

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 08-04**

The Ethics Committee received a letter request for an opinion, dated May 5, 2008, regarding the assertion that the requesting attorney is a necessary witness who ought to withdraw.

Rule 3.7 of the North Dakota Rules of Professional Conduct addresses this inquiry.

The opinion of this Committee does not bind a court of law deciding a motion to disqualify an attorney. An Ethics Committee opinion provides safe harbor in an ethical inquiry addressing whether attorney discipline is warranted and then only for acts that come after the opinion is issued. The Committee does not address the initial formation of an attorney client relation between the employer and the employee.

Assumed Facts

This Committee issues its opinion to a requesting attorney assuming the information provided by the requesting attorney is fact.

An employee [hereinafter Employee] of Requesting Attorney brought suit over physical and psychological injury stemming from an assault. Requesting Attorney is providing legal representation for Employee while having knowledge of Employee's work performance, injuries, and finances. Opposing counsel claims Employee's work performance, injuries, and finances are trial issues and that Requesting Attorney is a necessary witness on these issues and therefore disqualified from continuing to represent Employee.

Prior to the assault, Requesting Attorney's firm included Requesting Attorney, "Office Manager", another lawyer ("Attorney B"), and "Receptionist". These four are aware and have knowledge of the facts and circumstances regarding work performance, injuries, and finances.

Receptionist and Office Manager have even more knowledge on these issues than Requesting Attorney.

When it comes to work performance, Requesting Attorney, Attorney B, Office Manager, and Receptionist all have the same information.

Requesting Attorney does not have direct knowledge about Employee's wages, lost wages, hours worked, etc., so information on these topics would have to come from Office Manager.

After the assault, Requesting Attorney's firm added "Attorney C" and "Assistant to Requesting Attorney". These newer members also possess knowledge about residual effects of the injury.

If Requesting Attorney withdraws from the representation, Employee will be required to retain another lawyer who is not Employee's first choice and will participate only at a significantly increased cost.

Questions

Requesting Attorney asks whether opposing counsel's assertion that Requesting Attorney is likely to be a necessary witness at trial requires Requesting Attorney to withdraw from the case even if:

1. There are others inside the firm and out with the same or more knowledge on the issues; or
2. The Employee would have to deal with increased costs and inconveniences due to changing lawyers.

Discussion

Rule 3.7 of the North Dakota Rules of Professional Conduct deals with the subject of the lawyer expected to testify at trial.

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 except where:
 - (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 a conflict of interest.

1. Whether the Requesting Attorney is a necessary witness.

North Dakota has recognized that a lawyer will be deemed a necessary witness only when the lawyer is the sole available source for the information, that the information relates to a contested issue, and the information the lawyer has to offer on the issue is material. *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 871 (N.D. 1993) (evidence is “unobtainable elsewhere”); SBAND Ethics Committee, Opinion Number 01-04 at 5.

In a 1990 opinion the North Dakota Supreme Court recognized that more than “a mere declaration of an intention to call opposing counsel as a witness” is required to warrant disqualification. *Thompson v. Goetz*, 455 N.W.2d 580, 587 (N.D. 1990). The party seeking disqualification must satisfy a high burden which includes showing no other witness can testify to the facts. *Thompson v. Goetz*, 455 N.W.2d at 588. It is well accepted that “[a]n attorney is a necessary witness, under this rule, where no other person can testify in the place of the attorney.” *Northbrook Digital LLC v. Vendio Services, Inc.*, 2008 WL 2390740, 20 (D. Minn. 2008) (citing *Humphrey ex rel. State of Minnesota v. McLaren*, 402 N.W.2d 535, 541 (Minn.1987) (discussing substantially similar predecessor rule)).

The requesting attorney states others possess the same information that opposing counsel

would seek by having the Requesting Attorney testify. So long as the other persons are available to testify at trial on the issues, then the Requesting Attorney's testimony is not necessary as the term is used in Rule 3.7.

2. Whether increased costs and the inconveniences related to changing lawyers constitute substantial hardship.

Requesting Attorney provides the premise that if Requesting Attorney must withdraw, then Employee would have to find a new lawyer who would not be Employee's first choice and who would induce more expenses.

The general proviso of Rule 3.7 is: the lawyer who testifies for his client at trial must withdraw. One exception to the general rule is withdrawal is not mandated if it would work a substantial hardship on the client.

"[C]ourts have generally rejected arguments that a lawyer's long-standing relationship with a client, involvement with the litigation from its inception or financial hardship to the client are sufficient reasons to invoke the "substantial hardship" exception to the advocate-witness rule." *Jones v. City of Chicago*, 610 F.Supp. 350, 361 (D.C. Ill. 1984). It has been recognized that every case requiring disqualification due to testifying involves inconvenience and if this level of inconvenience were to amount to substantial hardship the exception would swallow the rule. *U.S. v. Peng*, 602 F.Supp. 298, 303 (D.C.N.Y. 1985); *May's Family Centers, Inc. v. Goodman's, Inc.*, 590 F.Supp. 1163, 1165 (D.C. Ill. 1984).

The situation where the litigant has secured a favorable rate from a lawyer who is a friend or a relative has also been viewed. It is understood that in these situations, if disqualification is required, the client will be forced to obtain counsel at a higher rate. In *Barrett*, the court found

that this increased expense did not amount to hardship. The court explained, “[i]t can be argued that disqualifying plaintiffs' daughter from representing them would merely place plaintiffs on a par with most other litigants, in that they would have to make a decision about whether to incur the expenses associated with prosecuting the litigation.” *Barrett v. Floyd*, 1990 WL 17876, 1 (E.D.Pa. 1990).

Courts have recognized disqualification and subsequent change of counsel can be a substantial hardship in cases where complicated litigation has been in progress a long time. *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 872 (N.D. 1993); *but see Jamieson v. Slater*, 2006 WL 3421788, 8 (D. Ariz.2006) (three year representation and cost of new counsel insufficient to establish substantial hardship). Here, though, we have not been provided with facts suggesting unusually complex or protracted representation.

When considering the hardship issue and the argument that the lawyer has been involved with the complicated litigation a long time, courts have viewed how much the hardship is of the party's own making. *Jones v. City of Chicago*, 610 F.Supp. 350, 361 (D.C. Ill. 1984). Where it was foreseeable either when the attorney client relationship was formed or at some point after that the lawyer might be a necessary witness but the pair forged ahead anyway, the party is ill positioned to argue that disqualification will constitute a hardship. *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 714-715 (C.A. Mich. 1982).

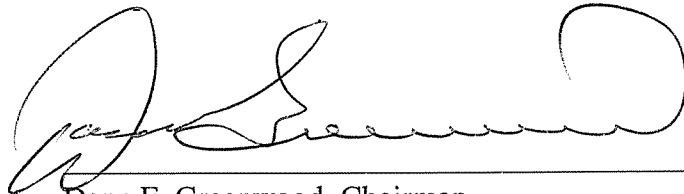
Conclusion

The Requesting Attorney is not required to withdraw so long as others are available to testify to the issues at trial. Were the information unobtainable elsewhere and the Requesting Attorney otherwise satisfied the criteria for being a necessary witness likely to testify at trial, the

increased expenses and inconveniences associated with changing counsel would not constitute substantial hardship amounting to an exception to the requirement for withdrawal.

This opinion offers safety to the requesting attorney as set out in Rule 1.2(B) of the North Dakota Rules of Lawyer Discipline.

This opinion was drafted by Fritz Fremgen and unanimously approved by the Committee on the 3rd of September 2008.



Dann E. Greenwood, Chairman