Attorney/Witness Ethics Rule Considerations for General Counsel

By:

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Ryan Henry graduated with honors from New Mexico State University with dual bachelor's degrees in Criminal Justice and Psychology in 1995. He attended law school at Texas Tech School of Law and graduated in May of 1998.

While attending law school, Ryan began clerking for the Lubbock City Attorney's Office. He received his third-year practice card and began prosecuting municipal court complaints and appearing in justice of the peace court for the City. As a result, he began defending governmental entities even before he graduated from law school, and so began his career supporting local governments. Upon graduation, Ryan began working in Brownsville, Texas, with the same focus. In June of 2002, Ryan moved to San Antonio and joined a local law firm doing the same type of law. In 2012, Ryan started the Law Offices of Ryan Henry, PLLC. Ryan is a practicing city attorney, civil litigation attorney, civil appellate attorney, municipal court prosecutor, and municipal court judge. In June 2016, 2017, 2019, and 2020 Ryan was listed as one of the best lawyers in municipal law by S.A. Scene Magazine in the San Antonio area. He was also designed by Texas Super Lawyers on its list for 2020. Ryan is the current chair for the State Bar of Texas - Government Law Section (at least for one more month).

I. Disclaimer

I wrote an article for a different publication, which caught the attention of several people. It directly led to me being asked to give this speech. So, the moral of the story is, don't ever write a paper.

However, since the paper is already written, it forms the basis of this presentation. And while I would love to provide additional information from what was previously provided, I simply ran low on time. As a result, please forgive my slightly reconstituted original paper on the Texas Disciplinary Rules of Professional Conduct Rule 3.08.

II. Law School

When you decided to go to law school, it probably all seemed so simple. You had a flair for research, writing, and debate; you were skilled at thinking on your feet; and you couldn't hide your competitive streak if you tried. You'd pass the bar exam and then, presto! Like Perry Mason, you'd have near-magical abilities to advocate for truth and justice, saving your clients from false accusations and undeserved doom.

III. Ethics

But then you learned about Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct -- commonly known as the "lawyer as a witness" ethical prohibitions rule. Essentially, it means that if the lawyer has been involved in a dispute as the client's general counsel or as another non-litigation attorney that later transitions into litigation, the attorney may not be able to be the litigator defending the lawsuit. This explanation is an over-simplification. However, the point is, an attorney assisting a client with a matter that potentially could transition into litigation or some other form of the tribunal should be aware of this rule when providing advice.

Rule 3.08 never played a part in a Perry Mason episode because – well, face it: That was not real. But for those of us who practice government law, particularly when we take on a general counsel role for our clients, Rule 3.08 is an ever-present possibility that governs how we advocate for our clients.

IV. The Rule

The Rule states:

Rule 3.08: Lawyer As Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory, proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

V. Official Comments

The official comments to the Rule can be very helpful in understanding when it applies. As noted by the official comments, two of the key concerns are 1) the confusion that potentially can result when the lawyer is allowed to serve as both an advocate and a witness for his or her client and 2) a lawyer having to provide testimony which is potentially adverse to his/her client. It is the job of the witness to testify to facts known to him or her personally; the job of the advocate is to provide analysis (explanation and commentary) of that testimony for the court. While those waters might typically be navigated in straightforward Perry Mason-style, they become muddied when the lawyer's testimony concerns "a controversial or contested matter" and the finder of facts is unsure whether to take the lawyer's statements as pure fact, as analysis, or both.

Additionally, the testifying lawyer should be mindful that he/she could be compelled to testify about facts that are averse to the client. Simply because an attorney is a witness does not relieve the attorney of his/her ethical obligations to the client.

This is of particular concern for attorneys who act as general counsel. They may be witnesses to many things that have not yet developed into litigation or a dispute but easily could. This rule is often confused with the typical "conflict of interest" prohibitions found in Rules 1.05-1.09. However, those conflicts of interest have to do with knowledge of privileged information and duties to the client, while Rule 3.08 is specific to facts. As a result, an entire firm or office is not usually prohibited from continuing to represent the client in litigation simply because one attorney in the firm/office may be a fact witness. However, that one attorney will have to balance what facts are essential for a claim or defense and not put himself/herself in a position of being compelled to testify.

VI. Adjudicatory Decision Maker

For lawyers representing an entity in a non-litigation matter can still be involved in front of a "tribunal" or in an "adjudicatory proceeding" as contemplated by the Rule. The lawyer must factor in the potential for individual disqualification in the event the lawyer becomes a witness. Care must be taken to delineate which "hat" he or she is wearing at all times.

This could include advocating in front of an arbitration panel, an administrative hearing such as those held before the State Office of Administrative Hearings, or even before a civil service commission.

However, this does not usually occur in front of boards/commissions such as the board of adjustment or planning and zoning commission. Mainly, depending on how your boards/commissions are set up, the general counsel advises the board and is not presenting in front of the board for purposes of advocating facts. But some governmental entities do set up specific boards (such as some types of ethics boards, or civil service commissions) where the boards have their own attorney and the entity's attorney is present to prosecute a complaint or advocate for a position. In those instances, Rule 3.08 could be implicated.

VII. Essential Witness

Rule 3.08(a) bars a lawyer from advocating before a tribunal "if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact." This does not mean the lawyer is automatically disqualified because they testify in an affidavit as to when the discovery was propounded or some other non-essential fact. The nuances of when the attorney is an "essential fact" witness -- and when they merely have personal knowledge to which others could easily testify -- depends largely on the individual circumstances. As a result, you should consult the cases and ethics opinions for any specific circumstance you potentially might face.

VIII. Lots More – But Conclusion Time

This article is not meant to scare anyone or to advocate for overly complex restrictions on the way attorneys represent their clients. However, it is meant as a healthy reminder that 3.08 exists and that attorneys should be mindful of it when serving in both roles. There are many nuances to Rule 3.08 which go beyond the purpose of this presentation. As a result, I encourage you to examine the Rule, the official comments, and any ethics opinions interpreting the Rule. That is the best way to determine how and in what instances it applies to you.