

ETHICS OPINION 140519

Facts:

The office of the Commissioner of Political Practices (“COPP”) is a small state agency with a limited budget and a staff of six people. Two of the six COPP staff are attorneys licensed to practice law in Montana. COPP staff attorneys are Jonathan Motl (also Commissioner) and Jaime MacNaughton.

The Commissioner investigates complaints that allege campaign practice violations. The Commissioner’s staff investigates these complaints and the Commissioner then drafts and writes a decision as to whether or not sufficient facts exist to show campaign practice violations. The final decision is a non-binding agency decision. The decision, however, can be a sufficient platform to allow the Commissioner and the candidate or political committee addressed by the complaint to settle the matter by the negotiation of a fine. The settlement is a final resolution of the complaint.

COPP is dealing with a number of complaints over Western Tradition Partnership, a nonprofit organization that is alleged to have been connected with “dark money” use in Montana’s 2010 elections. The Commissioner has issued a number of decisions on this issue, which have not been settled and must now be prosecuted in state district court. COPP has filed nine civil enforcement actions against nine 2010 candidates for public office, and anticipates filing more.

COPP files each enforcement action as a civil complaint in the 1st Judicial District. The complaints list “Jonathan Motl and Jaime MacNaughton” as attorneys for the Commissioner of Political Practices.

COPP intends to use Jonathan Motl in an active litigation role in all of the district court enforcement actions. Mr. Motl will take and defend depositions (other than his own), prepare and send discovery, interview and prepare witnesses, and generally work on the case. Mr. Motl will not appear as trial lawyer or advocate as a lawyer in any trial of any enforcement action. Jaime MacNaughton (who will also be involved in discovery) will act as the trial lawyer. Mr. Motl will appear in court as the representative of the party and will advocate as a witness for the party. COPP indicates that it does not have the resources to engage another attorney and it is therefore dependent on use of Jonathan Motl and Jaime MacNaughton in the manner set out above.

COPP requests a determination that its attorney, Jonathan Motl, is in compliance with Rule 3.7, Mont.R.Prof.Cond., when he acts as set out above.

Short Answer:

Yes, COPP's intention to use Mr. Motl in the civil enforcement actions as an advocate and witness is appropriate under Rule 3.7, Mont. R. Prof. Cond. (sometimes referred to as the "lawyer-witness rule" or the "advocate-witness rule.") Rule 3.7(a) addresses advocating "at trial." Case law construing the rule generally limits disqualification of a lawyer-witness as trial counsel but not from participating in pretrial matters. Rule 3.7(b) makes it clear that disqualification is not automatically imputed to partners and associates of the disqualified lawyer-witness at trial, unless a separate conflict of interest is present.

General Discussion:

Rule 3.7, Mont.R.Prof.Cond., states:

- (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.

As noted in Montana Formal Ethics Opinion 050317, the prohibition against a lawyer from serving as advocate and testifying as a witness in the same matter is essentially aimed at eliminating confusion about the lawyer's role. As an advocate, the lawyer's task is to present the client's case and to test the evidence and arguments put forth by the opposing side. A witness, however, provides sworn testimony concerning facts about which he or she has personal knowledge or expertise. When a lawyer takes on both roles, jurors are likely to be confused about whether a statement by an advocate witness should be taken as proof or as an analysis of the proof (see Comment 2, below).

Rule 3.7 is designed to preserve the distinction between advocacy and evidence and to protect the integrity of the advocate's role as an independent and objective proponent of rational argument. This is discussed in the Comments to the Model Rules:

[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.

[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.

See also *Restatement (Third) of the Law Governing Lawyers*, §108 cmt. b (2000) (“combined roles risk confusion on the part of the factfinder and the introduction of both impermissible advocacy from the witness stand and impermissible testimony from counsel table.”)

Further, the rule protects trial counsel from having to cross-examine opposing counsel and impeach his or her credibility, even if only on the obvious ground of interest in the outcome of the case. See, e.g., *Ford v. State*, 628 S.W.2d 340 (Ark. Ct. App. 1982) (opposing counsel handicapped in cross-examining and arguing credibility of lawyer-witness); Model Code EC 5-9 (“If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case.”)

As noted, Rule 3.7(a) prohibits a lawyer who is likely to be a necessary witness from “acting as an advocate at trial.” The majority of courts and ethics committees construing the rule have permitted pretrial preparation work by an attorney who likely will serve as a witness at trial. See, e.g., *Culebras Enter. Corp. v. Rivera-Rios*, 846 F.2d 94 (1st Cir. 1988) (lawyers who performed substantial pretrial work in case in which, had it gone to trial, they would have been called as witnesses but would not have served as trial counsel did not violate Rule 3.7 because they did not assume, and did not plan to assume, “advocate at trial” role); *United States v. Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985) (lawyer for alleged organized

crime group may participate fully in pretrial stage even though he will probably be called as witness, and other defense counsel are free to consult with him during trial); *United States v. Johnston*, 690 F.2d 638 (7th Cir. 1982) (prosecutor who testified at pretrial suppression hearing is not automatically disqualified from trying case); *Merrill Lynch Bus. Fin. Servs. v. Nudell*, 239 F. Supp.2d 1170 (D. Colo. 2003) (since the rule's purpose is to avoid jury confusion at trial, it does not automatically require that lawyers be disqualified from pretrial activities, such as participating in strategy sessions, pretrial hearings, settlement conferences, or motions practice; however, continued pretrial involvement cannot be used later as basis to argue that disqualification at trial works undue hardship); *Main Events Prods. v. Lacy*, 220 F. Supp.2d 353 (D.N.J. 2002) (companies' attorney would be properly disqualified as necessary witness but was appropriately allowed to represent client in pretrial matters; disqualification rule is designed to avoid confusing jury about what is testimony and what is argument); *Massachusetts Sch. of Law at Andover Inc. v. Am. Bar Ass'n*, 872 F. Supp. 1346, 1377, *aff'd*, 107 F.3d 1026 (3d Cir. 1997) (while plaintiff law school's administrators and faculty were disqualified by Rule 3.7 from serving as trial counsel, they were not prohibited from "attending any and all depositions, acting as an advisor, or as a consultant, or making 'the snowballs for somebody else to throw'"); *DiMartino v. Dist. Court*, 66 P.3d 945 (Nev. 2003) (rule doesn't necessarily disqualify counsel from pretrial proceedings; holding otherwise to permit total disqualification would invite rule's misuse as tactical ploy); *Cunningham v. Sams*, 588 S.E.2d 484, 487 (N.C. Ct. App. 2003) ("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"); *Heard v. Foxshire Assocs.*, 806 A.2d 348 (Md. Ct. Spec. App. 2002) (rule applies only to trials and does not preclude giving of evidence by attorney of record for party before administrative agency). See also ABA Informal Ethics Op. 89-1529 (1989) (lawyer who expects to testify on contested issue at trial may represent party in pretrial proceedings, provided that client consents after consultation and lawyer reasonably believes that representation will not be adversely affected by client's interest in expected testimony); Colorado Ethics Op. 78 (revised 1997) (rule permits lawyer who may be necessary witness to continue to represent client "in all litigation roles short of trial advocacy"); Michigan Informal Ethics Op. CI-1118 (1985) ("advocate" in context of Rule 3.7 is best defined as person who "participates as a spokesperson for the client in open court"; lawyer who in his capacity as certified public accountant will be providing expert testimony in divorce case may also serve as co-counsel to lawyer from another firm); Utah Ethics Op. 04-02 (2004) (if pretrial representation is not forbidden by another rule, lawyer who is necessary witness may represent client in pretrial stage and retain another lawyer to handle trial).

The Committee agrees with the majority of courts and ethics committees construing Rule 3.7(a). If Mr. Motl is a necessary witness, Rule 3.7(a) prohibits him from “acting as an advocate at trial.” However, even though it is likely he will serve as a witness at trial, Mr. Motl is permitted to participate in pretrial matters such as pleadings, motions, and other papers, taking and defending depositions (other than his own), preparing and sending discovery, interviewing and preparing witnesses, appearing at and participating in hearings, and other work leading up to trial.

Rule 3.7(b) does not extend the prohibition on lawyer-witnesses to the partners and associates of the testifying lawyer such as other counsel for COPP. Comment [5] to Model Rule 3.7 notes that the Rule does not automatically forbid lawyers to act as advocates in a trial where other lawyers from the same firm are testifying as necessary witnesses. The comment explains that it is unlikely the trier of fact will be misled under these circumstances. Comments [6] and [7], however, encourage lawyers to stay alert to the conflicts of interest that may arise when an attorney, or a lawyer with whom the attorney is associated, is a necessary witness. Counsel ought to resolve such conflicts in accordance with Rules 1.7 and 1.9.

Cases construing the rule generally support the position that disqualification is not imputed to other associated attorneys. *See, e.g., Brown v. Daniel*, 180 F.R.D. 298 (D.S.C. 1998) (no disqualification of entire firm even though partner in firm would be necessary witness); *Ramsay v. Boeing Welfare Benefit Plan Comm.*, 662 F. Supp. 968 (D. Kan. 1987) (guided by Rule 3.7(b), court refused to disqualify firm from representing plaintiff whose wife was firm member and likely witness; any perception of testifying lawyer’s interest is “attributable to her role as spouse,” rather than her status as lawyer); *Syscon Corp. v. United States*, 10 Cl. Ct. 200 (Cl. Ct. 1986) (refusing to disqualify lawyer whose partner was general counsel and major stockholder in plaintiff company, where partner’s testimony, if any, would be peripheral); *Owen & Mandolfo v. Davidoff of Geneva Inc.*, 602 N.Y.S.2d 369 (N.Y. App. Div. 1993) (under post-rules amendment to state’s code, no disqualification of law firm in arbitration proceeding; even though lawyer who was closely involved in design and construction project at issue would be testifying, colleague who was “of counsel” to firm would be handling proceeding); see also *Restatement (Third) of the Law Governing Lawyers*, §108 cmt. b (2000) (any other lawyer in testifying lawyer’s firm may serve as advocate despite disqualification so long as representation would not involve other conflict of interest such as giving adverse testimony).

Where, as here, the result would be to bar an entire government office from prosecuting cases, courts generally are even more hesitant to impute disqualification of a lawyer-witness to other lawyers in the office. See, e.g., *U.S. v. Watson*, 87 F.3d 927 (7th Cir. 1996) (U.S. attorney's office may prosecute cases where the office has interviewed a suspect and the statement is at issue); *In re Harris*, 934 P.2d 965 (Kan., 1997) (Rule does not disqualify deputy disciplinary counsel from prosecuting case in which another disciplinary counsel is a witness); *State ex rel. Macy v. Owens*, 934 P.2d 343 (Okla. Crim. App. 1997) (where two district attorneys were likely to be necessary witnesses, the entire district attorney's office could not be disqualified because the office is required by law to prosecute all crimes within the district and Rule 3.7(b) specifically allows other lawyers in the office to handle trial); *State v. Schmitt*, 102 P.3d 856 (Wash. Ct. App. 2004) (*ibid*).

For these reasons, under Rule 3.7(b), disqualification of Mr. Motl from serving as trial counsel is not imputed to other COPP counsel, unless a separate conflict of interest is present. The facts presented do not suggest that COPP's trial counsel would have a conflict in calling Mr. Motl as a witness at trial. However, counsel are encouraged to be mindful of any circumstances that might give rise to such conflicts.

Finally, as other authorities note, Rule 3.7 is used in disqualification motions far more than it is used in discipline. In this regard, paragraph 21 of the Preamble to the Montana Rules is an appropriate reminder that:

The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies....

Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.

Disqualification motions can be extremely burdensome, expensive, and time-consuming. So, the potential for abuse as a litigation tactic is well-recognized. See, e.g., *Kalmanovitz v. G. Heileman Brewing Co.*, 610 F. Supp. 1319 (D. Del. 1985) (motions to disqualify "are often disguised attempts to divest opposing parties of their counsel of choice"), *aff'd*, 769 F.2d 152 (3d Cir. 1985); *Council for Nat'l Register of Health Serv. Providers v. Am. Home Assurance Co.*, 632 F. Supp. 144 (D.D.C. 1985) (noting potential for tactical abuse of disqualification motions, court held that where lawyers testimony may be relevant but not necessary, "totality of circumstances," including client's desires, must be considered); *Devins v. Peitzer*, 622 So. 2d 558 (Fla. Dist. Ct. App. 1993) (refusing to disqualify lawyer

for estate merely because contestants announced intention to call him as adverse witness on their own behalf, court rejected use of rule as means of removing opposing counsel by calling him as witness); *Klupt v. Krongard*, 728 A.2d 727 (Md. 1999) (courts “will take a hard look” at disqualification motions out of concern that movant will use motion as tactical ploy); *May v. Crofts*, 868 S.W.2d 397 (Tex. App. 1993) (refusing to disqualify lawyer who represented proponents of a will in a will contest against allegations of their, and his, undue influence despite plaintiff’s assertion that she would be calling him as witness; court expressed disapproval of “tactical” use of lawyer-witness rule, and cited insufficient showing of prejudice).

Conclusion

If Mr. Motl is a necessary witness in the various civil enforcement actions, counsel for COPP are not violating Rule 3.7 as long as Mr. Motl does not act as trial counsel. Even though it is likely he will serve as a witness at trial, Mr. Motl is permitted to participate as counsel in pretrial proceedings. The disqualification of Mr. Motl as a witness-advocate at trial is not imputed to other attorneys for COPP, absent some other conflict of interest not described in the facts presented here.

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