer may be necessary to try the case, and that even then, there remains a potential for confusion and/or prejudice to the client's interests because of the appearance that the "witness" who would offer truthful testimony in connection with the client's case is (or was just immediately prior to trial) also a biased, paid advocate for the same party. As such, the client may be better served by paying for one lawyer who will clearly not be called as a

[3]Rule 1.4 (a) (5) of the Louisiana Rules of Professional Conduct (2004): "*A lawyer shall ... consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.*" See also Rule 1.7 of the Louisiana Rules of Professional Conduct (2004): "*...(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:...(2) there is a significant risk that the representation of one or more clients will be materially limited by...a personal interest of the lawyer...*"

necessary witness at trial than for two lawyers, one of whom may unintentionally prejudice the client simply by having been involved with the case prior to testifying at the trial. The disclosure and client's informed consent should be confirmed in writing.[4]

The exception is that the lawyer-witness should not conduct pre-trial depositions which may be admitted at trial and risk jury confusion concerning the lawyer's roles. *World Youth Day Inc. v. Famous Artist Merch. Exch. Inc.,* 866 F. Supp. 1297 (D. Colo. 1994).

[4]Rule 1.7 (b) of the Louisiana Rules of Professional Conduct (2004): "*...Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:...(4) each affected client gives informed consent, confirmed in writing...*"