

FORMAL OPINION NO 2005-8

Lawyer as Witness

Facts:

Lawyer *A* practices in a partnership with Lawyer *B*. Lawyer *A* may be a witness in a trial involving one of the clients of the *A & B* firm.

Questions:

1. May *A* try the case and be a witness if *A*'s testimony will support the client's case?
2. May *B* try the case if *A*'s testimony will support the client's case?
3. May *A* or *B* try the case if *A*'s testimony will be adverse to the client's case?

Conclusions:

1. No, qualified.
2. Yes.
3. No.

Discussion:

The first question is governed by Oregon RPC 3.7(a), which provides:

A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client unless:

- (1) the testimony relates to an uncontested issue.
- (2) the testimony relates to the nature and value of legal services rendered in the case.
- (3) disqualification of the lawyer would work a substantial hardship on the client.
- (4) the lawyer is appearing pro se.

Unless one of these categories applies, Lawyer A may not try the case and be a witness. Note that the supreme court has held that a lawyer's particular skills and a client's emotional makeup do not constitute circumstances warranting application of the "substantial hardship" exception. *In re Lathen*, 294 Or 157, 164–65, 654 P2d 1110 (1982). Note also that Oregon RPC 3.7(a) prevents a lawyer only from trying a case. Oregon RPC 3.7(a) does not prevent a lawyer from assisting in pretrial matters.¹

The second question is answered by Oregon RPC 3.7(b):

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.

Because Lawyer A's testimony is presumed in the second question to be favorable to the client, Lawyer B may try the case.

The third question is answered by Oregon 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.

Because Lawyer A's testimony is presumed in the third question to be unfavorable to the client, neither Lawyer A nor Lawyer B may try the case. In fact, they must withdraw from handling the case as soon as it becomes "apparent" that Lawyer A's testimony "is or may be prejudicial" to the client. Oregon RPC 3.7(c). Moreover, this conflict is not waivable by the client. *See In re Kluge*, 335 Or 326, 66 P3d 492 (2003) (conflict of

¹ Cf. State Bar of Michigan Ethics Op No RI-264 (1996) ("The advocate in [a] nonadjudicative forum is not bound by [ABA Model Model RPC] 3.7." Model RPC 3.7 should be applied, however, to arbitration proceedings.), *available at* <www.michbar.org/opinions/ethics/numbered_opinions/OpinionID=1134>.

interest existed when lawyer knew he would be called as witness in litigation and that his testimony would be adverse to client).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.9 (lawyer as witness) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 108 (2000) (supplemented periodically).

