Ohio Board of Professional Conduct

OPINION 2020-05
Issued June 12, 2020
Withdraws Adv. Op. 2003-5

Law Director Acting as an Advocate in a Trial in Which Another Lawyer in the Same Office is a Witness

SYLLABUS: A law director or assistant law director may act as an advocate in a trial in which another lawyer in the office will testify as a witness only when the testimony is permitted by common law, if the disqualification of the advocate would work a substantial hardship on the city, or when the testimony relates to an uncontested issue or the nature and value of legal services.

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QUESTION PRESENTED: May a law director or an assistant law director act as an advocate in a trial in which another lawyer in the law director's office will testify as a witness on behalf of the city?

APPLICABLE RULES: Prof.Cond.R. 3.7

OPINION: Whether a government lawyer may act as an advocate in a trial in which another government lawyer will testify as a witness is a fact-specific determination. The Ohio Rules of Professional Conduct recognize there is a difference between relationships among salaried lawyers in a government agency and relationships among partners and associates of a law firm. Prof.Cond.R. 3.7. cmt. [8]. Thus, a government lawyer is permitted to testify or offer the testimony of another lawyer in the same government agency when the testimony relates to an uncontested issue, relates to the nature and value of legal services rendered in the case, if the disqualification of the lawyer would work a

substantial hardship on the client, or if the testimony is permitted by common law. Prof.Cond.R. 3.7(a),(c). cmt. [8].

The first two instances in which a government lawyer may testify as a witness or call another government lawyer to testify as a witness in a case do not require extensive analysis. First, whether the government witness lawyer's intended testimony in a case relates to an uncontested issue is easily determined at the outset. Second, it is highly unlikely that another lawyer employed in an advocating lawyer's government entity would be called to testify in a case about the nature and value of legal services rendered.

The more difficult analysis is whether the disqualification of a government lawyer, due to the testimony of a necessary government lawyer witness, would work a substantial hardship on the lawyer's client. *See* Prof.Cond.R. 3.7(a)(3). "A necessary witness under Prof.Cond.R. 3.7 is one whose testimony must be admissible and unobtainable through other trial witnesses." *Champoir v. Champior*, 2019-Ohio-2235, ¶17, 138 N.E.3d 530 (*citing Gonzalez-Estrada v. Glancy*, 2017-Ohio-538, 85 N.E.3d 273, (additional citations omitted)). The term "substantial," when used in reference to measuring the degree or extent of something, is defined as a matter of real importance or great consequence. Prof.Cond.R. 1.0(m). The analysis under the rule of what constitutes substantial hardship contemplates a balancing of interests of the client and those of the tribunal and the opposing party. Prof.Cond.R. 3.7, cmt. [4]; *Reo v. University Hospitals Health System*, 2019-Ohio-1411, 131 N.E.3d 986.

A law director faced with this situation may consider many variables in determining if the lawyer should be disqualified due to the expected necessary testimony of a government lawyer witness.[1] Relevant considerations may include the nature of the case, the importance and probable tenor of the lawyer witness' testimony, the probability that the testimony will conflict with that of other witnesses, whether the lawyer witness' testimony is duplicative, and the weight of other available evidence. *See* Prof.Cond.R. 3.7, cmt.[4]. The government lawyer should bear in mind that courts have previously indicated that mere financial hardship or long-term familiarity is not enough to meet the substantial hardship exception. *Popa Land Co. v. Fragnoli*, 2009-Ohio-1299, ¶21, 2009 WL 735969 (*citing 155 N. High, Ltd. v. Cincinnati Ins. Co.*, 1995-Ohio-85, 650 N.E.2d 869 and

[1] The Board recommends application of this opinion to all similarly situated government lawyers, including prosecutor's offices and village solicitor's offices.

State Employment Rel. Bd. v. Springfield Local School District Bd. of Edu., 104 Ohio App.3d 191, 661 N.E.2d 278 (9th Dist. 1995)).

Common law recognizes that a prosecutor in extraordinary circumstances may act as an advocate in a trial in which another member of the office will testify as a witness, so long as the lawyer-witness is effectively screened from the matter. *State v. Coleman*, 45 Ohio St.3d 298, 544 N.E.2d 622 (1989). In *Coleman*, a death penalty case, the Supreme Court noted, "[w]e recognize that a prosecuting attorney should avoid being a witness in a criminal prosecution, but where it is a complex proceeding where substitution of counsel is impractical, and where the attorney so testifying is not engaged in the active trial of the cause and it is the only testimony available, such testimony is admissible and not a violation of DR 5-102 [Prof.Cond.R. 3.7]." *Id*. at 302. Thus, in certain situations it is possible that common law may permit a law director witness or prosecutor witness to testify in a case if he or she is effectively screened from the advocating government lawyer.

By way of example, an individual accused of domestic violence may attempt to discuss the matter with an assistant law director or intake prosecutor, and, in the course of such discussion, make incriminating statements. That lawyer-employee may then become a necessary witness in the prosecution of the accused. In analyzing whether or not the law director or prosecutor may act as an advocate in the trial where another government lawyer witness is expected to testify, the advocating government lawyer must ensure the employee-witness is not involved in the prosecution of the case and is effectively screened. The advocating lawyer should further examine whether the testimony is necessary, admissible, or obtainable elsewhere. Additional factors to assess include whether the assignment of outside counsel is impractical, the complexity of the case, whether the testimony is of great importance, whether the testimony will conflict with that of other witnesses, and the weight of other evidence on the case. In a civil context, law directors or prosecutors faced with similar questions about their ability to act as an advocate in a trial where another government lawyer witness in the same office will testify, may use the same factors to analyze the hardship of lawyer disqualification to their client.

CONCLUSION: The determination of whether a law director or assistant law director may act as an advocate in a trial in which another lawyer in the same office will testify as a witness is a fact-based inquiry. In limited situations, a law director or assistant law

director may act as an advocate at a trial when another lawyer in the same office will testify as a witness in the case. Those limited situations include when the witness' testimony is permitted by common law, when the testimony is related to an uncontested matter or the nature and value of legal services rendered, or when disqualifying the law director or assistant law director would work a substantial hardship on the client city. The law director or assistant law director must ensure the employee-witness is not involved in the prosecution of the case and is effectively screened. In making the substantial hardship determination, the law director or assistant law director must first consider whether the testimony is necessary, with an analysis of the admissibility of the testimony and whether the testimony is obtainable elsewhere. The law director or assistant law director may then consider multiple variables such as whether the assignment of outside counsel is impractical, the nature and complexity of the case, the importance and probable tenor of the testimony, the probability that the testimony will conflict with that of other witnesses, whether the testimony is duplicative, and the weight of other available evidence.