

Lawyers as Witnesses: An Overview

BY MARY C. DALY

When a lawyer thinks about conflicts of interest, what usually comes to mind are conflicts between the lawyer and a client or between clients. Too often a lawyer neglects to examine whether the lawyer or another lawyer in the firm may be called as a witness later in the matter on behalf of the lawyer's client, the opposing party, or a third-party. A lawyer who has been heavily involved in the events leading to litigation is especially at risk of being called as a witness. As one court succinctly observed, the testimony of a lawyer who "merely observed negotiations" may not be necessary, while the testimony of a lawyer who "negotiated, executed, and administered a contract and is the key witness at trial" will be. *Norman Reitman Co. v. IRB-Brasil Resseguros S.A.*, 2001 WL 1132015, at *2 (S.D.N.Y. Sept. 25, 2001).

Ignoring the possibility of having to testify can result in personal and professional embarrassment, additional cost to the client, and even the loss of the client's business, if a court subsequently grants a motion to disqualify the lawyer. This article provides a general introduction to the disciplinary rule that governs lawyers as witnesses. A subsequent article will examine recent applications of the rule in specific practice settings.

DR 5-102 of The Lawyer's Code of Professional Responsibility adopted by the New York State Bar Association ("Code") is entitled "Lawyers as Witnesses" and embodies the profession's long-standing hostility to a lawyer's serving both as advocate and witness in the same litigation. The public policy underlying that hostility is relatively straightforward. Advocates and witnesses perform very different functions in a litigation. An advocate shapes the best possible argument he or she can, based on the facts supplied by witnesses. An advocate is free to emphasize some facts, ignore others, and interpret still others in the light most favorable to the client.

A witness - in theory, at least - describes facts based on personal knowledge, does not argue their importance or lack thereof, and is not free to disregard facts just because they may harm the client's case.

Because of this fundamental difference in functions, the Code, the courts, and ethics committees take a dim view of a lawyer's assumption of the dual role of advocate and witness in the same matter. Their practical objections are weighty. They have questioned, for example, whether it is psychologically feasible for a lawyer to abandon the advocate's mind set and truly assume the neutrality expected of a fact witness. They fear that an inevitable bias will unconsciously creep into the advocate/witness's answers on direct and cross-examination, even if the advocate/witness is testifying with the most honorable of intentions. They worry that the advocate/witness will structure the client's case to minimize the testimony's scope or mask the lawyer's own possible negligence or misfeasance.

The impact on the opposing side's lawyer is also a matter of concern. The opposing lawyer may feel pressured to pull punches during discovery and at the trial in order to keep or win the advocate/witness's

cooperation on scheduling matters, as well as favor in settlement discussions. The dual role of advocate and witness may also confuse a jury. Despite instructions from the court, the jurors may not be able to distinguish between the lawyer's two functions, particularly if in the role of advocate, he or she argues for the credibility of his or her own testimony in summation. The advocate's success or failure as a trustworthy fact witness may improperly influence the jurors' assessment of the client's case.

DR 5-102 is divided into four subsections. Subsection A establishes the basic bar, prohibiting a lawyer from acting or accepting employment that "contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client . . . ," unless the lawyer's testimony falls into one or more of four exceptions. Thus, to comply with the Code, it is not enough for a lawyer to conduct the traditional conflicts check examining the lawyer's own financial, business, property, or personal interests and the law firm's data base of current and former clients. See DRs 5-101, 5-105 & 5-108.

In addition, the lawyer must ask if he or she ought to be called a witness on a significant issue on behalf of the client. If the answer to that question is yes, then the lawyer may not "act, or accept employment that contemplates the lawyer's acting as an advocate on issues of fact before any tribunal," unless the testimony falls within one of the four exceptions. While there is no generally accepted single standard by which to measure "ought to be called," the courts have narrowly interpreted the phrase, insisting that the lawyer's testimony be "strictly necessary" or "significantly useful." *E.g., Norman Reitman Co.*, 2001 WL 1132015, at *3; *A.V. By Versace, Inc. v. Gianni Versace, S.p.A.*, 2001 WL 959160, at *5 (S.D.N.Y. Aug. 23, 2001). The Code defines "tribunal" as including "all courts, arbitrators and other adjudicatory bodies." Definitions, Item 6.

The first two exceptions to the general prohibition in DR 5- 102(A) relate respectively to an uncontested issue, and to a matter of formality as to which there is no reason to believe that substantial evidence will be offered in opposition. An uncontested issue is one upon which the parties agree. A matter of formality refers to ministerial acts. The third exception permits an advocate/witness to testify to the value of legal services performed by the lawyer or the lawyer's law firm on behalf of the client in a case. Without this exception, a lawyer or law firm would have to hire separate counsel to pursue a claim for legal fees. Although the exception refers to "services rendered in the case," it makes little sense to interpret the exception as applying solely to litigated matters. The exception should be equally available if the services were rendered in connection with a transactional matter.

The fourth exception applies to any matter "if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case." Delay and cost do not create a substantial hardship; otherwise, the exception would swallow the rule. Instead, among the facts that courts consider are "the length of the relationship, the requirement for special expertise, and the extent of preparation for the case." *Drywall Tapers & Pointers v. Local 530, Operative Plasterers & Cement Masons Int'l Ass'n.*, 1996 WL 1088933, at * 7 (E.D.N.Y. 1996).

Unless one of the exceptions to Subsection A applies, a lawyer is personally disqualified from acting as an advocate in the disputed matter. That disqualification is not, however, imputed to the lawyer's law firm. Another lawyer in the firm may assume the advocate's role. Moreover, the personally disqualified lawyer may render legal services in connection with the disputed matter. While these services may include activities associated with pre-trial discovery, issues of law, and even client counseling, the lawyer

must strictly avoid advocacy activities touching upon the issues of fact upon which the lawyer will offer testimony.

DR 5-102, Subsection B, however, applies to both a lawyer and the lawyer's firm. The Subsection's prohibition kicks in at the very beginning of a potential representation when a client asks a lawyer to accept employment in a contemplated or pending litigation. The lawyer must decline the engagement if the lawyer "knows or it is obvious" that the lawyer or another lawyer in the firm "may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client."

The best way to approach Subsection B is for the lawyer to view the potential litigation from the opposing counsel's perspective. Is there a significant issue that may call for the lawyer's testimony? And if so, would that testimony be prejudicial? If the answer to both questions is "yes," the lawyer must decline the proffered employment. Furthermore, in answering these questions, a lawyer should proceed cautiously. The "knows or it is obvious" standard is an objective one. A lawyer who concludes that the answer is "no" should be especially careful to ensure that an unconscious bias in favor of going forward with the representation has not clouded the lawyer's judgment.

DR 5-102, Subsection C is essentially a reiteration of the prohibition expressed in Subsection A, except that it applies after a lawyer has undertaken employment in a contemplated or pending litigation rather than at the time of the initial engagement. Like Subsection A, it bars a lawyer from serving as an advocate on issues of fact subject to the four exceptions and does not impute the disqualification to the lawyer's firm.

DR 5-102, Subsection D, too, applies after a lawyer has undertaken employment in a contemplated or pending litigation. Its language is almost identical to Subsection B's. It requires a lawyer and the lawyer's firm to withdraw from acting as an advocate when the lawyer learns or it is obvious that the lawyer or a lawyer in the firm may be called as a witness "on a significant issue other than on behalf of the client" and "the testimony would be prejudicial to the client."

Finally, in weighing whether to file a motion to disqualify opposing counsel based on DR 5-102, a lawyer should look beyond the language of the Rule's text. The courts have repeatedly expressed a threshold reservation in deciding motions to disqualify based on this provision. That reservation springs from a perception that the motions are too often made for strategic purposes. The courts have especially warned against the "strong potential for abuse" when a lawyer announces an intention to call the opposing lawyer as a witness and then files a motion for disqualification. *See Norman Reitman Co.*, 2001 WL 1132015, at *2 (collecting cases). Thus, the burden on the moving party is a heavy one. *See e.g., Bristol Meyers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, 2000 WL 1006235, at *1 (S.D.N.Y. July 19, 2000).

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