ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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Opinion No. 11-06
March, 2011

Subject: Lawyer as Witness

Digest: A lawyer who is disqualified by reason of his or her likely being called as a necessary witness may continue the representation until commencement of trial.

References: Illinois Rule of Professional Conduct 3.7

Weil, Freiburg and Thomas, P.C. v. Sara Lee Corp., 218 Ill.App.3d 383, 160 Ill.Dec. 773 (1st Dist. 1991)

Jones v. City of Chicago, 610 F.Supp. 350 (N.D. Ill. 1984)

Culebras Enterprises Corporation v. Rivera-Rios, 846 F.2d 94 (1st Cir. 1988)

Mercury Vapor Processing Techs., Inc. v. Village of Riverdale, 545 F.Supp.2d 783 (N.D. Ill. 2008)

The Law Governing Lawyers, Restatement of the Law Third, Sec. 108, comment (c)

FACTS

Litigation has been initiated to contest a will and an associated trust. The attorney representing the trustee under the will is likely to be called as a witness by the adverse party. The trustee's attorney intends on turning the case over to trial counsel at the time the case proceeds to trial.

QUESTIONS

1. Can the trustee's attorney serve as trial counsel until the commencement of trial?

2. Can the trustee's attorney serve as trial counsel until the time he or she is called as a witness?

3. If the trustee's attorney is limited in acting as trial counsel, can he or she continue to represent the trustee in all other trust related matters?

OPINION

Illinois Rule of Professional Conduct ("IRPC" or "Rule") 3.7 addresses the ethics of a lawyer as a witness. Rule 3.7(a) provides that:

> A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless:
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> (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.

Based on the limited facts presented, the Committee presumes that none of the exceptions to IRPC 3.7(a) are applicable. The question is how far the trustee's attorney can continue to represent the client as the litigation progresses.

The purpose of Rule 3.7 is to avoid situations where the trier of fact may be confused or misled by a lawyer acting as both advocate and witness. IRPC 3.7, Comment [2]. See generally, *Weil, Freiburg and Thomas, P.C. v. Sara Lee Corp.*, 218 Ill.App.3d 383, 160 Ill.Dec. 773 (1st Dist. 1991). The trier of fact might perceive the lawyer-witness as prone to distort the truth for his client, or conversely that the trier of fact might give more credibility to the testimony of an officer of the court. It also places the lawyer in the position of vouching for his or her own credibility. In any of these circumstances, a party may be unfairly prejudiced. See *Jones v. City of Chicago*, 610 F.Supp. 350 (N.D. Ill. 1984).

However, concerns about trier of fact confusion or party prejudice only arise when the lawyer-witness actually appears before the trier of fact. Accordingly, neither the Rule nor

its purposes preclude a lawyer from participating in pre-trial litigation matters. This appears to be the commonly held view and the Committee concurs. E.g. *Culebras Enterprises Corporation v. Rivera-Rios*, 846 F.2d 94 (1st Cir. 1988)(lawyers engaged in pre-trial work, but not actual trial, did not violate Rule 3.7 and thus could be awarded attorneys fees). See also e.g., *Mercury Vapor Processing Techs., Inc. v. Village of Riverdale*, 545 F.Supp.2d 783, 789 (N.D. Ill. 2008)("even if [the lawyer] later becomes a witness at trial or in an evidentiary proceeding, he is not prohibited from conducting discovery, drafting motions, or serving in some other capacity….") Accord, The Law Governing Lawyers, Restatement of the Law Third, Sec. 108, comment (c)("A lawyer serving in a capacity other than that of a courtroom advocate is not precluded from being a witness for the lawyer's client.). It needs to be noted, however, that where the trustee's attorney is on notice that he or she will likely be called as a necessary witness, Rules 1.2(c) and 1.4 likely apply to require the trustee to be informed, and potentially consent, to the limits on the trustee attorney's representation.

Under the above analysis, the trustee's attorney in the hypothetical may participate in all pre-trial activities until the commencement of trial.

Under the same analysis, the trustee's attorney may not act as trial counsel up until he or she is called as a witness. By beginning the trial and participating in full view of the trier of fact, all of the concerns sought to be avoided by the Rule come into play. In the absence of one of the exceptions under Rule 3.7(a), none of which are presented in the hypothetical, the Committee believes appearing and acting as trial counsel in any portion of the trial is prohibited.

Finally, Rule 3.7 only addresses situations where a party's lawyer will likely be called as a necessary witness at trial. Nothing in Rule 3.7 prohibits a lawyer who is a witness in one matter from representing a party in non-litigation, even related, matters. Accordingly, in the hypothetical, it is permissible for the trustee's attorney to continue to represent the trustee in all other legal matters not involving an appearance as a witness before a trier of fact.