

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 682**

October 2018

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may Texas lawyers in the same law firm represent a client in a lawsuit involving a dispute in which one of the lawyers is likely to be a fact witness?

STATEMENT OF FACTS

A Texas lawyer assisted a client in drafting and negotiating a contract with another party represented by separate counsel. A lawsuit arose concerning the meaning of certain provisions in the contract. The lawyer drafted and negotiated those provisions. The lawyer's client wants the lawyer and a trial lawyer in the same firm to represent her in the lawsuit. Both lawyers are attempting to ascertain whether they may do so, and if so, under what conditions, if any.

DISCUSSION

Lawyers generally may not act as an advocate for a client and testify as a witness in the same proceeding. This prohibition, which is often referred to as the "advocate-witness rule," is set forth in Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct:

"(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- (3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing *pro se*; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter."

The principal purposes of the limitations on a lawyer acting as both a witness and an advocate in the same proceeding are (1) to ensure that a client's case is not compromised by being represented by a lawyer who could be a more effective witness for the client by not also serving as an advocate, (2) to ensure that the client is not burdened by counsel who may have to offer testimony substantially adverse to the client's position, (3) to avoid confusion for the finder of fact, and (4) to avoid possible prejudice to the opposing party that can arise when one person acts in the dual roles of advocate and witness. *See* Professional Ethics Committee Opinion 468 (March 1991). Comment 4 to Rule 3.08 further explains that combining the roles of advocate and witness can unfairly prejudice the opposing party because a witness must testify based on personal knowledge, while an advocate is expected to explain and comment on evidence given by others. Thus, it may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of proof.

Based on the facts presented, the lawyer who negotiated and drafted the contract in dispute may be a witness in the case. If the lawyer's testimony is "necessary to establish an essential fact on behalf of the lawyer's client," the lawyer will be prohibited from appearing as both an advocate and witness unless one of the five exceptions in Rule 3.08(a) apply. Under the facts, the lawyer is neither appearing *pro se* nor testifying on the nature and value of legal services rendered. In this situation, a lawyer-witness should not act as an advocate for a client before a tribunal unless (1) the testimony relates only to an uncontested issue, (2) the testimony relates solely to a matter of formality and no substantial evidence is expected in opposition, or (3) the lawyer promptly notifies opposing counsel that the lawyer expects to testify, and disqualification of the lawyer would work substantial hardship on the client.

Another important variable is the anticipated tenor of the lawyer's testimony. If the lawyer believes he or she will be compelled to provide testimony substantially adverse to

the client, the lawyer cannot continue as an advocate unless the client gives informed consent because of the substantial likelihood that the adverse testimony could damage the lawyer's ability to represent the client effectively. Comment 3 to Rule 3.08, provides:

“A lawyer who is considering both representing a client in an adjudicatory proceeding and serving as a witness in that proceeding may possess information pertinent to the representation that would be substantially adverse to the client were it to be disclosed. A lawyer who believes that he or she will be compelled to furnish testimony concerning such matters should not continue to act as an advocate for his or her client except with the client's informed consent, because of the substantial likelihood that such adverse testimony would damage the lawyer's ability to represent the client effectively.”

When a lawyer-witness should not act as an advocate for the client before a tribunal under Rule 3.08, the Rule does not prohibit the lawyer-witness from otherwise participating in the preparation of a matter for presentation to a tribunal. Rule 3.08(c); *see* Comment 8 to the Rule. In this situation, however, another lawyer in the testifying lawyer's firm may act as an advocate before a tribunal, provided the client's informed consent is obtained. Rule 3.08(c). In obtaining informed consent, the lawyer must explain the matter to the extent reasonably necessary to permit the client to make an informed decision. *See* Rule 1.03(b).

If there is a possibility that a lawyer may provide testimony regarding a contract that the lawyer negotiated and drafted, that lawyer or another lawyer in the same law firm should also consider whether a conflict exists under Rule 1.06 as part of deciding whether to represent the client in a lawsuit concerning the contract. One aspect of such representation will involve evaluating the possible testimony of the lawyer about the negotiation and drafting of the contract and advising the client on possible ways to proceed in light of that testimony. Rule 1.06 recognizes that in that situation the lawyer may not be able to represent a client if the representation of the client “reasonably appears to be or to become adversely limited by ... the lawyer's or law firm's own interests.” Rule 1.06(b)(2). A lawyer's ability to evaluate the possible testimony in a case to be given by the lawyer or by another lawyer in the lawyer's law firm and to thereafter advise a client on possible ways to proceed taking into account that testimony may be adversely limited by the lawyer's or the lawyer's law firm's own interests.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who represented a client in drafting and negotiating a contract and who may be called to testify as a fact witness in a subsequent lawsuit regarding that contract may not take an active role before the tribunal in the presentation of the matter unless (1) the testimony relates to an uncontested issue; (2) the testimony relates solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony,

or (3) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client, assuming the lawyer-witness' testimony will not be substantially adverse to the client. Even if the lawyer-witness should not act as an advocate for a client before a tribunal in the presentation of a matter, the lawyer-witness may otherwise participate in the preparation of the matter. With the client's informed consent, another lawyer in the lawyer-witness' law firm may represent the client in the matter as an advocate before the tribunal.