

Lawyer as Witness

An attorney generally may not act both as an advocate for a client and testify as a witness in the same trial. The rule is designed to preserve the distinction between advocacy and evidence and to protect the integrity of the advocate's role as an independent and objective proponent of rational argument.

Hawaii Rule of Professional Conduct ("HRPC") 3.7 states:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (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.

The threshold issue is whether the attorney is likely to be a *necessary* witness. For example, an attorney may not be a necessary witness if the testimony is cumulative or can be obtained from another source. The testimony must also be relevant and material.

HRPC 3.7 applies even if the *opposing* party or attorney calls the attorney as a witness. However, motions to disqualify based on HRPC 3.7 should be brought only when the witness-attorney is a necessary witness. Attorneys who bring unfounded disqualification motions risk violating HRPC 3.1 (meritorious claims and contentions) and HRPC 4.4 (burdening a third person).

If an attorney is likely to be a necessary witness, the attorney should then consider whether an exception applies. HRPC 3.7(a)(1)-(3). For example, HRPC 3.7(a)(3) allows an attorney-witness to continue as advocate if disqualification would result in "substantial hardship" on the client. The applicability of the hardship exception is determined by balancing the interests of the client and opposing party. It is also rel-

evant whether any party could reasonably foresee that the attorney would probably be a witness. HRPC 3.7, Comment [4].

Disqualification protects the justice system, not the client. If the attorney is likely to be a necessary witness and no exception applies, the client cannot waive the conflict. This rule, however, does not bar the attorney from all employment; pretrial preparation work is generally permissible.

In addition, the disqualification is not imputed to the attorney's partners and associates. HRPC 3.7(b). Thus, the attorney's partner or associate could act as the advocate in the trial in which the attorney is likely to be called as a witness, unless precluded from doing so by another conflict provision (HRPC 1.7 (Conflict of Interest: General Rule) or HRPC 1.9 (Conflict of Interest: Former Client)).

The witness attorney must, of course, maintain client confidences pursuant to HRPC 1.6, unless one of the exceptions to HRPC 1.6 applies.

Holiday Advice

As the holidays once again approach, we would like to remind attorneys that gifts to judges and court employees are generally improper. HRPC 3.5(a); HRPC 8.4(f); Disciplinary Board Formal Opinion No. 24 (1979).

If, however, there is a familial or bona fide social relationship justifying a gift and the gift does not otherwise violate the HRPC or Code of Judicial conduct, then the gift is not prohibited.

Disciplinary Board Appointment

Geraldine N. Hasegawa (Deputy Corporation Counsel, County of Hawaii) has been reappointed to the Disciplinary Board. Her term will expire June 30, 2001.