

## **Counsel Shall Not Bear Witness: Clarifying the Obligation of Counsel to Withdraw When Required to be a Witness**

**By Alice Woolley**

### **Cases Considered:**

*Toliver v. Koepke*, [2008 ABQB 37](#)

During divorce litigation the Plaintiff and Defendant disputed the existence of a settlement respecting distribution of matrimonial property. The dispute was directed for trial by Justice Moreau of the Alberta Court of Queen’s Bench, at which point counsel for the Defendant (who was newly appointed and therefore had not been involved in discussions related to the settlement) brought an application to remove counsel for the Plaintiff. The application was brought on the grounds that Plaintiff’s counsel was a potential witness at the trial of the settlement issue. Justice Eric Macklin of the Court of Queen’s Bench granted the application.

Justice Macklin noted Chapter 10, Rule 10 of the Law Society of Alberta’s Code of Professional Conduct, which prohibits a lawyer acting as counsel “in any proceeding in which it is likely that the lawyer will give evidence that will be contested”. Justice Macklin noted that the provisions of the Code are not binding on the Court but are nonetheless “important statements of public policy” (para. 10). In this case counsel for the Plaintiff would clearly be required to testify – indeed anyone “present at the settlement meeting will likely be required to testify” (para. 15). Further, the testimony of counsel would be particularly significant given the lack of objectivity of the parties to the proceeding regarding what had taken place.

Removal of counsel was found to be warranted because given that he would be a witness, his remaining on the file increased the likelihood of delay of the trial or a mistrial, and would undermine the ability of counsel to make appropriate tactical and strategic decisions. In the circumstances, the “interests of the administration of justice outweigh the Plaintiff’s right to counsel of her choice” (para. 22).

Justice Macklin’s judgment is difficult to disagree with. Why counsel should be prevented as appearing as both advocate and witness warrants, though, more detailed exploration. The issue with counsel appearing in these dual roles goes to both of the core ethical obligations of counsel: to be a resolute and effective advocate for her client and to ensure the proper functioning of the judicial system. When counsel appears as a witness her ability to provide effective advocacy is undermined. As Chapter 10, Rule 10 of the Alberta Code emphasizes, an advocate must be

objective and impartial in the advice that she provides to her client. Where that advocate is so embroiled in the matters at issue that she will be a witness, her ability to provide such advice is compromised. Can she advise her client, for example, as to whether she will be an effective witness? On likely grounds for cross-examination? On the effect her testimony will have on the success of the overall cause of action? She cannot – and her inability to do so ethically prevents her from continuing to act.

In addition, the ability of counsel to ensure the proper functioning of the judicial system is undermined if she is a witness in the case. Counsel has an obligation to retain a degree of objectivity and neutrality not just with respect to the advice he gives to clients, but also with respect to the presentation of a case to the court. He is prohibited from indicating his personal opinion or belief to the court about facts in evidence (Chapter 10, Rule 11), he is required to ensure that no steps are taken that are “clearly without merit” (Chapter 10, Rule 1), he must ensure that witnesses do not mislead the court (Chapter 10, Rule 14), he must correct misapprehensions that arise from a witness’s testimony (Chapter 10, Rule 15) and he must ensure that the court knows of relevant adverse authority and that no inadmissible facts or evidence are presented to the court (Chapter 10, Rules 18 and 19).

Again, discharge of these obligations is difficult (if not impossible) where counsel has become a witness. How can counsel both testify and be responsible for ensuring the accuracy of testimony given? How can counsel testify where the testimony necessarily includes an element of opinion (that the settlement was reached) and also be sure to keep his personal opinion removed from the adjudication of the case? How can counsel testify and answer questions that may elicit inadmissible evidence and also be sure that no inadmissible evidence is introduced – would he decline to answer a question asked where the question could have that effect? Again, since he cannot, he should not continue to take on the counsel role that requires him to be able to do so.

Three further points may be noted. First, the effect of the judgment in this case is not necessarily to prevent the Plaintiff from retaining her lawyer on subsequent litigation arising from her dispute with the Defendant. If, for example, the settlement is found not to exist, and its existence is no longer at issue in the litigation (on appeal or otherwise) than there is no issue with her returning to her current counsel in those matters. As the Code notes, “the lawyer may act as counsel in subsequent stages of a matter after giving evidence at a pre-trial proceeding in the matter, so long as the proceeding in question completely resolves the issue with respect to which the lawyer’s evidence was required” (Commentary, Chapter 10, Rule 10).

Second, though, the effect of the Rule is not only to prevent the Plaintiff from retaining her current lawyer, but is also to prevent the Plaintiff from retaining any member of that law firm. The Code only allows a firm member to be a witness where the lawyer is from the same firm where that firm member is the client.

Third, Justice Macklin hints at an additional justification for the removal of counsel that bears consideration. Justice Macklin appears to suggest that the dispute about the existence of a settlement may create a potential conflict of interest between the Plaintiff and her lawyer:

I would make one other point, however. The Plaintiff's position is that a settlement agreement was reached. If the Plaintiff loses on that issue, and the results at trial on the substantive issues are less favourable to her than the settlement would have been, where does the Plaintiff then turn and who does she hold responsible for the settlement agreement being ineffective?

The point Justice Macklin appears to be making is that the fact the Plaintiff may have a future complaint against her lawyer in relation to the settlement, weighs in favour of the lawyer being precluded from continuing to act. This point creates a potentially much broader basis for removal of counsel. It is true that counsel cannot act for a client where a potential conflict exists (Chapter 6 Rule 7 of the Code of Professional Conduct); however, to see a potential conflict here requires that the settlement not be valid, that the result at trial be less advantageous than the settlement and that the failure of the settlement be attributable to the fault of counsel. While these events could unfold in this way, it creates a significant burden on counsel to require that she recuse herself based on this sequence of speculative events. The analysis may be different if counsel knows that she has been negligent, or even arguably negligent, but absent that knowledge it goes too far to suggest that counsel should remove herself in any circumstance where, perhaps, a conflict might arise.