NATIONAL BUSINESS INSTITUTE

"ADVANCED TRIAL ADVOCACY IN SOUTH CAROLINA"
February 10-11, 2005

Marcus A. Manos, Member-Nexsen Pruet, LLC

VI. ETHICAL CONSIDERATIONS

The trial of a case presents specific ethical considerations not normally encountered in the other stages of litigation. When you undertake to represent a client, your firm conducts a thorough conflict of interest review. However, when you represent a long-standing client and the litigation arises out of a transaction in which your firm was involved, a firm member may become a material witness as to an issue in dispute. This can create a different type of conflict of interest which must be reviewed under the rules. Also, many lawyers today believe it is to their advantage to represent an ex-employee or friendly witness in the course of a deposition. This allows the lawyer to shield the deposition preparation meetings from inquiry and to act as the deponent's lawyer. When the witness comes to trial, conflicts may arise if the witness give testimony harmful to your client's case and you must attack the witness.

The ethical rules also place limitations on how you may attack prejudicial evidence introduced by your opponent. While zealous advocacy requires you to attack the foundation of evidence and testimony, its credibility, and otherwise vigorously represent your client, knowledge regarding the evidence may limit the scope of what you may do before the tribunal.

Finally, the ethical rules place restrictions on what the lawyer may do in preparing both client and non-client witnesses to testify. The witness testimony should always be

his or her own, not a parroting of the lawyer's words. The materials below will discuss these restrictions and the potential consequences when the line is crossed.

A. CONFLICTS OF INTEREST AT TRIAL

Lawyers and law firms develop relationships with clients that last over time. They handle various transactions and sometimes those transactions lead to litigation. The client often looks to the same lawyer or law firm to handle the litigation who represented the client in the initial transaction. The client views this as an important cost savings and increase in expertise because the lawyer already understands the transaction.

Representation of a client at trial can violate the Rules of Professional Conduct when the trial attorney must testify as to a material issue in the case. The rules specifically forbid a lawyer from having both the role of advocate and material witness as it confuses the role of the lawyer and when the jury should be listening to the lawyer for evidence versus argument. S.C. App. Ct. R. 407, Rule 3.7.

This disqualification is not, however, an imputed disqualification. Another attorney in the same firm may proceed as trial counsel. S.C. App. Ct. R. 407, Rule 3.7(b). The trial court may also allow the lawyer witness to proceed as trial advocate if the testimony relates to an uncontested issue, relates only to the nature or value of legal services rendered in the case, or disqualification would cause a substantial hardship to the client. S.C. App. Ct. R. 407, Rule 3.7(a)(1), (a)(2), and (a)(3). As the comment to the rule accurately points out: "Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client."

The inquiry does not end with the application of Rule 3.7, however. If the attorney/witness testimony contradicts that of the client or seriously injures the client's

position, then a conflict of interest may arise under Rule 1.7 or Rule 1.9, which would disqualify the entire firm, not just the testifying attorney. Thus, it is absolutely essential that you know and completely understand the testimony that will be given by an attorney witness in your firm in advance of making the decision whether or not to continue as trial counsel. The nature and content of the testimony should be revealed to the client in writing. You must invite the client to analyze with a separate, independent lawyer whether or not the client believes a conflict exists under Rule 1.7 or 1.9.

You must also feel comfortable in rendering your own opinion internally that there is no conflict under Rule 1.7 or 1.9. You must warn the client of the possibility that the opposing party may seek disqualification and, under certain circumstances, may win disqualification which will then cause the client to incur the expense of getting new trial counsel. You must also warn the client of the impact on the attorney client privilege if the attorney testifies. If the client allows the attorney to testify, the client may waive the attorney client privilege, at least as to that topic. See, e.g., *Drayton v. Industrial Life & Health, Ins. Co.*, 205 S.C. 91, 31 S.E.2d 148 (1944). If you follow these steps, many clients will opt to start with a different law firm from the beginning simply to avoid the possibilities.

It is not always obvious from the initial pleadings and investigation that a lawyer involved in the earlier transaction may be a material witness. As the issues develop, you should reassess the issue.

You ignore the analysis of Rule 3.7 and proceed as your client's trial attorney when you yourself are a material witness at great risk to yourself. The Supreme Court of South Carolina will discipline an attorney for violating Rule 3.7 because of the

prejudicial impact it has on the opposing party, not just the client. Violation of Rule 3.7 was one of the justifications for public reprimands entered in two cases in 2003. See, e.g., *In the Matter of Atwater*, 355 S.C. 620, 586 S.E.2d 589 (2003); *In the Matter of Westmoreland*, 353 S.C. 44, 577 S.E.2d 2009 (2003).

The prohibitions of Rule 3.7 do not extend to non-lawyer employees of the law firm. Thus, an investigator employed by the law firm may testify or an accident reconstruction expert employed directly by the law firm may testify. I often use my own paralegals to testify in trademark cases regarding Internet searches for similar marks being used by other companies to help show that the plaintiff failed to enforce its mark or that the mark has entered the public domain. See, e.g., *Hagood v. Sommerville*, 2005 WL 17862 (S.C. Sup. Ct. January 4, 2005) (Op. No. 25918) (unpublished opinion **attached**).

In one of the few cases addressing the "hardship" exception to Rule 3.7, the Court of Appeals of South Carolina applied a fairly liberal standard and affirmed the trial court allowing counsel to testify. *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 347-48, 450 S.E.2d 66, 75 (Ct. App. 1994) (cert. denied). Injecting your own factual knowledge into the case as if you are a witness may have certain risks, however. Many lawyers will cross-examine a witness regarding a statement made to the lawyer in the course of investigating the case. Usually, the witness has testified contrary to what you were told and it has surprised you and you are attempting to limit the damage with a last minute move. In one criminal case, the Court of Appeals of South Carolina held that a prosecutor who engaged in this tactic made himself a witness under Rule 3.7 and, since he was not placed on the stand and cross-examined regarding the alleged inconsistent statement, the defendant's Sixth Amendment rights were violated and the conviction

reversed. *State v. Sierra*, 337 S.C. 368, 376-79, 523 S.E.2d 187, 191-92 (Ct. App. 1999). One way to avoid this problem is to always have a non-lawyer employee or agent like an investigator or paralegal with you during an important interview. This person can then be the offering witness on the impeachment material, if needed.

Another area which may lead to potential conflicts of interest at trial comes from representing non-party witnesses in deposition. Over the last decade, I have noticed a trend among lawyers to represent former employees or other friendly non-party witnesses at the deposition. The lawyer believes that this creates a strategic advantage as the deposition preparation is no longer subject to examination and the lawyer can assert certain objections which would otherwise not be available. Under recent amendments to the South Carolina Rules of Civil Procedure and the United States District Court Local Civil Rules regarding depositions, representing a witness at deposition is not as effective of a tactic as it used to be since conferences held with the witness during the deposition are now open to examination by opposing counsel without regard to the attorney/client privilege or the work-product exemption. S.C. R. Civ. P. Rule 30(j); U.S.D.C. Local Rule 30.04.

My research has not uncovered a case where a trial court found a conflict of interest simply because an attorney represented a party and a non-party witness at a deposition. Indeed, the few decisions that I found specifically allowed it. See, *Varner v. Palmdale Chamber of Commerce*, 2002 WL 1398236 (Cal. App. 2002) (unpublished opinion **attached**); *Gould Investors, L.P. v. The General Ins. Co. of Trieste & Venice*, 1992 WL 42164 (S.D.N.Y. 1992) (unpublished opinion **attached**). I believe the real problem in this dual representation will emerge if the witness' testimony in deposition is

adverse to your client's interest and you must then attack the witness on cross-examination in the deposition or if the witness comes to trial and makes statements adverse to your party client's position which you must then attack on cross-examination. The act of attacking your own client on cross-examination could easily seem to violate Rule 1.7 or even Rule 1.9 if the attorney/client relationship has been terminated. This could lead to discipline or perhaps disqualification. It will be interesting to see how the law develops in this potential area of conflict of interest.

B. ETHICAL LIMITATIONS ON HANDLING PREJUDICIAL EVIDENCE

Lawyers know instinctively that they must minimize the impact of prejudicial evidence. Every piece of evidence your opponent introduces should be designed to weaken some proposition of your case or build some proposition of the opponent's case. This is true whether it is witness testimony, documents, videotape, or other physical evidence. Our duty as zealous advocates is to attack prejudicial evidence to minimize its impact on the thinking of the jury and show how the evidence does not really affect the crucial issues of the case. The rules of ethics place limitations on how a lawyer may go about this.

First, a lawyer may not even controvert an issue unless there is a non-frivolous basis including a good faith argument for the extension, modification or reversal of existing law. S.C. App. Ct. R. 407, Rule 3.1. A lawyer may also not make a false representation of material fact to a tribunal nor offer evidence he/she knows to be false. *Id.*, Rule 3.3(a)(1) and (a)(4). Is it ethical to attack the genuineness of a document, for example, when you know for a fact it is a genuine and accurate copy? Likewise, an attorney may never alter, destroy or conceal a document or other material having

evidentiary value in an attempt to undermine the opponent's case. *Id.*, Rule 3.4(a). The thrust of these rules makes clear that a lawyer acting as advocate at trial should have a reasonable and good faith basis for the attacks on the credibility, meaning, and force of the opposing evidence presented. This having been said, it is difficult to imagine a court or other disciplinary body attempting to enforce the fine line between conjecture not based upon some reasonable good faith and other attacks launched at opposing evidence.

Perhaps the most difficult circumstance for a lawyer at trial comes when a third party witness, friendly to your client, states facts which are adverse to your client's position. The witness then states that he will not testify in a court with his accurate memory because it would hurt your client's position. You are under an absolute obligation not to present the witness if he is going to provide false information, even if your client wants you to. *Id.*, Rule 3.3(a)(4). Further, you cannot assist the witness in falsifying evidence even if it is only offered in response to opposing counsel's questions. *Id.*, Rule 3.4(a). If the witness testifies falsely in answer to another attorney's question, you are obligated to take reasonable remedial measures. *Id.* at Rule 3.3(a)(4).

In the section I offered above on opening statements, I discussed the danger of making an opening that will not be supported by admissible evidence or asserting personal knowledge of facts. You should note that engaging in this conduct also violates the Rules of Professional Conduct. *Id.*, Rule 3.4(e).

When confronting prejudicial evidence against your client, you must always keep these base line ethical obligations in mind. Temper zealous advocacy with appropriate conduct toward your opponent and the tribunal.

C. ETHICAL ISSUES IN PREPARING WITNESSES TO TESTIFY

Preparing witnesses to testify at trial involves many of the same ethical considerations discussed in topic B above. A lawyer may not offer evidence he knows to be false and cannot himself falsify evidence nor assist another in falsifying evidence.

A lawyer does nothing wrong in trying to refresh a witness' recollection of events. Showing the witness documents, prior testimony, the testimony of others can all help the witness refresh and more accurately recall events and, therefore, better testify at trial. The lawyer also does nothing wrong by helping the witness be more articulate in how the witness testifies. Helping the witness to improve language and presentation skills, teaching the witness concepts of eye contact and other methods to help the witness' testimony seem more sincere are all not only legitimate but required efforts that the lawyer must put forth on behalf of his client.

The ethical problem comes when the lawyer goes beyond refreshing the memory and improving the style of the witness and tells the witness the "facts." This can occur in either of two cases where the witness, despite seeing refreshing materials, simply has no independent recollection or where the witness remembers an unfavorable version of the facts. When the lawyer has no reasonable basis to believe the witness is making a mistake, i.e. a prior statement that differs from the current negative recollection, a lawyer should tread carefully. While it may seem like splitting hairs, generally courts have found no problem with a lawyer saying something along these lines to a witness: "What you are telling me today seems quite different from a letter you wrote on June 3, 2003. Please take a look at the letter and tell me if that helps clarify the issue for you." On the other hand, directly suggesting to the witness what he remembers today is harmful to

your case and it would be much better if he testified to something else borders on suborning perjury as well as violating the Rules of Ethical Conduct.

Common sense must be your guide on these issues. You know when you are encouraging someone to testify falsely rather than using an existing document or statement to try and help refresh their memory. The punishment for such conduct is, appropriately, severe. Attorneys who encourage a witness to testify falsely or who assist a client in fabricating a knowingly false defense and present false material facts are generally disbarred. See, e.g., *In re LaRosee*, 122 N.J. 298, 585 A.2d 326 (1991) (disbarring attorney who encouraged former client to present false testimony); *In re Edson*, 108 N.J. 464, 530 A.2d 1246 (1987) (disbarring attorney who counseled client to fabricate defense involving knowingly false material of facts and permitted client to offer false evidence at trial).

In South Carolina, I did not find a case where presenting false testimony or encouraging a witness to testify falsely alone supported disciplinary action. It has, however, been among a list of wrongdoing for which an attorney has been disbarred. See, *In the Matter of Edwards*, 323 S.C. 3, 448 S.E.2d 547 (1994). In that particular matter, the attorney's client presented false testimony before the court at a hearing and the disciplinary panel found that the attorney knowingly allowed the client to present the false testimony. *Id.* at 6, 448 S.E.2d at 548. This was one basis for disbarring the attorney. The Supreme Court stated in one of its early disciplinary cases that any attempt by counsel to suborn perjury, falsify testimony, or otherwise practice deception upon a court is gross misconduct which would warrant disbarment. *Burns v. Clayton*, 237 S.C. 316, 324, 117 S.E.2d 300, 309 (1960). In that case, lawyers allegedly tried to get three

persons who had not witnessed an accident to testify that they had and offered to pay one of them to recant a statement that he had given to the police.[1]

If you use common sense and your sense of honor as a guide and follow your sworn commitment to conduct yourself, as an officer of the court, with integrity and candor, you will never cross this line. You will always have a reasonable basis for attempting to refresh recollection or merely work on the stylistic presentation of the witness testimony. If for any reason you have doubts as to whether or not your actions might be viewed as encouraging a witness to change his honestly held testimony simply to further your client's interest, consult with other attorneys and mentors or even ethics counsel at the law school or elsewhere before finding yourself in a situation which could result in disbarment.

NPCOL1:748237.1-PRS-(MAM) 999999-00001

---

[1] The principle is stated even earlier in a case where an attorney was found to have presented a false affidavit not sworn to by the affiant in support of a motion for new trial on the ground of newly discovered evidence. In that case, the court disbarred the attorney for presenting false evidence. *In re Duncan*, 81 S.C. 290, 62 S.E. 406 (1908).