Attorney-Witnesses Face a Host of Hazards

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Increasingly, parties to litigation are seeking testimony from attorneys. Sometimes clients want their attorneys to testify to buttress their case or otherwise support their legal position. Other times, litigation adversaries attempt to subpoena their opposing counsel as part of a larger litigation strategy. Attorneys may also be called as fact witnesses to the events at issue.[1]

Although many attorneys may be comfortable with the idea of testifying, attorney testimony is comparable to high-stakes poker, and the decision to testify should not be taken lightly. In addition to the risks inherent for all witnesses, such as perjury or impeachment, attorneys face unique additional hazards, such as creating a conflict of interest with a client, and other potential ethical implications, which only raise the stakes higher.

For this reason, an attorney who receives a subpoena or other request for testimony should carefully consider the associated risks, and take appropriate steps to mitigate those risks. Upon receiving such a request or subpoena, an attorney should first ask, "Who wants the testimony?" The answer to that question can determine what preventative steps are necessary to protect both the attorney and the attorney's law practice.

This article discusses common parties who may seek attorney testimony and addresses the risks associated with each type of request.

Client Requests

Sometimes clients ask their attorney to testify on their behalf because they believe the attorney is best situated to support their cause. These types of requests occur only in limited situations, however, such as where a client asserts the "advice of counsel" defense or the attorney is a fact witness regarding the negotiation of an agreement that has become the subject of a dispute.

An attorney testifying for a client implicates several significant risks. First, the moment an attorney testifies on behalf of a client, the client's attorney–client privilege and work product protections are potentially waived because the privilege cannot be used as both a sword and shield.[2]

Of course, it is possible to offer testimony limited to topics that segregate privileged and non-privileged information.[3] The risks of successfully walking that line are so great, however, that efforts to wall off privileged information rarely succeed. The attorney should disclose this risk to the client, who should assume the risk through informed consent provided in writing. Because testifying on privileged topics may waive certain protections the client might otherwise enjoy, the first step for an attorney at a law firm with its own in-house counsel is to notify such in-house counsel of the client's request for testimony or of the informed consent. Attorneys whose organizations do not have an in-house counsel position should consult with outside counsel.

Second, the Colorado Rules of Professional Conduct bar some attorneys, such as litigators, from continuing the representation after testifying on a client's behalf in most circumstances.[4] State law varies regarding the degree to which testifying attorneys can continue to participate in a trial as advocates for clients. In Colorado, an attorney cannot act as an advocate and a witness in the same case except under limited circumstances.[5] Colo. RPC 3.7(a) expressly provides that "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testi-

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mony 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."[6] When an attorney's testimony is likely to create a conflict of interest with a current or former client, the attorney must obtain the client's written, informed consent before testifying.[7]

Third, attorney testimony can create a conflict of interest between the client and the attorney's law practice.[8] When testifying, an attorney not only must consider what is best for the client, but also must be cognizant of how providing testimony under oath might adversely affect his law practice. In addition to the risk of an allegation of perjury, there are risks that the testimony might suggest a violation of the Rules of Professional Conduct or the standard of care, both as evidence of a deviation from the applicable standard of care and as an admission under oath.

The attorney's testimony also may create a conflict with the client.[9] Certainly, it is the client's right to waive the attorney–client privilege by permitting such testimony, but it is the attorney's obligation to protect confidences and secrets, as well as privileged communications, until a waiver has occurred.[10] Indeed, as a witness, an attorney's highest and most sacred obligation is to the court, not the client.[11] Again, this risk of conflicting interests should be disclosed in writing to the client and written consent obtained before any continued future involvement in the matter, assuming there are no actual, non-waivable conflicts implicated.[12]

Because of these risks, it is a best practice for an attorney who is considering testifying on behalf of a client to seek the advice of counsel. It is too much to expect a testifying attorney to protect the client's interest while simultaneously protecting the attorney's interest. The safest course is always to have independent counsel advise the attorney-witness and protect the attorney in this situation.

Requests by Opposing Counsel

Counsel-requested attorney testimony carries the same types of risks as testimony requested by a client, and these risks must be addressed with the client. The third consideration discussed above—a potential conflict between the attorney's law practice and the client—is especially important where the client's adversary seeks the lawyer's testimony, because both the client's interests and the attorney's interests are at stake.

Effective risk management involves providing notice to clients of any discovery request or subpoena directed personally to the attorney or law practice. As a threshold matter, such discovery or subpoena should also be reported to the law firm's counsel. In addition, because such "process" can trigger a mandatory reporting obligation under some legal malpractice policies, the attorney and the law practice should determine whether they must report the discovery requests or subpoena to their legal malpractice insurer. If so, the notice will preserve coverage if a related claim is later asserted. Moreover, many professional liability carriers will assist their policyholders who have been served with subpoenas.

Federal Rule of Civil Procedure 26 and judicial interpretation of the Rule are quite strict for parties attempting to obtain discovery from opposing counsel.[13] Nonetheless, attorneys are sometimes called to testify at depositions and trials.[14] When this occurs, the attorney should carefully consider the risks and, if appropriate, should challenge the request to testify based on the applicable legal authorities.

Third-Party Requests

Sometimes a third party will call the attorney to testify as a fact witness.[15] For example, an attorney who drafted a will may be subpoenaed to testify in a probate proceeding regarding the competency of the testator. Insurance defense attorneys are sometimes called in bad faith litigation against the insurance company to attest to the investigation, evaluation, and adjustment of the claim.[16] Even testifying in these situations carries risk.

Unlike a current client's request for testimony, which may raise conflict issues with that client, third-party requests for fact testimony often implicate a former representation. Yet the attorney should nonetheless advise the former client of the request and the accompanying risk of disclosure of the substance of privileged communications.

Specifically, because attorney testimony typically involves a prior representation, the attorney testimony and the prior representation are likely "substantially related."[17] Pursuant to Colo. RPC 1.9, a matter is "substantially related" if "it involves the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."[18] As a result, the ethics rules associated with conflicts of interest and duties owed to clients, like those concerning former clients, almost always apply to these types of requests for attorney testimony.[19]

Under these circumstances, the attorney should give notice to the firm's in-house or other counsel and the former client, so the

client can take the necessary steps to protect her interests. Effective risk management entails considering the issues discussed above before agreeing to a third-party request.

Sometimes, third-party requests for testimony come from government agencies, including law enforcement agencies. Notwithstanding any assurances provided, attorneys should tread carefully in such circumstances, even when the situation involves an informal interview. As a best practice, any attorney who receives a request for testimony or a subpoena from a government agency should immediately seek the assistance of counsel.

Challenging a Subpoena

An attorney who wishes to challenge a subpoena compelling his testimony has a limited number of procedural options. The attorney could move for entry of a protective order or for an order quashing the subpoena, although a discussion of the grounds for obtaining such orders is beyond the scope of this article. Further, the client or former client could similarly seek an order barring the third party from compelling the attorney to testify.[20]

Conclusion

The risks associated with attorney testimony are very real, and the decision to testify should not be taken lightly. An attorney who is subpoenaed to testify should consider the risks discussed in this article before deciding to testify, and implement the practices suggested above to ensure she protects both herself and her client.

Reader feedback on this article is welcomed and appreciated. Any references in this article to "safest courses to proceed," "safest course," or "best practices" are not intended to suggest that the Colorado Rules require such actions. Often, best practices and safest courses involve more than just complying with the Rules. In practice, compliance with the Rules can and should avoid a finding of discipline in response to a grievance or a finding of liability in response to a malpractice claim. However, because most claims and grievances are meritless, effective risk management in the modern law practice involves much more. Hence, best practices and safer courses of action do more: they help prevent and more quickly defeat meritless claims and grievances.

Notes

1. *See Luster v. Schafer*, No. 08-cv-02399-PAB-KMT, 2009 WL 2219255, at *3 (D.Colo. July 23, 2009) (citing *United Phosphorous, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248 (D.Kan. 1995) ("Attorneys with discoverable facts not protected by attorney–client privilege or work product, are not exempt from being a source for discovery by virtue of their license to practice law or their employment by a party.")).

2. *Frontier Ref. v. Gorman-Rupp Co.*, 136 F.3d 695, 700–05 (10th Cir. 1998); *Sedillos v. Bd. of Educ. of Sch. Dist. No. 1*, No. 03-cv-01526-EWN-BNB, 2005 WL 2086008, at *33 (D.Colo. Aug. 29, 2005).

3. *See Luster*, 2009 WL 2219255, at *3.

4. Colo. RPC 3.7. *See FDIC. v. Isham*, 782 F.Supp. 524, 528–29 (D.Colo. 1992) (disqualifying attorney because it was likely attorney would testify and the dual role would "taint the trial" and possibly confer an unfair advantage).

5. Colo. RPC 3.7, cmt. [6].

6. Colo. RPC 3.7(a).

7. Colo. RPC 1.7; Colo. RPC 1.9. *See generally People v. Albani*, 276 P.3d 64, 66-68, 70 (Colo. PDJ 2011) (attorney suspended for disclosing client confidences at in camera conferences, ostensibly to protect himself from possible ineffective assistance of counsel claim, without client consent).

8. *See Fognani v. Young*, 115 P.3d 1268, 1278 (Colo. 2005) (addressing the extent to which disqualification of an attorney based upon a conflict of interests with the client precludes the participation of his firm in the case).

9. *Williams v. Dist. Ct.*, 700 P.2d 549, 553 (Colo. 1985) ("Obviously, a lawyer's duty to exercise independent judgment on behalf of his client will be even more seriously jeopardized when the lawyer is called as a witness to give testimony adverse to his client.").

10. *Mountain States Tel. & Tel. Co. v. Di Fede*, 780 P.2d 533, 542 (Colo. 1989) (noting a client may waive the attorney–client privilege, and waiver "is really a form of consent to disclosure"); Colo. RPC 1.6.

11. *Jones v. Dist Ct.*, 617 P.2d 803, 808 (Colo. 1980) ("Attorneys are officers of the court and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'").

12. Colo. RPC 1.7; Colo. RPC 1.9.

13. Fed.R.Civ.P. 26(b)(2)(C). *See Boughton v. Cotter Corp.*, 65 F.3d 823, 829 (10th Cir. 1995) (favoring the criteria set forth in *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (restricting circumstances under which opposing counsel may be deposed)).

14. *See, e.g.*, *Shelton*, 805 F.2d at 1327 ("[C]ircumstances may arise in which the court should order the taking of opposing counsel's deposition . . . [b]ut those circumstances should be limited to where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.") (internal citations omitted).

15. *See, e.g.*, *Luster*, 2009 WL 2219255, at *2 (noting that the *Shelton* factors did not apply to attorneys who are not counsel in the case, and outside attorneys with discoverable information are subject to being deposed.).

16. *See, e.g.*, *Gebremedhin v. Am. Family Mut. Ins. Co.*, No. 13-cv-02813-CMA-NYW, 2015 WL 4272716, at *3 (D.Colo. July 15, 2015).

17. *See Ball Corp. v. Xidex Corp.*, 705 F.Supp. 1470, 1473–74 (D.Colo. 1988) (finding that "the mere coincidence that the person . . . in the prior litigation is also defendants' attorney in this litigation is not sufficient to preclude [his] deposition."); Colo. RPC 1.9(b).

18. Colo. RPC 1.9, cmt. [3].

19. *See, e.g.*, Colo. RPC 1.9.

20. Absent a court order relieving the attorney from his duty to respond to a subpoena, the attorney must comply with it or face serious consequences. For example, on November 2, 2016, a federal court affirmed a finding of contempt and an award of sanctions against Husch Blackwell for failing to comply with a third-party subpoena. See Memorandum & Order, *West Side Salvage, Inc. v. RSUI Indem. Co.*, No. 15-cv-0442-MJR, slip op. at 6-8 (S.D.Ill. Nov. 2, 2016). ■