Colo. R. Prof'l. Cond. 3.7

Rule 3.7 - Lawyer as Witness

(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 or LLP 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.

RPC 3.7

Entire Appendix repealed and readopted April 12, 2007, effective 1/1/2008; amended and adopted by the Court, En Banc, effective 11/16/2023.

COMMENT

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client. Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest. Conflict of Interest

[6] 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. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

ANNOTATION Law reviews. For Formal Opinion No. 78 of the CBA Ethics Committee, "Disqualification of the Advocate/Witness", see 23 Colo. Law. 2087 (1994). Annotator's note. Rule 3.7 is similar to Rule 3.7 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule. A violation of section (a) of this rule ordinarily will require disqualification because the very purpose of the rule is to avoid the taint to a trial that results from jury confusion when a lawyer acts as both witness and advocate. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp. 2d 1170 (D. Colo. 2003). Section (a) is a prohibition only against acting as an advocate at trial. It does not automatically require that a lawyer be disqualified from pretrial activities, such as participating in strategy sessions, pretrial hearings, settlement conferences, or motions practice. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp. 2d 1170 (D. Colo. 2003). Disqualification from pretrial matters may be appropriate, however, where that activity includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual role. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp. 2d 1170 (D. Colo. 2003). Subsection (a)(1) allows an attorney to testify only regarding an uncontested issue and does not allow an attorney to testify to undisputed facts to support a disputed issue. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009). A party seeking disqualification of any attorney as "likely to be a necessary witness" must show that "the advocate's testimony is necessary, and not merely cumulative". Religious Tech. Ctr. v. F.A.C.T. Net, Inc., 945 F. Supp. 1470 (D. Colo. 1996). This rule does not mandate a hearing where there is a possibility of a conflict of interest on the part of an attorney called as a witness against his or her client. Taylor v. Grogan, 900 P.2d 60 (Colo. 1995). Rule requires that plaintiffs' counsel who is also their son be disqualified from appearing as an advocate because he is likely to be called as a witness at trial. Determining whether the moving party has demonstrated that opposing counsel is "likely to be a necessary witness" involves a consideration of the nature of the case, with emphasis on the subject of the lawyer's testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently

establish the relevant issues. The moving party's burden is complete if he proves that opposing counsel is "likely to be a witness" at trial. Here, the facts and circumstances demonstrate that plaintiffs' son who is also their counsel and who was endorsed by plaintiffs as a fact witness is likely to be a necessary witness on his clients' and parents' behalf. The statements of plaintiffs' counsel and son is that he spoke with the defendant-doctor after the procedure performed on his plaintiff father and that the defendant made certain admissions against interest. Fognani v. Young, 115 P.3d 1268 (Colo. 2005). Rule permits a lawyer to maintain a dual role in the same proceeding if "disqualification would work substantial hardship on the client". Even if there is a risk of prejudice to both parties if the attorney is permitted to testify, court must balance the competing interests, affording "due regard" to the effect of disqualification on his clients. When determining whether disqualification would impose a substantial hardship on the client, court should consider all relevant factors in light of the specific facts before it, including the nature of the case, financial hardship, giving weight to the stage in the proceedings, the time at which the attorney became aware of the likelihood of his testimony, and whether the client has secured alternate representation. Here, considering the specific facts and circumstances, trial court did not abuse its discretion in rejecting plaintiffs' substantial hardship claim. In light of ample justification in the record, trial court did not abuse its discretion in disqualifying plaintiffs' counsel and son from his representation of his parents at trial. Fognani v. Young, 115 P.3d 1268 (Colo. 2005). But trial court did not abuse discretion in disqualifying a lawyer where the lawyer was the sole source, other than the defendant, of potentially critical and outcome determinative information to be used to establish the defendant's defense and the court determined that allowing the lawyer to continue the representation would undermine the public's interest in maintaining the integrity in the judicial system. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009). Court declines to issue a rule that would permit automatic participation by disqualified attorney in all pretrial litigation. Upon assuring that the client has consented to pretrial representation by the disqualified attorney, trial court has discretion to determine whether participation by the attorney in a particular pretrial activity would undermine the purpose of the rule. If, for example the attorney's dual role in a deposition proceeding would likely be revealed at trial, trial court may properly limit attorney's role in that activity. Here, trial court was given opportunity on remand to fashion its orders in a way dictated by facts of the case. Fognani v. Young, 115 P.3d 1268 (Colo. 2005). Rule does not impose automatic vicarious disqualification of the disqualified attorney's law firm. As such, the trial court must consider whether the requirements of C.R.C.P. 1.7 and 1.9 have been met. The inquiry is two-fold: (1) Whether the firm reasonably believes its representation of the plaintiffs will not be materially limited by its responsibilities to the attorney; and (2) the client's consent to the ongoing representation and whether that consent is objectively reasonable under the circumstances. The trial court has the authority to decline to honor the client's choice if the court concludes that the client should not agree to the representation under the circumstances of the case. In making that determination, the court may balance the clients' interests in the continuing representation against the nature of the anticipated testimony and the credibility issues that the testimony may pose. Here, record does not permit supreme court to determine whether trial court abused its discretion in disqualifying the law firm of plaintiffs' son from representing plaintiffs. Accordingly, remand is necessary to determine whether the requirements of C.R.C.P. 1.7 have been met. Fognani v. Young, 115 P.3d 1268 (Colo. 2005). Trial court's conclusion that defendant would likely have a compelling need to call his attorney to testify within its discretion. Although prosecution failed to demonstrate a compelling need for testimony of defendant's attorney, thus creating a conflict under this rule and need for disqualification, the trial court did not rule arbitrarily, unreasonably, or unfairly when it ruled to disqualify defendant's attorney. People v. Hagos, 250 P.3d 596 (Colo. App. 2009). Court of appeals uses abuse of discretion standard to review trial court's decision to disqualify counsel under this rule. Haralampopoulos v. Kelly, __ P.3d __ (Colo. App. 2011). Court did not abuse discretion in disqualifying counsel from representing plaintiff at trial but allowing counsel to participate in pretrial preparation and allowing counsel's firm to represent plaintiff at trial. Counsel had been deposed and could be called as a witness but exclusion of counsel from pretrial preparation could create a substantial hardship for plaintiff. Haralampopoulos v. Kelly, __ P.3d __ (Colo. App. 2011).