The Attorney as a Witness for His Client

Introduction

It is the purpose of this comment to delineate those situations in which the courts have held that it is not a breach of professional ethics for an attorney to testify on behalf of his client without withdrawing from the case and to indicate to what extent the courts have enforced the ABA Code of Professional Responsibility (hereinafter referred to as ABA Code) in regard to this matter.

Exceptions

Generally the courts in this country have stated that it is improper for an attorney to appear in a trial both as a witness and as an advocate for his client[1] except when his testimony relates only to uncontested matters in the case,[2] formal matters,[3] or when denial of the testimony would defeat the ends of justice.[4] These decisions are reflected in the ABA Code, Disciplinary Rule 5-101(B).[5]

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1. Hubbard v. Hubbard, 233 So. 2d 150 (Fla. Dist. Ct. App. 1970); Ferraro v. Taylor, 197 Minn. 5, 265 N.W. 829 (1936); Garrett v. Garrett, 86 N.J. Eq. 293, 98 A. 848 (1916); Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

2. Beavers v. Conner, 258 So. 2d 330 (Fla. Dist. Ct. App. 1972); Mildfelt v. Lair, 221 Kan. 557, 561 P.2d 805 (1977); State v. Spencer, 186 Kan. 298, 349 P.2d 920 (1960).

3. Robbins v. Hannen, 194 Kan. 596, 400 P.2d 733 (1965); Cox v. Kee, 107 Neb. 587, 186 N.W. 974 (1922); Teats v. Anderson, 358 Pa. 523, 58 A.2d 31 (1946); Matney v. Cedar Land Farms, Inc., 216 Va. 932, 224 S.E.2d 162 (1976).

4. French v. Hall, 119 U.S. 152 (1886); Montgomery v. First Nat'l Bank of Newport, 246 Ark. 502, 439 S.W.2d 299 (1969); Manion v. Chicago R.I. & Pac. Ry., 12 Ill. App. 2d 1, 138 N.E.2d 98 (1956); Schwartz v. Wenger, 267 Minn. 40, 124 N.W.2d 489 (1963).

5. ABA, CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Disciplinary Rule [hereinafter cited as DR] 5-101(B).

> 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, except that he may undertake the employment and he or a lawyer in his firm may testify:
> (1) If the testimony will relate solely to an uncontested matter.
> (2) If 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) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

Under the first exception, in *Mildfelt v. Lair,*[6] a Kansas decision, an attorney representing one of the parties in the case was allowed to testify as to the preparation of a contract and as to his service as a member of the board of directors of a bank since these facts were not contested by the opposing party. Likewise, the District Court of Appeal of Florida has held that an attorney representing a party to the action may take the stand where he does not testify to anything which is not conceded by the opposition, although the court added that "each such situation will have to be scrutinized with utmost care whenever it arises and counsel should be very careful in testifying for a client while handling the trial."[7] The Kansas Supreme Court has also said that it is proper, even in a criminal case, for the prosecuting attorney to testify where "[h]is testimony in no way contradicted defendant's evidence and, in fact, merely corroborated that which defendant already admitted."[8]

In regard to the second exception, the courts have never actually defined what constitutes a formal matter, preferring, instead, to simply cite specific examples. To date the courts have found formal matters to include testimony concerning custody of business records and authenticity of documents,[9] the receipt of a letter,[10] the preparation and execution of deeds of correction[11] or other papers,[12] identifying an exhibit,[13] the custody of an exhibit,[14] and the authen-

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(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

6. 221 Kan. 557, 561 P.2d 805 (1977).

7. Beavers v. Conner, 258 So. 2d 330, 332 (Fla. Dist. Ct. App. 1972).

8. State v. Spencer, 186 Kan. 298, 349 P.2d 920, 923-24 (1960). Here the county attorney had accompanied officers to New Orleans for the purpose of taking the defendant into custody. While there he had redeemed some stolen diamond rings with a pawnshop ticket which had been found in the defendant's room. After returning to Kansas he had kept these rings in a safe under his supervision and at trial his testimony was for the purpose of filling in the chain of events leading to the redemption of the rings and their subsequent introduction into evidence.

9. Mr. Steak, Inc. v. Ken-Mar Steaks, Inc., 522 P.2d 1246 (Colo. Ct. App. 1974).

10. Robbins v. Hannen, 194 Kan. 596, 400 P.2d 733 (1965).

11. Matney v. Cedar Land Farms, Inc., 216 Va. 932, 224 S.E.2d 162 (1976).

12. Nye Odorless Incin. Corp. v. Felton, 35 Del. 236, 162 A. 504 (1931).

13. Young v. Colorado Nat'l Bank of Denver, 148 Colo. 104, 365 P.2d 701 (1961).

14. Branom v. Smith Frozen Foods of Idaho, Inc., 83 Idaho 502, 365 P.2d 958 (1961); Cox v. Kee, 107 Neb. 587, 186 N.W. 974 (1922); Kink v. Combs, 28 Wis. 2d 65, 135 N.W.2d 789 (1965).

tication of photographs.[15] Some courts have gone further and found testimony as to facts which were shown in the records of a business,[16] or the computation of interest on a debt owed to his client[17] to be within the ambit of formal matters.

These two categories of exceptions are not hard and fast, however. The courts occasionally do not attempt to distinguish between uncontested matters and formal matters so that some overlap results.[18] Also, different courts may agree that an attorney should be allowed to give a certain type of testimony but may not agree under which of these exceptions it should be allowed. For example, in *Mildfelt v. Lair,*[19] the Kansas court found testimony in regard to the preparation of a contract to be within the exception for uncontested matters, while in *Matney v. Cedar Land Farms, Inc.*[20] the Virginia court classified testimony concerning the preparation of a deed of correction as a formal matter. The fact that one commentator has suggested that formal matters should include all matters that are uncontroverted is a measure of how blurred the distinctions really are.[21]

A third exception is made in those instances where the ends of justice require that the attorney testify to a material matter.[22] The rationale behind this exception is that once the litigation has reached an advanced stage, the loss of counsel who is thoroughly familiar with the case and his replacement by another who is unprepared will jeopardize the interests of the client and contribute to a possible miscarriage of justice.[23] Most courts require that the necessity for the attorney's testimony concerning a material matter be one which could not have been discerned before the inception of the trial and that the attorney be genuinely surprised by it.[24] In *Montgomery*

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15. Gray v. Pennsylvania R.R., 33 Del. 450, 139 A. 66 (1927).

16. Burnett v. Taylor, 36 Wyo. 12, 252 P. 790 (1927).

17. Stratton v. Henderson, 26 Ill. 69 (1861).

18. *See* State v. Spencer, 186 Kan. 298, 349 P.2d 920 (1960).

19. 221 Kan. 557, 561 P.2d 805 (1977).

20. 216 Va. 932, 224 S.E.2d 162 (1976).

21. Whitman, *Comment on Recent Decisions of Courts of Last Resort on Ethical Propriety of a Lawyer Appearing as Witness in Case in which He is Acting as Counsel,* 9 A.B.A.J. 123 (1923).

22. Cases cited note 4 *supra.*

23. Montgomery v. First Nat'l Bank of Newport, 246 Ark. 502, 439 S.W.2d 299 (1969); Cuvelier v. Town of Dumont, 221 Iowa 1016, 266 N.W. 517 (1936).

24. Montgomery v. First Nat'l Bank of Newport, 246 Ark. 502, 439 S.W.2d 299 (1969); Cuvelier v. Town of Dumont, 221 Iowa 1016, 266 N.W. 517 (1936); Hagerty v. Radle, 228 Minn. 487, 37 N.W.2d 819 (1949).

v. First National Bank of Newport,[25] an attorney who had assisted the defendant in guardianship matters took the stand as a witness and, while on the stand, instructed his associate, who was representing the defendant at trial, as to methods of preserving the record. Concerning situations of this type, Justice Fogleman said:

> Any doubts about the application of these canons should be resolved by a declination of employment by any member of a law firm when a partner or associate may become a witness or by withdrawal of the firm from the representation when it becomes apparent that the testimony of a member or associate on behalf of a client will become necessary. We recognize, however, that there will be cases in which the necessity for a lawyer testifying cannot be anticipated until a stage of the trial at which his withdrawal, or that of his firm, would be impossible without serious injustice to his client. In such a case withdrawal should not be expected, but it should be clear that the necessity for the lawyer's testimony could not have been anticipated.[26]

All courts, however, do not require that the necessity for the testimony be unanticipated in order to come within this exception. In *Adams v. Flora,*[27] a case involving a will contest, the attorney for the will proponent testified as to the circumstances surrounding the drafting of the will in question. The court said that it was "not an ethical violation for an attorney to testify on behalf of his client when the proper administration of justice requires it."[28] Despite the fact that the attorney must have known his testimony concerning the drafting of the will would be necessary when he took the case, the court allowed him to testify and remain in the case. The Missouri court, in *Burgdorf v. Keeven,*[29] has said that, where the testimony of the attorney was important and he was the only available witness, it was permissible for him to testify.[30] There the action was one to set aside a deed on the grounds of mental incapacity and the attorney's testimony concerned the mental capacity of the grantor. One presumes the attorney could have anticipated the necessity of his testimony when he was offered the case, but the court did not mention the requirement of surprise. The United States Court of

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25. 246 Ark. 502, 439 S.W.2d 299 (1969).
26. *Id.*, 439 S.W.2d at 303-04.
27. 445 S.W.2d 420 (Ky. 1969).
28. *Id.* at 422.
29. 351 Mo. 1003, 174 S.W.2d 816, 819 (1943).
30. *Id.*

Appeals for the District of Columbia has also refused to require that the necessity of the attorney's testimony be unanticipated where the loss of counsel for the remainder of the trial would be detrimental to his client's case.[31]

Enforcement

The cases discussed above were exceptional because the courts declared that it was not unethical for counsel to testify on behalf of his client without withdrawing from the case. This does not mean that in most cases counsel's testimony is excluded or he is required to withdraw before testifying. In the great majority of courts attorneys are competent to testify and are allowed to remain in the case as advocates even though the court deems the attorney's actions improper and unethical.[32] This is because, in most jurisdictions, the rule against an attorney being a witness for his client is a rule of ethics and not of law.[33] Under the law of evidence the attorney is a competent witness and his testimony is admissible regardless of whether he is breaching his professional ethics.[34] The court in *Miller v. Urban*[35] stated this proposition in the following manner:

> When counsel becomes a witness in behalf of his client in the same cause on a material matter, . . . and not in an emergency to avoid defeat of the ends of justice but having knowledge that he would be required to be a witness in time to relinquish the case to other counsel, he violates a highly important rule of professional conduct. . . . [citations omitted] However, the great weight of authority in this country holds that the impropriety of an attorney so testifying is a matter of professional

31. Callas v. Independent Taxi Owner's Ass'n, 66 F.2d 192 (D.C. Cir. 1933) (The court, however, said that such testimony was improper and that the attorney was subject to punishment after trial for professional impropriety.).

32. Universal Athletic Sales Co. v. American Gym, Recreat'l, & Athletic Equip. Corp., 546 F.2d 530 (3d Cir. 1976); Ford v. District of Columbia, 96 A.2d 277 (D.C. 1953); Wetzel v. Firebaugh, 251 Ill. 190, 95 N.E. 1085 (1911); Storbeck v. Fridley, 240 Iowa 879, 38 N.W.2d 163 (1949).

33. American Trust Co. v. Fitzmaurice, 131 Cal. App. 2d 382, 280 P.2d 545 (1955); Morgan v. Roberts, 38 Ill. 65 (1865); Wilson v. Wilson, 89 Neb. 749, 132 N.W. 401 (1911); Estate of Elvers v. Security First Nat'l Bank of Sheboygan, 48 Wis. 2d 17, 179 N.W.2d 881 (1970).

34. Manion v. Chicago R.I. & Pac. Ry., 12 Ill. App. 2d 1, 138 N.E. 2d 98 (1956); Shapiro v. Wendell Packing Co., 366 Mich. 289, 115 N.W.2d 87 (1962); Pull v. Nagle, 9 N.J. Misc. 987, 156 A. 271 (1931); McLaren v. Gillespie, 19 Utah 137, 56 P. 680 (1899).

> etiquette and not one of strict law, and that admission of testimony under such circumstances is not reversible error. Reliance has been placed instead, upon "the restraining influence of a professional education, and of the opinion of the bar and bench, and the liability to discipline for persistent misconduct as competent to suppress evils of this character."[36]

Most courts have criticized the practice of an attorney acting in the dual role of advocate and witness for his client,[37] but the majority feel that punishment for the sins of the attorney should not be visited upon the innocent client and for this reason do not find the attorney's misconduct to be reversible error.[38] Some courts have even held that it is reversible error to refuse to allow an attorney to offer himself as a witness[39] or to force him to withdraw after testifying.[40]

Often it is said that the allowance of the attorney's testimony is in the trial court's discretion,[41] and it is rare that a reviewing court has found an abuse of discretion in allowing the attorney to testify[42] and remain in the case.[43] This makes it apparent that a large part of the responsibility for lax enforcement of the rule against an attorney acting as both advocate and witness must be attributed to the trial courts.

Nevertheless, the courts have not been totally remiss in enforcing this rule. Many have said that, while the fact of the attorney's employment does not affect his competency as a witness, it does go

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35. 123 Conn. 331, 195 A. 193 (1937).

36. *Id.*, 195 A. at 194 (quoting French v. Waterbery, 72 Conn. 435, 437, 44 A. 740, 741 (1899)).

37. Wicks v. Wheeler, 139 Ill. App. 412 (1908); *In re* Otto's Estate, 349 Pa. 205, 36 A.2d 797 (1944).

38. Waterman v. Bryson, 178 Iowa 35, 158 N.W. 466 (1916).

39. State v. Blake, 157 Conn. 99, 249 A.2d 232 (1968); Gradsky v. State, 243 Miss. 379, 137 So. 2d 820 (1962); Barbetta Agency v. Sciaraffa, 135 N.J. Super. 488, 343 A.2d 770 (1975); White v. Board of Tax Appeals, 123 N.J.L. 350, 8 A.2d 819 (1939); Shannon v. State, 104 Tex. Crim. 483, 284 S.W. 586 (1926).

40. Callas v. Independent Taxi Owner's Ass'n, 66 F.2d 192 (D.C. Cir. 1933).

41. United States v. Buckhanon, 505 F.2d 1079 (8th Cir. 1974); Holbrook v. Seagrave, 228 Mass. 26, 116 N.E. 889 (1917); People v. Stratton, 64 Mich. App. 349, 235 N.W.2d 778 (1975); Pentimall v. Bankers Auto. Fin. Corp., 92 Pa. Super. Ct. 110 (1927).

42. For an example of abuse of discretion, see Rushton v. First Nat'l Bank of Magnolia, 224 Ark. 503, 426 S.W.2d 378 (1968).

43. Kausgaard v. Endres, 126 Neb. 129, 252 N.W. 810 (1934) (permitting attorney to participate in trial after he had testified held prejudicial error).

to the weight and credit to be given the attorney's testimony.[44] The United States Court of Appeals for the Seventh Circuit has held that it is not an abuse of discretion for the trial court to require the attorney to withdraw before testifying or, if he refuses to withdraw, to exclude his testimony.[45] South Dakota has taken the most stringent action to enforce the rule against an attorney being a witness for his client. In that state the rules of evidence as well as ethics prohibit such testimony unless it comes within certain enumerated exceptions.[46] These instances of strict enforcement are the exception, though, rather than the rule.

Conclusion

The record of court enforcement of the ethical standard relating to denying attorneys the right to testify for their clients leaves much to be desired. The courts have based their lack of firmness in this regard upon the rationale that the innocent client should not be made to pay for the ethical breach of the lawyer who accepted the case knowing he might have to testify at trial.[47] The counterargument to this rationale is that the hardship visited upon the innocent client has not prevented the courts from enforcing other rules, which carry the force of law, simply because they were invoked by his attorney's mistake rather than by any action of the client himself. Where the attorney fails to preserve error by objection during trial, the appellate courts in the United States have not excused the failure and thus have not agreed to review the contended error on the basis that it would otherwise work a hardship on an innocent party.[48] Likewise, where an attorney negligently drafts a provision of a will so that it violates the Rule Against Perpetuities, the courts have not excused the violation and given effect to the provision simply because the attorney was at fault and not the client.[49] If the

44. Lau Ah Yew v. Dulles, 257 F.2d 744 (9th Cir. 1958); Waterman v. Bryson, 178 Iowa 35, 158 N.W. 466 (1916); Little v. McKeon, 3 N.Y. Super. 607 (1848).

45. United States v. Clancy, 276 F.2d 617 (7th Cir. 1960); Christensen v. United States, 90 F.2d 152 (7th Cir. 1937).

46. S.D. COMPILED LAWS ANN. § 19-1-3 (1967); Jones v. South Dakota Children's Home Soc'y, 238 N.W.2d 677 (S.D. 1976).

47. Callas v. Independent Taxi Owner's Ass'n, 66 F.2d 192 (D.C. Cir. 1933); State v. Blake, 157 Conn. 99, 249 A.2d 232 (1968); Levas v. Dewey, 33 Wash. 2d 232, 213 P.2d 933 (1950).

48. *See* FED. R. EVID. 103(a)(1).

49. *See* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

client is held to account for the errors of his legal representative in other instances, why not in a situation where the attorney's conduct detracts from the integrity of the legal system and undermines public confidence in the legal profession? If the legal profession is to continue to enjoy the esteem and confidence of the public, it must police itself effectively. It is submitted that, in order to achieve this end, both the trial and appellate courts must be stricter in their enforcement of professional ethics and, in particular, the rule against an attorney testifying on behalf of his client.

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