The Lawyer as Witness
RPC Rule 3.7

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(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 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.

Overview

Because "[c]ombining 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," Rule 3.7 of the North Carolina Rules of Professional Conduct prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness, subject to certain exceptions. Part of the justification for the rule is that the trier of fact "may be confused or misled by a lawyer serving as both advocate and witness" because, traditionally, a witness offers proof based on personal knowledge while a lawyer offers analysis of a witness's proof. *See* Commentary to R.P.C. 3.7. It may be unclear to the trier of fact whether a lawyer is offering proof or analysis of the proof in cases where a lawyer is both an advocate and a witness in the same trial. *Id*. Whether a lawyer is a necessary witness "is an issue best left to the discretion of the tribunal," and a "lawyer should be disqualified under Rule 3.7 only upon a showing of compelling circumstances." N.C. State Bar 2012 FEO 15 (internal quotation omitted).

In cases where an opposing party moves to disqualify a lawyer pursuant to Rule 3.7, whether disqualification is proper is an issue for the tribunal. *Id*. Courts have recognized that "a party may move to disqualify opposing counsel for mere tactical or strategic reasons," and that such a practice "conflict[s] with the opposing litigant's right to counsel of its choice." *Beller v. Crow*, 742 N.W.2d 230, 234 (Neb. 2007). Thus, "the court must strike a balance between the potential for abuse and those instances where the attorney's testimony may be truly necessary to the opposing party's case." *Id*. (internal quotation omitted); *see also* N.C. State Bar 2011 FEO 1 (disqualification limited to cases where lawyer's testimony is truly necessary in order to prevent abuse of rule by opposing party). The moving party bears the burden of establishing that the lawyer is subject to disqualification. *Id*.; *Cf. Cunningham v. Sams*, 161 N.C. App. 295, 298 (2003) (moving party "stated with specificity why defense counsel was a necessary witness" subject to disqualification).

Regardless of whether a motion to disqualify has been made, in cases where a lawyer has been named as a witness by an opposing party, the lawyer has an obligation to "evaluate his knowledge of the facts in controversy and make a good faith determination as to whether his testimony will be relevant, material, and unobtainable elsewhere." N.C. State Bar 2011 FEO 1. "The evaluation must be ongoing, and a lawyer should withdraw from representation in the trial if the lawyer knows or reasonably should know that he is a necessary witness." *Id*. Failure to do so is a violation of the Rule. *Id*. The recognition in the State Bar's formal ethics opinion that a lawyer may be named as a witness by an opposing party and that disqualification may be necessary in that circumstance illustrates that the Rule is applicable regardless of which party intends to call the lawyer as a witness. *See, e.g., Klupt v. Krongard*, 126 Md. App. 179, 206 (1999) (so noting with regard to analogous Maryland rule).

Lawyer as "Necessary Witness"

As a threshold matter, a lawyer must be a "necessary witness" in order to be subject to disqualification from acting as a client's advocate at trial. R.P.C. 3.7(a); N.C. State Bar 2012 FEO 15. A lawyer's testimony is "necessary" when it is "relevant, material, and unobtainable by other means." N.C. State Bar 2012 FEO 15; *Compare Cunningham v. Sams*, 161 N.C. App. 295, 298 (2003) (defense counsel was necessary witness in case where he was uniquely aware of factual issues relevant to sole issue at trial – legal services for defendant in a domestic action which were at issue in subsequent action to recover unpaid legal fees – and became aware of such issues prior to beginning representation of client), *State v. Rogers*, 219 N.C. App. 296, 305 (2012) (defense counsel was likely to be necessary witness where he was "uniquely aware" of relevant circumstances because of his long-standing friendship with defendant and his private correspondence with defendant's lover who was also victim's wife), *and Braun v. Trust Dev. Grp., LLC*, 213 N.C. App. 606, 610 (2011) (plaintiff's attorneys were necessary witnesses in case where communications between plaintiff's attorneys and defendant's attorneys were sole basis for defendant's defense); *with State v. Smith*, 230 N.C. App. 387, 392 (2013) (defense counsel was not "necessary witness" for his client in case where he "was able to make the same points through his vigorous cross-examination as he would have made as a witness"), *and Sec. Gen. Life Ins. Co. v. Superior Court In & For Yuma Cty.*, 718 P.2d 985, 988 (Ariz. 1986) ("A party's mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony."). As a general guideline, "[d]etermining whether a lawyer 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." N.C. State Bar 2012 FEO 15 (internal quotation omitted).

Exceptions to the Rule

Assuming that a lawyer is a necessary witness, the lawyer may still act as an advocate at trial if any one of three exceptions to the rule applies. The first exception allows a lawyer to act as a witness when his or her "testimony relates to an uncontested issue." R.P.C. 3.7(a)(1). In cases where testimony will be uncontested, the trier of fact is not likely to be confused and "the ambiguities in the dual role are purely theoretical." Commentary to R.P.C. 3.7.

The second exception allows a lawyer to act as a witness when his or her "testimony relates to the nature and value of legal services rendered in the case." R.P.C. 3.7(a)(2). It is important to note that this exception applies to testimony regarding the value of legal services rendered in the case in which the testimony will be offered. Thus, the exception was not applicable where plaintiffs sought to disqualify defense counsel from acting as an advocate during the trial of a case in which the value of legal services rendered by plaintiffs in a separate domestic action was at issue. *Cunningham v. Sams*, 161 N.C. App. 295 (2003). In *Cunningham*, the plaintiffs were lawyers who had rendered legal services for defendant in a domestic action and later sued the defendant to recover unpaid legal fees arising from the domestic action. The trial court properly disqualified defense counsel from representing the defendant at trial because, due to his involvement in the separate domestic action, defense counsel was a necessary witness regarding the nature and value of plaintiffs' legal services rendered in the domestic action. The exception in Rule 3.7(a)(2) was inapplicable because defense counsel's testimony did not relate to the nature and value of legal services rendered in the matter before the court – the action for the unpaid fees. *See Cunningham*, 161 N.C. App. at 297 (trial court made specific finding of fact to this effect).

The third exception is a catchall that permits a lawyer to testify in a case in which he or she is an advocate where "disqualification of the lawyer would work substantial hardship on the client." R.P.C. 3.7(a)(3). This exception calls for "a balancing . . . between the interests of the client and those of the tribunal and the opposing party." Commentary to R.P.C. 3.7; *see also D.J. Inv. Grp., L.L.C. v. Dae/Westbrook, L.L.C.*, 147 P.3d 414, 419 (Utah 2006) (favorably citing commentary to analogous state rule for same proposition). "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." Commentary to R.P.C. 3.7. On the other side of the balance, "due regard must be given to the effect of disqualification on the lawyer's client," and "[i]t is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." *Id.*; *see also Beller v. Crow*, 742 N.W.2d 230, 236 (Neb. 2007) (disqualification of plaintiff's counsel would not work substantial hardship in part because plaintiff should have reasonably foreseen that counsel would be a witness at trial prior to filing complaint); *Fognani v. Young*, 115 P.3d 1268, 1275 (Colo. 2005) (stating that most jurisdictions take foreseeability of lawyer's necessity as a witness into account). Ultimately, the tribunal has significant discretion in determining whether disqualification would cause a substantial hardship as the term "substantial" and the balancing analysis are by nature inexact. *D.J. Inv. Grp., L.L.C.*, 147 P.3d at 419. That said, some courts have recognized that finding

"substantial hardship" requires "something beyond the normal incidents of changing counsel." *Brown v. Daniel*, 180 F.R.D. 298, 302 (D.S.C. 1998).

Some illustrative guidance on factors relevant to an analysis of hardship can be found in *State v. Rogers*, 219 N.C. App. 296, 306 (2012). In *Rogers*, a criminal defendant's counsel was disqualified because he was "uniquely aware" of the circumstances surrounding the defendant's act of shooting another man as counsel had a longstanding friendship with the defendant and had privately discussed the consequences of divorce with the victim's wife who was having an affair with the defendant. The court found that there was no evidence of substantial hardship based on the following factors: (1) defendant was appointed new counsel, which he subsequently declined; (2) his original counsel was disqualified more than a year before the trial was to take place; and (3) "the issues being adjudicated were not so complicated as to require someone with a unique accumulation of knowledge to handle them." *Id.* In general, the availability of substitute counsel, the timing of the disqualification, and the complexity of the case seem to be relatively common factors in the hardship analysis across cases and jurisdictions. Though the court didn't explicitly discuss the issue, it's reasonable to think that it was foreseeable in *Rogers* that defense counsel may be a necessary witness under the circumstances of the case.

Also illustrative on the issue of hardship is *Chapman Engineers, Inc. v. Nat. Gas Sales Co.*, 766 F. Supp. 949, 959 (D. Kan. 1991). In *Chapman*, the court found that disqualifying a party's attorney who was serving as lead counsel would work a substantial hardship because: (1) none of the party's other attorneys were in a position to accept the responsibility of serving as lead counsel; (2) the party did not have the financial means to retain counsel except on a contingency basis and the volume of discovery and complexity of the case posed an "immense barrier" to finding a replacement litigator willing to take the case on contingency at the point at which the proceedings stood; and (3) the case was going to be tried soon because it was one of the oldest cases on the docket. *Id.*; *see also Fognani*, 115 P.3d at 1275 ("[W]hen determining whether the disqualification would impose a substantial hardship on the client, we 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 attorney became aware of the likelihood of his testimony. In addition, we also consider whether the client has secured alternative representation."); *Beller*, 742 N.W.2d at 236 (Neb. 2007) (ready availability of alternative counsel in part supported conclusion that disqualification would not work substantial hardship). A "common concern" with regard to hardship is whether the result of disqualification is that "a party will lose the knowledge and expertise that counsel has acquired throughout the litigation." *Northbrook Digital, LLC v. Vendio Servs., Inc.*, 625 F. Supp. 2d 728, 766 (D. Minn. 2008). "[A]s the duration of litigation increases, there is an accordingly greater likelihood that disqualification of counsel will work hardship against the client." *Id.*; *see also Brown v. Daniel*, 180 F.R.D. 298, 302 (D.S.C. 1998) ("loss of extensive knowledge of a case based upon a long-term relationship between the client and counsel and substantial discovery conducted in the actual litigation" may support finding of substantial hardship).

Scope of Disqualification

A trial court may mitigate the hardship of disqualification by continuing a trial for a sufficient amount of time to allow a client to obtain new counsel and prepare for trial. *Cf. Braun v. Trust Dev. Grp., LLC*, 213 N.C. App. 606, 610 (2011) (after disqualifying plaintiff's counsel, trial court continued trial for a minimum of 90 days and ordered plaintiff to obtain new counsel within 30 days).

By its terms, Rule 3.7 disqualifies a lawyer from acting as an "advocate at a trial" in cases where the rule is applicable. "Thus, it appears that even though an attorney may be prohibited from being an advocate during trial, the attorney may, nevertheless, represent his client in other capacities, such as drafting documents and researching legal issues." *Cunningham*, 161 N.C. App. at 299. In *Cunningham*, the trial court abused its discretion by disqualifying defense counsel from engaging in "legal representation beyond the trial." *Id*. at 300; *see also* N.C. State Bar 2011 FEO 1 (prohibition on serving as advocate and witness does not apply to pretrial work, settlement negotiations, or assisting with trial strategy); *Droste v. Julien*, 477 F.3d 1030, 1036 (8th Cir. 2007) (analogous federal rule "only prohibits a lawyer from acting as an advocate at trial" (internal quotation omitted); trial court abused discretion by imposing broader disqualification).

Subsection (b) of the Rule permits a lawyer to act "as an 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." R.P.C. 3.7(b). Rule 1.7 prohibits representation of a client when the representation involves a concurrent conflict of interest, and Rule 1.9 describes a lawyer's obligations, including avoiding certain conflicts of interest, with respect to former clients. In *Cunningham*, the trial court abused its discretion by disqualifying an attorney's entire law firm from representing his client at trial under Rule 3.7 where neither Rule 1.7 nor 1.9 precluded such representation. 161 N.C. App. at 300.

Interlocutory Appeal of Disqualification Ruling

Courts have allowed interlocutory appeals of disqualification rulings under Rule 3.7. The North Carolina Supreme Court has held that an order granting a motion to disqualify counsel affects a substantial right "because it has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client's choice. Neither deprivation can be adequately redressed by a later appeal of a final judgment adverse to the client." See, *Braun v. Trust Development Group, LLC, 213 N.C. App. 288, 293 (1992), citing Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 293, 420 S.E.2d 426, 429 (1992).

Additional Cases

Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 129 n.11 (2008) (Newby, J. dissenting) (noting as follows:

> In several of its findings of fact, the trial court relies on information contained in the affidavit of plaintiffs' attorney. Reliance on the affidavit raises . . . concerns. . . . [U]nder Rule 3.7 of the North Carolina Rules of Professional Conduct, "[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." N.C. St. B. Rev. R. Prof. Conduct 3.7 (Lawyer as Witness), 2007 Ann. R. N.C. 717, 812. In this case, the propriety of plaintiffs' own counsel providing an affidavit concerning not merely "services rendered in [this] case" but also regarding his opinion whether it would be "feasible to pursue claims such as this on an individual basis" is questionable under the rule.)

Silicon Knights, Inc. v. Epic Games, Inc., No. 5:07-CV-275-D, 2011 WL 5439156, at *6 (E.D.N.C. Nov. 8, 2011) (unpublished) (rejecting argument that disqualification of counsel would work substantial hardship, court notes that disqualification was foreseeable because the issue had been raised early in the proceedings)

George v. McClure, 266 F. Supp. 2d 413, 419 (M.D.N.C. 2001) (granting motion to disqualify counsel in a case where counsel had participated in a prior lawsuit that resulted in a settlement agreement that was the subject of the action before the court; in the settlement process, counsel "allegedly was aware of misrepresentations made by others and made misrepresentations himself" and thus was "likely be a material witness regarding the issues at the heart of this action given the allegations of his participation in the Lawsuit and the resulting settlement agreement"; disqualification was not prejudicial to the client because the action was at an early stage and other attorneys were competent to represent the client)

Ohio Cas. Ins. Co. v. Firemen's Ins. Co. of Washington, D.C., No. 5:07-CV-149-D, 2008 WL 441840, at *2 (E.D.N.C. Feb. 13, 2008) (unpublished) (counsel was not a necessary witness where any relevant evidence he could testify to could be obtained from other sources)

Metro. P'ship, Ltd. v. Harris, No. CIV. A. 3:06CV522-W, 2007 WL 2733707, at *2 (W.D.N.C. Sept. 17, 2007) (unpublished) (court was not convinced counsel was a necessary witness where his purported testimony pertained only to an alternative theory of recovery and it was not clear whether the theory would actually be pursued at trial and evidence from counsel's testimony was available from other sources)

Spring v. Bd. of Trustees of Cape Fear Cmty. Coll., 2015 WL 5562293, at *3 (E.D.N.C. Sept. 21, 2015) (law firm was not disqualified despite fact that one of firm's attorneys was a necessary witness)

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The Lawyer as Witness: Rule 3.7

Preliminary Quiz

1. Rule 3.7 is designed to deal with which of the following concerns:
   a. Preventing lawyers from double-billing for serving both as an advocate and as a witness.
   b. Preventing confusion on the part of the fact-finder during the trial.
   c. The attorney cannot be objective or truthful because the jury will assume she will biased toward the interests of her client.
   d. The attorney is presumed to have a conflict of interest, whether she is called as a witness for her own client, or by the opposing party.

2. If an attorney is "disqualified" from testifying under Rule 3.7, she is prohibited from participating in any trial preparation activities, and is limited to the role of witness.

_____ True _____ False

3. If an attorney is "disqualified" it is perfectly legal for a different attorney in the same firm to represent the client.

_____ True _____ False

4. Opposing counsel wants to depose you in a pending lawsuit. Should you have any concern about the applicability of Rule 3.7?

_____ Yes _____No

5. The trial court is required to rule on a motion under Rule 3.7 at the time of the trial, and not before.

_____ True _____ False

6. Rule 3.7 can best be characterized as
   a. An ethical rule, designed to direct appropriate actions of the attorney
   b. A procedural matter under the jurisdiction of the trial judge
   c. An evidentiary issue for the attorneys and the judge before and during the trial
   d. All of the above.

7. Rule 3.7 only applies if the law has been named as a witness by the opposing party.

_____ True _____ False