

Nebraska Ethics Advisory Opinion For Lawyers
No. 11-03

AN ATTORNEY MAY SERVE AS BOTH A PROSECUTOR IN GRAND JURY PROCEEDINGS CONVENED PURSUANT TO NEB. REV. STAT. SEC. 29-1401(4), AND AS A MEMBER OF THE NEBRASKA JAIL STANDARDS BOARD, AS LONG AS THERE IS NOT A CONCURRENT CONFLICT OF INTEREST, AND AS LONG AS THE ATTORNEY REMAINS SOLELY AN ADVOCATE, AND DOES NOT BECOME A WITNESS, NOR PERSONALLY VOUCH FOR ANY FACTS OR OPINIONS IN THE GRAND JURY PROCEEDING.

STATEMENT OF FACTS

An attorney is employed as a Deputy County Attorney and in that capacity, acts as a prosecutor in grand jury proceedings convened pursuant to *Neb.Rev.Stat. § 29-1401(4)*. On certain occasions the attorney is also appointed as a special prosecutor for such proceedings in other counties throughout the state.

Neb.Rev.Stat. § 29-1401(4) requires that, "District courts shall call a grand jury in each case upon certification by the county coroner or coroner's physician that a person has died while being apprehended or while in the custody of a law enforcement officer or detention personnel." The purpose of a grand jury convened under those circumstances is to determine whether there is probable cause to believe that the death was the result of criminal wrongdoing. The role of the prosecutor in such proceedings is defined by statute. Specifically, *Neb.Rev.Stat. § 29-1408* provides that:

The county attorney or the assistant county attorney shall be allowed at all times to appear before the grand jury for the purpose of giving information relative to any matter cognizable by such jury, or giving such jury advice upon any legal matter the jury may require, and such county attorney or assistant county attorney may interrogate witnesses before the jury when the grand jurors, the county attorney, or the assistant county attorney shall deem it necessary. . . .

The foregoing provision provides the prosecutor with a very substantial degree of control over the proceedings, since it effectively designates the prosecutor to direct the investigation, present the evidence and provide legal advice to the grand jurors. The degree of control afforded a prosecutor in such proceedings is increased even further by the fact that the law provides that they be conducted in secret, without direct participation by a judge, and with little or no participation by attorneys other than the prosecutor. (Pursuant to *Neb.Rev.Stat. § 29-1411*, attorneys for subpoenaed witnesses may be present with their clients during their testimony solely to advise their clients in connection with that testimony, but may not make objections or arguments, or address the grand jury).

The inquiry to the Committee stems from the attorney's interest in seeking a position on the

Nebraska Jail Standards Board. The Jail Standards Board is an eleven member body created by *Neb.Rev.Stat. § 83-4,124*, for the purpose of furthering the policy of the State that all criminal and juvenile detention facilities in the state conform to certain minimum standards of construction, maintenance and operation. The function of the Board is to study, develop and implement minimum standards for construction, maintenance and operation of detention facilities. *Neb.Rev.Stat. §§ 83-4,126* and *83-4,127*. Each year, staff from the Nebraska Commission on Law Enforcement and Criminal Justice, inspect each detention facility in the state to determine whether it is in compliance with the standards established by the Board, and prepares a report of that inspection. If the inspection discloses that the facility is not in compliance with the standards, the Jail Standards Board is required to send a notice to the governing body with jurisdiction over the facility. The governing body must then either initiate appropriate corrective action or close the facility within six months of receipt of the Board's notice. If the governing body fails to address the deficiency or close the facility within six months, the Jail Standards Board must advise the State Department of Correctional Services that the facility does not qualify for reimbursement for holding state prisoners. It may initiate an action in the district court of the judicial district in which the facility is located to close the facility.

Obviously, many of the deaths in custody for which grand juries are convened pursuant to *Neb.Rev.Stat. § 29-1401(4)*, take place in detention facilities that are obligated to conform to the minimum standards promulgated by the Jail Standards Board. Thus, the minimum standards developed and implemented by the Board, as well as the written reports of the statutorily mandated annual inspections of those facilities, may be considered relevant to the grand jury's deliberations.

ISSUE

Whether an attorney whose duties include acting as a prosecutor or special prosecutor in grand jury proceedings convened pursuant to *Neb.Rev.Stat. § 29-1401(4)*, would have a conflict of interest by serving as a member of the State Jail Standards Board, which is responsible for developing and implementing minimum standards for facilities that are often involved in such proceedings.

NEB. CT. R. OF PROF. COND. §3-501.7 CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or

by a personal interest of the lawyer.

...

COMMENT [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. . . . The critical questions are the likelihood that a difference of 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.

§ 3-503.7. Lawyer as witness.

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (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.
- (b) 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 1.7 or Rule 1.9.

COMMENT

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

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

DISCUSSION

As indicated in Comment 2 to **Neb. Ct. R. of Prof. Cond. §3-501.07**, the first step in resolution of a conflict of interest problem under the rule is to clearly identify the client or clients. In the circumstances about which you have inquired, the attorney would have only one client. As the prosecutor in grand jury proceedings, the attorney's sole client would be the State of Nebraska. Membership on the Jail Standards Board would not create an attorney-client relationship between the attorney and the Board, and the attorney would not be acting as a legal representative of the Board during the grand jury proceedings, even if the grand jury were to consider the minimum standards promulgated by the Board, or the reports of the annual inspections of a facility for compliance with those standards. Thus, the situation would not involve a concurrent conflict under paragraph (a)(1) of the rule, in which representation of one client would be directly adverse to another client.

The question, then, is whether a concurrent conflict would exist under paragraph (a)(2) of the rule, due to a significant risk that the attorney's representation of the State would be materially limited by the attorney's responsibility to the Jail Standards Board or personal interest arising from membership on the Board. In that regard Comment 8 to **Rule 3-501.7** is instructive. As stated there, "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."

While it is certainly possible that an attorney, in directing a grand jury's investigation into an "in custody death", may uncover evidence that a statutorily mandated annual inspection of a facility for compliance with jail standards failed to identify a condition or factor that contributed to the death being investigated, there seems to be little basis from which to conclude that such a situation would materially interfere with the attorney's independent professional judgment in considering how to proceed on behalf of the State, despite his or her membership on the Jail Standards Board. Comment 10 to **Rule 3-501.7** does identify, "the probity of a lawyer's own conduct in a transaction," as a factor that may result in an attorney having a personal interest that materially interferes with the ability to exercise independent professional judgment on behalf of a client. But given the fact that the Jail Standards Board consists of eleven members, actions of the Board could not reasonably be attributed to its individual members. More importantly, the Board's role in the statutorily mandated inspection process is solely ministerial. Neither the Board or its individual members are required, or even authorized, to conduct the annual inspections. That duty, as well as the duty of determining compliance with the standards, is imposed by the provisions of *Neb.Rev.Stat. § 83-4,131*, upon, "personnel of the Nebraska Commission on Law Enforcement and Criminal Justice." The Board's only role in the process is to provide notice of non-compliance to the appropriate governing body and to take steps to secure compliance if efforts to do so are not voluntarily undertaken within the statutorily prescribed time frame. Accordingly, responsibility for any defects in the process of inspecting facilities and determining their compliance with the standards would be attributed to personnel of the Nebraska

Commission on Law Enforcement and Criminal Justice, and not to the Jail Standards Board.

Finally, because the issue to be decided in grand jury proceedings convened pursuant to *Neb.Rev.Stat. § 29-1401(4)*, if whether the death in custody was the result of criminal wrongdoing, any deficiencies in the process of inspecting facilities and determining compliance with jail standards would be relevant to such a grand jury only to the extent that they had a direct bearing on the determination of whether some sort of criminal conduct had been the cause of the death.

The next part of the analysis concerns the “lawyer-witness” rule. The Lawyers' Manual On Professional Conduct, in its section on Trial Conduct, The Lawyer as Witness (61:501) explains:

History of Rule

A lawyer generally may not act as an advocate and a witness at the same trial. This prohibition, usually referred to as the “lawyer-witness rule” or the “advocate-witness 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. See Restatement (Third) of the Law Governing Lawyers §108 cmt. b (2000) (“combined roles risk confusion on the part of the factfinder and the introduction of both impermissible advocacy from the witness stand and impermissible testimony from counsel table”).

The lawyer-witness rule apparently originated as a rule of evidence in an 1846 case in which a trial judge, citing no precedents, declared inadmissible a lawyer's testimony for his client; it had been argued that the jury “might have considerable difficulty in separating those statements which they had heard from a person as advocate, from those which they had heard from the same person as witness.” *Stones v. Byron*, 4 Dowl. & L. 393, 394. See generally 6 Wigmore, Evidence §1911 (Chadbourn rev. ed. 1976) (noting that proscription was “repudiated in the same jurisdiction within [six] years by a court en banc”).

Now well established as a rule of professional conduct rather than a rule of evidence, the lawyer-witness rule does not make a lawyer incompetent as a witness. Rather, it recognizes that the trial court has discretion to determine whether a lawyer may appear as a witness without withdrawing from the case. *United States v. Morris*, 714 F.2d 669 (7th Cir. 1983).

Although the lawyer-as-witness scenario can arise in a number of different circumstances, lawyers typically find themselves being viewed as potential witnesses when they handle business transactions that fall apart. See Luna, Avoiding a “Carnival Atmosphere”: Trial Court Discretion and the Advocate-Witness Rule, 18 Whittier L. Rev. 447, 452 (1997).

Policy Considerations

The Seventh Circuit, in affirming a trial court's use of its discretion to permit the defendant's lawyer to testify at a suppression hearing, stated that there are five recognized rationales for the rule:

(1) it eliminates the possibility that the attorney will not be a fully objective witness, (2) in the case of a Government witness, the rule eliminates the possibility that the prestige of the Government will artificially enhance the attorney's credibility as a witness, (3) it reduces the risk that the trier of fact will confuse the roles of advocate and witness and erroneously grant testimonial weight to an attorney's arguments, (4) it reflects a broad concern that the administration of justice not only be fair, but also appear fair, and (5) it prevents a Government attorney ... from running "the risk of impeachment or otherwise being found not credible," and thereby disgracing his office. *United States v. Morris*, 714 F.2d 669, 671-72 (7th Cir. 1983), quoting *United States v. Johnston*, 690 F.2d 638 (7th Cir. 1982) (en banc).

A leading court decision on this issue elaborated on the problems as follows: When an attorney persists in acting both as witness and advocate, ordinary procedural safeguards designed to give the parties a full and fair hearing become problematic. For example, the familiar mechanics of question-and-answer interrogation become impossible. The rule excluding witnesses from the courtroom may be invoked, yet the advocate-witness obviously must be allowed to remain. The advocate who testifies places himself in the position of being able to argue his own credibility. This special witness can take the stand, objectively state the facts from personal knowledge, then press home those facts by argument to the jury. Our belief is that an adversary system works best when the roles of the judge, of the attorneys, and of the witnesses are clearly defined. Any mixing of those roles inevitably 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. *Cottonwood Estates Inc. v. Paradise Builders Inc.*, 624 P.2d 296, 300 (Ariz. 1981).

Other cases have noted that the lawyer-witness rule also protects against the possibility that a lawyer's credibility as an advocate may be enhanced once he is sworn as a witness, see *Bottaro v. Hatton Assocs.*, 680 F.2d 895, 900 (2d Cir. 1982) (lawyer enhances credibility as advocate by taking oath as witness); see also *MacArthur v. Bank of New York*, 524 F. Supp. 1205 (S.D.N.Y. 1981); *Comden v. Superior Court*, 576 P.2d 971 (Cal. 1978); and against the opposite possibility that the lawyer whose honesty on the stand has been successfully attacked will find that his diminished credibility as a witness jeopardizes his persuasiveness as an advocate, see, e.g., *Cottonwood Estates Inc. v. Paradise Builders Inc.*, 624 P.2d 296, 299 (Ariz. 1981); *Gen. Mill Supply Co. v. SCA Servs.*, 697 F.2d 704 (6th

Cir. 1982).

Comments [1] through [4] to Model Rule 3.7 were amended in 2002 to clarify that the tribunal has a valid interest in not having the trier of fact be confused or misled about an attorney's role and that the rule serves to protect this interest.

Finally, the rule protects the non-testifying lawyer from being put in the awkward position of having to cross-examine his opposing counsel and impeach his credibility, even if only on the obvious ground of interest in the outcome of the case. See *Ford v. State*, 628 S.W.2d 340 (Ark. Ct. App. 1982) (opposing counsel handicapped in cross-examining and arguing credibility of lawyer-witness); Model Code EC 5-9 (“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.”).

Perhaps because the rule admits of the exercise of so much discretion, and perhaps because the problem invariably arises in the context of litigation, the rule is used in disqualification motions far more than it is used in discipline.

For more on the policy considerations behind the lawyer-witness rule, see generally *In re Am. Cable Publ'ns Inc.*, 768 F.2d 1194 (10th Cir. 1985); *Comden v. Superior Court*, 576 P.2d 971 (Cal. 1978); *Weil, Freiburg & Thomas PC v. Sara Lee Corp.*, 577 N.E.2d 1344 (Ill. App. Ct. 1991); Luna, Avoiding a “Carnival Atmosphere”: Trial Court Discretion and the Witness-Advocate Rule, 18 Whittier L. Rev. 447 (1997); Moss, Ethical Proscription Against a Lawyer's Serving as Both Advocate and Witness, 23 Mem. St. U. L. Rev. 555 (1993); Stonerock, The Advocate-Witness Rule: Anachronism or Necessary Restraint?, 94 Dick. L. Rev. 821 (1990). 61:505

Prosecutors

It is said that testimony by prosecutors poses a unique risk of prejudice because jurors may be unduly influenced by the prestige of the prosecutor's office. *United States v. Edwards*, 154 F.3d 915, 14 Law. Man. Prof. Conduct 335 (9th Cir. 1998) (advocate-witness rule is designed to prevent prosecutors from taking advantage of jurors' natural tendency to believe in honesty of lawyers in general, and government attorneys in particular).

Prosecutors may violate the rule even if they don't actually take the stand. See *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (prosecutors ran afoul of the rule by referring to a law enforcement investigation team as “we” and “us” during closing arguments, thus “assuming a witness-like role in addition to serving as advocates”); *People v. Blue*, 724 N.E.2d 920 (Ill. 2000) (prosecutor

violated advocate-witness rule with objections that included too much editorial and constituted improper attempt to introduce evidence).

Violation by a prosecutor may also implicate the criminal defendant's constitutional rights. See *State v. Sierra*, 523 S.E.2d 187 (S.C. 1999) (prosecutor violated defendant's confrontation rights by injecting facts in questions that amounted to testifying). Cf. *People v. Donaldson*, 113 Cal. Rptr.2d 548, 17 Law. Man. Prof. Conduct 715 (Cal. Ct. App. 2001) (ineffective assistance where defense counsel failed to object to prosecutor's statement that he personally believed in defendant's guilt).

CONCLUSION

For the foregoing reasons it does not appear likely that a difference in interests would eventuate as a result of an attorney serving as both a prosecutor in grand jury proceedings convened pursuant to *Neb.Rev.Stat. § 29-1401(4)*, and as a member of the Nebraska Jail Standards Board, or that if such a difference of interest did arise, it would materially interfere with the attorney's ability to exercise independent professional judgment on behalf of his or her client, the State of Nebraska. In the unlikely event that the unique circumstances of a particular case were sufficient to create a concurrent conflict of interest, however, the attorney would be obligated to withdraw from representation of the State in the grand jury proceeding. See, **Neb. Ct. R. of Prof. Cond. §3-501.7**, Comment 4, and 3-501.16. However, the prosecutor cannot blur the lines between being an advocate and a witness by stating his personal opinion as to what the evidence is from the Jail Standards Board, or on any other issue, in a grand jury or any other proceeding, as opposed to explaining and commenting on the evidence given by others. Similarly, a prosecutor should not voice his personal opinion as to the guilt or innocence of any defendant, as opposed to what the evidence presented by others has shown to the tribunal. See, **Neb. Ct. R. of Prof. Cond. §3-503.7**.

Very truly yours,

THE ADVISORY COMMITTEE

By: _____

Michael W. Pirtle, Chairman