Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 04-02

Issued April 19, 2004

¶1 **Issue:** May a plaintiff's lawyer continue to represent the plaintiff in a legal malpractice action when opposing counsel has announced an intention to call plaintiff's lawyer as a witness?

¶2 **OPINION:** There is no *per se* disqualification of a lawyer in a case where she may be called as a witness. The lawyer must determine whether, under the facts of the case, she is a "necessary witness" in the litigation under Rule 3.7. If she is, and if disqualification of the lawyer would not work a substantial hardship on the client, she must withdraw prior to trial. If the lawyer does not withdraw, the lawyer must insure that the client's interests are and can be protected in a timely manner. This could include the filing of a motion *in limine* or other pleading to resolve the issue prior to trial. Concurrently, the lawyer must determine if there is a conflict of interest under Rule 1.7.

¶3 **FACTS:***C,* a former client of lawyer *L,* has sued *L* for legal malpractice for failure to protect client assets from waste by a former spouse in a divorce case. *L's* lawyer has advised *C's* current lawyer *F* that *F* will be called as a witness on the issues of apportionment and contribution for her alleged failure to protect the assets of the client she now represents.

¶4 **ANALYSIS:***L's* decision to call *C's* current lawyer *F* as a witness as to the issue of responsibility of F for damages to her own client for malpractice engages Utah Rules of Professional Conduct 3.7, "Lawyer as Witness," and 1.7, "Conflict of Interest."

Rule 3.7, Lawyer as Witness. Rule 3.7 addresses the lawyer-witness issue and provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be necessary as a 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.

¶5 Rule 3.7 does not automatically require withdrawal.**1**Rather, Rule 3.7(a) provides that a lawyer may not act as an advocate at trial if she is likely to be a "necessary" witness. Whether or not this lawyer's testimony is necessary is a fact-specific question the lawyer being summoned must resolve. If the testimony is duplicative and obtainable from other sources, her testimony may not be necessary, and the lawyer should not withdraw or should not be subject to disqualification.**2** "The naming of a party's attorney does not *ipso facto* render the named attorney a 'necessary witness' . . . nor does the availability of other competent witnesses for the same testimony automatically render the named attorney 'unnecessary'."**3**

¶6 The attorney should not continue the representation when she is or ought to be a witness with respect to issues that are not incidental or insignificant. "[A]pplication of this rule does not depend on whether an attorney will be called but rather, as the Code provides, on whether he 'ought to be called as a witness' in the underlying action."**4**

¶7 Calling opposing counsel as a witness has been used as a bad-faith trial tactic to create a disqualification of the client's lawyer to the disadvantage of one of the parties in the proceeding. Some courts have described situations in which a lawyer ought to testify and be required to withdraw, and those in which the lawyer may continue representation.

In *In re Bahn,***5**the Texas Court of Appeals interpreted Texas Rule 3.08, which is similar to Utah's rule for withdrawal when the lawyer may be called as a witness, to mean that the moving party had to establish that the testimony was essential to the case and that it was not enough for the moving party merely to announce its intention to call the attorney as a witness.

¶8 Similarly, a Georgia federal district court noted: "If by merely announcing his intention to call opposing counsel as a witness an adversary could thereby orchestrate that counsel's disqualification under the disciplinary Rule, such 'a device' might often be employed as a purely tactical maneuver."**6**In that case, the court also found that, when an adversary declares an intention to call opposing counsel as a

witness, the court should determine whether counsel's testimony is in fact genuinely needed before ordering disqualification of counsel. As a result, disqualification has been deemed to be an extreme measure to be imposed only when absolutely necessary.**7**

¶9 If calling the lawyer as a witness is merely a bad-faith trial tactic, the analysis by the lawyer under Rule 3.7 may be short. However, the lawyer should proceed cautiously and objectively where protecting the client's interests is the primary concern. The current lawyer should obtain an early resolution of this issue by withdrawing, if necessary, or by a motion *in limine* or other pleading to resolve this issue well prior to trial.**8**

¶10 Also, if disqualification of the current lawyer would work a substantial hardship on the client, she should not withdraw nor be disqualified.**9** Disqualification is generally limited to the lawyer acting as trial counsel. Assuming no other rule disqualifies the lawyer, the lawyer may represent the client in the pretrial stage of the case in which the lawyer might be called as a necessary trial witness and retain another firm to act as trial counsel. **10**The current lawyer must evaluate the facts to determine whether she is a necessary witness under Rule 3.7 and, to protect her client's interests, prepare for the possibility she may need to withdraw or that she might be disqualified and new trial counsel be brought in.

¶11 **Rule 1.7, Conflict of Interest: Current Clients.** Under Rule 1.7, the current lawyer may be precluded from continued representation in the pretrial or trial stage. It provides as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. The conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third party by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), the lawyer may represent if:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) Representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or another proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

¶12 Testimony from the current lawyer *F* regarding her possible liability to her client involves a conflict of interest—namely, *F's* personal interest in avoiding a finding that she caused part of her client's damages. *F* must determine whether the client *C*, under these circumstances, is likely to be able to obtain objective advice from her as to whether or not that lawyer is liable to *C* for any part of the losses he suffered, and whether *C* can or should consent to the conflict or waive any potential claim against *F*.

¶13 The comment to Rule 1.7 requires the current lawyer in the first instance to make the determination of whether there is a conflict of interest, but the Rule also recognizes that, in some cases, the current lawyer may need to advise the client to seek independent advice:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. . . . The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or forecloses courses of action that reasonably should be pursued on behalf of the client. . . .

If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.**11**

¶14 Rule 1.7 permits the client to consent to the conflict and, in effect, waive any claim he may have against *F*, his current lawyer. The ABA annotation to the Model Rules notes that informed consent requires "full disclosure of the nature and implication of the lawyer's conflict. Informed consent denotes the client's agreement to the lawyer's proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of—and reasonably available alternatives to—the proposed course of conduct."**12**

¶15 The Rules recognize that there are circumstances under which the client cannot be requested to give consent: "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."**13**

¶16 The comment to Rule 1.7 of the ABA Model Rules of

Professional Conduct also provides:

Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent burdened by a conflict of interest . . . representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.**14**

¶17 Since *F* may be subject to a claim that her actions damaged her client, her ability to give independent advice in the prosecution of the claim for damages against *L* is open to question. If *F* believes that she is subject to a *bona fide* malpractice claim, it is difficult to imagine circumstances under which she could give independent advice.**15**

¶18 **CONCLUSION:** Under Rule 3.7, it is the lawyer's responsibility to determine whether she is a "necessary" witness, whether her testimony, if she is called, relates to a contested issue and whether it may be in conflict with her client's position. The lawyer must also determine if her withdrawal would create a substantial hardship for her client. As these questions are fact-specific, the Committee cannot express a bright-line rule. It is the lawyer's responsibility to analyze the facts under the application of Rules 1.7 and 3.7 and the guidelines set forth above to determine if she must withdraw under the circumstances.

¶19 Under Rule 1.7, it is the responsibility of the lawyer to determine whether she is precluded from continuing representation because of a conflict of interest. If the claim prompting the notice that the lawyer will be called as a witness is not made in bad faith and the lawyer intends to seek the client's consent, it would be prudent for the lawyer to advise her client to seek independent advice as to whether, given the relevant facts, it is reasonable to consent to the conflict. However, not every conflict of interest under Rule.17 may be consented to by a client. We recommend that, prior to requesting any consent, the lawyer in this circumstance advise the client to seek independent advice from an attorney on the requested consent.

Footnotes

1. We note the difference between an ethical obligation to withdraw as counsel under certain circumstances and the legal issue of whether a presiding tribunal would order a disqualification of the lawyer. They are closely connected, but not congruent. As a matter of law, disqualification of a lawyer in an ongoing litigation is not within the purview of the Committee.

2. *Mazurkiewicz v. New York Transit Auth.,* 806 F. Supp. 1093 (S.D.N.Y. 1992); *Chappell v. Cosgrove*, 916 P.2d 836 (N.M. 1996).

3. Colo. Bar Assoc. Formal Op. 78, www.cobar.org/static/comms/ethics/fo/fo_78.htm (Rev. May 10, 1997). In a similar case, the Delaware State Bar Association Committee on Professional Ethics advised the lawyer not to *undertake* representation. Del. St. Bar Assoc. Comm. Op. 1991-4, www.dsba.org/ethics91-4.pdf. We believe that the analysis of the opinion is sound. However, in cases where, as here, representation has already been undertaken, disqualification or withdrawal is not automatic.

4. *State v. Leonard*, 707 P.2d 650, 653 (Utah 1985) (quoting *Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983)). This case was decided under the previous Code of Professional Responsibility, which contained a provision similar to the current Rule 3.7.

5. 13 S.W.3d 865 (Tex. App. 2000).

6. *Connell v. Clairol, Inc.*, 440 F. Supp. 17, 18 n.1 (N.D. Ga. 1977).

7. *Weeks v. Samsung Heavy Industry Co., Ltd.*, 909 F. Supp. 582 (N.W. Ill. 1996); *Zurich Ins. Co. v. Knotts*, 52 S.W. 3d 555 (Ky. 2001).

8. If a motion to disqualify is filed by the opposing lawyer, the burden to establish that counsel's continuing in the case would violate the disciplinary rules falls on the party seeking to have the opposing counsel disqualified. *Zions First Nat. Bank, N.A. v. United Health Clubs*, 505 F. Supp. 138, 140 (D. Pa. 1981). In *Zions*, the court explained that the moving party has the burden because the rule was not created as a way for a lawyer to get opposing counsel disqualified, and that granting such a motion without a clear showing that the continued representation is impermissible would undermine the integrity of the rule.

9. Utah Rules of Professional Conduct 3.7(a)(3).

10. It is also possible to have another lawyer in the withdrawing lawyer's firm to represent the client at trial, so long as there is no Rule 1.7 (conflict) or Rule 1.9 (former client) problem. Utah Rules of Professional Conduct 3.7(b) & cmt. 5.

11. Utah Rules of Professional Conduct 1.7, cmt.

12. ABA Ann. Model Rules of Professional Conduct 135 (5th ed. 2002).

13. Utah Rules of Professional Conduct 1.7, cmt. 4.

14. ABA Model rules of Professional Conduct 1.7, cmt. [15] (2002). This is not part of the current Utah Rules, but

is consistent with Utah Rule 1.7.

15. *See, e.g.*, The ABA/BWA Lawyers Manual on Professional Conduct 51:407 (suggesting that a lawyer faced with threatened malpractice action in the course of representing a client should disqualify herself).