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DISQUALIFICATION OF THE ADVOCATE/WITNESS

Adopted June 18, 1988

Revised June 18, 1994, May 10, 1997 and October 20, 2012

Introduction and Scope

This opinion provides ethical guidance when a lawyer who will serve as an advocate at trial or another lawyer in the trial advocate's firm may also be called as a witness. The opinion also discusses the ethical limitations and considerations of subpoenaing or disclosing another party's trial advocate (or another lawyer in the trial advocate's firm) as a witness or potential witness.

Although Rule 3.7 of the Colorado Rules of Professional Conduct (Colo. RPC or Rules) is most often invoked as the basis for a motion to disqualify another party's lawyer, rather than as the basis for lawyer discipline, this opinion does not purport to be a *legal* opinion regarding the circumstances under which a motion to disqualify should be filed by a lawyer, or granted or denied by a tribunal.

Syllabus

A lawyer may not both serve as an advocate at trial and testify as a necessary witness at a trial except as permitted under one of the exceptions in Colo. RPC 3.7(a). A lawyer who is a necessary witness generally may act as an advocate in pretrial activities unless the lawyer's participation in a particular pretrial activity would undermine the purpose of Rule 3.7.

Unless precluded from doing so by Colo. RPC 1.7 or 1.9, a lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness.

In the representation of a client, a lawyer may be required to obtain discovery from, or call as a witness at trial, a lawyer who represents an adverse party. No ethical proscription automatically prohibits a lawyer from taking such action. However, a lawyer should not routinely or lightly subpoena, identify as a potential witness, or call as a witness an opposing party's trial counsel (or another lawyer in the opposing lawyer's firm). Doing so solely as a contrivance to disqualify opposing counsel (whether or not combined with a motion to disqualify) violates the Rules.

Analysis

Construing the predecessor Colorado Code of Professional Responsibility (Colorado Code), the Colorado Supreme Court observed:

A lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both roles.... [T]he lawyer is placed in the unseemly position of arguing his own credibility to the jury.... Obviously a lawyer's duty to exercise independent judgment on behalf of his client will be even more seriously jeopardized when the lawyer is called as a witness to give testimony adverse to his client.

Williams v. District Court, 700 P.2d 549, 553 (Colo. 1985) (*Williams*). Colo. RPC 3.7, cmt [1] reflects similar considerations.¹

I. Analysis of Advocate-Witness Issues Under the Rules

A number of the Rules bear on the propriety of a lawyer simultaneously acting as trial advocate and testifying as a witness at trial, or of another lawyer in the testifying lawyer's firm acting as a trial advocate.

A. Colo. RPC 3.7

Colo. RPC 3.7 directly addresses the advocate-witness situation. It is divided into two subsections: the first establishes the general rule that a necessary witness may not be a trial advocate and enumerates the exceptions to that rule; the second governs when another non-testifying lawyer in a testifying lawyer's firm may and may not serve as trial advocate.²

1. Colo. RPC 3.7(a): The General Rule

Colo. RPC 3.7 provides that, absent an applicable exception, a trial advocate may not simultaneously testify as a necessary witness in the same matter: "A lawyer *shall not act* as an advocate in a trial in which the lawyer is likely to be a necessary witness *unless...*" (Emphasis added.)

a. Necessity of Lawyer's Testimony

Before a lawyer is precluded from serving as an advocate at trial under Colo. RPC 3.7, it must be "likely" that the lawyer will be a "necessary" witness. Compare Colorado Code DR 5-1 01(B) (lawyer must decline employment if the lawyer "ought to be called" as a witness). The "necessary" witness standard requires "an even more specific showing of necessity" than under the prior Code. *Security Gen. Life Ins. Co. v. Superior Court*, 149 Ariz. 332, 718 P.2d 985 (1986) (Rule 3.7(a) "requires a showing that the proposed testimony is relevant, material, and unobtainable elsewhere"). Courts have held that the advocate's testimony must be truly necessary, and not merely cumulative, and that the court may delay ruling on a motion to disqualify until it can determine whether another witness's testimony can adequately replace the lawyer's testimony. Rule 3.7(a) is "less prone [than the predecessor Code provision] to exploitation by opposing parties and more compatible with each party's interest in retaining counsel of choice." *Cannon Airways, Inc. v. Franklin Holdings Corp.*, 669 F. Supp. 96, 100 (D. Del. 1987).

The "necessary witness" test is flexible and the result depends on the circumstances. Thus, the naming of a party's lawyer does not automatically render the named lawyer a "necessary witness" under Colo. RPC 3.7. While the availability of other witnesses to testify regarding the same matters as to which the lawyer has knowledge usually will render the lawyer an "unnecessary" witness, that determination also depends upon the particular circumstances.

b. Prohibition Limited to Advocacy at Trial

Despite the breadth of its general prohibition, Colo. RPC 3.7 applies only to a lawyer "act[ing] as [an] advocate at a trial." Thus, with the client's informed consent, a lawyer who is likely to be a necessary witness may generally accept employment and continue to represent the client in all litigation roles short of in-court trial advocacy.³

Colo. RPC 3.7, like Model Rule 3.7, addresses only advocacy at "trial." In reliance upon that language, courts in Colorado and elsewhere have held that the disqualification rule is inapplicable to proceedings other than "trials." Thus, in *People ex rel. S.G.*, 91 P.3d 443, 450 (Colo.App. 2004), the Court of Appeals held that Rule 3.7 was inapplicable to post-trial proceedings. The Court of Appeals further noted that courts from other jurisdictions with rules similar to Colo. RPC 3.7 have held that the disqualification rule is inapplicable to "appeals, summary judgment motions or pretrial or post trial proceedings." *Id.*; see also *United*

States v. Berger, 251 F.3d 894, 906 (10th Cir. 2001) (Oklahoma rule substantially similar to Colo. RPC 3.7 does not apply to appeals); *Carroll v. Town of University Park*, 12 F. Supp. 2d 475, 486 (D. Md. 1997) (rule substantially similar to Colo. RPC 3.7 does not bar counsel's affidavits attached to a summary judgment motion), *aff'd*, 155 F.3d 558 (4th Cir. 1998); *Columbo v. Puig*, 745 So.2d 1106, 1107 (Fla. Dist. Ct. App.1999) (rule substantially similar to Colo. RPC 3.7 does not encompass pretrial or posttrial proceedings).⁴

However, the Colorado Supreme Court has held that limiting participation to pretrial procedures will not always avoid a Rule 3.7 violation.

We also accept the conclusions by other jurisdictions that such activities may include strategy sessions, pretrial hearings, mediation conferences, motions practice and written discovery, or being consulted by the non-testifying counsel. However, we decline to issue a rule that would permit automatic participation by the disqualified attorney in all pretrial litigation. Upon assuring that the client has consented to pretrial representation by the disqualified attorney, the trial court has the discretion to determine whether participation by the attorney in a particular pretrial activity would undermine the purpose of Rule 3.7. Accordingly, if for example, the attorney's dual role in deposition proceedings would likely be revealed at trial, the court may properly limit the attorney's role in that activity. We leave to the trial court upon remand the opportunity to fashion its orders in a way dictated by the facts of this case.

Fognani v. Young, 115 P.3d 1268, 1277 (Colo. 2005); *see also World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc.*, 866 F. Supp. 1297, 1303 (D. Colo. 1994) (disqualifying lawyer from taking or defending depositions because "[r]ealistically, the testimony from oral depositions in this case cannot easily be taken and read into evidence without revealing [lawyer's] identity as the deposing attorney").

The advocate faced with the prospect of being a witness is well advised to consult fully with the client early in the case regarding both the potential complications arising from being a witness and the potential advantages and disadvantages of serving as "pretrial" counsel. The consultation should address the possibility of retaining a second "shadow" trial lawyer early in the case in the event the first lawyer is ethically precluded from acting as trial advocate.

c. Non-Jury Trials

It is unclear in Colorado whether the advocate-witness disqualification rule is relaxed in non-jury proceedings. In *In re Leventhal*, 2012 WL 1067568 (Bkrtcy. N.D. Ill. March 22, 2012), the court denied a motion to disqualify a lawyer who was also a witness because the trial was a bench trial, not a jury trial: "Because the trial will be a bench trial, not a jury trial, there is no risk whatever that the trier of fact will confuse the roles of advocate and witness." *Id.* at *5; *see also United States v. Johnston*, 690 F.2d 638, 644 (7th Cir. 1982) (advocate-witness rule is applied more flexibly in a bench trial); *Saline River Prop., LLC v. Johnson Controls, Inc.*, No. 10-10507, 2011 WL 4916688 *3 (E.D. Mich. 2011). *But see Mount Rushmore Broad., Inc. v. Statewide Collections*, 42 P.3d 478, 482 (Wyo. 2002) (Wyoming Rule 3.7 (which is identical to Colo. RPC 3.7) "does not make any exceptions between jury and bench trials.").

d. Enumerated Exceptions

Colo. RPC 3.7(a) identifies three instances in which a lawyer who is likely to be called as a necessary witness may also act as an advocate:

- (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.

Colo. RPC 3.7(a)(1) recognizes that where the advocate's testimony relates to an uncontested issue, the policy considerations that support the general rule are inapplicable. However, it is not enough that the facts pertaining to a disputed issue are uncontested; the *issue* itself must be uncontested. *People v. Pasillas-Sanchez*, 214 P.3d 520, 526 (Colo. App. 2009).

For similar reasons, Colo. RPC 3.7(a)(2) permits an advocate to give testimony regarding the nature and value of the lawyer's legal services.

Colo. RPC 3.7(a)(3) liberalizes the "substantial hardship" provision of DR 5-101(B)(4), by deleting the Colorado Code's requirement that the hardship must result "because of the distinctive value of the lawyer or his firm as counsel in the particular case." Comment [4] to Colo. RPC 3.7 recognizes that "a balancing is required between the interests of the client and those of the tribunal and the opposing party." Thus, the financial burden on the client of replacing the lawyer, if combined with other circumstances, may be sufficient to permit the lawyer to act in both roles. *See generally Wolfram* § 7.5.2, at 386-88.

In *Fognani*, the Supreme Court addressed when disqualification imposes a substantial hardship on the client:

...[W]e consider all relevant factors in light of the specific facts before the court, including the nature of the case, financial hardship, giving weight to the stage in the proceedings, and the time at which the lawyer became aware of the likelihood of his testimony. In addition, we also consider whether the client has secured alternative representation.

115 P.3d at 1275.

B. Conflicts of Interest; Colo. RPC 1.7 and 1.9⁵

If the trial advocate concludes that Rule 3.7 will not be violated by the lawyer's testimony or the testimony of another lawyer in the trial advocate's firm, the general conflict of interest rule, Colo. RPC 1.7 (current client), and the former client conflict of interest rules, Rule 1.9, must also be considered. While Colo. RPC 3.7 expressly refers to Rules 1.7 and 1.9 only in subsection (b), concerning a lawyer acting as an advocate in instances where *another* lawyer in the firm is likely to be called as a witness, Comment [6] to Colo. RPC 3.7 makes clear that the general conflict of interest rules also pertain to Rule 3.7(a):

In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. 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.

If a conflict of interest exists under Colo. RPC 1.7 or 1.9, the lawyer must comply with those Rules to obtain an effective waiver. Any such waiver would require the informed consent of the affected client or former client, and would need to be confirmed in writing. See Colo. RPC 1.0(e) (defining "informed consent"); Colo. RPC 1.0(b) (defining "confirmed in writing").

C. Other Colorado Rules

Even where the trial advocate or another lawyer in the trial advocate's firm may testify, the lawyer must comply with all other applicable Rules. Thus, for example, the lawyer must consult with the client regarding the means by which the client's objectives are to be pursued and consult concerning the limits of representation due to the lawyer's role as a trial witness. *See* Colo. RPC 1.2(c) (limitation of scope of representation). Also, the lawyer-witness must consider the effect of Colo. RPC 1.6 regarding confidentiality of information relating to the representation. The testifying lawyer may face a conundrum upon cross-examination into information that would otherwise be protected from disclosure.

D. Vicarious Disqualification

If the conflict of interest rules—Rule 1.7 (conflict with current client) or Rule 1.9 (conflict with former client)—preclude a lawyer from testifying, then Colo. RPC 1.10 imputes that disqualification to all lawyers in the same firm unless the client gives informed consent confirmed in writing under the conditions stated in Colo. RPC 1.7. *See* Colo. RPC 3.7, cmt. [7]. However, absent a Colo. RPC 1.7 or 1.9 conflict, Colo. RPC 1.10 does not impute to all lawyers in a firm the disqualification of an advocate-witness under Rule 3.7(a), which is intended only as a personal bar.

II. *Propriety of Identifying or Listing Another Party's Lawyer as a Witness or Moving for Disqualification*

A lawyer is not ethically prohibited from calling another party's lawyer or another member of opposing counsel's law firm as a witness, either in discovery or at trial, where the lawyer may have unprivileged knowledge relevant to the case or reasonably calculated to lead to the discovery of admissible evidence.

Frequently, the identification or subpoenaing of a lawyer as a witness is accompanied by a motion to disqualify that lawyer (and the lawyer's firm) from further participation in the lawsuit. Indeed, the Colorado Supreme Court has deemed the act of subpoenaing opposing counsel as a trial witness under certain prescribed circumstances as the "functional equivalent" of a motion to disqualify. *Williams*, 700 P.2d at 555. In *Taylor v. Grogan*, 900 P.2d 60 (Colo. 1995), the Supreme Court described the ethical obligation imposed upon a lawyer who is considering subpoenaing (or naming as a witness) opposing counsel:

In *Williams v. District Court*, 700 P.2d 549, 553 (Colo. 1985), we examined the ethical considerations that "necessarily arise when an attorney of record is subpoenaed by opposing counsel in order to testify against the subpoenaed attorney's client in a pending trial." We concluded that an attorney may subpoena opposing counsel to testify adversely to his client only after showing:

- (1) that [opposing counsel's] testimony will be actually adverse to [his or her client];
- (2) that the evidence sought to be elicited from the lawyer will likely be admissible at trial under the controlling rules of evidence;
- and (3) that there is a compelling need for such evidence, which need cannot be satisfied by some other source.

Williams, 700 P.2d at 555-56 (footnotes omitted). *Id.* at 62.

* * *

Williams was a criminal case in which the prosecution subpoenaed the attorney of the accused as a prosecution witness. DR 5-102(B) was applicable to both civil and criminal cases. In our view, the *Williams* factors are equally applicable in the civil context.

Id. at 62 (n.5). The lawyer subpoenaing or listing opposing counsel as a witness must decide whether to file a motion to disqualify. However, regardless of whether the lawyer files a motion to disqualify, the subpoenaed or named lawyer has a duty to promptly determine whether or not the Rules require withdrawal, and to act accordingly. *Id.*

The proliferation of motions to disqualify has led courts to view them with suspicion. *See, e.g., Greenbaum-Mountain Mort. Co. v. Pioneer Nat'l Title Ins. Co.*, 421 F. Supp. 1348, 1354 (D. Colo. 1976) (“We also recognize that counsel can approach the Code and Canon 5 as another arrow in his quiver of trial tactics.”). *See also J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975). In the criminal context the United States Supreme Court has ruled that the erroneous disqualification of defense counsel denied the defendant of his right to counsel under the Sixth Amendment and his conviction was reversed. *United States v. Gonzales-Lopez*, 548 U.S. 140 (2006).

Before filing a disqualification motion, the moving lawyer should make a good faith effort, through both investigation and available discovery, to ascertain the validity of the facts underlying the motion. Timeliness in subpoenaing, identifying or listing an opposing lawyer or another member of the opposing lawyer’s firm is an important factor in determining whether counsel is genuinely seeking relevant, significant testimony or is merely seeking to disqualify an adversary. What a lawyer learned or should have learned in the development of the case is important in determining timeliness.

A motion to disqualify not well supported in law or fact exposes the lawyer filing the motion (and the lawyer’s client) to various sanctions, apart from the denial of the motion. These may include an award of attorney’s fees incurred in connection with opposing the motion against the moving lawyer, the client or both. *See* C.R.C.P. 11 and Fed. R. Civ. P. 11; C.R.S. §§ 13-17-101 *et seq.*; C.R.C.P. 121, § 1-15(7); 28 U. S. C. § 1927. *See also Wold v. Minerals Eng’g Co.*, 575 F. Supp. 166 (D. Colo. 1985) (imposing Rule 11 sanctions against lawyer filing motion to disqualify). Such conduct can also violate the Rules. *See, e.g.,* Colo. RPC 3.1 (precluding frivolous claims, defenses, and assertions).

The use of the subpoena power solely as a contrivance to disqualify opposing counsel may also constitute unprofessional conduct prejudicial to the administration of justice in violation of Colo. RPC 8.4(d). *Cf., Williams*, 700 P.2d at 554 (construing the Colorado Code). The assertion of a position merely to harass or maliciously injure another, and knowingly advancing a claim unwarranted under existing law, further violates Colo. RPC 3.1. Irrespective of whether a court denies a motion to disqualify, a frivolous motion to disqualify constitutes independent grounds for lawyer discipline. *See generally Wolfram* § 7.5.1 at 375.

NOTES

¹ Historic rationales for the advocate-witness rule are numerous, often contradictory and have begot no shortage of critical comment. *See generally Wolfram, Modern Legal Ethics* § 7.5.2, at 337-79 (1986) (Wolfram); Hazard & Hodes, 1 *The Law of Lawyering*, § 3.7:102, at 678-79 (Supp. 1992).

² Effective January 1, 2008, Colo. RPC 3.7 and Rule 3.7 of the American Bar Association Model Rules of

Professional Conduct (Model Rules) are identical. That was not always the case. When the Rules were first adopted in Colorado (effective January 1, 1993), the Colorado Supreme Court appeared to reverse the presumption of non-disqualification contained in Model Rule 3.7(b). ABA Model Rule 3.7(b) provides:

(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.

Prior to January 1, 2008, Colo. RPC 3.7(b) provided:

(b) A lawyer shall not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless the requirements of Rule 1.7 or Rule 1.9 have been met.

There was a question as to whether this difference in wording had any significance – an issue that is academic now that Colo. RPC 3.7 and Model Rule 3.7 are identical.

³ Colo. RPC 3.7 does not expressly require informed consent for a lawyer to act as both advocate and witness. However, the Colorado Supreme Court has indicated that the client's informed consent is necessary for a lawyer who may not act as an advocate at trial to provide pretrial representation. *Fognani v. Young*, 115 P.3d 1268, 1277 (Colo. 2005). Moreover, when a conflict of interest under either Colo. RPC 1.7 or 1.9 arises as a result of the lawyer acting in both witness and advocate roles, those Rules expressly require the client's informed consent, confirmed in writing, as a condition to an effective waiver of the conflict. The Colorado Bar Association Ethics Committee does not believe that informed consent is required when an exception in Colo. RPC 3.7(a)(1), (2), or (3) permits the lawyer to act as both advocate and lawyer, or when the lawyer is not a "necessary" witness.

⁴ While Colo. RPC 3.7 expressly limits only "act[ing] as an advocate *at trial*" (emphasis added), many of the policies supporting Rule 3.7 apply equally to administrative adjudicative proceedings.

⁵ The version of Colo. RPC 1.7 in effect prior to January 1, 2008 included in its text a comment from the then-operative version of Model Rule 1.7, which stated a "disinterested lawyer" standard for assessing whether a conflict was subject to a waiver by the affected client. The current version of Colo. RPC 1.7 does not contain the disinterested lawyer standard; instead, it provides (as does current Model Rule 1.7) that a conflict may not be waived unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Whether the disinterested lawyer and reasonable belief tests materially differed is another academic issue, which this opinion does not address.