

Tip of the Month

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Lawyers As Witnesses: Address the Issue Early to Avoid Later Problems

There's a new ethics opinion, from Wisconsin, addressing the "Lawyer as Witness" rule, RPC 3.7. While every state has adopted the ABA's Model Rules, most states have also modified the language of the Rules in places, so be sure to consult your jurisdiction's version of the Rules when considering this issue and the Wisconsin opinion.

RPC 3.7 is rarely the topic of discipline. Most often, the Rule is used to support disqualification motions. While disqualification is less troublesome for a lawyer than discipline, it's typically more troublesome for the lawyer's client. Lawyers should avoid, if possible, providing viable grounds for disqualification to opposing parties. The Wisconsin opinion provides helpful information and analysis to consider when structuring representation and attendance at hearings, negotiations, and other interactions with witnesses and parties that are part of a litigation or transaction.

First, the Rule is uniformly applied to jury trials, but there's a question about whether it also applies to bench trials or administrative proceedings. The Wisconsin committee therefore recommends that lawyers seek guidance on this issue from the tribunal early in the matter.

Second, although this Rule is relatively infrequently applied, its application can be "disruptive and costly." Accordingly, lawyers should consider early on in the matter whether the Rule might come into play, in order to create a strategy to avoid its application. If the Rule cannot be avoided, best practice is to discuss the issue with the client as soon as possible.

Third, if the lawyer's testimony is favorable to the client, the lawyer may participate in preparations, but must relinquish advocacy at trial. However, if the lawyer's testimony will be adverse, a conflict of interest exists, and is governed by the conflict rules. The Committee suggests that in most cases, such a conflict will require withdrawal.

Fourth, the model rule contains three exceptions, including when the lawyer's testimony relates to an "uncontested issue," to the "nature and value of legal services rendered," or if "disqualification would "work substantial hardship on the client."

If you have questions about this or any other rule, ethical, risk management, or claim avoidance issue, please contact the senior risk management counsel at Attorneys Risk Management, and click on the "Request a Risk Management Consultation" button.