Wisconsin Formal Ethics Opinion EF-25-01
Lawyers as Witnesses

April 7, 2025

Synopsis: *In general, a lawyer may not testify as a fact witness at a trial at which they also appear as an advocate for a client.*[1] *Nor, if they are "likely to be a necessary witness" may the lawyer choose to forego testifying to continue in an advocacy role. SCR 20:3.7(a). A witness is necessary if their testimony is critical for the client's case and unavailable from other sources. Protecting the integrity of and public confidence in the judicial system and avoiding jury confusion over the lawyer's role are the most common justifications for the rule. Because the rule protects the integrity of the justice system rather than only the interests of the parties, informed consent does not prevent disqualification of the lawyer or exclusion of their testimony.*

The rule has been uniformly applied to jury trials. Less clear is whether it also applies to bench trials or administrative proceedings. In either situation the lawyer generally may participate in pretrial or appellate matters. Given the ambiguity over the rule's reach, the committee recommends that lawyers proactively seek guidance from the presiding tribunal in a matter not tried to a jury on whether the rule applies.

Although situations where a lawyer may be a necessary witness occur infrequently, when they do arise, they can be disruptive and costly, especially when not anticipated in advance. Because lawyers may know at the initial stages of a case whether they may be a necessary witness, they should discuss the issue with the client at the earliest opportunity.

If the lawyer's testimony is favorable to the client, the rule permits the lawyer to participate in pretrial matters and transfer advocacy responsibilities at trial to another lawyer in the firm if the lawyer's testimony becomes necessary. SCR 20:3.7(b). This option requires the client's informed consent.

If the lawyer's testimony would be adverse to the client or a former client, a conflict of interest exists and is governed by SCRs 20:1.7, 20:1.9(c) and 20:1.10, as well as SCR 20:3.7. This must also be discussed with the client. In most cases the conflict would require the lawyer and their firm to withdraw from the representation.

[1] In this opinion the term fact witness refers to a witness whose testimony is based upon firsthand knowledge of the events at issue. Lawyers may also testify as experts, a situation that raises ethical issues beyond the scope of this opinion.

SCR 20:3.7 contains three exceptions to the general prohibition, allowing the lawyer to testify without disqualification if their testimony relates (1) to an "uncontested issue", (2) the "nature and value of legal services rendered", or (3) if disqualification would "work substantial hardship on the client." SCR 20:3.7(a).

Although expressed as an ethics rule, the prohibition against a lawyer assuming dual roles in the same case is rarely the subject of discipline. Rather, it most frequently arises in the context of disqualification motions.

Sometimes disqualification motions are tactical efforts to remove the lawyer from the case and not based on a bona fide need for the lawyer's testimony. Lawyers should normally resist such requests absent a showing of a compelling need for the testimony.

Introduction

The general prohibition against a lawyer being both an advocate and a witness in the same trial has a long history.[2] Even so, there has been "remarkable uncertainty over the reasons for the rule."[3] 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.[4] 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.[5] Serving in both roles could also impede the opponent's ability to conduct cross examination.[6] 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."[7]

The American Bar Association has included variations of this rule in each of its ethics codes, beginning with Canon 19 of the Canons of Professional Ethics (1908), continuing with DR 5-101(B) and DR 5-102(A) of the 1969 Code of Professional Responsibility and culminating in Rule 3.7 of

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[2] Wolfram, *Modern Legal Ethics* 375-382 (1986), *Lawyers Manual on Professional Conduct* 61:501, 2 (2022).

[3] Enker, *The Rationale of the Rule That Forbids a Lawyer To Be Advocate and Witness in the Same Case*, 1977 Am. B. Found. Res. J. 455, 456 (1977).

[4] Rotunda & Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, §3.7-1(a) at 715 (2005). This was an early and frequent justification for the rule. *Stones v. Byron*, 4 Dowl. & L. 393 (1846).

[5] *ABA Annotated Model Rules of Professional Conduct* (9th ed. 2019) 417, *People v. Rivera*, 986 N.E. 2d 634 (Ill. 2013). Additional concerns may arise when government lawyers are involved, where their status may either suggest their testimony is entitled to extra weight, or if discredited, that their testimony would discredit their office. See *United States v. Morris*, 714 F.2d 669, 671-72 (7th Cir. 1983), *People v. Linton*, 302 P.3d 927 (Cal. 2013).

[6] SCR 20:3.7 cmt. ¶¶ 1-3, Richmond, *Lawyers as Witnesses*, 36 N.M. L. Rev. 47, 48-49 (2006), *ABA Annotated Model Rules of Professional Conduct* (9th ed. 2019) 417-418.

[7] Wigmore, *Evidence* §1911(2) (3d ed. 1940).

the 1983 Model Rules of Professional Conduct. Wisconsin adopted the current ABA version of the rule as Supreme Court Rule ("SCR" or "rule") 20:3.7.[8]

SCR 20:3.7 issues arise infrequently. First, few cases are tried to juries, with most resolved by other means, obviating the need to apply SCR 20:3.7 at all. Second, lawyers are rarely fact witnesses simply because they typically lack firsthand knowledge of the facts underlying the litigation.

However, there are at least two situations in which a lawyer may be called to testify. The first is when the litigation is based on a transaction in which the lawyer was intimately involved. The second is when the lawyer interviewed a witness whose trial testimony differs from their pretrial interview, making the lawyer an impeachment witness. In both situations, advocate-witness issues can be avoided by having others present during the negotiations or interviews.

Lawyers should know in advance if their testimony may be necessary at trial. If so, the lawyer should consult with the client,[9] explain the possible scenarios, including disqualification of the lawyer as advocate, and possible responses. If the client is uncomfortable with the prospect of having to change lawyers during the pendency of the matter, the lawyer may need to withdraw.[10] On the other hand, if the client gives informed consent, knowing it is possible that a change of lawyers may be required if the case is tried, the lawyer may still continue involvement in pretrial matters.[11] Recognizing and resolving these issues ahead of trial can prevent confusion and harm to the client that could arise if the lawyer must testify and withdraw from an advocacy role while the case is ongoing.[12]

In this opinion, the State Bar's Standing Committee on Professional Ethics (the "committee") discusses what circumstances trigger the rule, its scope, whether the prohibition can be waived, whether the disqualification is imputed to other firm members, exceptions to the general prohibition, the tactical misuse of the rule, situations in which the lawyer's testimony creates a conflict of interest with the current or a former client, and several other related issues.

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[8] *See Lawyers Manual on Professional Conduct* 61:501 at 2 (2022); *ABA Annotated Model Rules of Professional Conduct* (9th ed. 2019) 419, Rochvarg, *The Attorney as Advocate and Witness: Does the Prohibition of an Attorney Acting as Advocate and Witness at a Judicial Trial also Apply in Administrative Adjudications?* 26 J. Nat'l Ass'n Admin. L. Judges 1, 2-3 (2006).

[9] *See* SCR 20:1.4.

[10] *See* SCR 20:1.16. If these issues surface at the initial consultation between the lawyer and prospective client, it may be wise to decline representation altogether.

[11] *See* pp. 5-6, *infra*.

[12] This part of the opinion assumes the lawyer's testimony would be favorable to the client. If the testimony would be adverse to either the client's interests or those of a former client, the lawyer and their firm may be required to withdraw from the case. *See* pp. 7-8 infra, SCRs 20:1.7, 20:1.9(c) and 20:1.10.

When a Lawyer is a Necessary Witness for the Client

Understanding when SCR 20:3.7 applies is important for the lawyer and their client. If the lawyer cannot be both a witness and an advocate, requiring their testimony means the client will not be represented by their chosen lawyer.[13] On the other hand, the loss of important evidence may doom the client's chances of a successful outcome.

SCR 20:3.7(a) applies when the lawyer's testimony is "necessary." This is a deliberate change from the language of the former Code of Professional Responsibility which disqualified lawyers who "ought to be called."[14] The Code standard was a source of confusion, with some courts applying disqualification only to indispensable witnesses[15] and others when the lawyer's testimony merely had the potential to be helpful.[16]

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."[17] This suggests testimony is necessary if needed to withstand a motion for summary judgment or to dismiss.[18] If available from other sources or only tangentially relevant, the testimony would likely not be found necessary.

Given the impact of disqualification on the lawyer and client, a "bright line" standard that could be applied with clarity and confidence might be preferred.[19] However, application of the rule is necessarily case specific and requires a close examination of the contested issues, the significance of the lawyer's testimony, the availability of similar evidence from other sources, and the hardship caused by withdrawal. The wide variety of circumstances to which the rule applies led the drafters to articulate a general standard with factors to consider. Inevitably, this adds an element of uncertainty to whether and how the rule applies. This being so, lawyers faced with

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[13] In some cases, disqualification of a client's chosen lawyer may implicate the client's constitutional right to counsel in both civil and criminal cases. Wis. Const. Art. I, §§ 7,21, U.S. Const. Amendments VI, XIV, *Wheat v. United States*, 486 U.S. 153 (1988).

[14] ABA Code of Professional Responsibility DR 5-102(A). *See also Restatement (Third) of the Law Governing Lawyers* (2000) §108(b), which would apply the rule either when "the lawyer is expected to testify for the lawyer's client" § 108 (1)(a) or when "the lawyer does not intend to testify but (i) the lawyer's testimony would be material to establishing a claim or defense of the client, and (ii) the client has not consented … to the lawyer's intention not to testify."

[15] *See Universal Athletic Sales Co. v. Am. Gym, Recreational & Athletic Equip. Corp*., 546 F.2d 530 (3d Cir. 1976); *J.D. Pflaumer Inc. v. U.S. Dep't of Justice*, 465 F. Supp. 746 (E.D. Pa. 1979).

[16] *See Davis v. Stamler*, 494 F. Supp. 339 (D.N.J. 1980), *Supreme Beef Processors Inc. v. Am. Consumer Indus*., 441 F. Supp. 1064 (N.D. Tex. 1977).

[17] *See Lawyers Manual on Professional Conduct* 61:501, 3 (2022).

[18] *See ABA Annotated Model Rules of Professional Conduct* (9th ed. 2019) 419-420.

[19] The debate whether "bright line" rules or flexible standards are preferrable is as old as the legal profession and plays out in virtually all practice areas. *See* Coenen, *Rules Against Rulification*, 124 Yale Law. J. 644 (2014), Schalg, *Rules and Standards*, 33 UCLA L. Rev. 379 (1985).

the possibility of being a witness should err in favor of caution just as trial courts tasked with ruling on disqualification motions should be certain that such an extreme remedy is truly warranted.[20]

Scope of Disqualification

Application of SCR 20:3.7 requires defining both what constitutes a "trial" and what constitutes "advocacy" within the meaning of the rule. Neither term is defined in the text or comment. Although there is some guidance in case law, ethics opinions, and academic literature, ambiguities remain.

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 facts or law put in issue in a cause, for the purpose of determining such issue."[21] Common usage suggests it includes both jury and bench trials. The text of SCR 20:3.7 makes no distinction.

On one hand, given that avoidance of jury confusion is a primary rationale for the rule it could be suggested that it only applies to jury trials, or other proceedings, such as recorded depositions, that would be seen by a jury. In cases tried before a judge, there seems little risk an experienced jurist would be confused if a lawyer testified while also acting as an advocate. Limiting the rule's application to jury trials would avoid potential harm from disqualification of the client's chosen lawyer.[22] These considerations support an argument that the rule only applies to jury trials.

On the other hand, Wigmore's concern – that dual attorney roles would diminish public respect for the profession - focuses on the lawyer and not the type of proceeding and thus would apply to both bench and jury trials, supporting an opposing point of view.

The same issues apply to administrative hearings before a hearing examiner. The relevance of SCR 20:3.7 to these types of cases is important because far more cases are resolved through administrative processes than jury trials before a court.[23] These proceedings are not typically

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[20] Id. at 3-4.

[21] https://thelawdictionary.org/trial/*Black's Law Dictionary, 2nd Ed.*

[22] *See* Richmond, n. 4 *supra* at 49-51, *ABA Annotated Model Rules of Professional Conduct* (9th ed. 2019) 421-422, *Lawyers Manual on Professional Conduct* 61:501 at 4-5 (2022).

[23] For example, data from 2022-2023 suggests there were more than 20,000 circuit court trials in Wisconsin, with fewer than 10% tried to a jury. https://www.wicourts.gov/publications/statistics/circuit/circuitstats.htm. During the same period, statistics from the Department of Administration Division of Hearings and Appeals reported more than 22,000 cases from four of the fifteen state agencies for which they conduct administrative hearings. It seems reasonable to assume that that the number of hearings related to the eleven agencies for which data was not

referred to as trials, do not involve lay juries as fact-finders, and are conducted in a wide variety of ways with varying degrees of formality.[24] Authority is split on whether SCR 20:3.7 applies to such proceedings.[25] 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.[26]

The committee believes "advocacy" involves interactions with the jury, either by presentation of evidence or arguments designed to persuade.[27] Issues such as whether the attorney witness can sit at counsel table, interact with advocacy counsel during the trial, or be subject to witness sequestration requirements should also be raised with the court or hearing examiner.

It is important to note that even if SCR 20:3.7 prevents a lawyer-witness from being an advocate at trial, the disqualification has generally not been applied to pretrial or appellate involvement by the lawyer-witness.[28]

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available would be similar. This, combined with federal administrative hearings, makes clear that far more contested matters are resolved by administrative hearings than trial court jury trials.

[24] See Congressional Research Service, *Informal Administrative Adjudication: An Overview* (2021).

[25] *See* Rochvarg, *The Attorney as Advocate and Witness: Does the Prohibition of an Attorney Act as Advocate and Witness in a Judicial Trial Also Apply in Administrative Adjudications*, 26 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2006). This issue was noted in the case of *Peck v. Meda-Care Ambulance Corp.*, 156 Wis. 2d 662, 670-673, 457 N.W.2d 538 (Ct. App. 1990). The committee does not believe the decision is authority for application of SCR 20:3.7 to administrative hearings given that this precise issue was not before the court and its discussion in dicta referred to former SCR 20.25, based on the since repealed Code of Professional Responsibility. Thus, the application of SCR 20:3.7 to administrative law proceedings in Wisconsin remains unresolved.

[26] Trial level judges manage the procedures in cases before them, including the manner in which evidence is presented. *See Rupert v. Home Mutual Insurance Company*, 138 Wis. 2d 1, 405 N.W.2d 661 (Ct. App. 1987). "We recognize the trial court's inherent discretionary power to control its docket with economy of time and effort." *Citing Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314, 127 N.W.2d 225, 226 (1964). *See also Schultz v. Sykes*, 2001 WI App 255, 248 Wis. 2d 746, 638 N.W.2d 604 (2001). Administrative law judges have similar authority. Wis. Stat. §227.46(1).

[27] *See* Michigan Ethics Opinion CI-1118 (1985).

[28] Richmond, *Lawyers as Witnesses*, 36 N.M. L. Rev. 47, 49-51 (2006), *ABA Annotated Model Rules of Professional Conduct* (9th ed. 2019) 422-423, *Lawyers Manual on Professional Conduct* 61:501 at 4-5 (2022). *See also* ABA Formal Opinion 89-1529 (1989), ABA Informal Ethics Op. 83-1503 (1983), Colorado Ethics Op. 78 (1988, revised 2013), Illinois Ethics Op. 2011-06, Missouri Ethics Op. 2014-03, Montana Ethics Op. 14-0519 (2014), North Carolina Ethics Op. 2011-1.

Waiver of the Attorney-Witness Prohibition

SCR 20:3.7 does not allow the client to consent to the lawyer assuming dual roles at trial or forego testifying altogether to remain an advocate if their testimony is deemed necessary. This is because the rule protects the integrity and fairness of the process and not simply the interests of clients.[29]

Imputation of Disqualification

SCR 20:3.7(b) disqualifications affect only the testifying lawyer and not the rest of their firm.[30] If a non-testifying associate of the personally disqualified lawyer acted as advocacy counsel, there would be little risk of jury confusion as the lawyer-witness would not be able to argue their credibility nor unfairly improve their status as an advocate by taking an oath to be truthful. This allows the lawyer to discuss with the client if they would be willing to have another firm lawyer assume the advocacy role if the lawyer's testimony becomes necessary.

However, when the lawyer's testimony is or is reasonably likely to be adverse to the client's interests or that of a former client, the representation involves a conflict of interest, and SCRs 20:1.7 or 20:1.9(c) would control as well as the imputation requirements of SCR 20:1.10. This would require disqualification of the individual lawyer and their entire firm unless continued involvement would be reasonable and the client gives informed consent.[31] In such situations, declining representation at the outset or withdrawal will normally be required.[32]

Exceptions

SCR 20:3.7 includes three exceptions to the general rule of disqualification, providing,

> (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.

[29] ABA Model Rule 3.7(b) cmt. ¶ 5.

[30] *See* ABA Model Rule 3.7 cmt. ¶ 5; *Restatement (Third) of the Law Governing Lawyers* §108 cmt. b (2000). It has been suggested that this change from the Model Code of Professional Responsibility, which typically led to disqualification of the lawyer-witness' entire firm, has functioned to reduce the number of strategic disqualification requests.

[31] SCR 20:1.7(b); *See also Lawyers Manual on Professional Conduct* 61:501, 6-7 (2022); *ABA Annotated Model Rules of Professional Conduct* (9th ed. 2019) 416. In the case of government lawyers, another firm lawyer could appear as as advocate as the imputation rules differ from those that apply to private attorneys. SCR 20:1.11(f).

[32] See pp. 8-9, *infra*. The committee believes informed consent is unlikely to be reasonable and thus viable in situations where the lawyer's testimony would be harmful to their client.

The first two exceptions are straight-forward and unremarkable. Subsec. (a)(1) applies to uncontested issues and not uncontested facts. This is intended to prevent a lawyer from testifying about uncontested facts and later, in an advocacy role, arguing that these facts compel a favorable finding regarding a contested issue.[33] If the issue is uncontested, allowing the lawyer to testify and remain in their advocacy role is permissible.

Subsec. (a)(2) allows a lawyer-advocate to testify regarding the nature and value of the legal services provided in the case at hand. The trial judge's firsthand knowledge of the case minimizes the need for adversary testing of the testimony and allowing the lawyer's testimony avoids the need for a second trial. This exception does not apply if the case itself concerns the value and quality of legal services in a different case that are the subject of the lawyer's testimony.[34]

Subsec. (a)(3) is more complicated, allowing the lawyer to remain in an advocacy role while testifying if disqualification would "work substantial hardship on the client". A survey of the case law suggests allowing dual roles is disfavored, particularly where the issue was foreseeable and avoidable.

Like the standard to determine when a lawyer's testimony is "necessary" the "substantial hardship" exception requires "a balancing … between the interests of the client and those of the opposing party."[35] Among the factors courts consider are the additional financial burden involved in replacing counsel,[36] whether arrangements for substitute counsel have already been made,[37] the unique expertise of the lawyer regarding the issues involved and the amount of time already invested in the representation.[38] As this is fact specific, the determination of whether this exception applies would normally be made by the tribunal in the context of a disqualification motion hearing. Given the inherent ambiguity of the standard, a lawyer should be wary of relying on the exception to allow their continued involvement as both a witness and an advocate and seek a determination from the tribunal as to whether the exception applies.

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[33] See *People v. Pasillas-Sanchez*, 214 P. 3d 520 (Colo. Ct. App. 2009); *cf. Cottonwood Estates Inc. v. Paradise Builders Inc.*, 624 P. 2d 296 (Ariz. 1981).

[34] In some cases, issues may arise whether it is appropriate for a lawyer to charge the same fee when testifying as when they act as an advocate. A discussion of how such fees should be calculated is beyond the scope of this opinion although the general rule that fees be "reasonable" suggests a distinction should be drawn. SCR 20:1.5(a).

[35] SCR 20:3.7 cmt. [4].

[36] *See D.J. Inv. Group LLC v. DAE/Westbrook LLC*, 147 P.3d. 414 (Utah 2006), *McElroy v. Gaffney*, 529 A.2d 889 (N.H. 1987), *Sargent County Bank v. Wentworth*, 500 N.W.2d 862 (N.D. 1993).

[37] *See Fognani v. Young*, 115 P.3d 1268 (Colo. 2005), *DeBiasi v. Wayne County*, 284 F. Supp. 2d 760 (E.D. Mich. 2003).

[38] *See Lumbard v. Maglia Inc.*, 621 F. Supp. 1529 (S.D.N.Y. 1985), *Brown v. Daniel*, 180 F.R.D. 298, 302 (D.S.C. 1998), *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555 (Ky. 2001).

The Appropriate and Inappropriate Use of Disqualification Requests[39]

Early discussion and resolution of lawyer-witness issues can avoid a variety of problems for the lawyer, the client and the opponent and may eliminate the need to litigate the disqualification issue at all. However, it may not be clear whether the lawyer's testimony will be necessary until discovery is completed and, in some cases, until trial.[40]

There is always a risk that a less than scrupulous lawyer will seek to disqualify opposing counsel as a litigation tactic based on a spurious claim that counsel's testimony is necessary at trial. Even when warranted, disqualification of a client's chosen lawyer is disruptive,[41] costly, and harmful to the client's case. It is important for a reviewing court to ensure the legitimacy of a disqualification request and not simply rely on the lawyer's claim that they intend to call opposing counsel as a witness.[42]

There are lessons here for both the moving and responding lawyer.

For the lawyer contemplating a disqualification motion, it is important to conduct a thorough investigation to determine whether the lawyer's testimony is truly necessary and unavailable from any other source. If a lawyer moves to disqualify opposing counsel without an investigation of need, they may violate SCRs 20:3.1(a)(1) (filing a frivolous claim) or SCR 20:4.4(a) (improper burden or delay).[43]

For the lawyer receiving a disqualification motion, it is prudent to have prepared in advance for the possibility of testifying and arranging for substitute counsel if their testimony is deemed

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[39] *See Lawyers Manual on Professional Conduct* 61:501, 4 (2022); *ABA Annotated Model Rules of Professional Conduct* (9th ed. 2019) 418-419.

[40] When discovery is thorough and complete it may be known in advance of trial whether a lawyer's testimony is critical and necessary, such that a timely resolution of potential advocate-witness issues is possible. Alternatively, when uncertainty remains until trial about the availability and substance of witness testimony, pretrial resolution may be premature. It should also be noted that disqualification requests based on other reasons may be ripe for pretrial resolution. When this may be the case is beyond the scope of this opinion.

[41] *See Kalmanovitz v. G. Heileman Brewing Co.*, 610 F. Supp. 1319 (D. Del. 1985) (acknowledgement that disqualification operates to deprive a party of their counsel of choice), n. 7 *supra*.

[42] *See Council for Nat'l Register of Health Serv. Providers v. Am. Home Assurance Co.*, 632 F. Supp. 144 (D.D.C. 1985); *Klupt v. Krongard*, *728 A.2d 727* (Md. 1999) (admonishing reviewing courts to examine if disqualification motions are being used "block, harass, or otherwise hinder the other party's case"). See also Devins v. Peitzer, 622 So. 2d 558 (Fla. Dist. Ct. App. 1993)(stating intent to call opposing counsel as witness alone insufficient to disqualify attorney), Utah Ethics Op. 04-02 (2004) (lawyer not required to withdraw simply because opponent claims they will be called as witness).

[43] Courts may sanction the improper use of disqualification motions. *See Optyl Eyewear Fashion Int'l Corp. v. Style Co. Ltd.*, 760 F.2d 1045 (9th Cir. 1985) (affirming sanctions under 28 U.S.C. § 1927).

necessary. On the other hand, if the lawyer believes the request for disqualification is baseless, they should be prepared to vigorously contest it.

Lawyer Testimony that is likely to be Detrimental to the Client or Former Client

As noted, a lawyer will typically know well before trial if they are likely to be a necessary witness and whether their testimony would likely be detrimental to the client. For example, the lawyer's testimony might contradict that of their client or support a claim adverse to a former client.

In the former situation the lawyer's responsibility to testify truthfully would be adverse to the interests of the client in the matter and the lawyer would be materially limited in their ability to provide competent and diligent representation to the client.[44] In the latter, the lawyer's testimony could violate their responsibilities to the former client if the matter is the same or substantially related to the former client's matter[45] or the testimony involves the use of information detrimental to the former client or the disclosure of information relating to the representation of the former client.[46]

Whenever a lawyer's testimony would be adverse to the interests of a current or former client a conflict exists and the lawyer's responsibilities are controlled by SCRs 20:1.7, 20:1.9 and 20:1.10 as well as SCR 20:3.7. If discovered before trial, the lawyer and their firm should either decline representation or withdraw as soon as the issue emerges.[47]

It is important to distinguish lawyer-witness situations that involve conflicts of interest from those that do not. This is because the applicable rules, analyses and consequences of each situation are distinct.[48]

For example, informed consent to a conflict may technically, if highly unlikely, be permissible,[49] not so when the witness-advocate rule controls. So too, SCR 20:1.7 and SCR 20:1.9 conflicts are

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[44] SCRs 20:1.7(a)(1) and (2), 20:1.1, 20:1.3. The lawyer would be faced with either arguing their testimony is credible and thus harmful to the client, or that is unworthy of belief, suggesting they did not testify truthfully. Neither option satisfies the lawyer's ethical obligations.

[45] A situation in which SCR 20:1.9(a) would apply appears to be exceedingly rare.

[46] SCR 20:1.9(c). Confidentiality problems could arise if the lawyer's testimony involved confidential client information relating to the representation of the former client.

[47] *See* pp. 6-7 n. 29, supra.

[48] SCR 20:3.7 cmt. ¶6.

[49] SCR 20:1.7(b) would permit the lawyer to continue representation if objectively reasonable and the client provided informed consent in writing. See also SCR 20:1.9(b), (c). It is extremely unlikely that if a lawyer's testimony would be detrimental to the interests of the client that the conditions of SCR 20:1.7(b)(1) could be met because the firm cannot reasonably believe they would be effective in attacking the credibility and truthfulness of a colleague and could not agree to forego such measures when necessary for competent representation. Therefore, except in the rarest of circumstances, the committee does not believe that conflicts arising from a firm lawyer's adverse testimony are subject to informed consent and the firm must withdraw. See SCR 20:1.16(a)(1).

imputed to others in the firm whereas under SCR 20:3.7 disqualification only applies to the testifying lawyer and not their entire firm.[50] And, none of the exceptions to SCR 20:3.7 apply to cases involving conflicts of interest.

Confidentiality Issues

Whenever a lawyer is called upon to testify it will almost always involve "information relating to the representation" of a client that is protected under SCR 20:1.6(a) This being so, the lawyer may not testify absent informed client consent or the existence of an applicable exception to the rule.

If the lawyer's testimony is necessary and favorable to the client, the lawyer will typically have obtained informed consent to disclosure pursuant to SCR 20:1.6(a) which should be done promptly to avoid confusion or misunderstanding.

On the other hand, if the testimony involves protected information and would be adverse to the client or former client, the lawyer should consult with the client or former client about the possible risks of the lawyer-witnesses' testimony. In most cases, a client will not provide informed consent to testimony that will be adverse to their interests, but the lawyer may still be compelled by subpoena or court order to testify. Even though SCR 20:1.6(c)(5) provides discretion to disclose protected information to comply with "other law or a court order," the lawyer normally must advance all non-frivolous legal bases to resist disclosure.[51]

Related Issues

A. Pro Se Litigants

When a self-represented litigant is also a lawyer, application of the advocate-witness rule is problematic. The Wisconsin Constitution protects the right to self-represent in a civil or criminal matter.[52] A litigant, represented or not, also has a right to due process, which includes the right to present evidence in support of their claim.[53] Strict application of the advocate-witness rule would jettison one or the other of these fundamental rights. This being so, the rule has not been applied to cases in which the lawyer is also a litigant.

[50] SCR 20:1.10(a).

[51] Full discussion of a lawyer's obligations when forced to testify against a current or former client is beyond the scope of this opinion, but see ABA Formal Opinion 473 (2016) for a detailed treatment of the lawyer's obligations upon receiving a subpoena or other order to testify or disclose documents involving "information relating to the representation". SCR 20:1.6(a).

[52] Wis. Const. Art. I, §§ 7,21, U.S. Const. Amendments VI, XIV, *Faretta v. California*, 422 U.S. 806 (1975).

[53] *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

This carve-out applies not only when the lawyer is involved in a personal capacity[54] but also when the lawyer represents entities in which they have an ownership interest.[55]

B. Application to Guardian ad Litem Cases

The Wisconsin statutes allow for the appointment of a guardian ad litem in cases involving children,[56] guardianships and conservatorships,[57] actions involving the family,[58] and juvenile criminal matters.[59] In each, statutes require the guardian ad litem to represent the best interests of the ward. Typically this involves investigation and a report to the court.

The importance of a guardian ad litem's report suggests they could be a necessary witness in contested cases. However, in *Hollister v. Hollister*, 173 Wis. 2d 413, 496 N.W.2d 642 (1992), the court held that guardians ad litem could not be called as witnesses given their statutory duty to act as advocates. Were they called as witnesses, the court reasoned, SCR 20:3.7 would require their removal as advocates and prevent discharge of their statutory responsibility.[60]

C. Claiming Personal Knowledge of Evidence in Argument

A core policy underlying SCR 20:3.7 is the unfairness of allowing a lawyer to testify as a witness and later argue that their testimony is credible and supports their client's claim.[61] For the same reasons, SCR 20:3.4(e) prohibits a lawyer from "assert[ing] personal knowledge of facts in issue except when testifying as a witness …" This prohibition applies to opening statements, closing arguments, and the framing of questions to a witness.[62]

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[54] *See Presnick v. Esposito*, *513 A.2d 165* (Conn. App. Ct. 1986); *Horen v. Bd. of Educ.*, 882 N.E.2d 14 (Ohio Ct. App. 2007).

[55] *See Farrington v. Law Firm of Sessions*, 687 So.2d 997 (La. 1997); *Gorovitz v. Planning Bd. of Nantucket*, 475 N.E.2d 377 (Mass. 1985). *Nat'l Child Care Inc. v. Dickinson*, 446 N.W.2d 810 (Iowa 1989). (lawyer who is sole shareholder of corporation may represent the entity at trial); *see also* North Carolina Ethics Op. 2020-4 (advising that Rule 3.7 does not necessarily prohibit a solo practitioner from representing their own firm in a fee dispute).

[56] Wis. Stat. §48.235.

[57] Wis. Stat. §54.40.

[58] Wis. Stat. §767.407.

[59] Wis. Stat. §938.235.

[60] Although *Hollister* an action involving the family under ch. 767, the court's analysis suggests it would apply with equal force to other types of actions involving guardians ad litem. *See also* Wisconsin Ethics Opinion EF-23-02 at 13.

[61] *Infra* at 2.

[62] *See State v. Sierra*, 523 S.E.2d 187 (S.C. 1999) (reversible error to include facts not of record in questions to witness); *United States v. Rangel-Guzman*, 752 F.3d 1222 (9th Cir. 2014) (error to refer to non-admitted pretrial interview with defendant during cross examination at trial); prosecutor violated rule by referring to information acquired from pre-trial interview with defendant in cross-examination questions). *See also United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002); *People v. Blue*, 724 N.E.2d 920 (Ill. 2000).

Conclusion

As with all disciplinary rules, it is important that lawyers and law firms that practice litigation understand SCR 20:3.7 and how it serves the important function of preserving the integrity of the fact finding function, particularly in trials to a jury.