

## Rule 34, Ariz. R. Crim. P. – Subpoenas

### ATTORNEY CONFLICT – Attorneys called as witnesses, in general..... .....Revised 3/2010

Under the Arizona Rules of Professional Conduct, codified at Rule 42, Rules of the Supreme Court, ER 3.7 (2003), an attorney cannot serve as both advocate and witness when the attorney would be considered a “necessary” witness, unless certain exceptions are met. ER 3.7 provides:

#### Lawyer as Witness

(a) A lawyer shall not act as 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.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by ER 1.7 or ER 1.9.

The comment to this Rule states in part:

[P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer’s client.

A conflict of interest that requires disqualification may arise “whether the lawyer is called as a witness on behalf of the client or is called by the opposing party.” *Sellers v. Superior Court*, 154 Ariz. 281, 289, 742 P.2d 292, 300 (App. 1987). *Sellers* raised,

but did not decide, the issue of whether the “substantial hardship” exception could be considered when testimony could potentially prejudice the client. *Id.* at 289, 743 P.2d at 300 (explaining that the text of ER 3.7 does not distinguish between testimony favorable or prejudicial to the lawyer’s client).

### **Defense Attorney as Witness**

A defense lawyer may be a witness for a defendant in a case handled by another firm member. Case law looks more critically at the situation in which a prosecutor calls a defense lawyer currently handling a defendant’s case. The defense lawyer may be compelled to withdraw because the testimony could be adverse to the defendant, thus depriving the defendant of his counsel of choice. Even if the defense attorney were able to testify, there are practical problems, such as the inability of a lawyer/witness to cross-examine himself.

In Arizona State Bar Ethics Opinion No. 87-10 (May 7, 1987), the Bar discussed ER 3.7 and concluded that a defense lawyer who is subpoenaed by the State to prove a defendant’s prior conviction should ordinarily seek to withdraw. The opinion addresses various justifications for not withdrawing, including “substantial hardship,” and finds them unpersuasive. The Bar does not express an opinion on how the court should rule on the motion to withdraw or whether it is appropriate for the prosecutor to subpoena defense counsel. However, the opinion states: “There is a serious question as to whether a prosecutor may ever subpoena counsel in a case she is presently defending, because to do so interferes with the defendant’s right to counsel of his choice. But the

ethical rules do not directly address the issue at present.” *Id.* at 5.<sup>1</sup> The rules were subsequently amended so that ER 3.8(e) places restrictions on when a prosecutor may subpoena a lawyer to testify about a past or present client.

In *Venable v. State*, 108 Md.App. 395, 404, 672 A.2d 123, 128 (1996), the court stated that a per se violation of Rule 3.7 did not occur when the State called defense counsel as a rebuttal witness. However, the prosecutor had to make a detailed offer of proof of what the expected testimony would be, defense counsel had to have an opportunity to respond, and alternate methods of presenting the evidence had to be considered. 108 Md.App. at 407, 672 A.2d at 129. If the court found the State entitled to defense counsel's testimony, the court then had to determine whether the defendant wanted the assistance of another attorney while his attorney testified. *Id.*

In *State v. Reynolds*, 564 S.W.2d 874, 876 (Mo. 1978), the court overturned the defendant's conviction when the prosecution was allowed to call defense counsel as a rebuttal witness without notice. The defendant argued he had been deprived of his right to counsel when his lawyer was forced to testify against him. *Id.* at 874-875.

The issue of calling opposing counsel is addressed in Arizona civil cases, but the analysis is somewhat different because the “right to counsel” argument is less significant. In *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 103, 624 P.2d 296, 300 (1981), decided under the former disciplinary rules, the Court stated that “an adversary system works best when the roles of the judge, of the attorneys, and of

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<sup>1</sup> Ethics Opinion No. 87-10 is available online at <http://myazbar.org/ethics/pdf/87-10.pdf>.

the witnesses are clearly defined. Any mixing of those roles inevitably diminishes the effectiveness of the entire system. The practice not only raises the appearance of impropriety but also disrupts the normal balance of judicial machinery.” [Citations omitted.] In connection with calling the opposing party’s counsel, which would result in disqualification, the court stated:

When an attorney is to be called other than on behalf of his client, a motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney’s client.

*Id.* at 105, 624 P.2d at 302.

In *Security General Life Ins. Co. v. Superior Court*, 149 Ariz. 332, 718 P.2d 985 (1986), the Court followed *Cottonwood Estates* and stated that ER 3.7 required an even more specific showing of necessity than the former disciplinary rules:

[T]he rules do permit a party to call adverse counsel as a witness and therefore there are times when counsel must be disqualified because an adverse party intends to call him as a witness. We believe, however, that the obvious dangers inherent in such a practice and the importance of the right to have the counsel of one’s choice require careful scrutiny of the facts before such a result is permitted....Ethical Rule 3.7 requires that a lawyer-witness may be disqualified only if he is a “necessary witness.” Even if he is a necessary witness, there are three enumerated exceptions to disqualification. .... A party’s mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony....[Under *Cottonwood Estates*] ... there is a dual test for “necessity.” First the proposed testimony must be relevant and material. Then it must also be unobtainable elsewhere.

*Id.* at 335, 718 P.2d at 988 [citations omitted].

In *State v. Caldwell*, 117 Ariz. 464, 471, 573 P.2d 864, 871 (1977), the Court stated, “as a matter of evidence law, the general rule is that a defense attorney is competent to testify on behalf of his client. Nevertheless, because of the ethical

improprieties of defense counsel acting as both witness and advocate, courts have historically disapproved of the practice.” [Citations omitted.] To resolve the tension between the evidentiary rule and the disciplinary rule, counsel is usually permitted to testify only if he or she withdraws. *Id.*

### **Prosecutor as Witness**

A prosecutor may be a witness for the State in a case handled by another prosecutor. Case law indicates that a prosecutor need not withdraw if called by the defendant. However, in *State v. Howard*, 27 Ariz.App. 339, 341, 554 P.2d 1282, 1284 (1976), the Court stated that if a prosecutor finds it necessary to testify for the State in a case he or she is prosecuting, the prosecutor should withdraw. Whether the prosecutor would be allowed to testify is left to the discretion of the court, as is the question of whether the defendant can call the prosecutor as a witness. *Id.* at 341-342, 554 P.2d at 1284-85. The Court stated that the prosecutor would have no duty to withdraw if called by the defendant. *Id.* at 342, 554 P.2d at 1285. (Nevertheless, from a practical standpoint, testifying and prosecuting appear incompatible.)

### **Pretrial Hearing Not Distinguished from Trial**

Trials and pretrial hearings are probably treated the same for purposes of this Rule. In *People ex rel. Younger v. Superior Court*, 86 Cal.App.3d 180, 193, 150 Cal.Rptr. 156, 163 (1978), the Court stated that the California disciplinary rule “prescribes only withdrawal ‘from the conduct of the trial,’ but the word ‘trial’ is broad enough to include a pretrial hearing at which the testimony of witnesses is taken and a contested fact issue is litigated. ... [T]he rule should not be so narrowly construed as to make it inapplicable to a deputy district attorney’s acting as both prosecutor and

material prosecution witness at a pretrial hearing that might significantly affect the trial.”  
For example, if testimony at the pretrial hearing determines whether a case will be dismissed, ER 3.7 would apply.