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State v. Silva-Gonzales: Court of Appeals on What Is a "Necessary" Witness Under the Lawyer-Witness Rule

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The "lawyer-witness" rule—RPC 3.7—generally prohibits a lawyer from acting as trial counsel if the lawyer will be a "necessary" witness. Division III of the Court of Appeals recently discussed what the word "necessary" means in this context in *State v. Silva-Gonzales*, 2015 WL 3618620 (Wn. App. June 9, 2015) (unpublished). The lawyer involved was representing a criminal defendant and had related some information about the investigation to his client. The client, in turn, was taped in a jailhouse telephone conversation (not with the lawyer) discussing an aspect of the facts of the case of which the lawyer was one—but not the exclusive—source of the information involved. When the prosecution sought to play the recording to the jury, the lawyer objected and, once it was admitted, moved to withdraw—arguing that the recording had made him a witness on the source of the information. The trial court denied the motion and the Court of Appeals affirmed. In doing so, both concluded that the lawyer was not a "necessary" witness as that term is used in RPC 3.7.

The rule itself does not define the word "necessary." The Court of Appeals put it this way addressing that term: "[C]ounsel never showed why he, and he alone, could provide the information and why the information was critical

to the case." (*Id*. at *4). *Silva-Gonzales* echoes another comparatively recent Division III decision in published form on this point: *American States Ins. Co. ex rel. Kommavongsa v. Nammathao*, 153 Wn. App. 461, 220 P.3d 1283 (2009). In that earlier decision, Division III surveyed both Washington and national law on this question and concluded that for a lawyer to be a "necessary" witness "'the attorney will give evidence material to the determination of the issues being litigated . . . [and] . . . that the evidence is unobtainable elsewhere[.]'" *Id.* at 467 (citation omitted). The federal district court in Seattle used that same standard in *Microsoft Corp. v. Immersion Corp.*, 2008 WL 682246 at *2 (W.D. Wash. March 7, 2008) (unpublished). In sum, if there are 10 witnesses to an event and they all say the same thing, then a lawyer does not become a "necessary" witness under the rule. Rather, the prohibition is only triggered if the lawyer must play a unique role at trial in supplying material evidence.

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