ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rule of Professional Conduct 3.7. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 93-7
January 21, 1994

Topic: Attorney as witness and advocate in the same case.

Digest:
1. As a general rule, an attorney should avoid appearing both as the advocate and as witness in the same case.
2. An attorney may act as a witness and have another attorney of the same firm act as advocate in a trial.
3. An attorney may be both advocate and witness if substantial hardship will result to the client if the attorney is disqualified as counsel.

Ref.:
Illinois Rules of Professional Conduct, Rule 3.7(a)(b)(c)
ISBA Opinions on Professional Conduct, Nos. 540 and 389
ABA Informal Opinion No. 89-1529
ABA/BNA Manual of Professional Conduct, 61:501
United States v. Morris, 714 F.2d 669 (7th Circ. 1983)
Greater Rockford Energy & Technology v. Shell Oil, 777 F.Supp. 690 (C.D.Ill. 1991)
Weil, Freiburg & Thomas v. Sara Lee, 160 Ill.Dec. 773, 577 N.E.2d 1344, 218 Ill.App.3d 383 (1991)

FACTS

Attorney A representing tenant B in action for breach of lease with C, telephoned C demanding immediate occupancy for B. In the conversation, C refused because he could not afford the price provided for in the lease. Attorney A filed a lawsuit for breach of lease against C. Attorney A will be a witness in the lawsuit as to his conversation(s) with C.

QUESTION

Is attorney A disqualified as advocate because he will be a witness?

OPINION

As a general rule, an attorney should avoid being both an advocate and a witness in the same cause.

> Rule 3.7(b) - Lawyer as Witness:
>
> (a) A lawyer shall not accept or continue employment in contemplated or pending litigation if the lawyer knows or reasonably should know that the lawyer may be called as a witness on behalf of the client, except that the lawyer may undertake the employment and may testify:
>
> > (1) if the testimony will relate to an uncontested matter;
> > (2) if the testimony will relate to a matter of formality and the lawyer reasonably believes that no substantial evidence will be offered in opposition to the testimony;
> > (3) if the testimony will relate to the nature and value of legal services rendered in the case by the lawyer or the firm to the client; or
> > (4) as to any other matter, if refusal to accept or continue the employment would work a substantial hardship on the client.
>
> (b) If a lawyer knows or reasonably should know that the lawyer may be called as a witness other than on behalf of the client, the lawyer may accept or continue the representation until the lawyer knows or reasonably should know that the lawyers' testimony is or may be prejudicial to the client.
>
> (c) Except as prohibited by Rule 1.7 or Rule 1.9, a lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm may be called as a witness.

Under the facts given for this opinion, the attorney knew well in advance of any litigation that he would be a potential witness for the plaintiff based on his conversation with the other party. It is clear that his testimony does not come within the exceptions of Rule 3.7(a)(1), (2) and (3), and also would not work a substantial hardship on the client under subsection (4) since a member of his own firm is available to try the case.

The 7th Circuit has also addressed the issue of allowing an attorney to be a witness and not be disqualified as counsel. United States v. Morris, 714 F.2d 669 (1983). The Court found that disqualification of attorney is discretionary with the court, and indicated a 5-point test to be used in exercising such discretion. Of the five points used, several apply here:

(1) it eliminates the possibility that the attorney will not be a fully objective witness;
(2) in the case of a Government attorney, the rule elminiates the possibility that the prestige of the Goivernment will artificially enhance the attorney's credibility as a witness;
(3) it reduces the risk that the trier of fact will confuse the roles of advocate and witness and erroneously grant testimonial weight to an attorney's arguments;
(4) it reflects a broad concern that the administration of justice not only be fair, but also appear fair;
(5) it prevents a Government attorney, who is "expected to adhere to the highest standards of professional behavior and to be worthy of public trust and confidence" from running "the risk of impeachment or otherwise being found not credible," and thereby disgracing his office.

The exceptions to the general rule prohibiting an attorney acting as both advocate and witness relate to the denial of justice to the client. If the evidence the attorney is to submit is unavailable from any other source or witness and is crucial or important to the client's cause, it would obviously be detrimental or prejudicial to the client and work a hardship if that attorney was refused the ability to testify.

Whether or not the attorney testifies, the question of whether he can continue as advocate is a different disqualification issue and generally it would be found that acting as a witness will subject the attorney to disqualification. For obvious reasons it would be difficult to determine when an attorney's testimony is testimony and when it is argument when he is acting in dual capacity and diminishes his effectiveness as an advocate, as well as his effectiveness as a witness.

Where, however, the facts of the situation are such that litigation has proceeded and is in a later stage and that the testimony of the attorney who is advocate is peculiar and unique to the interests of the client and cannot be procured elsewhere, and in addition, the motion of opposing counsel to disqualify such an attorney can be said to be in the nature of harassment or undue influence, then the Court and situation may generally be such that hardship has been proven pursuant to 3.7(a)(4) of the Rules and the attorney may indeed remain as both advocate and witness in such limited situations. Greater Rockford Energy & Technology v. Shell Oil, 777 F.Supp 690 (C.D.Ill. 1991).

Rule 3.7(c) specifically allows an attorney to act as an advocate in a trial in which another attorney in the same firm may be called as a witness. The questions asked in this case indicate that there is another member of the firm available to handle the case and, pursuant to Rule 3.7(c) it is clearly possible and allowable for the second attorney to take over the trial of the case and the first attorney to testify only.

To specifically answer the questions asked, attorney A may well be disqualified as an advocate if he testifies; he had knowledge well in advance of the filing of the lawsuit that he probably would be or could be called as a witness and the credibility afforded his testimony may be less than advantageous to his client. No real hardship appears to exist to except this situation from the Rule.

The Committee notes that Rule 3.7(c) corrects some problems caused by its predecessor but also does not resolve the discrepancy with a sole practitioner.

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