

## **OPINION 2008-4**

### **SYNOPSIS**

- (1) A lawyer may not continue to represent a client in trial if another current client will be called as a directly adverse witness by opposing counsel and where the lawyer possesses confidential client information adverse to the client witness that should be used during cross-examination of the client witness.
- (2) Whether the mid-trial disclosure of the client/witness requires preclusion of the witness, a new trial, or some other consequence is a legal question for the court and outside the scope of this Section's authority.

### **FACTS**

This question arises in the context of a Probate Court case involving a Mother's motion to terminate guardianship and the Guardian's motion to terminate Mother's parental rights and adopt the children. Mother is represented by Law Firm A. Guardian has been presenting testimony first. Shortly before the third day of hearing, a new witness, Witness C, came forward to offer testimony against Mother, on behalf of Guardian. Guardian's counsel, Law Firm B, believes this witness, who has been a long term friend of Mother, has relevant testimony to the issues under consideration. Upon discovery of the availability of this witness, Guardian noticed Law Firm A of her intention to call Witness C to testify. However, Witness C has been, and is currently, represented by Law Firm A in unrelated matters – a representation that began long before Law Firm A undertook representation of Mother. Once Law Firm B called Witness C to testify against Mother, an intractable conflict instantly arose. Although Law Firm A was aware of the friendship between Mother and Witness C at the time they agreed to represent Mother,

they did not believe that presented a conflict, since they did not expect that Witness C would testify in this case at all, much less as an adverse witness.

Law Firm A had acquired information regarding Witness C in the course of its prior and ongoing representation of her that would be extremely valuable for cross-examination (bearing directly upon credibility and truthfulness, among other things), meaning that Law Firm A's duties to Mother require that it be aired. However, this information is adverse to Witness C, meaning that exposing it would violate Law Firm A's duties of loyalty and confidentiality to Witness C, quite aside from the ethical conflict that would be presented by cross examining a current client. Since these conflicting duties have placed Law Firm A in an untenable ethical dilemma, it filed a Motion in Limine seeking to exclude Witness C, and/or to withdraw. Law Firm A believes that these conflicts cannot be waived by either Mother or Witness C under Rule 1.7(a) (2), and argues that with significant constitutional rights at stake, and in the middle of hearing, the interests of Mother in keeping her counsel should outweigh the Guardian's interest in calling this witness, and the witness should be excluded. Law Firm A argues that unless the witness is excluded, they must withdraw pursuant to Rule 1.16(a), which would deprive Mother of her counsel in the middle of hearing. Delay in this case is even more prejudicial than in civil litigation, since it impacts the placement of children. Law Firm A further argues that this witness's testimony is cumulative and is offered under circumstances that undermine its credibility.

Law Firm B asserts that the remedy of excluding this witness is prejudicial to the Guardian. Counsel for Guardian believes that Witness C has information that is directly relevant to a highly controverted issue in the case. Counsel for Guardian believes that the evidence that

this witness would testify to is not at all cumulative and goes directly to Mother's credibility, and that this evidence is not available from any other witness. Guardian argues that she should not be deprived of the use of this witness because of a conflict that is not of her making. Counsel further argues that her duty of loyalty and zealous representation of her client requires her attempt to present all evidence that she believes would be helpful to her client's case. Counsel further suggests that the Mother's rights could be preserved and Guardian's right to call this witness could also be preserved by appointing a special counsel to cross-examine this witness, thereby avoiding the conflict with Law Firm A, a remedy which Law Firm B maintains does not eliminate the conflict or the ethical dilemmas it faces.

### ANALYSIS

The current Vermont Rules of Professional Conduct (the "Rules") do not differ from their predecessor the Vermont Code of Professional Conduct (the "Code") in prohibiting an attorney or an attorney's firm ( by extension under Rule 1.10) from accepting or continuing representation of one client in litigation when another current client will be called as a directly adverse witness and where the lawyer possesses confidential client information which the lawyer would be required to use against the witness client during cross-examination in order to competently represent the party client.

Rule 1.7 currently provides:

#### **Rule 1.7. Conflict of Interest: General Rule**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

This section has issued numerous formal and informal opinions on this current client/witness situation (*see*, Opinions 98-13, 90-17, 90-07 and 87-10) and on the similar but more common former client/witness situation (*see*, Opinions 88-07 and 88-02). In the former client/witness conflict situation, there are cases where an attorney may accept or continue representation. But in the current client/witness conflict situation presented here, and as the requesting attorney acknowledges, the representation cannot be continued. Our prior opinions express the reasons for such a rule, based not only on the express provisions of the applicable rules, but also the underlying policy considerations related to conflicts of interest, maintaining confidentiality, providing zealous representation of the non-witness client in litigation, and more. The comments to Rule 1.7 confirm that the same considerations applied in our opinions under the Code apply with equal force under this Rule.

In the facts presented for an advisory opinion here, Law Firm A is correct in its understanding that if the current client/witness is called to testify, Law Firm A must resign from

its representation. This conclusion applies not only to Rule 1.6 (governing confidentiality obligations) but also under Rule 1.7.

Law Firm A notes that it has an ethical dilemma as a result of the Rules' application, as the exigent circumstances of an ongoing trial to determine guardianship and parental rights raise the stakes. This "ethical dilemma," however is not one which arises under the Rules, but a matter of trying the case under Vermont law, and we are constrained in our own authority by the Section rule of procedure seven providing "The Section will not issue opinions on question of law." Thus, we cannot opine on how to resolve the trial dilemma. The suggestion that has been made to use a special counsel for cross examination of the client witness strikes us as problematic.<sup>1</sup> At the same time, we are not in a position to weigh, let alone decide, whether the witness is cumulative, what the consequences of mid-trial notice of the witness ought to be, whether her exclusion would be prejudicial, or the host of other possible legal issues presented.

In conclusion, we would like to reemphasize that there is no dilemma under the Rules. If the current client is permitted to testify as an adverse witness in the circumstances presented, Law Firm A must withdraw.

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<sup>1</sup> On these facts, for example, we note that the Mother is entitled to have her attorney attack the testimony of the client witness in closing argument as well as during cross examination.