OPINION 2014-1

Requesting attorney poses the following inquiry: "May a licensed attorney employed by a state department as an investigator serve as a witness in an administrative hearing and, at the same time, present the case in lieu of department legal counsel without violating V.R.P.C. 3.7?"

Synopsis: A licensed attorney employed by a state department as an investigator cannot serve both as a witness in an administrative hearing and as an advocate presenting the case in lieu of department legal counsel consistent with V.R.P.C. 3.7 if the attorney is a necessary witness in the hearing and is testifying about a contested issue.

Vermont Rule of Professional Conduct 3.7, captioned "Lawyer as Witness," provides as follows:

(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 Rule 1.7 or Rule 1.9.

The inquiry posed by the requesting lawyer involves a straightforward application of V.R.P.C. 3.7. As explained in the comments to Rule 3.7, "combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client," because witnesses and lawyers play such different roles in contested proceedings. The role of a witness is to testify about fact issues based upon personal knowledge. A lawyer, on the other hand, serves as an advocate, explaining and making arguments based upon the evidence, with the goal of convincing the tribunal to reach the result supported by their client.[1]

Given the different responsibilities of witnesses and advocates, Rule 3.7 begins by imposing the bright line rule that a lawyer is prohibited from serving in the dual role of advocate and witness if the lawyer is "likely to a be a necessary witness." As explained in World Youth Day, Inc. v. Famous Artists Merchandising Exch., Inc., 866 F.Supp. 1297, 1301 (D.Colo.1994), whether a lawyer is a "necessary witness" depends on whether their anticipated testimony is "relevant, material and unobtainable elsewhere." Accordingly, the Professional Responsibility Section first responds that, unless the testimony to be provided by the requesting lawyer relates only to a ministerial issue, and can be provided at the administrative hearing by another witness, then the

[1] "Tribunal" is defined in V.R.P.C. 1.0(m) to include an "administrative agency or other body acting in an adjudicative capacity." Given this definition, the term "trial" in Rule 3.7 is properly construed to include an administrative hearing. See In re Disciplinary Proceeding Against Pfefer, 344 P.3d 1200, 1203-04 (Wash. 2015) (holding that R.P.C. 3.7 applies to administrative proceedings).

requesting lawyer is a "necessary witness," and V.R.P.C. 3.7 will prohibit the lawyer from serving as both witness and advocate unless an exception in Rule 3.7 is applicable.

Rule 3.7 establishes a number of exceptions to the prohibition on a lawyer serving as both necessary witness and advocate. As explained in the Comments to Rule 3.7, a necessary witness is allowed also to serve as an advocate in a contested proceeding "if the testimony will be uncontested, [because then] the ambiguities in the dual role are purely theoretical." Accordingly, the Professional Responsibility Section next finds that, if the requesting lawyer is a necessary witness in the administrative hearing, then V.R.P.C. 3.7 prohibits that lawyer from also serving as an advocate in the same proceeding unless the requesting lawyer's testimony relates to an uncontested issue.

Since the requesting lawyer is an investigator who works for the State , it appears likely that the requesting lawyer will not be testifying about "the nature and value of legal services rendered in the case" as addressed in V.R.P.C 3.7(a)(2). Under the circumstances, the only other exception to the general prohibition on a lawyer serving in the dual role of both necessary witness and advocate is when the lawyer's disqualification "would work substantial hardship on the client. As explained in the comments to V.R.P.C. 3.7, this exception "recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. . . . [I]n determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client." Given the ability of State government to plan ahead and allocate resources as needed, however, it is difficult for the Professional Responsibility Section to envision a scenario in which it would work substantial hardship on the State to enforce the prohibition on a lawyer serving in the same proceeding as both a necessary witness testifying about disputed facts, and as an advocate.

Finally, V.R.P.C. 3.7 clarifies that 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 Rule 1.7 or Rule 1.9." The scope and applicability of attorney-client privilege and conflict of interest principles in relation to lawyers employed by the government are matters beyond the scope of the inquiry posed by the requesting lawyer and this ethics opinion. However, it must also be noted that the requesting lawyer would be obligated to evaluate both conflict of interest and attorney-client privilege issues under V.R.P.C. 1.7 and 1.9 if that lawyer is appearing as a witness in an administrative hearing where the advocate is a lawyer who is employed by the same government agency.