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Two-Level Disqualification: The Lawyer-Witness Rule

Mark J. Fucile
Fucile & Reising LLP

As business activities have gotten more complicated over time, lawyers have played an increasingly common role as frontline intermediaries in dealing with counterparties, regulators, and others. If litigation follows, that can then mean that those same lawyers may be called as witnesses—often on behalf of their clients, but sometimes not. In those circumstances, the "lawyer-witness" rule, RPC 3.7, enters the mix for determining how the fact that a law firm lawyer will be a witness impacts the firm's continuing ability to try the case involved.

RPC 3.7 addresses two distinct scenarios when a law firm lawyer will appear as a witness at trial in a case the lawyer's law firm is handling. The first is a rule of personal disqualification from being trial counsel. The second is a rule of law firm disqualification when the lawyer's testimony will be adverse to the firm's client. In this column, we'll survey both parts of the rule.

Before we do, however, an important qualifier is in order. Although Oregon RPC 3.7 is similar substantively to ABA Model Rule 3.7, it also differs in several ways from the Model Rule. When Oregon moved from the former Code of Professional Responsibility to the Rules of Professional Conduct based on the ABA Model Rules in 2005, the Supreme Court took the new number for the lawyer-witness rule—RPC 3.7—but retained the text of "old rule"—DR 5-102—in

its entirety. Therefore, the principal Oregon State Bar opinion on RPC 3.7—OSB Formal Opinion 2005-8 (rev. 2016)—relies on Supreme Court authority applying DR 5-102 on several key points and those older cases have continuing relevance in interpreting the current version of the rule.

Personal Disqualification

RPC 3.7(a) generally prohibits a lawyer-witness from acting as trial counsel.

The prohibition is intended to address the risk of jury confusion over a lawyer's role as witness and advocate. Although RPC 3.7(a) includes a limited set of exceptions—such as the lawyer testifying on an uncontested issue—the exceptions are intentionally narrow. At the same time, the personal disqualification from being trial counsel does not generally extend to other aspects of a case. For example, a law firm lawyer precluded from being trial counsel could still assist with discovery, motions, and trial preparation.

Although Oregon RPC 3.7(a) uses the word "likely" when referring to the prospect of a lawyer being a witness rather than the Model Rule term "necessary," courts have generally applied them to similar effect. In *D.H.M. v. Oregon Youth Authority*, 2008 WL 1766727 (D. Or. Apr. 8, 2008) (unpublished),

for example, the court dismissed the suggestion that a lawyer was a "likely" trial witness when the same evidence was available through other witnesses.

Because RPC 3.7(a) is focused on a lawyer's personal disqualification as trial counsel, RPC 3.7(b) expressly permits other lawyers at the firm to try the case involved (subject to the considerations discussed in the next section):

> A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness on behalf of the lawyer's client.

Evraz, Inc., N.A. v. Continental Insurance Company, 2013 WL 6174839 (D. Or. Nov. 21, 2013) (unpublished), for example, was an insurance coverage case in which the plaintiff was seeking reimbursement from its insurance carrier for legal expenses incurred in the Portland harbor superfund litigation. The law firm handling the coverage case for the plaintiff had also represented the plaintiff in the underlying environmental litigation. The carrier moved to disqualify the plaintiff's law firm arguing that one of its lawyers who handed the environmental litigation would likely be a witness in the subsequent insurance coverage case. The court denied the motion—noting that under RPC 3.7(b) other lawyers at the law firm could try the insurance coverage case even if the environmental lawyer was a witness.

Firm Disqualification

Personal disqualification ripens into firm disqualification when the lawyer's testimony will be adverse to the lawyer's client as framed by RPC 3.7(c):

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the lawyer's firm may be called as a witness other than on behalf of the lawyer's client, the lawyer may continue the representation until it is apparent that the lawyer's or firm member's testimony is or may be prejudicial to the lawyer's client.

In *In re O'Neal*, 34 DB Rptr. 176 (Or. 2020), for example, a lawyer-witness continued to represent a client in a family law case even though the lawyer's expected testimony was adverse to the lawyer's client. The trial court disqualified the lawyer and awarded attorney fees to the moving party forced to bring the disqualification motion. The lawyer was later disciplined under RPC 3.7(c). Although what is "apparent" is inherently contextual, a lawyer can't ignore the obvious.

In a case interpreting former DR 5-102, *In re Kluge*, 335 Or. 326, 337, 66 P.3d 492 (2003), the Oregon Supreme Court held that this conflict not waivable as a matter of law. OSB Formal Opinion 2005-8 (at 2) cites *Kluge* for this point under RPC 3.7. Although the ABA Model Rule usually reaches the same result

as the Oregon version in practice, the Model Rule does not include a categorical prohibition as in Oregon.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.