



# ISBA Advisory Opinion on Professional Conduct

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## Opinion No. 11-05

March, 2011

Subject: Lawyer as Witness; Multiple Representation

Digest: A lawyer who is disqualified by reason of his or her likely being called as a necessary witness may continue the representation until commencement of trial. Representation of multiple clients in a single matter is not prohibited, although a number of special concerns must be addressed. Representation of multiple clients in the same matter will ordinarily require the informed consent of the clients.

References: Illinois Rule of Professional Conduct 3.7

*Weil, Freiburg and Thomas, P.C. v. Sara Lee Corp.*, 218 Ill.App.3d 383, 160 Ill.Dec. 773 (1<sup>st</sup> Dist. 1991)

*Jones v. City of Chicago*, 610 F.Supp. 350 (N.D. Ill. 1984)

*Culebras Enterprises Corporation v. Rivera-Rios*, 846 F.2d 94 (1<sup>st</sup> Cir. 1988)

*Mercury Vapor Processing Techs., Inc. v. Village of Riverdale*, 545 F.Supp.2d 783 (N.D. Ill. 2008)

ISBA Advisory Opinion 04-01

ISBA Advisory Opinion 11-06

The Law Governing Lawyers, restatement of the Law Third, Sec. 75

### **FACTS**

Attorney A represents Client 1 and Attorney B represents Client 2 in related litigation against Defendant X. During the initial phases of the litigation, Attorneys A and B meet and consult on several occasions to coordinate their efforts against Defendant X.

During the pendency of the litigation, Client 1 discharges Attorney A. Client 1 retains Attorney B to represent Client 1 in the litigation against Defendant X. Attorney B now represents both Client 1 and 2 against defendant X.

After he has been discharged from the representation, Attorney A files a lawsuit against Client 1 to recover legal fees allegedly earned by Attorney A in the Defendant X litigation prior to being discharged. Client 1 seeks to retain Attorney B to represent him in the fee litigation. Attorney B agrees.

Upon learning that Attorney B will be representing Client 1 in the fee litigation, Attorney A advises Attorney B that Attorney B will be called as a witness regarding Attorney A's efforts in the Defendant X litigation. Attorney A suggests that Attorney B should withdraw from representing Client 1 in the fee dispute.

### **QUESTIONS**

1. Can Attorney B accept and represent client 1 in the fee dispute against Attorney A?
2. Can Attorney B accept and represent client 1 in the litigation against Defendant X?

### **OPINION**

#### **1. Lawyer as Witness**

Illinois Rule of Professional Conduct (“IRPC” or “Rule”) 3.7 addresses the ethics of a lawyer as a witness. Rule 3.7(a) provides that:

A lawyer shall not act as an 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.

The purpose of Rule 3.7 is to avoid situations where the trier of fact may be confused or misled by a lawyer acting as both advocate and witness. IRPC 3.7, Comment [2]. See generally, *Weil, Freiburg and Thomas, P.C. v. Sara Lee Corp.*, 218 Ill.App.3d 383, 160 Ill.Dec. 773 (1<sup>st</sup> Dist. 1991). The trier of fact might perceive the lawyer-witness as prone to distort the truth for his client, or conversely that the trier of fact might give more credibility to the testimony of an officer of the court. It also places the lawyer in the position of vouching for his or her own credibility. In any of these circumstances, a party may be unfairly prejudiced. See *Jones v. City of Chicago*, 610 F.Supp. 350 (N.D. Ill. 1984).

Rule 3.7 is narrowly drafted to address these concerns. Because the perceived confusion and prejudice only arises when a lawyer actually appears before a trier of fact, the Rule only prohibits lawyers from acting as advocates at trial if they will also likely be a necessary witness. If Attorney B is “likely to be a necessary witness” and none of the exceptions of Rule 3.7 apply, Attorney B may not represent Client 1 at trial in the fee dispute with Attorney A.

Notwithstanding the prohibition on appearing at trial, neither the Rule nor its purposes preclude a lawyer from participating in pre-trial litigation matters. This appears to be a well accepted and reasonably held view that the Committee shares. See ISBA Ethics Advisory Opinion 11-06. *Culebras Enterprises Corporation v. Rivera-Rios*, 846 F.2d 94 (1<sup>st</sup> Cir. 1988)(lawyers engaged in pre-trial work, but not actual trial, did not violate Rule 3.7 and thus could be awarded attorneys fees). See also e.g., *Mercury Vapor Processing Techs., Inc. v. Village of Riverdale*, 545 F.Supp.2d 783, 789 (N.D. Ill. 2008)(“even if [the lawyer] later becomes a witness at trial or in an evidentiary proceeding, he is not prohibited from conducting discovery, drafting motions, or serving in some other capacity...”). As far as Rule 3.7 applies, Attorney B is under no ethical restriction from accepting employment as Client 1’s lawyer in Client 1’s dispute with Attorney A. It needs to be noted, however, that where Attorney B is on notice that he or she likely will be called as a necessary witness, Rules 1.2(c) and 1.4 likely apply to require Client 1 to be informed, and potentially consent, to the limits on Attorney B’s representation.

## 2. Common Representation

The second question raises issues of the common representation (also referred to as “multiple representation”) of Clients 1 and 2 by Attorney B. As presented, there is nothing in the facts that would prohibit Attorney B from representing both Client 1 and Client 2 against Defendant X. However, Attorney B needs to be mindful of conflicts of interest and confidentiality issues.

As noted in the Comments to Rule 1.7 (“Conflict of Interest: Current Clients”) a number of concerns arise in any common (or multiple) representation. The common representation simply may fail because the clients will become antagonistic between each other. IRPC 1.7,

Comment [29]; see also IRPC 1.9, Comment [1] (addressing the conflict consequences of a failed common representation). Also, if the assets of Defendant X are insufficient to satisfy both Clients' demands an impermissible conflict may exist. See ISBA Advisory Opinion on Professional Conduct 04-01.

Issues of confidentiality and the attorney-client privilege must also be considered. Confidentiality as between the two clients will likely not be ethically permissible. Rule 1.7 Comment [31]("the lawyer [representing multiple clients] has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit."). In addition, should the relationship between the two clients break down and litigation ensue between them, the attorney-client privilege will likely not operate to protect communications between them individually and the attorney. IRPC 1.7, Comment [30]. Accord, The Law Governing Lawyers, Restatement of the Law Third, Sec. 75 (While communications by co-clients with their common lawyer retain confidential characteristics against third persons, in subsequent proceedings in which they are adverse to each other one of them may not invoke the attorney client privilege against the other.).

Finally, clients involved in a multiple representation should give their informed consent to it. A lawyer's communication to clients seeking informed consent should disclose the above factors. IRPC 1.7, Comment [18]("When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."); Comment [31]("The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other."). These factors are not an exhaustive list; the particular facts and circumstances of the representation will guide what disclosures may be necessary.

Notwithstanding these concerns, but without more facts, the Committee is reluctant to opine that the representation as presented is prohibited.