



ETHICAL DILEMMA: Understanding the Lawyer- Witness Rule

If a lawyer is providing favorable and admissible testimony that would not be available from another source, the lawyer is a necessary witness and may not represent the client at trial of the matter. But, another lawyer in the firm may represent the client at trial.

BY TIMOTHY J. PIERCE

Question

I represent a client in a civil matter in circuit court. Opposing counsel notified me that they intend to testify on their client's behalf when the case goes to trial, and I responded asserting that opposing counsel has a conflict and must withdraw. To my surprise, opposing counsel stated that they had no conflict and would not withdraw but that another lawyer from their firm would handle the trial. To me, the conflict seems obvious.

Isn't it straightforward that lawyers must withdraw from matters in which they are likely to be witnesses?

Answer

This scenario is addressed in the recently issued Wisconsin Formal Ethics Opinion EF-25-01 "Lawyers as Witnesses." The opinion discusses the responsibilities of the lawyer when the lawyer is likely to be a necessary witness in a matter.

What the Rule Says

Most lawyers are aware that there is some sort of rule that prohibits lawyers from being witnesses in matters in which they represent clients, but there is much confusion about the meaning of the disciplinary rule. SCR 20:3.7 reads as follows:

"(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness 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; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by SCR 20:1.7 or SCR 20:1.9."

Immediately noteworthy is that the rule doesn't state that the lawyer has a "conflict"; rather, the lawyer is prohibited from acting as an advocate at *trial* of a matter in which the lawyer is likely to be a necessary witness, but the rule imposes no prohibition on acting as an advocate in the matter in pretrial and out-of-court capacities. This is because the rule is not a conflict rule but a rule intended to ensure the sound administration of matters before tribunals. EF-25-01 discusses the purposes and background of the rule:



Timothy J. Pierce, U.W. 1992, is ethics counsel with the State Bar of Wisconsin. Access the digital article at www.wisbar.org/wl.
tpierce@wisbar.org



“The general prohibition against a lawyer being both an advocate and a witness in the same trial has a long history. Even so, there has been ‘remarkable uncertainty over the reasons for the rule.’ Among the most cited rationales is the prevention of jury confusion in distinguishing the roles of an advocate who explains and analyzes evidence from a witness who provides evidence. Another is that it would harm the client, as the lawyer’s inherent client bias would make them less credible, or, alternatively, that it would unfairly prejudice the opponent by improperly bolstering the lawyer’s testimony due to their professional status. Serving in both roles could also impede the opponent’s ability to conduct cross examination. Professor Wigmore disagreed that lawyers would distort their testimony but supported the rule on the ground that, ‘the public will think they may, and that the public’s respect for the profession and confidence in it will be effectively diminished.’” (Footnotes omitted.)

Thus the rule is primarily intended to prohibit lawyers from performing both the role of evidence giver and the role of evidence arguer at trial and therefore prevent confusion on the part of the finder of fact. Our lawyer has no “conflict” and need not withdraw but is prohibited from representing the client at trial.

What Is a Trial?

Within the meaning of the rule, it is clear that the prohibition applies to jury trials. But if one of the main purposes of the rule is to prevent juror confusion, what if there is no jury? Does the prohibition in the rule apply to court trials? What about administrative hearings? EF-25-01 states:

“The committee believes that the rule clearly applies to jury trials. Less clear is whether it also applies to bench trials and administrative proceedings conducted before a hearing examiner.

“A ‘trial’ has been defined as ‘[t]he examination before a competent tribunal, according to the law of the land, of the

ALSO OF INTEREST

Wisconsin Ethics Opinions

What It Is

Wisconsin Ethics Opinions (State Bar of Wis. 2d ed. 2017 & Supp.) collects every Formal, Informal, and Memorandum Ethics Opinion issued by the State Bar of Wisconsin Standing Committee on Professional Ethics since 1954, along with SCR Chapter 20 and detailed indexes.

Why It Matters

Ethical questions arise in all areas of practice. This resource clarifies obligations, supports sound decision-making, and helps reduce risk in conflicts, guardian ad litem duties, online communications, trust-account management, and other complex matters.

What’s New for 2024-25

- New opinions on attorney testimony and duties when leaving a firm
- Revised guidance on guardians ad litem
- Recent *Ethical Dilemmas* columns addressing practical, real-world challenges



How to Use It

Use the indexes to quickly locate relevant opinions. Reference it when evaluating client matters, advising colleagues, reviewing firm policies, or preparing CLE materials.

Next Step

Keep *Wisconsin Ethics Opinions* within reach. Consult it before making ethics-related decisions and order your copy today. Product: AK0049, available at marketplace.wisbar.org. **WL**

facts or law put in issue in a cause, for the purpose of determining such issue.’ Common usage suggests it includes both jury and bench trials. The text of SCR 20:3.7 makes no distinction.

“Authority is split on whether SCR 20:3.7 applies to such proceedings. This lack of clarity suggests that application of the rule to non-jury proceedings should rest with the tribunal and the committee does not believe that 20:3.7(a) should apply automatically to such proceedings. The judge or other judicial official, such as a hearing examiner, is best positioned to determine whether the lawyer serving as both advocate and necessary witness would be detrimental to the proceeding.

“Therefore, a lawyer in non-jury

settings – bench trials before a judge or administrative hearings before a hearing examiner – should clarify as early as possible whether the rule will be applied or not.” (Footnotes omitted.)

While the prohibition for jury trials is clear, Wisconsin lawyers should look to the relevant tribunal for a determination as to whether a specific judge or hearing officer will apply the rule’s disqualification in non-jury settings.

When Is a Witness ‘Necessary’?

Sometimes a lawyer may be called as a witness by the opposing side and there is a dispute as to whether that is a tactic aimed at disqualifying the lawyer or whether the lawyer is truly a necessary witness. EF-25-01 states:

“The current choice of language was

intended to both clarify and narrow the rule, limiting its application to situations in which the testimony is 'relevant, material, and unobtainable elsewhere.' This suggests testimony is necessary if needed to withstand a motion for summary judgment or to dismiss. If available from other sources or only tangentially relevant, the testimony would likely not be found necessary."

So, if a lawyer is called to provide testimony about information that is available from another source, or is not relevant and material, the lawyer is not a "necessary" witness. In the hypothetical under discussion, if the lawyer is providing favorable and admissible testimony that would not be available from another source, the lawyer is a necessary witness and may not represent the client at trial of the matter. The lawyer may still represent the client in pretrial and out-of-court proceedings, and, as set forth in subpart (b) of the rule, another lawyer from the same firm may represent the client at trial.

When Conflicts Arise

As stated above, SCR 20:3.7 is *not* a conflict rule. But if a lawyer likely would be a necessary witness and the lawyer's testimony is relevant and admissible and likely would be detrimental to the client, the lawyer and the lawyer's firm are conflicted out of the matter. The conflict exists between the lawyer's obligation under the law to provide truthful testimony and the lawyer's duty of loyalty to the client. Further, that conflict is imputed to every other lawyer in the firm under SCR 20:1.10(a) and because other firm lawyers would have a duty to attempt to attack the credibility of a colleague, they thus would have a conflict between their loyalty to a colleague and the client. It is extremely unlikely that any firm lawyer can reasonably conclude they can competently represent the client when confronted with such a choice and thus the conflict would not be subject to informed consent and the firm must withdraw from the matter. See EF-25-01 for further discussion of this and other questions about SCR 20:3.7. **WL**

UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Reader Publications)

1. Publication Title Wisconsin Lawyer		2. Publication Number 687-740		3. Filing Date 09/24/2025	
4. Issue Frequency Monthly, except combined July/August issue		5. Number of Issues Published Annually 11		6. Annual Subscription Price \$35 member; \$53 nonmember	
7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®) State Bar of Wisconsin, 5302 Eastpark Blvd, Madison, Dane, WI 53718-2101				Contact Person Joe Forward Telephone (include area code) (608) 250-6161	
8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer) State Bar of Wisconsin, 5302 Eastpark Blvd, Madison, Dane, WI 53718-2101					
9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)					
Publisher (Name and complete mailing address) State Bar of Wisconsin, 5302 Eastpark Blvd, Madison, Dane, WI 53718-2101					
Editor (Name and complete mailing address) Joe Forward, 5302 Eastpark Blvd, Madison, Dane, WI 53718-2101					
Managing Editor (Name and complete mailing address) Karl Lester, 5302 Eastpark Blvd, Madison, Dane, WI 53718-2101					
10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)					
Full Name State Bar of Wisconsin		Complete Mailing Address 5302 Eastpark Blvd, Madison, Dane, WI 53718-2101			
11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box <input checked="" type="checkbox"/> None					
Full Name		Complete Mailing Address			
12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one) The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes: <input checked="" type="checkbox"/> Has Not Changed During Preceding 12 Months <input type="checkbox"/> Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)					
13. Publication Title Wisconsin Lawyer		14. Issue Date for Circulation Data Below 07/24/2024			
15. Extent and Nature of Circulation		Average No. Copies Each Issue During Preceding 12 Months		No. Copies of Single Issue Published Nearest to Filing Date	
a. Total Number of Copies (Net press run)					
b. Paid Circulation (By Mail and Outside the Mail)	(1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	24349		24533	
	(2) Mailed In-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	0		0	
	(3) Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	0		0	
	(4) Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	101		106	
c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4))		24450		24639	
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)	(1) Free or Nominal Rate Outside-County Copies included on PS Form 3541	0		0	
	(2) Free or Nominal Rate In-County Copies Included on PS Form 3541	0		0	
	(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	0		0	
	(4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)	0		0	
e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4))		0		0	
f. Total Distribution (Sum of 15c and 15e)		24450		24639	
g. Copies not Distributed (See Instructions to Publishers #4 (page #3))		1494		1472	
h. Total (Sum of 15f and g)		25944		26111	
i. Percent Paid (15c divided by 15f times 100)		100		100	
16. Electronic Copy Circulation		Average No. Copies Each Issue During Preceding 12 Months		No. Copies of Single Issue Published Nearest to Filing Date	
a. Paid Electronic Copies		0		0	
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a)		24450		24639	
c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a)		24450		24639	
d. Percent Paid (Both Print & Electronic Copies) (16b divided by 16c × 100)		100		100	
17. Publication of Statement of Ownership <input checked="" type="checkbox"/> If the publication is a general publication, publication of this statement is required. Will be printed in the 10/10/25 issue of this publication. <input type="checkbox"/> Publication not required.					
18. Signature and Title of Editor, Publisher, Business Manager, or Owner Joe Forward, State Bar of Wisconsin Communications Director				Date 09/23/2025	
I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).					