Ethics Opinion

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QUESTION PRESENTED: Is an attorney disqualified from representing a client in a case if that attorney could be called as a witness?

ANSWER: No, not automatically.

ANALYSIS: Montana's Rule of Professional Conduct 3.7(a), Lawyer as Witness, reads as follows:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue; or
(2) The testimony relates to the nature and value of legal services rendered in the case; or
(3) Disqualification of the lawyer which works substantial hardship on the client.

The question boils down to whether the lawyer is a "necessary witness". As (a)(3) makes clear, it is permissible in hardship cases for the lawyer to act as both attorney and witness.

If there are other witnesses who could positively testify as well or better than the attorney, then the problem is alleviated by having those witnesses testify. The comment to Rule 3.7 states:

> Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether 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 lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.
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> 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. See Comment to Rule 1.7.

The old Disciplinary Rule 5-102(A) provided that a lawyer was prohibited from acting as such if he learns or is obvious that he . . . ought to be called as a witness on behalf of his client. DR 5-102(B) provided that a lawyer could continue representation even after learning that the other side may call him as a witness "until it is apparent that his testimony is or may be prejudicial to his client."

The focus of the Disciplinary Rule is whether or not the lawyer's testimony would harm his ability to act as an advocate for his client. Model Rule 3.7 introduces a concept of protecting the opposition if the opposition can prove the lawyer is a "necessary witness."

Probably no better test of "necessary" can be devised than to inquire whether the absence of the lawyer's testimony could seriously undermine the ability of the client either to survive a motion for a directed verdict by an opposing party or to persuade the fact finder of the greater believability of the client's version of important events. If the client's case would surely fail without the lawyer's testimony, then the lawyer is clearly required to abandon the role of advocate and testify. The lawyer should also testify in any instance in which it is probable, although not certain, that the lawyer's testimony would be considered by a disinterested lawyer to be important to the client's success.

Nothing should turn automatically on the technical classification of the lawyer's possible testimony or the order in which it would be presented. Even if the lawyer would be called only in rebuttal, if the testimony is necessary in the above sense, then the lawyer should appear at trial only as a witness. But it should not be enough to force an advocate from the case if all that can be said about the lawyer's possible testimony is that it would be relevant and useful.

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