

LITIGATION ETHICS: PART III (WITNESSES)

Hypotheticals

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Hypothetical 1

Your largest client recently downsized its upper management. Unfortunately, now you find that you need the testimony of several retired senior executives. Perhaps a bit bitter about being laid off, several of them have demanded that you reimburse them for their travel expenses, and that you pay for their time.

(a) May you reimburse the executives for their travel expenses?

YES

NO

(b) One of the retired executives has started a consulting firm. May you agree to his demand that you pay for the time he spends preparing for his testimony at the hourly rate he charges his consulting clients?

YES

NO

(c) May you pay the same rate for the time that the retired executive spends actually testifying in a deposition or at the trial?

YES

NO

(d) Another retired executive moved to Florida and plays golf, fishes, or relaxes every day. Can you pay him an hourly rate for the time he spends preparing for his testimony?

YES

NO

(e) Another retired executive has found a job with a competitor. In addition to being reimbursed for his travel expenses, this fact witness has demanded \$5,000 "to tell the truth" when he testifies. Can you pay him \$5,000 to "tell the truth"?

YES

NO

Hypothetical 2

One of your company's retired executives initially wanted \$5,000 to "tell the truth" as a fact witness. When you balked at his request, he dropped his demand to \$2,500 -- and tells you that he won't insist on being paid unless you are successful in the trial.

May you pay a fact witness an amount contingent on the case's outcome?

YES

NO

Hypothetical 3

From your many years as a commercial litigator, you know that lawyers representing litigants in civil litigation cannot offer money or any other benefit to fact witnesses -- based either on the content of their testimony or the case's outcome. You have begun to represent criminal defendants, and you wonder whether the same rules apply in the criminal context.

May government prosecutors offer a benefit to fact witnesses, based either on their testimony's content or the criminal case's outcome?

YES

NO

Hypothetical 4

You represent a wealthy individual in a child custody case. At your first meeting with the client, you begin to ask him background facts about how he treated his children. The client stops you and asks the following question: "Before I tell you how I treated my children, why don't you tell me the law governing child custody."

May you answer your client's question before examining him about the factual background?

YES

NO

Hypothetical 5

You are preparing your executive vice president to be deposed. She asks whether you will be able to discuss her testimony during deposition breaks.

May you discuss a witness's testimony during a deposition break?

YES

NO

Hypothetical 6

Your adversary has scheduled the depositions of your client's four most senior executives. Your client's in-house lawyer suggests that you represent the executives at their depositions.

Should you represent your client's executives at their depositions?

YES

NO

Hypothetical 7

You have had some trouble finding a testifying expert to support your theory in a case coming to trial soon. You recently hired an agency which advertised its ability to find experts in nearly any topic. You eventually find a mediocre expert, and you worry that he will not do a very good job.

- (a)** May you enter into an arrangement in which the testifying expert's fee is contingent on the outcome of the case?

YES

NO

- (b)** May you enter into an arrangement in which the agency's fee is contingent on the outcome of the case?

YES

NO

Hypothetical 8

You have hired a non-testifying expert to help you understand the facts of a complicated case, and "vet" several testifying experts whom you are considering hiring.

May the fee you pay the non-testifying expert be contingent on the outcome of the case?

YES

NO

Hypothetical 9

You just received an angry call from the lawyer representing an adversary. She claims that you have acted unethically by hiring a testifying expert that she had actually interviewed several months earlier. Although she had not retained the testifying expert, she claims to have shared confidential information with the expert.

- (a)** May you hire a testifying expert who has received material confidential information from the adversary?

YES

NO

- (b)** May you hire a testifying expert who works at the same engineering firm as the expert who had been interviewed by your adversary (as long as he had not learned any of the confidential information provided to his colleague)?

YES

NO

Hypothetical 10

You are representing your client in litigation pending in another state, and you are familiarizing yourself with the pertinent ethics rules.

(a) May you contact an adversary's testifying expert ex parte?

YES

NO

(b) May your testifying expert contact the adversary's testifying expert ex parte?

YES

NO

Hypothetical 11

You helped your small manufacturing client negotiate a contract with a large retailer. In some negotiation sessions you and your client were the only participants from your side. You also had one-on-one telephone calls with the retailer's lawyer about the contract. After only six months, the retailer reneged on several provisions. Your client wants you to file a breach of contract action against the retailer. You and your client agree that you will have to testify about some of the negotiations and your telephone calls with the retailer's lawyer -- but your client also wants you to try the case.

May you act as an advocate at the trial in which you are sure to be a witness for your client?

YES

NO

Hypothetical 12

You and a friend have been discussing the reason why every state's ethical rule generally prohibits the same lawyer from acting both as a witness and as an advocate in the same trial. You disagree about the effect of such a dual role on a jury. You think that a jury will give less weight to the factual testimony of a lawyer who is also acting as an advocate in that case, because the lawyer is so obviously interested in the outcome of the case for his client. Your friend thinks that the jury will give more weight to the lawyer's testimony, because she obviously is acting as an officer of the court in the proceeding itself.

Is the jury likely to provide less weight to the factual testimony of a lawyer who is acting as an advocate in the trial?

YES

NO

Hypothetical 13

You and a friend had been debating the rationale for an application of the witness-advocate rule. After deadlocking in your discussion of the jury's reaction to the same lawyer acting as both a witness and an advocate, you seem to agree on one point -- that the witness-advocate rule should not apply to judge trials or pretrial proceedings before a judge. Both of you think that judges should be capable of distinguishing between the different roles that lawyers play, and therefore will not suffer from the confusion that a jury might face.

(a) Should the witness-advocate rule apply to trials before a judge?

YES

NO

(b) Should the witness-advocate rule apply to pretrial proceedings?

YES

NO

Hypothetical 14

You and your friend disagree about the best time for a trial court to address any witness-advocate issues. Your friend thinks that the trial court should address the issue as soon as possible, so that all of the parties and their lawyers know what role they can play in the pretrial proceedings and the trial itself. You vehemently disagree, contending that it does not make sense to address the witness-advocate issue until the last minute -- both because most cases settle before trial (meaning that the judge will never have to bother with any witness-advocate issues) and because it will not be clear until the end of discovery whether the lawyer will or will not have to testify.

Should trial courts address any witness-advocate issues as soon as possible?

YES

NO

Hypothetical 15

Your paralegal had a one-on-one conversation about an important matter with a witness. That witness now appears poised to provide totally different testimony against your client at an upcoming trial.

May you continue to act as an advocate in the trial if your paralegal will testify about the conversation?

YES

NO

Hypothetical 16

Even though you normally represent clients in litigation, it looks as if you might soon be involved in litigation as a party. You have begun to wonder about the witness-advocate rule's applicability to several situations that might arise in the near future.

- (a)** May you represent yourself as an advocate pro se even if you have to testify as a fact witness in the trial?

YES

NO

- (b)** If you are acting as an executor, may you testify and also act as an advocate at trial?

YES

NO

- (c)** May you represent a corporation of which you are the sole shareholder, if you will have to testify as a fact witness at the trial?

YES

NO

- (d)** You, your husband, and your daughter are all plaintiffs in an action against a school board, alleging discrimination against your disabled daughter. May you represent yourself, your husband, and your daughter at the trial?

YES

NO

Hypothetical 17

You assisted your client in a transaction last year, which is now the subject of litigation. Mindful of the witness-advocate rule, you do not believe that you are a "necessary" witness on your client's behalf. You are very certain that any testimony you might provide would assist rather than prejudice your client. However, your adversary has indicated that it intends to notice your deposition and call you as a trial witness.

(a) May the adversary take your deposition during the discovery phase of the case?

YES

NO

(b) Must you be disqualified if the adversary calls you as a witness at the trial?

YES

NO

Hypothetical 18

You handled a business transaction for a client last year, which is now the subject of litigation. Your adversary has moved to disqualify you, arguing that it intends to call you as a witness on two factual issues.

- (a)** Will your adversary succeed in seeking your disqualification if you must testify about a comment your adversary's president made in your presence about a relatively minor issue?

YES

NO

- (b)** Will your adversary succeed in seeking your disqualification if you must testify about a meeting at which each side in the negotiation was represented by two lawyers and two corporate representatives?

YES

NO

Hypothetical 19

You have represented a small businesswoman for nearly a decade. Among other things, you just filed a lawsuit on her behalf against a rival company, claiming various business torts. You have warned your client that the other side might move to disqualify you as an advocate, because you were either the only participant or one of only a few participants in several communications that might be important in the case. Your client has told you that she is willing to forego whatever helpful testimony you might offer on those matters -- in order to keep your services as an advocate. You are flattered by your client's loyalty, but wonder about its effectiveness.

May a client forego a lawyer's helpful testimony to retain the lawyer's services as an advocate?

YES

NO

Hypothetical 20

You handled a client's business transaction last year, and now want to represent that client in litigation involving the transaction. The other side has moved to disqualify you from representing your client. It argues that it intends to call you as a witness (both in a deposition and at the trial), and that your testimony will hurt your client because you will contradict your corporate client's president's recollection about several key meetings.

If your testimony would contradict your client's president's testimony, is your adversary likely to succeed in seeking your disqualification?

YES

NO

Hypothetical 21

You have represented a local businessman in essentially all of his matters for the past twenty years. You just helped him in a transaction last year, and now want to act as his trial lawyer in the litigation even though you probably will be called as a necessary witness.

May you avoid disqualification by arguing that losing you as the trial lawyer will cause your client a "substantial hardship"?

YES

NO

Hypothetical 22

You and your client agree that you will have to testify on her behalf in an upcoming trial.

May one of your partners serve as trial counsel in the trial if you have to testify as a witness in that trial?

YES

NO

Hypothetical 23

You have always practiced on your own. Your largest client just asked you to represent her in an important commercial dispute headed for litigation. You played an integral role in the background incidents, and will therefore have to testify for your client at trial about meetings in which you were the only participant acting on your client's behalf. However, your client wants you to play as active a role as you possibly can before (and possibly after) the trial.

Even if you are disqualified by the witness-advocate rule from acting as your client's trial advocate, may you undertake the following activities on your client's behalf?

(a) Work "behind the scenes" in drafting briefs, cross-examination outlines, etc.?

YES NO

(b) Represent your client at settlement negotiations?

YES NO

(c) Take depositions?

YES NO

(d) Attend depositions on your client's behalf?

YES NO

(e) Argue at pretrial non-evidentiary hearings on issues (such as venue or summary judgment) that involve issues that will not come up again at the trial?

YES NO

(f) Argue at pretrial evidentiary hearings?

YES

NO

(g) Testify at a pretrial evidentiary hearing, as long as the issue will not come up again at the trial?

YES

NO

(h) Sit at counsel table during the trial?

YES

NO

(i) Argue on your client's behalf on appeal?

YES

NO

Hypothetical 24

You represented a new client in negotiating a franchise agreement. Your client and the franchisor eventually had a falling-out, and you have been representing the client in a lawsuit against the franchisor. As it turns out, your recollection of some important meetings with the franchisor and its lawyer differed dramatically from your client's recollection. Despite your efforts to avoid it, the court eventually disqualified you from acting as an advocate -- because your testimony would harm your client, based on the discrepancy between his and your testimony about the meetings. Now you wonder where that has left you and your firm.

(a) Will your individual disqualification prevent one of your partners from trying the case for the client?

YES

NO

(b) May you continue to advise the client "behind the scenes"?

YES

NO

(c) May you assist the client in reminding him of historical facts?

YES

NO