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August 25, 2009

Mr. Dwight Dinkla
Executive Director
Iowa State Bar Association
625 E. Court
Des Moines, IA 50309

Re: Ethics Opinion 09-03: Conflicts: Material Limitation and Lawyer as Witness Rules

Dear Mr. Dinkla:

May a lawyer or law firm who has been involved in the creation of a transaction represent the client in litigation concerning the validity of the transaction?[1] The answer to the question requires an analysis of two distinct but difficult to define terms: "material" (Rule 32.1.7) and "necessary" (Rule 32.3.7).

In the situation before the Committee, buyer and seller were represented by separate counsel in a transaction whereby the buyer was purchasing a closely held corporation owned by multiple shareholders. Counsel and their clients were intimately involved in building the transaction. We use the term "building" to describe activities which were much more than that of a mere scrivener and involved complex negotiations, strategic advice and document creation and revision. A dispute has arisen post-transaction that

[1]A variant of the same issue arises when a lawyer has represented a client in a prior contested matter and the positions taken by the lawyer or client in that matter become relevant in subsequent litigation.

revolves around what the parties knew or should have known as a result of their pre-transaction due diligence as well as parties' intent regarding the interpretation of the purchase agreement. Can the lawyer and the law firm who represented the client in the underlying transaction now represent the client in the litigation? They suggest that the historical and institutional knowledge they have acquired will put them in a position to best represent the clients' interests. But they recognize that their acts or omissions could be the focus of the litigation. To answer the question we must examine the parameters of two rules: Rule 32:1.7 "Conflicts of Interests: Current Clients;" and Rule 32:3.7 "Lawyer as Witness."

Rule 32:1.7
"Material Limitation"

Rule 32:1.7 concerns conflicts of interest regarding the attorney-client relationship. In particular Rule 32:1.7(a) prohibits representation if:

> (2) there is a significant risk that the representation of one or more clients will be materially limited *** by a personal interest of the lawyer.

Comment 8 to the Rule gives guidance with respect to identifying a material limitation:

> [8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate, and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Once the lawyer's work product or performance becomes the focus of the dispute, especially when the correctness or thoroughness of the work is at issue, a determination must be made as to whether there is significant risk that the lawyer or law firm's continued involvement would affect the:

> lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Generally, the lawyer or law firm's interest in defending the quality of the work product or performance is congruent with that of the client on whose behalf it was rendered. But congruency or mutuality of interest does not in and of itself prove lack of a material limitation under Rule 32:1.7(a)(2). What is at issue is the "lawyer's independent professional judgment in considering alternatives." The risk is that a lawyer or law firm whose work product is attacked may easily become subjective and self-defensive at the expense of providing objective and independent judgment to the client. Cf. Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Wagner, 599 N.W.2d 721, (Iowa 1999).

Lawyers and law firms, in conducting their Rule 32:1.7(a)(2) "material limitation" due diligence, would be well advised to rhetorically ask the following question: If, at the conclusion of the subsequent litigation, the lawyer's or law firm's work product or performance in the underlying matter is found to be deficient, have they by undertaking the representation needlessly exposed themselves to a legal claim or ethics complaint alleging that they have failed to provide independent professional judgment and conflict-free representation or that their actions on behalf of the client were merely an attempt to gloss over or cover up their own mistakes. From an affirmative answer one could easily conclude that a material limitation exists and the representation should not be undertaken, whereas an equivocal response would dictate that the lawyer or law firm should perform more due diligence and perhaps obtain an outside opinion. But the analysis does not end with a negative response to the rhetorical question. In that situation a Rule 32:3.7 Lawyer-as-Witness Analysis must be conducted.

Rule 32:3.7
Lawyer-as-Witness Analysis

If, after performing the Rule 32:1.7 analysis, the lawyer comes to the conclusion that there is no material limitation that would create a conflict of interest, the lawyer must then proceed to conduct Rule 32:3.7 due diligence. The issue is whether the client's interest is better served by having the lawyer act as a witness or as an advocate.

The Rules recognize the differing roles that the lawyer and the law firm have in the delivery of legal service. For example, under Rule 32:2.1 lawyers are advisors and counselors, under Rule 32:5.1. Lawyers are supervisors and mentors. The lawyer's role as advocate is given special treatment under Rule 32:3.1 because it directly involves the lawyer as an officer of the court and a principal in the administration of justice.

Rule 32:3.7 prohibits the lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness unless the testimony relates to an uncontested issue or the nature and value of legal services rendered in the case. The prohibition does not apply if disqualification of the lawyer would work substantial hardship on the client.

To focus the issue we must analyze the term "necessary witness" as that term is presently used in Rule 32:3.7 in relationship to the concept of "obvious" witness as that

term was used in the prior Iowa Code of Professional Responsibility in DR 5-101(C).[2] In other words is there a substantive difference between the two standards, and, if so, how does it affect the calculus of disqualification. For guidance we turn to the rational underlying both concepts.

The DR 5-101(C) "Obvious Witness" Standard

The rational underlying DR 5-101(C) was found in the dynamics of the trial itself. EC 5-9 and 5-10 advised that:

> If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

See also Heninger & Heninger, P.C. v. Davenport Bank & Trust Co., 341 N.W.2d 43, 49 -50 (Iowa,1983). Under DR 5-101(C) and as explained in Heninger, the lawyer may act as advocate where the lawyer's testimony would be cumulative, or related solely to uncontested fact, or, if recusal would cause an unfairness or hardship to the client. If unfairness or hardship were claimed, the lawyer bore the burden to:

> determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement.

The Heninger court characterized these situations as "exceptional" and advised that:

> Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

Rule 32:3.7 The "Necessary Witness" Standard

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[2] Iowa Code of Professional Responsibility is DR 5-101(C): "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness..."

Unlike DR 5-101(C), Iowa Rule of Professional Conduct, Rule 32:3.7 begins the analysis from a different viewpoint. Comment [1] states that:

> [1] Combining the roles of advocate and witness can prejudice the tribunal and opposing party and can also involve a conflict of interest between the lawyer and client.

Consequently, what is or is not a "necessary witness" must be viewed from the standpoint of the administration of justice, the rights of the opposing party, as well as the conflict of interest between the lawyer and client. This is a much broader analysis than that previously conducted under DR 5-101(C). Comment [4] 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.

Rule 32:3.7 Application

The term "necessary witness" is a term of art long used in the law. Forshee v. Abrams, 2 Clarke 571, (Iowa 1856). It implies a witness whose evidence is necessary or required to prove or disprove a particular point. See also Iowa Supreme Court Attorney Disciplinary Bd. v. Buchanan, 757 N.W.2d 251 (Iowa 2008). We note that the rule does not use the term "sole evidence," which leaves open the possibility that other evidence may exist by which to prove or disprove a proposition. Consequently, to determine what is or is not necessary, one must engage in a form of qualitative analysis which is by its very nature subjective and greatly influenced by the motive of the individual performing the analysis. For example, in one instance, the client's opponent may determine that the client's lawyer has "necessary" evidence that can prove or disprove a point. Obviously the lawyer and the lawyer's client would disagree. Or the conflict may be more discrete as in the situation where the lawyer is reluctant to relinquish the role of advocate and assume the duties of a witness.

Unfortunately, there is no litmus paper test by which to judge what testimony is or is not necessary. But unlike the prior Code, the new rules give guidance. Comments [1],[2],[3] and [4] require that the above qualitative analysis be performed with regard to the protection of or prejudice to the tribunal as well as prejudice to the opponent as well as the potential for conflict in regard to Rule 32:1.7 or 32:1.9. See Annotated Model Rules of Professional Conduct, 5th Ed, ABA Center for Professional Responsibility, at 383:

> Any mixing of roles between advocate and witness [citation omitted] ... 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.

In this regard Rule 32:7(a) creates a shield for the protection of the tribunal. It is not a tactical sword by which an opponent can gain a strategic litigation advantage. The possibility of the metaphoric sword has been eliminated by Rule 32:7(b) which provides 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 32:1.7 or Rule 32:1.9. But Rule 32:1(b) should be used with caution and only after a "material limitations" analysis has been performed as described at the start of this Opinion. We also caution that there are foreseeable difficulties to the advocate associated with offering evidence from one's own partner particularly as it concerns impeachment.

We recognize that each situation must be judged on its own merits. But, in those situations where there is doubt, we suggest the following simple best practice approach: Anytime you believe there is a possibility that you will hear your name or the name of your law firm in court, not as an advocate but in the context as evidence as to what you or your firm did or did not do regarding the underlying transaction, it is probable that you may have a conflict.

For the Committee

Nick Critelli, Chair