

ALASKA BAR ETHICS OPINION 2020-01

Representing a Non-Party Witness at a Deposition in a Matter Where the Lawyer Also Represents a Named Party

FACTS: A lawyer is representing a client at the deposition of a third-party witness. During a break in the deposition, the lawyer and witness confer. When the deposition resumes the lawyer announces that the lawyer is now representing the witness. As the deposition proceeds, the lawyer instructs the witness not to answer certain questions and at different points recesses the deposition to consult with the witness.

The Committee is told that this scenario is not infrequent in litigation, and has been asked whether it is permissible under the Rules of Professional Conduct.

RULES: ARPC 1.2, 1.5, 1.6, 1.7, 1.8(f), 1.9, 1.10, 1.11, 1.13, 4.3, 7.3

SUMMARY: Agreeing to represent a witness mid-deposition when representing one of the parties to the matter raises serious ethical issues. Before undertaking such a representation, a lawyer must carefully consider the issues, disclose potential conflicts, and obtain informed consent from both the prospective client and from the lawyer's existing client. Caution and prudence are in order, as many ethical issues are implicated in this situation.¹

OPINION: The factors that apply to any representation of multiple clients in the same matter apply to this situation. These considerations may not be ignored simply because of time pressures in the deposition setting. We review the applicable ARPCs below.

ARPC 1.2 – Scope of Representation. The first issue is scope of representation. The lawyer and the client must agree on “the objectives of representation” and “the means by which they are to be pursued.” ARPC 1.2(a). If limited, the scope must be reasonable under the circumstances and the client must give informed consent (“consent after consultation”). ARPC 1.2(c).

¹ These ethical concerns are present in many situations involving actual or potential multiple representation. For example, a lawyer representing a corporation may be asked to attend a deposition of a company employee. The employee may see the lawyer as “their” lawyer and rely upon the lawyer for advice and guidance before and during the deposition. A lawyer facing this or another multiple representation situation should consider the ethical issues identified in this opinion and address those issues, in advance, with all concerned.

Questions to consider include whether the representation is limited to representing the witness during the deposition, or is it concerning any issue that may arise relating to the matter, or perhaps even a broader scope? Does the witness understand what the limitations are and how they affect the witness's interest? In this circumstance, given the on-the-fly creation of an attorney-client relationship, clarity and understanding on the scope of representation are critical.

Ethics opinions from other jurisdictions express skepticism that a person can be adequately represented at a deposition on a "limited representation" basis.²

² The New York City Bar Association, for example, concluded that it is doubtful that a lawyer could ever adequately represent a deposition witness on a "limited" basis:

Although there is no such thing as a "one-size-fits-all" representation, representing a non-party witness for the purposes of a deposition may involve the following activities:

- Reviewing relevant documents, testimony and other materials in order to understand the issues in the case and the potential relevance of the witness's testimony;
- If the witness is also subpoenaed to produce documents, assisting the witness in identifying, collecting, reviewing and producing documents in response to the subpoena;
- Meeting with the witness in advance of the deposition to prepare for the testimony;
- Evaluating whether the potential testimony may expose the witness to criminal or civil liability, and providing advice on how to minimize such liability (or, if the potential liability implicates an area of practice that is outside the attorney's expertise, advising her to retain competent counsel);
- Evaluating what impact the witness's potential testimony may have on the case generally;
- Attending the deposition and interposing appropriate objections and offering appropriate guidance to the witness concerning the testimony;
- Ensuring that the deposition transcript is transmitted to the witness, assisting as needed with filling out an errata sheet, securing the witness's signature on the transcript, and delivering the signed transcript to opposing counsel;
- Following up, as needed, with additional requests for information or documents from the witness; [and]

ARPC 1.5 – Fees. The lawyer and client must agree on fees. ARPC 1.5. If fees are expected to exceed \$1,000, a written fee agreement must be entered “before or within a reasonable time after commencing the representation.” ARPC 1.5(b). The rules require disclosure of any potential assessment of an adverse party’s “costs, fees, or expenses if the client is not the prevailing party.” ARPC 1.5(b).

Additionally, if the representation is limited under ARPC 1.2 and a written agreement is required under ARPC 1.5, “the agreement shall describe the limitation on the representation.” ARPC 1.2(c)(2).

The questions to consider in this situation include whether fees will be charged for the representation, who is paying those fees and, if the lawyer’s existing client is paying for the lawyer’s services, whether both clients agreed to the arrangement.³ The question of potential liabilities must also be considered and disclosed. While seemingly remote in this situation, an adverse fee award is within the realm of possibility: for example, if the lawyer instructs the witness not to answer a question and an order to compel and award fees is entered by the court.

ARPC 1.6 and 1.8 – Confidentiality of Information. In the usual representation, a lawyer “shall not reveal a client’s confidence or secret unless the client gives informed consent,” except for disclosures that (1) are impliedly authorized in order to carry out the representation, ARPC 1.6(a), and (2) are permitted in certain very limited circumstances. ARPC 1.6 (b). “Use of

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- Answering any questions the witness has concerning the testimony and its implications for the witness or for the case generally.

NYC Bar Ethics Committee Formal Opinion 2016-2: “Representing a Non-Party Witness at a Deposition in a Proceeding Where the Attorney Also Represents a Named Party.” <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2016-2-representing-a-non-party-witness-at-a-deposition-in-a-proceeding-where-the-attorney-also-represents-a-named-party>

³ See ARPC 1.7 Cmt (“Interest of Person Paying for a Lawyer’s Services”) (“A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client.”) *and see* ARPC 1.8(f) (“A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the lawyer-client relationship; and (3) information relating to a client’s confidences or secrets are protected as required by Rule 1.6.”).

confidences and secrets to the disadvantage of the client violates the lawyer's duty of loyalty." ARPC 1.8(b) Cmt.

When there is joint representation of two or more clients, "impliedly authorized" disclosures encompass confidential information material to the joint representation. The prospective jointly represented clients need to be informed and consent to the exchange of otherwise confidential information with each other and the concomitant waiver of confidentiality between them. "With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised." ARPC 1.7, Cmts.

In the situation presented, the lawyer must analyze whether representation of the witness is a separate representation or a joint representation with the lawyer's other client and seek consent accordingly. For example, if the lawyer is representing a corporation and one of its employees is the witness, will the lawyer's representation of the witness be a stand-alone representation or is it part of a joint representation with the corporation? If joint, and the witness confides something to the lawyer that could jeopardize the witness's employment, but which is also material and helpful to the corporation's defense, the lawyer may be obligated to disclose that information to the corporation—and vice versa. The lawyer must carefully explain these issues and obtain informed consent from both the witness and the existing client before agreeing to represent the witness.

ARPC 1.7, 1.8, 1.9, 1.10, 1.11 – Conflict of Interest. The general rule on conflict is that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." ARPC 1.7(a). "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client, or a third person or from the lawyer's own interests." ARPC 1.7 Cmt. Specific conflict rules apply in certain circumstances.⁴

In the situation described, the obvious initial inquiry is whether there is a conflict of interest between the lawyer's existing client and the witness. There may be no conflict; there may be a waivable conflict; or there may be an unwaivable conflict. See, ARPC 1.7(a) and (b). Other conflicts, with other clients or the lawyer's own interests, may also exist. In the situation presented, regardless of the time pressures inherent in an ongoing deposition, the lawyer is

⁴ See ARPC 1.8 (Conflict of Interest: Current Specific Rules); ARPC 1.9 (Duties to Former Clients); ARPC 1.10 (Imputation of Conflicts of Interest: General Rule); and ARPC 1.11 (Special Conflicts of Interests for Former and Current Government Officers and Employees).

required to assure that there are no conflicts that would prevent the representation. The lawyer must:

- 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is waivable; and 4) if so, consult with the clients affected ... and obtain their informed consent, confirmed in writing.

ARPC 1.7 Cmt.

It is also important to recognize and disclose that “[o]rdinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.” ARPC 1.7 Cmt. Representation of the witness may be tactically advantageous at the moment, but if conflicts emerge after the deposition, the lawyer may be disqualified from representing either party as the matter proceeds. And, as the Alaska Supreme Court has noted, “It is well established that an attorney, disqualified on conflict-of-interest grounds, generally is barred as a matter of public policy from receiving any fee from either of the opposed interests.”⁵

Conflict of interest is a significant issue in this scenario. Great caution is in order. Disclosure to, and informed consent by, both clients is critical. Moreover, even if a conflict is not apparent at the outset of the representation, a conflict can arise later. The lawyer must be aware, attentive and responsive to developing conflicts.

ARPC 4.3 and 1.13 – Dealing with Unrepresented Persons and Organization as a Client. While perhaps not the classic situation, in the scenario presented the witness is an “unrepresented person.” Whether the lawyer is proposing representation or is responding to the witness’s request for representation mid-deposition, the “lawyer shall not state or imply that the lawyer is disinterested.” ARPC 4.3.

In particular, and related to the conflict issues discussed above, when dealing with an organization’s employee or other “constituent,” a lawyer is obligated to “explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” ARPC 1.13(f).

ARPC 7.3 – Solicitation of Clients. This rule may not be a major issue in the situation presented. Nonetheless, it is worth keeping in mind that a lawyer “shall not by in-person, live telephone, or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain...” ARPC 7.3(a).

⁵ *Moses v. McGarvey*, 614 P.2d 1363, 1372 (Alaska 1980).

The concern is that the prospective client “may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.” ARPC 7.3 Cmt. That concern could easily be an issue during a heated deposition, where the witness is the subject of aggressive or hostile questioning by the opposing party’s lawyer.

Conclusion. As the above list indicates, agreeing to represent a witness mid-deposition when representing one of the parties to the matter raises any number of serious ethical issues. The Committee counsels prudence and deliberation before a lawyer agrees to undertake representation in the situation presented.

Approved by the Alaska Bar Association Ethics Committee on January 2, 2020.

Adopted by the Board of Governors on January 30, 2020.