

NACDL ETHICS ADVISORY COMMITTEE

Formal Opinion No. 04-03 (May 10, 2004)

Introduction

The Ethics Advisory Committee of the National Association of Criminal Defense Lawyers has been asked by an Alabama member whether it violates Alabama Rule of Professional Conduct 3.7(a) for a sole practitioner to tape record a statement from a witness without having a third person present. The prosecutor seeks a hearing to disqualify counsel because the prosecutor intends to call defense counsel as a witness about the statement, apparently no matter what the statement says or whether there is a bona fide issue of voluntariness of the statement.

We conclude that tape recording witness statements does not per se require disqualification of defense counsel under Alabama Rule of Professional Conduct 3.7(a), which is the same as Model Rule of Professional Conduct 3.7(a). The prosecution seeks to disqualify defense counsel merely because defense counsel took a witness statement on tape. Moreover, a rule that works to bar sole practitioners and lawyers with limited budgets from tape recording witnesses because they do not have a third party present would work to disqualify those lawyers in violation of the client's right to counsel of choice under the Sixth Amendment and Art. I, § 6 of the Alabama Constitution. The prosecution's motion presumes defense counsel will be a witness, but this cannot be presumed at this stage of the case. More must be known, and a hearing will be required, with the burden on the prosecution, to show defense counsel is "a necessary witness" before defense counsel can be disqualified.

Prosecutor's contentions

The prosecutor has filed a "Motion to Remove Defense Attorney for Becoming a Necessary Witness in the Case" and contends, *inter alia*, that the defense lawyer interviewed the minor alleged victim without her mother being present and recorded the statement, after the mother much earlier said that she did not want the lawyer to talk to the witness¹; that if the statement is consis

¹ We are informed that defense counsel was looking for the alleged victim's aunt, and the alleged victim was at the aunt's house, answered the door, and agreed to talk to defense counsel on

tent, the state can bolster the alleged victim's testimony with it²; that if the statement is inconsistent, the prosecution can call the lawyer as a witness as to the circumstances of the taking of the inconsistent statement in an effort to impeach the inconsistent statement; and defense counsel should be removed from the case because it is likely she will be a necessary witness, and the state intends to call defense counsel as a witness. For relief, the prosecution asks that defense counsel be disqualified, or, in the alternative, that the court should order the taped interview be turned over to the state and the information obtained from the interview not be used to cross-examine the victim.

The defense at trial is denial; the wrong person is accused; and this issue arose because defense counsel wanted to interview the alleged victim concerning her identification of the accused.

Advocates as witnesses

Is defense counsel a necessary witness for the prosecution or defense? It is too early to tell. The mere existence of this tape does not make defense counsel a necessary witness.

Alabama Rules of Professional Conduct Rule 3.7(a)

Rule 3.7(a) of the Alabama Rules of Professional Conduct provides as follows:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:

- (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 hard-

tape.

² The prosecution cites *Murphy v. State*, 355 So. 2d 1153 (Ala. Crim. App. 1978) (holding that witness could be asked about a prior consistent statement after tape recorded inconsistent statement was admitted); and *Cady v. State*, 455 So. 2d 101 (Ala. Crim. App. 1984), neither of which seem particularly pertinent to this situation.

ship on the client.³

ABA Standards, The Defense Function

ABA STANDARDS, *The Defense Function* § 4-4.3(e) (2d ed. 1991) provides:

Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.

Restatement (Third) of the Law Governing Lawyers

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108 (2000) provides:

(1) Except as provided in Subsection (2), a lawyer may not represent a client in a contested hearing or trial of a matter in which:

- (a) the lawyer is expected to testify for the lawyer's client; or
- (b) the lawyer does not intend to testify but (i) the lawyer's testimony would be material to establishing a claim or defense of the client, and (ii) the client has not consented as stated in § 122 to the lawyer's intention not to testify.

(2) A lawyer may represent a client when the lawyer will testify as stated in Subsection (1)(a) if:

- (a) the lawyer's testimony relates to an issue that the lawyer reasonably believes will not be contested or to the nature and value of legal services rendered in the proceeding;
- (b) deprivation of the lawyer's services as advocate would work a substantial hardship on the client; or
- (c) consent has been given by (i) opposing parties who would be adversely affected by the lawyer's testimony and, (ii) if relevant, the lawyer's client, as stated in § 122 with respect to any conflict of interest between lawyer and client (see § 125) that the lawyer's testimony would create.

...

³ This rule is the same as the 1983 version of the ABA Model Rule of Professional Conduct, so this opinion applies beyond Alabama. The 2003 version of the Model Rules uses "unless" instead of "except when."

(4) A tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony.

Constitutional right to counsel of choice

The Sixth Amendment to the U.S. Constitution and Art. I, § 6 of the Alabama Constitution guarantee to an accused person the right to counsel of choice, and denial of counsel of choice is constitutional error not overcome by the weight of the evidence. *Davis v. State*, 292 Ala. 210, 215, 291 So.2d 346, 350 (1974) (counsel had a conflicting setting and trial court refused continuance; the fact that evidence was overwhelming and substitute counsel performed adequately did not obviate error). In addition, federal courts have held that a denial of counsel of choice is not even subject to the requirement of a showing of prejudice. *See, e.g., United States v. Panzardi-Alvarez*, 816 F.2d 813, 817-18 (1st Cir. 1987) (quoting *Flanagan v. United States*, 465 U.S. 259, 267-68 (1984) (prejudice need not be shown for violation of right to counsel of choice)); *United States v. Walters*, 309 F.3d 589, 592 (9th Cir. 2002); *United States v. Childress*, 58 F.3d 693, 733-36 (D.C. Cir.1995) (remanding for hearing; denial of counsel of choice issue was not even mooted by the death of the lawyer during the pendency of the appeal).

Must defense counsel be per se disqualified?

In the situation presented for our review, defense counsel has a tape recorded statement of the alleged victim to a sexual assault. The prosecution has not heard the tape, so the prosecution does not know whether the statement aids or harms the defense, and neither do we. Likewise, whether the witness was coerced in giving her statement is not mentioned, but the prosecution apparently hopes to show that. Nevertheless, that is a fact for the trial judge to decide, and that will determine whether defense counsel is "a necessary witness" under Rule 3.7(a).

One of the reasons given by prosecutors for disqualification is that they can bolster their witness with defense counsel's testimony. Testimony which merely bolsters credibility universally is not admissible. *See, e.g., Wilsher v. State*, 611 So.2d 1175 (Ala. Crim. App. 1992). Therefore, that ground cannot be used by prosecutors to show defense counsel is "a necessary

witness.” And, even if they could, that does not even suggest that defense counsel is “a necessary witness” if the tape is otherwise admissible.

Defense counsel’s duty to investigate

Defense counsel had a constitutional duty to investigate on behalf of her client. “Counsel’s obligation is to conduct a ‘substantial investigation into each of the *plausible* lines of defense.’ *Strickland*, 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added).” *Jones v. State*, 753 So.2d 1174, 1191 (Ala. Crim. App. 1999). *Accord: Bui v. State*, 717 So.2d 6, 18 (Ala. Crim. App. 1997); *Dill v. State*, 484 So.2d 491, 497-98 (Ala. Crim. App. 1985) (insanity defense). Defense counsel might well have been derelict in her duty to her client had she failed to seek to interview the witness, depending upon the circumstances of the case. Whether to interview a sexual abuse victim is strictly a judgment call for defense counsel. In this case, defense counsel did not seek to interview the witness early in the case, and she happened upon the witness months later and then elected to seek to talk to her and the witness agreed to be taped. This was her constitutional duty as defense counsel if she believed it was necessary for her client. A criminal defense lawyer needs to evaluate the credibility of witnesses before the trial. The mother’s wishes concerning interviewing the minor are entitled to weight, but, depending on the age and maturity of the alleged victim, defense counsel has the right to seek to interview the minor without the influence of the mother.⁴

Not all defense lawyers have the luxury of having investigators to either investigate for them or be witnesses to statements they take. As a matter of economics, defense counsel often must do the work herself, as happened here. When a lawyer takes a statement that the witness denies, then the lawyer *may* become an impeaching witness. But, if the statement is tape recorded, the lawyer seeks to obviate that problem because the witness herself can lay the foundation for admissibility of the tape under Ala. R. Evid. 901(b)(5). *Johnson v. State*, 826 So.2d 1, 30-31 (Ala. Crim. App. 2001). Disqualifying a lawyer merely for taking a tape recorded statement would deny due process by interfering with his ability to defend⁵ and equal protection based on the

⁴ See Alabama Rule of Professional Conduct 4.4 (respect for rights of third persons).

⁵ “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). “Few rights are more fundamental than that of an accused to present witnesses in his

client's economic means.

Is defense counsel a necessary witness?

Under Rule 3.7(a), it must be “likely” that defense counsel will be “a necessary witness.” As a general rule, “there must be a showing that the proposed testimony is relevant, material, and unobtainable elsewhere.” ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.7 at 384-85 (5th ed. 2003) (citing cases). *Accord*: RESTATEMENT § 108(4), *supra*.

To disqualify defense counsel, the prosecution bears the burden of showing that defense counsel is a necessary witness, the information is not obtainable elsewhere, and, under RESTATEMENT § 108(4), that this is not merely an effort to disqualify counsel. The nature of the Motion, essentially assuming that the admission of the tape recording will force defense counsel out of the case because it will make defense counsel a witness, almost sounds like the latter here,⁶ but we do agree that a motion to disqualify is a permissible method of resolving the issue before trial. RESTATEMENT § 108, *Comments k-l*. That does not, however, presume that the motion should be

own defense.” *Id.*, 410 U.S. at 302.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). Accordingly, it is held that “the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

⁶ See *Harter v. University of Indianapolis*, 5 F.Supp.2d 657, 663 (S.D.Ind. 1998):

Where one party argues that an opponent's attorney is a necessary witness and moves to disqualify that attorney, however, courts view the opponent's asserted need to call the attorney more skeptically and must be concerned about the possibility that the motion to disqualify is an abusive tactic to hurt the opponent's ability to pursue his case. See, e.g., *McElroy v. Gaffney*, 129 N.H. 382, 529 A.2d 889, 894 (1987); *Spence v. Flynt*, 816 P.2d 771, 779 (Wyo.1991).

granted without some proof from the prosecutor.

The prosecution still bears the burden of proving as a preliminary fact under Ala. R. Evid. 104(a-b): that the witness denies that her voice is on the tape (an issue that almost certainly can be resolved without calling defense counsel), or that (if the statement favors the defense) she was coerced into giving it. If the witness does not dispute that her voice is on the tape and her statement was voluntary and that she just misunderstood what was asked of her, defense counsel would not be “a necessary witness” at all because the tape would speak for itself.

If the issue of coercion of the statement is raised by the witness, not just the prosecution in the abstract, then the choice would be up to defendant and defense counsel. If the statement is so important to the accused that it must be played and the circumstances of its being taken are seriously controverted,⁷ then, and only then, would defense counsel face the question of disqualification. If the defense (*i.e.*, the defendant after consultation with defense counsel) elects not to use the tape, then defense counsel would not be disqualified. ABA STANDARDS, *The Defense Function* § 4-4.3(e), *supra*.⁸

The state cannot elect to play the tape recorded statement solely to exclude defense counsel from the case if the state cannot otherwise prove that defense counsel is “a necessary witness” to the taking of the statement.

⁷ Not just contested by the state, just for the purpose of disqualifying defense counsel without knowing more.

It has been held that a bona fide question of authenticity of tape recordings disqualified the lawyer in possession of them. *State ex rel. Karr v. McCarthy*, 417 S.E.2d 120 (W.Va. 1992). Authenticity has not been questioned here.

⁸ How this issue is handled could implicate a future ineffective assistance claim, if the client gets convicted. Counsel must fully and clearly explain the implications to the client, and another lawyer might be called upon to assist. Disqualification during trial itself is possible, and having additional counsel on hand to conclude the trial would obviate this problem. That, however, is a hypothetical issue at this point.