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A Thoughtful Case on The Advocate-Witness Rule

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This year has produced a bumper crop of decisions about the advocate-witness rule (Rule 3.7) in New York state and federal courts. I have already written about the advocate-witness rule once this year – *see A Flurry of Decisions Under The Advocate-Witness Rule (Rule 3.7)* (*NYPRR* May 2010). What caught my attention then was a series of four different decisions (two state, two federal) on the advocate-witness rule between March 15th and March 29th. Two of those decisions granted disqualification under Rule 3.7, while the other two denied disqualification as "premature" but left open the possibility that further developments might warrant disqualification. I ended that article by saying:

> Given that New York Rule 3.7 differs significantly both from former DR 5-102 and from the ABA Model Rule, the proper interpretation of Rule 3.7 will likely take years to evolve. We can expect many more motions and many more decisions under Rule 3.7 as lawyers and courts hammer out the meaning of New York's unique version of the advocate-witness rule.

My prediction has come true. Since my May article appeared six months ago, another dozen decisions have come down on Rule 3.7, and they are almost evenly divided between granting and denying disqualification. In this article I will make some brief observations about the full corpus of cases on New York's advocate-witness rule during 2010.

The opinions I cite (*see* my chart on pages 9-10 of this issue) focus almost exclusively on the personal disqualification of the advocate-witness under Rule 3.7(a), but half of the cases granting disqualification also disqualify the law firm, virtually without discussion, and usually without even citing Rule 3.7(b). That is troubling. The imputed disqualification of the entire firm under Rule 3.7(b) requires an analysis distinct from the analysis under Rule 3.7(a).

Only a handful of the opinions in my chart paid any attention to the Second Circuit's landmark decision about Rule 3.7 in *Murray v. Metropolitan Life Ins. Co.,* 583 F.3d 173 (2d Cir. 2009), even though it made headlines in the *New York Law Journal.* In *Finkel v. Frattarelli Brothers, Inc.,* 2010 WL 3724373 (E.D.N.Y. 2010), however, Judge Joseph F. Bianco demonstrated that he was well aware of *Murray* and the differences between Rule 3.7(a) and Rule 3.7(b). His opinion is carefully written and closely reasoned, and will be the main focus of this article.

Finkel v. Frattarelli Brothers, Inc.: Factual Background

The Trustees and Fiduciaries of the Local 282 Welfare Trust Fund and various related funds ("plaintiffs" or "the Funds") alleged that Frattarelli Brothers Inc. and other defendants, through a coordinated fraudulent scheme, failed to pay contributions to the Funds as required by the collective bargaining agreement with Building Material Teamsters Local 282. Plaintiffs, who were represented by Bruce Levine and Elizabeth O'Leary, and by their law firm of Cohen, Weiss & Simon, LLP ("Cohen Weiss"), sought injunctive and monetary relief under the Employee Retirement Income Security Act of 1974 ("ERISA").

Invoking the witness-advocate rule, defendants moved to disqualify the entire firm of Cohen Weiss as counsel for plaintiffs. Defendants argued that Bruce Levine and potentially other members of the firm, including trial counsel Elizabeth O'Leary, might be called to testify regarding three issues:

(i) their knowledge about and experience with "double-breasting" in the construction industry;

(ii) the nature and extent to which double-breasted operations were permitted to exist within the Local 282 landscape; and

(iii) why the Funds allowed the double-breasted operation to continue for so many years without objection when they were on notice of a potential double-breasted operation involving Defendants as early as 1999.

(Judge Bianco explained that "double-breasting" is a practice in the construction industry and elsewhere pursuant to which a single commercial complex functions through two corporate entities, one of which is a party to a collective bargaining agreement and a second non-union entity that is not subject to a collective bargaining agreement. He noted that the practice of double-breasting has spawned litigation in the labor field raising questions as to whether the non-union entity is subject to the collective bargaining agreement, and what group of employees constitutes an appropriate bargaining unit.)

Basic Principles of Rule 3.7

Judge Bianco began with the usual litany about disqualification motions (e.g., disqualification is viewed with "disfavor" in this Circuit because it impinges on a "client's right freely to choose his counsel." A "high standard of proof" is required for disqualification motions because such motions are "often interposed for tactical reasons," and "even when made in the best of faith, such motions inevitably cause delay." (Citations omitted).

Turning to what he called the "witness-advocate rule," Judge Bianco set out the standard established by Rule 3.7(a): "[A] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue 2010 of fact." In a footnote, he noted that this prohibition is subject to five exceptions stated in Rule 3.7(a)(1)-(5) – an attorney may ethically act as both witness and advocate before the same tribunal if: "(1) the testimony relates solely to an uncontested issue; (2) the testimony relates solely to the nature and value of legal services rendered in the matter; (3) disqualification of the lawyer would work substantial hardship on the client; (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or (5) the testimony is authorized by the tribunal."

With the basic framework of Rule 3.7(a) in place, Judge Bianco stated a series of axioms for deciding motions to disqualify a lawyer who is simultaneously serving as an advocate and witness.

1. Disqualification under subsection (a) is triggered "only when the attorney actually serves as an advocate before the jury."

2. Disqualification is warranted "only where the testimony given by counsel is 'necessary'."

3. When considering whether testimony is necessary, a court should examine factors such as (i) "the significance of the matters," (ii) the "weight of the testimony," and (iii) the "availability of other evidence."

4. If the advocate-witness (the attorney who is the subject of the motion to disqualify) would be testifying on behalf of a party other than his own client, the party seeking to disqualify the attorney "must show that there is a substantial likelihood that the testimony would be

prejudicial to the witness-advocate's client," and must therefore demonstrate "specifically how and as to what issues in the case the prejudice may occur" and that the likelihood of prejudice occurring to the advocate-witness's client is "substantial'."

5. "Prejudice" exists where the testimony would be "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony."

Next, Judge Bianco turned to disqualification by imputation under Rule 3.7(b)(1), which provides:

> A lawyer may not act as advocate before a tribunal in a matter if another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client.

Judge Bianco then laid down the axioms for analyzing a motion under Rule 3.7(b):

1. To disqualify an entire law firm, the moving party must show "by clear and convincing evidence that [A] the witness will provide testimony prejudicial to the client, and [B] the integrity of the judicial system will suffer as a result.

2. As under Rule 3.7(a), the moving party must demonstrate that the lawyer-witness is "likely to be called" to testify on a "significant issue" – meaning that a court will find disqualification "only when it is likely that the testimony to be given by the witness is necessary."

3. Because Rule 3.7 "lends itself to opportunistic abuse," motions brought under this rule are especially "subject to fairly strict scrutiny." In particular, motions to disqualify by imputation should be granted "sparingly . . . and only when the concerns motivating the rule are at their most acute," 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."

4. As the Second Circuit has repeatedly indicated, the New York disciplinary rules "are not to be rigidly applied," and courts should look to Rule 3.7 "solely for guidance as to the Court's exercise of its discretion."

Judge Bianco addressed defendants' motion by evaluating the two prongs of Rule 3.7: (1) the "necessity" of counsel's testimony, which is relevant under Rule 3.7(a), and (2) "prejudice," which is relevant under Rule 3.7(b). (He used "necessity" and "prejudice" as headings.) Like Judge Bianco, Iwill deal with each prong in turn.

Necessity: A Multi-Factored Inquiry

Regarding the necessity prong, Judge Bianco had earlier set out three key factors to consider in determining whether the advocate's testimony is necessary:

(i) "the significance of the matters,"
(ii) the "weight of the testimony," and
(iii) the "availability of other evidence."

Judge Bianco did not expressly organize his analysis around these three factors (for example, he did not use those factors as headings), but he addressed all three in detail.

The factors that determine necessity, of course, can be understood and applied only in the context of movant's argument about the need for the testimony. Defendants contended that testimony regarding the "industry standard" for double-breasted operations was necessary because it would establish that (a) double-breasted operations were allowed and condoned, and (b) defendants modeled their own operations after other contractors' business practices, believing those practices to be proper.

Significance of the matters. Significance refers to legal relevance and probative value – will the testimony make any difference? In Judge Bianco's view, the specific testimony that defendants sought to elicit from plaintiffs' counsel – how the industry standard was created and what the process was for deciding whether to act against double-breasted operations – was not probative on the issue of defendants' intent. Thus, it had minimal "significance" (though he did not use that word). The only evidence that would be relevant is what defendants (and perhaps other contractors) *perceived* the standard to be, not how the standard was created or what recommendations counsel made to their clients behind closed doors. Yet defendants produced no evidence that they were even aware of Cohen Weiss's alleged role in developing and applying standards for evaluating double-breasting operations. Accordingly, given defendants' undisputed lack of interaction with Cohen Weiss and their lack of awareness regarding any involvement by Cohen Weiss on the double-breasting issue, defendants could not argue that their state of mind was in any way influenced by counsel's alleged recommendations.

Even if defendants were aware that counsel made certain recommendations as to how to proceed against various double-breasted operations, testimony on this subject would not prove that defendants thought their business structure was legal. It is not a defense to fraud, Judge Bianco pointed out, to claim that defendants thought their conduct was proper merely because other individuals also carried on their businesses fraudulently and nevertheless escaped punishment. (*My comment*: The Judge's analysis of relevance shows the close connection between substantive law and the analysis of "significance" required under the advocate-witness rule. The facts of every case are planted in the soil of the law.)

Likewise, any testimony regarding why the Funds declined to pursue defendants over such a long period is also "inapposite." If plaintiffs proved that defendants acted improperly, a delay in pursuing defendants would not excuse conduct. A trial would scrutinize defendants' behavior, not the behavior of their counsel. In short, Judge Bianco concluded, the Funds' failure to take action earlier against defendants proves nothing in and of itself regarding the legality of defendants' operation and proves nothing about whether defendants believed their operation was proper.

Weight of the testimony. The difference between the "significance" of testimony and its "weight" is subtle, but in my mind the difference is that "significance" concerns legal relevance whereas "weight" concerns the ability of the particular witness to provide highly relevant (*i.e.*, "significant") testimony. Significance thus focuses on the law, whereas weight focuses on the witness. Assuming that the testimony would be legally relevant and probative, can the advocate-witness in question give that testimony? In other words, does the advocate-witness have the knowledge to offer weighty testimony on the issue?

Without using the word "weight," Judge Bianco criticized defendants for failing to specify the relevant knowledge that they believed Ms. O'Leary possessed. (Ms. O'Leary was serving as plaintiffs' trial counsel.) Defendants' only allegations directed expressly to Ms. O'Leary were that (a) she was the "principal attorney" for the Funds, and (b) she appeared at Board meetings to report on alter-ego and double-breasting issues and to make recommendations to the Board. All of defendants' other references to Ms. O'Leary were "conclusory statements" regarding her alleged knowledge about the industry standard for double-breasted operations. This did not satisfy Judge Bianco.

"The mere fact that Ms. O'Leary acted as an attorney for the Funds and appeared at Board meetings in that capacity," the judge said, "does not establish that she has knowledge about double-breasting within the industry generally or that she knew why the Funds failed to take any action against defendants …. Speculation as to the testimony that counsel would give is not sufficient to support a motion to disqualify." In other words, her testimony would not carry much weight. (When you are the target of a motion to disqualify under the advocate-witness rule, you want to be a lightweight.)

Availability of other evidence. Even if defendants had persuaded Judge Bianco that the testimony of the Cohen Weiss lawyers would be legally significant and of substantial weight, defendants would have fallen short on the third factor in determining necessity – the availability of other evidence. Defendants failed to persuade Judge Bianco that plaintiffs' counsel "would be the only available witnesses on this topic." Defendants' own motion papers stated that they intended to call several contractors and shop stewards as witnesses regarding this precise subject. (Perhaps defendants listed multiple witnesses in an effort to show how significant the issue was to their case. (The movant was thus "hoist with his own petard" – *see Hamlet*.) Judge Bianco concluded: "Where counsel's testimony would be merely cumulative of testimony provided by others, disqualification is not appropriate."

Accordingly, defendants failed to establish that any Cohen Weiss attorney would provide "necessary" testimony on a "significant" issue of fact. Nevertheless, Judge Bianco proceeded to the second prong of his analysis – prejudice.

Prejudice: Do Counsel's Testimony and the Client's Testimony Clash?

The issue of prejudice appears in Rule 3.7(b) – the imputed disqualification branch of the advocate-witness rule – which provides that a lawyer may not act as advocate before a tribunal if "(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue *other than on behalf of the client, and* it is apparent that the testimony may be *prejudicial* to the client …." Thus, Rule 3.7(b)(1) comes into play only if a lawyer in the firm is likely to be a witness for the opposing side. That wasn't the case, here, but Judge Bianco covered the issue for the sake of completeness.

The court found that any testimony to be given by plaintiffs' counsel, even if deemed "necessary," would not be "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony." In other words, the testimony of Ms. O'Leary and other Cohen Weiss lawyers, even if given, would not be "prejudicial" to plaintiffs. Judge Bianco articulated three reasons to support this conclusion.

First, the court had no reason to believe that the testimony of the lawyers from Cohen Weiss would be inconsistent with their clients' own account of the facts. As one ground for disqualification, defendants argued that the Cohen Weiss lawyers' testimony would "destroy their client's case" because it would "provide Defendants with a basis for believing they were not doing anything wrong." This argument apparently assumed either that (a) Cohen Weiss had advised the Funds that defendants' operation was

legal, or (b) Cohen Weiss had advised the Funds that defendants' operation was illegal and told them to pursue defendants, but the Funds had ignored the recommendation. Defendants argued that either scenario would be fatal to plaintiffs' case, because plaintiffs "clearly changed their position regarding the legality of Defendants' operations," and thus, testimony about any prior contradictory stances taken by the Funds would "destroy" their current position by showing that defendants were justified in believing that their operation was proper.

Judge Bianco found defendant's argument to be "inherently flawed," however, because it was based upon "pure speculation" about the Funds' motivation for not taking action against defendants sooner. Indeed, in their opposition, plaintiffs strongly denied that plaintiffs counsel would testify that they had advised the Funds to take action against defendants or had made a finding that defendants were engaged in impermissible double-breasting. Defendants did not put forth any facts that can counter plaintiffs' opposition papers on this point. Without evidence to support defendants' assumptions about the Funds' motivations and the facts to which Cohen Weiss lawyers would testify, the court could not conclude that this testimony would be prejudicial to plaintiffs' case.

Second, the issue at trial would be whether defendants knowingly and intentionally defrauded the Funds, not whether the Funds could have pursued the defendants earlier for their behavior. Even if the Funds could have taken action against the defendants as early as 1997, such a finding would not change the fact that defendants' behavior vis-a-vis the Funds was fraudulent, if such fraud were proven. "Accordingly," Judge Bianco said, "any testimony on this subject would not be prejudicial because it would have no bearing on any ultimate determination of whether the defendants knew their double-breasted operation was improper." (This shows that 'significance' in Rule 3.7(a) and 'prejudice' in Rule 3.7(b) are related factors – if testimony is not significant, it is also not likely to be prejudicial.)

Judge Bianco concluded with a paragraph that succinctly sums up the "prejudice" element of the advocate-witness rule:

> Thus, under either the requirements of *Rule 3.7(a)* or the "considerably higher showing of prejudice" required by *Rule 3.7(b),* defendants cannot demonstrate that plaintiffs would be prejudiced, or that the integrity of the judicial system would be undermined,5 if their counsel were forced to testify.6 In sum, given the "strict scrutiny" with which motions to disqualify must be analyzed, this Court finds that defendants' motion to disqualify under the witness-advocate rule must be denied. [Citations omitted; footnotes discussed below.]

Footnote 5 in the quoted passage highlighted important points from the Second Circuit's decision in *Murray v. Metropolitan Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009), *supra*:

[D]isqualification by imputation is proper only where the moving party demonstrates that counsel's testimony would be "so prejudicial" that, as a result of the testimony, "the integrity of the judicial system may be threatened." This level of prejudice exists only in rare circumstances where the concerns underlying the witness-advocate rule "are at their most acute."

Do the Exceptions in Rule 3.7(a) Apply in Rule 3.7(b)?

Finkel raises one more interesting issue: do the exceptions in Rule 3.7(a) apply in Rule 3.7(b)? Footnote 6 to Judge Bianco's opinion notes plaintiffs' alternative argument that the exception for "substantial hardship" under Rule 3.7 should apply because Cohen Weiss had represented plaintiffs in this litigation since 2005. Judge Bianco responded that "the Court need not address that issue because … there is no basis to disqualify under subsections (a) *or (b)* of Rule 3.7." (Emphasis added.) This seemingly obvious

and innocuous point – there is no need to analyze an exception if the moving party has not triggered the rule – embeds an unstated but crucial implication: although the "substantial hardship" exception is mentioned only in Rule 3.7(a), it also applies in Rule 3.7(b). This is not apparent from the text of the rule. Rule 3.7(b) says nothing at all about exceptions. But if one lawyer in a firm is personally disqualified on advocate-witness grounds under Rule 3.7(a), and if that lawyer's testimony may be prejudicial to the lawyer's client – thus meeting both elements for imputed disqualification of the advocate-witness's entire firm – a court should have discretion to deny a motion for imputed disqualification based on "substantial hardship."

This makes good sense. Even in circumstances where it would not be a substantial hardship to disqualify an individual attorney from acting as an advocate, it might well be a substantial hardship to disqualify that attorney's entire law firm from acting as an advocate. Accordingly, courts and ethics committees should read the "substantial hardship" exception into Rule 3.7(b). The Appellate Divisions and COSAC should probably have drafted the rule this way, but there's no harm because courts have power and discretion to read the substantial hardship exception into Rule 3.7(b) now. As Judge Bianco noted in his statement of basic principles about Rule 3.7, the Rules of Professional Conduct "are not to be rigidly applied," and courts in the Second Circuit should look to Rule 3.7 "solely for guidance as to the Court's exercise of its discretion."

Similarly, the courts should import the exception in Rule 3.7(a)(5) that permits advocate-witness testimony when "the testimony is authorized by the tribunal" for any other good cause. This would reflect an exercise of the courts' inherent power to supervise the lawyers and litigation before them. Importing these exceptions into Rule 3.7(b) will be consistent with the view (also set out above by Judge Bianco) that motions to disqualify by imputation should be granted "sparingly . . . and only when the concerns motivating the rule are at their most acute."

However, there is no need to import the other three exceptions from Rule 3.7(a) into Rule 3.7(b). Those exceptions, which cover testimony about "uncontested" issues, the "nature and value of legal services," and matters of "formality," will avoid disqualification of the advocate-witness under Rule 3.7(a), and hence will not trigger an inquiry into prejudice for purposes of imputed disqualification under Rule 3.7(b). In any event, testimony in those narrow categories would almost never be "prejudicial" to the advocate-witness's client, so they would not meet Rule 3.7(b)'s threshold test for imputed disqualification.

Conclusion: Fact-Intensive Questions Produce Many Motions

As Judge Bianco's thoughtful and well reasoned opinion in *Finkel v. Frattarelli Brothers*, Inc. shows, analyzing the multiple factors in a Rule 3.7 motion to disqualify is fact-intensive and bound up with the legal context. Fact-intensive inquiries require courts to decide issues on a case-by-case basis. A court must carefully analyze the legal issues in the case and then determine the necessity for the advocate-witness's testimony under Rule 3.7(a) by examining (1) the relevance of the issues on which the advocate-witness will allegedly testify (*i.e.*, the "significance" of the testimony), (2) the depth of the advocate-witness's knowledge regarding those issues (*i.e.*, the "weight" of the probable testimony), and (3) whether other witnesses could cover the same ground (*i.e.,* the "availability of other evidence"). If the moving party persuades the judge regarding these factors, then the court must consider the five exceptions in Rule 3.7(a)(1)-(5) that will allow the advocate-witness to testify despite the basic prohibition on serving simultaneously as both advocate and witness.

If the exceptions do not apply and the advocate-witness is personally disqualified, then the court must move to possible imputed disqualification under Rule 3.7(b), which requires the court to decide whether the advocate-witness's testimony may be "prejudicial" to the advocate-witness's client. If so, the court should consider the policies underlying Rule 3.7, and should ask whether imputed disqualification will cause "substantial hardship" or whether the court should exercise its inherent supervisory powers to allow the advocate-witness's law firm to continue the representation despite the disqualification of the advocate-witness personally.

All of these determinations depend on many variables – law, facts, policy, and the nuances of the particular case. The more variables that go into a decision, the less predictable the outcome. Since unpredictable outcomes encourage lawyers to bring motions that might yield a tactical advantage, we can expect the bumper crop of Rule 3.7 motions to continue for a long time.

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