
Wisconsin Memorandum Ethics Opinion M-10-02: Lawyer as Witness

November 1, 2010

Question: If a lawyer representing a plaintiff speaks with a defense witness and in the course of the conversation, the defense witness reveals information about possible illegal conduct by the defendant with respect to the witness and other information which greatly undermines the defense, may the lawyer continue to represent the plaintiff in the matter? Assume, for purposes of the question, that there were no other persons privy to this conversation.

Answer: SCR 20:3.7 normally prohibits lawyers from acting at trial in matters in which the lawyer is likely to be a necessary witness. The purpose of the Rule is to protect the integrity of the fact finding process by prohibiting lawyers from both giving evidence and later commenting on and arguing that evidence before the tribunal. It is important to note that this prohibition applies only at trial, and a lawyer who may be prohibited from representing a client at trial by SCR 20:3.7 is not prohibited by that Rule from representing the client in pre-trial proceedings. SCR 20:3.7 also prohibits only the individual lawyer from representing the client at trial and the lawyer's firm is not disqualified by the Rule. Therefore, if a lawyer is personally disqualified under SCR 20:3.7, another lawyer in the firm may still represent the client at trial.

The above paragraph assumes that the testimony the lawyer would provide would not be adverse to the client, the lawyer or the lawyer's firm. If such testimony would be adverse, then the lawyer has a conflict of interest under SCR 20:1.7, which is imputed to every other lawyer in the firm by SCR 20:1.10 and the firm must normally withdraw from the representation.

In the question posed above, the lawyer will likely be a necessary witness to provide the information regarding the conversation with the witness at trial in the event that the defense witness becomes unavailable or later denies the conversation. Therefore, the individual lawyer would be disqualified from representing the client at trial by SCR 20:3.7. Because the testimony by the lawyer would appear to be beneficial to the client, and not otherwise detrimental to the firm or the lawyer, the lawyer's firm may represent the client at trial. The individual lawyer may continue to represent the client in pretrial proceedings.