

DANGER AT THE CROSSROADS: ETHICAL CONSIDERATIONS FOR THE
LAWYER SEEKING TO TESTIFY ON BEHALF OF A CONTINGENCY CLIENT
AFTER *ANDERSON PRODUCING INC. v. KOCH OIL CO.*

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I. INTRODUCTION

The prohibition against lawyers serving as both counsel and witness in a trial proceeding has a long and complicated history, and the rule itself is riddled with exceptions. On the other hand, the prohibition against using witnesses with a contingency interest in the outcome of a civil trial is clear and nearly universal. The point where the two rules intersect is almost uncharted. Can an attorney appear as a witness, either to establish an essential fact or to provide expert testimony, on behalf of the client if the attorney or the attorney’s firm retains a contingent fee interest in the case?

For those lawyers who regularly take cases on a contingency basis, the risks are obvious. But even for those lawyers who do not generally work for contingency fees, the possibility can arise. For example, Adam is a lawyer representing Bethany in a transaction and becomes a vital witness to misrepresentations and fraudulent inducements made by the opposing party during the course of negotiations. As a result, Bethany is defrauded and no longer has funds to pay Adam or to hire a new lawyer, and Adam’s hourly fee for the performance of transactional work remains unpaid.

This example raises numerous questions: May Adam serve as a witness and continue representing Bethany in the subsequent litigation, on either a contingent fee basis or an hourly fee basis, payment of which is dependent

on recovery of funds in litigation? May Adam serve as a witness while someone else from his firm serves as the courtroom attorney for Bethany? Or must Adam disavow the previously earned but unpaid fee—payment of which is not ostensibly dependent on the outcome of the litigation—in order to serve as a witness? Any lawyer who finds himself or herself in this uncomfortable position must make difficult decisions, made even more difficult by ever-shifting rules of ethics and conflicting court decisions.

The Supreme Court of Texas raises these questions in *Anderson Producing Inc. v. Koch Oil Co.*¹ While the court wrestled with each of these questions in turn, this Comment focuses on the issues raised by Justice Owen.² In her dissenting opinion, Justice Owen identified two related questions: the first being when a testifying lawyer should be disqualified as counsel and the second being when a lawyer should be prohibited from testifying altogether.³ In answer, Justice Owen stated that in most cases, she “would hold that an attorney may not appear as a witness to establish an essential fact on behalf of the client . . . if the attorney or the attorney’s firm retains a contingent interest in the case.”⁴ The majority refused to address the question at all because the issue had not been preserved for appeal.⁵ Though the high court refused to pass judgment on the question, the argument appears to bear teeth, with one commentator opining that *Anderson Producing* is “an example of a party who snatched defeat from the jaws of victory by failing to complain that the attorney’s conduct violated Texas Disciplinary Rule 3.04(b).”⁶

By historical examination of the Texas Disciplinary Rules of Professional Conduct and review of case law and persuasive legal authority, this Comment seeks to provide a practical guide for lawyers who find themselves in such circumstances. Part II reviews the history and ethical concerns behind the rule prohibiting lawyers from testifying on behalf of their clients, commonly known as the “Lawyer-Witness Rule.” Part III considers the principles that led to the prohibition against witnesses—particularly expert witnesses—taking a contingent interest in the cases in which they testify. In Part IV, this Comment analyzes the state of Texas

¹ 929 S.W.2d 416 (Tex. 1996).

² *Id.* at 427 (Owen, J., dissenting).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 425.

⁶ Leslie R. Masterson, *Witness Immunity or Malpractice Liability for Professionals Hired as Experts?*, 17 REV. LITIG. 393, 412 (1998).

law as it stood on the issues in the past and where it stands today, focusing on those cases where the lawyer-witness rule and contingency fees intersect. The case against disqualification is discussed in Part V, along with recommendations for protecting the lawyer-witness's financial interest and practical application of the Texas Rules.

II. THOU SHALT NOT PROFESS THE TRUTH AND PRESENT THE LAW: THE EVOLUTION OF THE LAWYER-WITNESS RULE

The history of the lawyer-witness rule is obviously complicated, reflecting the paradigm shift from a rule of evidence to one of professional ethics. However, as in most things, an understanding of the history of the rule is the key to understanding its future.

A. *The Model Lawyer-Witness Rules*

While modern law evaluates the lawyer-witness rule as an ethics issue, the prohibition was born under the rules of evidence.⁷ Under the common law, a lawyer was deemed incompetent to testify on behalf of a client on the basis that a lawyer was an agent of that client.⁸ In 1908, the American Bar Association ("ABA") adopted Canon 19, which stated:

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client.⁹

The inherent ambiguities led to a small flurry of opinions issued by the ABA Committee on Professional Ethics as they struggled to define the parameters of the rule.¹⁰ The original foundation for the rule—pecuniary interest—crumbled under the weight of legal examination, and it was ultimately acknowledged that "[t]he problem is not one of competency. A

⁷Robert K. Wise, *The Lawyer-Witness Rule: A Comparison of a Lawyer's Ability to be Both a Lawyer and an Advocate Under the Texas Code of Professional Responsibility and the Texas Disciplinary Rules of Professional Conduct*, 31 S. TEX. L. REV. 651, 658 (1990).

⁸*Id.*

⁹ABA CANONS OF PROFESSIONAL ETHICS NO. 19 (1908).

¹⁰See James B. Lewis, *The Ethical Dilemma of the Testifying Advocate: Fact or Fancy?*, 19 HOUS. L. REV. 75, 81–84 (1981–1982).

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lawyer, no less than a vagrant, teenager, or litigant, is a competent witness.”¹¹ It was apparent that the real issue behind the lawyer-witness rule was not one of incompetence, but one of impropriety.¹²

B. The History of the Lawyer-Witness Rule in Texas

The history of the lawyer-witness rule in Texas moved in step with that of the ABA.¹³ Texas adopted the ABA canons in 1909, and re-adopted them, with modifications, following the enactment of the State Bar Act in 1939.¹⁴ The ABA’s Code of Professional Responsibility became effective in 1970.¹⁵ This ABA Model Code of Professional Responsibility took a more permissive view of the lawyer-witness rule, making prohibition the exception rather than the rule.¹⁶ This new Code also replaced earlier rules that required the disqualification of the entire firm upon the disqualification of the lawyer-witness.¹⁷ In 1971, the State Bar of Texas adopted its own Code of Professional Responsibility (“CPR”).¹⁸ The CPR included nine

¹¹*Id.* at 85 (quoting John F. Sutton, Jr., *The Testifying Advocate*, 41 TEX. L. REV. 477, 478 (1963)).

¹²*Id.* Despite this shift, the issue of incompetence still comes up occasionally, even in Texas. *See, e.g.*, *Aghili v. Banks*, 63 S.W.3d 812, 818–19 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (holding that “a lawyer who represents clients as an advocate before a court should be incompetent to provide evidence in the matter unless one of the exceptions to Rule 3.08 applies.”).

¹³Wise, *supra* note 7 at 652 n.2.

¹⁴*Id.*

¹⁵Lewis, *supra* note 10 at 78.

¹⁶MODEL RULES OF PROF’L CONDUCT R. 3.7 (1970), which reads:

RULE 3.7: 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.

¹⁷*Id.* 3.7(b).

¹⁸Wise, *supra* note 7, at 652 n.2. This original Code can be found at SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XII (1973), *restated, continued and*

Canons and the Disciplinary Rules (“DRs”) appertaining to each.¹⁹ The Ethical Considerations (“ECs”) were added the next year.²⁰ Though coming a year after the more permissive ABA rules, the Texas CPR continued to retain the harsher standards found in the earlier rules, embodied in Disciplinary Rules 5-101²¹ and 5-102.²²

promulgated, SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (1988), *reprinted in* TEX. GOV’T. CODE ANN. Tit. 2, Subtit. G app. A (Vernon 1988) (TEX. STATE BAR R. art. X, § 9).

¹⁹Wise, *supra* note 7, at 652 n.2.

²⁰*Id.* It is useful to note that the ECs and DRs differ in character: the ECs are treated as aspirational, where the DRs are mandatory in nature and “define proper conduct for purposes of disciplinary sanctions.” *Id.* In that respect the Texas Rules correlate to the DRs. *Id.*

²¹TEX. STATE BAR R., art XII, § 8, DR 5-101 (Tex. Code of Prof’l Resp.), 34 TEX. B.J. 758 (1971, superseded 1990):

DR 5-101—Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

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.
- (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.

²²TEX. STATE BAR R., art XII, § 8, DR 5-102 (Tex. Code of Prof’l Resp.), 34 TEX. B.J. 758 (1971, superseded 1990):

DR 5-102—Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in

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In 1977, the ABA set to work developing a new ethical code, which the State Bar of Texas began to consider adopting in 1983.²³ On January 1, 1990, the Texas Disciplinary Rules of Professional Conduct (“Texas Rules”) came into effect, replacing the CPR.²⁴ One final clarification was made in 1994, when Rule 3.08(a), which embodies today’s lawyer-witness rule, was amended to say, “[a] lawyer shall not accept or continue employment as an *advocate before a tribunal* in a contemplated or pending adjudicatory proceeding.”²⁵

The Texas Rules fell more in line with the trend toward permissibility in the lawyer-witness rule, but notable differences remain. Today, Texas Rules 3.08 reads as follows:

Rule 3.08—Lawyer as Witness

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer’s client, unless:

- (1) the testimony relates to an uncontested issue;
- (2) 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) the testimony relates to the nature and value of legal services rendered in the case;
- (4) the lawyer is a party to the action and is appearing *pro se*; or

his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

²³Wise, *supra* note 7, at 652 n.2.

²⁴*Id.*

²⁵Anderson Producing Inc. v. Koch Oil Co., 929 S.W.2d 416, 421 (Tex. 1996) (citing TEX. DISCIPLINARY R. PROF’L CONDUCT 3.08(a) (1994) (noting the change to the selected portion and stating that the remainder of Rule 3.08 was not altered in the 1994 revision)).

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.²⁶

The earlier lawyer-witness rule in the Texas CPR was "almost completely prophylactic—both the lawyer-witness and his law firm [were] disqualified from representing the client in all but a few narrow situations."²⁷ Under the new Rule 3.08, disqualification is not automatic, permitting the lawyer and the client to consider the wisdom of continued representation and to make the decision amongst themselves.²⁸ Section C applies directly to the lawyer-witness's firm, and allows for that firm's continued representation with the client's informed consent.²⁹ Another difference lies in the "substantial hardship" exception, which has been both "broadened and narrowed" by Rule 3.08: on the one hand, the exception is no longer based upon some distinctive factor of either the lawyer or the firm, but it does require that opposing counsel be promptly notified of the lawyer's intent to testify.³⁰ Prior to the promulgation of this Rule, the lawyer-witness bore the burden of proving "distinctiveness" to prevent

²⁶TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.08, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

²⁷Wise, *supra* note 7, at 655.

²⁸*Id.* at 655–56.

²⁹*Id.* at 655.

³⁰*See id.* at 656.

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disqualification,³¹ but Comment 10 to Rule 3.08 makes it clear that the burden has shifted to the opposing party to “demonstrate actual prejudice to itself resulting from the opposing lawyer’s service in the dual roles.”³² Finally, the 1994 amendment makes it clear that these rules only apply when the testifying lawyer also represents the client before the court.³³ In order to understand the significance of these changes, it is necessary to understand the policy considerations served by the lawyer-witness rule.

C. Interests Served by the Lawyer-Witness Rule

At the root of the rule lie three fundamental concerns: preventing injury to the client, preventing unfair prejudice to the opposing party and counsel, and preventing damage to the legal system.³⁴

1. Protecting the Client

Justification for the lawyer-witness rule based upon client protection comes in many forms. Some believe that when a client’s lawyer takes the stand, that lawyer’s credibility—and thus, the client—suffers.³⁵ Others believe that the lawyer’s testimony represents an impermissible conflict of interests.³⁶ At least one source has surmised that designating the lawyer-witness as an expert could lead to a waiver of attorney-client privilege.³⁷

It can be argued that testimony on the part of the attorney can injure the client because the lawyer is “more readily impeachable because of the interest he has, as an advocate, in the outcome of the proceeding.”³⁸ Section EC 5-9 of the Texas Code of Professional Responsibility (the predecessor to the Texas Disciplinary Rules of Professional Conduct) stated

³¹ See *infra* Part IV.B.1. However, the lawyer-witness does still bear the burden of proving that the lawyer’s testimony is “necessary” and goes to an “essential fact.” See *In re Bahn*, 13 S.W.3d 865, 873 (Tex. App.—Fort Worth 2000, no pet.).

³² TEX. DISCIPLINARY R. OF PROF’L CONDUCT 3.08, cmt. 10, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

³³ *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 421 (Tex. 1996).

³⁴ Wise, *supra* note 7, at 658–60.

³⁵ Wise, *supra* note 7, at 659.

³⁶ TEX. DISCIPLINARY R. OF PROF’L CONDUCT 3.08, cmt. 3, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

³⁷ Tex. Comm. On Prof’l Ethics, Op. 513, 59 Tex. B.J. 84 (1996) (dealing specifically with whether a Certified Public Accountant employed by the firm can testify as an expert in a case in which the law firm is employed, but the opinion can clearly be extended to an attorney).

³⁸ Wise, *supra* note 7, at 659.

that “[i]f a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness.”³⁹ The client may thus be further injured by the damage done to that lawyer’s credibility with the jury once he leaves the stand.⁴⁰

Comment 3 of Texas Rule 3.08 discusses the clients’ interests from a conflicts standpoint: if the lawyer is even considering the possibility of representing the client both as a counsel and witness and that lawyer possesses knowledge which may be adverse to that client, then the lawyer should withdraw due to “substantial likelihood that such adverse testimony would damage the lawyer’s ability to represent the client effectively.”⁴¹ However, the Rule does allow for testimony—even adverse testimony—on the part of the representing lawyer if the client knowingly consents to the arrangement after full disclosure.⁴²

Should the lawyer testify as an expert, the Texas Commission on Professional Ethics has identified one other potential source of harm: work-product, reports, and any other documents created or reviewed by that attorney in preparation for his or her testimony would no longer be protected by privilege and become discoverable.⁴³ This alone is likely

³⁹ *Id.* (quoting MODEL CODE OF PROF’L RESPONSIBILITY EC 5-9 (1986)).

⁴⁰ *Id.*

⁴¹ TEX. DISCIPLINARY R. OF PROF’L CONDUCT 3.08, cmt. 3, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9), which reads in full:

(3) A lawyer who is considering both representing a client in an adjudicatory proceeding and serving as a witness in that proceeding may possess information pertinent to the representation that would be substantially adverse to the client were it to be disclosed. A lawyer who believes that he or she will be compelled to furnish testimony concerning such matters should not continue to act as an advocate for his or her client except with the client’s informed consent, because of the substantial likelihood that such adverse testimony would damage the lawyer’s ability to represent the client effectively.

⁴² *Id.* at 3.08(b). There are some who question permitting the decision to rest at the client’s feet, pointing out that the lawyer-witness rule protects more than just the client’s interests, seeking also to protect the efficacy of the entire litigation process. *See, e.g.*, 48 Robert P. Schuwerk & Lillian B. Hardwick, TEXAS PRACTICE: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8.8 (2006); *Koch Oil Co. v. Anderson Producing Inc.*, 883 S.W.2d 784, 788 (Tex. App.—Beaumont 1994) (stating that “[a]n attorney’s decision to testify regarding substantive matters, especially expert testimony, should not be viewed solely from the prospective of client interest.”), *rev’d*, 929 S.W.2d 416 (Tex. 1996).

⁴³ Tex. Comm. on Prof’l Ethics, Op. 513, 59 Tex. B.J. 84 (1996) (though dealing specifically with a Certified Public Accountant originally hired by the firm to perform in-house audits

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prohibited, as the Commission pointed out that “[a]ccording to DR 1.05, no exceptions exist in this situation for the lawyer to waive that privilege.”⁴⁴

2. Protecting the Opposing Party and Counsel

As for the opposing party and counsel, there is the concern that the lawyer’s role as an advocate will hinder the opposing counsel’s ability to challenge the credibility of the lawyer when he takes the stand as a witness.⁴⁵ There is the additional concern that the jury will give the lawyer’s testimony undue weight based on their perception of the lawyer as an unimpeachable officer of the court.⁴⁶

The first concern is “based on an assumed desire to preserve professional congeniality.”⁴⁷ However, this argument “pose[s] an ethical dilemma for opposing counsel rather than for the attorney who testifies,” and some scholars suggest that such consideration may be discarded as a cultural dinosaur.⁴⁸

Comment 4 to Texas Rule 3.08 addresses the second concern directly. It acknowledges that where a lawyer’s testimony addresses a point of controversy in the litigation, unfair prejudice arises from the confusion caused by the conflicting roles played by witnesses and lawyers.⁴⁹

providing expert testimony for one of the firm’s clients, the opinion is clearly broad enough to include any employee of the firm, including counsel).

⁴⁴ *Id.*

⁴⁵ Wise, *supra* note 7, at 660.

⁴⁶ *Id.* It is interesting to note that this theory is in direct contradiction to the theory that the lawyer-witness will harm the client due to loss of credibility. Taken together, both theories illustrate the obvious: jurors will give a witness’s testimony more or less weight for a variety of reasons.

⁴⁷ Schuwerk & Hardwick, *supra* note 42, § 8.8.

⁴⁸ *Id.* (stating that “for better or worse, such restraint has become increasingly improbable in our contentious contemporary legal culture.”).

⁴⁹ TEX. DISCIPLINARY R. OF PROF’L CONDUCT 3.08, cmt. 4, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9), which states:

(4) In all other circumstances, the principal concern over allowing a lawyer to serve as both an advocate and witness for a client is the possible confusion that those dual roles could create for the finder of fact. Normally these dual roles are unlikely to cause exceptional difficulties when the lawyer’s testimony is limited to those areas set out in sub-paragraphs (a)(1)–(4) of this Rule. If, however, the lawyer’s testimony concerns a controversial or contested matter, combining the roles of advocate and witness can unfairly prejudice the opposing party. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on

Specifically, fact witnesses are expected to be objective and to testify from personal knowledge, where lawyers are expected to analyze the evidence and use it to advocate the client's cause.⁵⁰

3. Protecting the Judicial System

The lawyer-witness rule also means to protect the interests of the judicial system by preserving it from the appearance of impropriety.⁵¹ The fear is that the public's respect for and confidence in the legal profession may suffer, not because lawyers as witnesses actually are more prone to distorting the truth, but because the public may believe they are.⁵² Ultimately, "[t]he adversary system works best when the roles of the judge, of the attorneys, and of the witnesses are clearly defined. Any mixing of these roles inevitably diminishes the effectiveness of the entire system."⁵³ Perhaps the most stinging criticism of the practice came from the Minnesota Supreme Court in 1936, when it said, "[t]he practice of attorneys furnishing from their own lips and on their own oaths the controlling testimony for their client is one not to be condoned by judicial silence . . . for nothing short of actual corruption can more surely discredit the profession."⁵⁴

Texas Rule 3.04(c)(3) clearly prohibits a lawyer from stating a personal opinion concerning the credibility of a witness.⁵⁵ But when a trial lawyer takes the stand as a witness, he is necessarily thrust into the position of bolstering his own credibility once he steps down. The State Bar of Texas addressed this concern, saying, "An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility."⁵⁶

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.

⁵⁰ *Id.*

⁵¹ Wise, *supra* note 7, at 660.

⁵² *Id.*

⁵³ *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 624 P.2d 296, 300 (Ariz. 1981) (en banc).

⁵⁴ *Ferraro v. Taylor*, 265 N.W. 829, 833 (Minn. 1936) (citing *People's State Bank v. Drake-Ballard Co.*, 205 N.W. 59, 62 (Minn. 1925) (Stone, J., dissenting)).

⁵⁵ TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.04(c)(3), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

⁵⁶ TEX. STATE BAR R., art X, § 9, EC 5-9 (Tex. Code of Prof'l Resp.) (1972, repealed 1990).

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Even so, some scholars argue that such “concern may be only a theory that attorneys impose upon themselves.”⁵⁷ There is no evidence that jurors possess a belief that it is somehow impermissible for an attorney to function as both advocate and witness.⁵⁸

The lawyer-witness rule aside, Texas Rule 3.04 contains another prohibition that is relevant to the discussion here. Under this rule, a lawyer may not “pay, offer to pay, or acquiesce in the offer of payment or compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case.”⁵⁹

III. THOU SHALT NOT INFLUENCE A WITNESS: THE PROHIBITION AGAINST CONTINGENT INTEREST TESTIMONY

Where the lawyer-witness rule enjoys a long and complicated history, the prohibition against the use of a witness who has been or will be paid for testimony—the contingent witness—is pretty straightforward. The rule does not say that witnesses cannot be paid for any reason, but simply that the payment cannot be relative to the content of that witness’s testimony or dependent upon a specific outcome at trial. At this point, it is vital to point out that the application of the contingent-witness rule depends upon the nature of the suit. Some courts have held that contingent-fee testimony is admissible in criminal prosecutions.⁶⁰ Such considerations are outside the scope of this Comment, which will focus strictly on civil cases.

A. *The Model Contingent-Witness Rules*

Under the earlier ABA Model Code of Professional Responsibility, “[a] lawyer shall not pay, offer to pay, or acquiesce in the payment of

⁵⁷Jeffrey A. Stonerock, *The Advocate-Witness Rule: Anachronism or Necessary Restraint?*, 94 DICK. L. REV. 821, 866–67 (1990).

⁵⁸*Id.* at 867.

⁵⁹TEX. DISCIPLINARY R. OF PROF’L CONDUCT 3.04(b), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

⁶⁰*See, e.g.,* Union v. State, 66 S.E. 2d 24, 26 (Ga. Ct. App. 1909) (holding that a \$25 reward for testimony leading to the conviction of the suspect did not render the witness’s testimony incompetent though the interest of the witness might affect his credibility); People v. Mills, 237 N.E.2d 697, 705 (Ill. 1968) (holding that the effectiveness of the law enforcement system would be jeopardized if the paid-informant program were eliminated); U.S. v. Baxter, 342 F.2d 773, 774 (6th Cir. 1962) (holding that testimony arising from contingent-fee arrangements was admissible); U.S. v. Costner, 359 F.2d 969, 973 (6th Cir. 1966) (informant’s testimony arising from contingent-fee arrangement was admissible).

compensation to a witness contingent upon the content of his testimony or the outcome of the case.”⁶¹ When the ABA went on to adopt the Model Rules of Professional Conduct, the new rules said simply that a lawyer shall not “falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”⁶² This clearly prohibits the sorts of payments that constitute a crime—bribery, suborning perjury, or the obstruction of justice by buying silence—but leaves other forms of payment in question.⁶³ The Texas Rule is more specific.

B. The Contingent-Witness Rule in Texas

As in the case of the lawyer-witness rule, the contingent-witness rule in Texas evolved along with the Model Rules. Under the Texas CPR, a lawyer was prohibited from “pay[ing], offer[ing] to pay, or acquiesce[ing] in the payment of compensation to a witness contingent upon either the content of the testimony of the witness or the outcome of the case.”⁶⁴ Upon the adoption of the Texas Rules, the contingent-witness rule was modified to mandate that a lawyer shall not “pay, offer to pay or acquiesce *in the offer of payment* compensation to a witness *or other entity* contingent upon either the content of the testimony of the witness or the outcome of the case.”⁶⁵ The first alteration prohibits a lawyer from tolerating even the mere offer of payment. The second alteration, the addition of the term “other entity,” was intended to bring the rule in line with the Texas Commission on Professional Ethics, which had held that the prohibition applied not only the expert witness, but to any entity which provided the expert witness.⁶⁶

⁶¹ MODEL CODE OF PROF'L RESPONSIBILITY DR 7-109(c) (1980).

⁶² ABA Model Rules of Prof'l Conduct 3.4(b).

⁶³ Schuwerk & Hardwick, *supra* note 42, § 8.4.

⁶⁴ TEX. STATE BAR R., art XII, § 8, DR 7-109(c) (Tex. Code of Prof'l Resp.), 34 TEX. B.J. 757, 772 (1971, superseded 1990).

⁶⁵ TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.04(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9) (emphasis added).

⁶⁶ Tex. Comm. On Prof'l Ethics, Op. 458, 51 Tex. B.J. 942 (1988) (in which “[a] medical-legal consulting firm ha[d] engaged in substantial advertising involving the use of contingent fee contracts wherein the firm enter[ed] into a contingent contract with a particular plaintiff and in return provide[d] various services including the providing of expert testimony.”).

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C. Interests Protected by the Contingent-Witness Rule

The contingent-witness rule is designed to address two different circumstances. First, the rule bars payment that is dependent upon the content of the testimony.⁶⁷ Second, the rule bars payment contingent upon the outcome of the case.⁶⁸ Though similar, these two prohibitions are based upon two distinct policy considerations. The first involves an actual intent on the part of the lawyer to influence testimony on the stand. The second consideration has two parts: first, to remove any incentive the witness may have to color their own testimony; and second, to remove the specter of impropriety.

1. The Prevention of Corrupt Influence

The most commonly cited consideration for the rule is obvious: it seeks to prevent manipulation of testimony by removing any financial incentive to testify falsely.⁶⁹ The rule prohibits bribery, subornation of perjury, and obstruction of justice.⁷⁰ While the illegality of bribery and perjury are well known, the contingent-witness rule also expressly addresses the once-common practice of purchasing *silence*.⁷¹

As a matter of fact, it wasn't until after the passage of Texas Rule 3.04 that the Texas Supreme Court expressly condemned the practice of buying a witness's testimony in order to silence it.⁷² In 1993, the high court took it a step further and outlawed "Mary Carter" agreements as being against public policy in *Elbaor v. Smith*.⁷³ "Mary Carter" agreements are "ones in which a plaintiff enters into a settlement with one defendant and goes to trial against a remaining defendant, while the settling defendant remains a party and guarantees the plaintiff a minimum payment that may be offset in whole or in part by any excess judgment recovered at trial."⁷⁴ In *Elbaor*, the court determined that Rule 3.04(b) "prohibits a lawyer from paying or offering to pay a witness contingent upon the content of the testimony of the witness or

⁶⁷ Schuwerk & Hardwick, *supra* note 42, § 8.4.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (emphasis added).

⁷² *Id.* (citing *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 (Tex. 1990)).

⁷³ *Id.* (citing *Elbaor v. Smith*, 845 S.W.2d 240, 249–50 (Tex. 1993)).

⁷⁴ *Id.* (quoting *Elbaor*, 845 S.W.2d at 247, n.14).

the outcome of the case.”⁷⁵ It held that “Rule 3.04(b) mandates that an attorney has an ethical duty to refrain from making a settlement contingent in any way on the testimony of a witness who was also a settling party.”⁷⁶

2. Protecting the Truth-Seeking Process

As a practical matter, the policy concern here is identical to the concern for the protection of the judicial system espoused by the lawyer-witness rule. The issue is propriety. First is the concern that a witness could be financially manipulated into testifying falsely. The second concern addresses the issues of incentive and appearance.

At this point, it is important to differentiate between a fact witness and an expert witness. While none of the rules express an outright prohibition on payment to witnesses, the rules do differentiate between the types of payments and the types of witnesses. Texas Rule 3.04(b) (1)–(3) provides one of the rare instances in which the Disciplinary Rules provide for what may, rather than what may not, be done.⁷⁷ In pertinent part, the Rule states:

But a lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) expenses reasonably incurred by a witness in attending or testifying;
- (2) reasonable compensation to a witness for his loss of time in attending or testifying;
- (3) a reasonable fee for the professional services of an expert witness.⁷⁸

Where the Rule expressly provides for payment of reasonable “expenses” incurred by any witness, the payment of an actual “fee” is reserved for the expert witness.⁷⁹ While the question of what constitutes a reasonable fee for expert testimony is outside the scope of this Comment, it

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Schuwerk & Hardwick, *supra* note 42, § 8.4.

⁷⁸ TEX. DISCIPLINARY R. OF PROF’L CONDUCT 3.04(b) (1)–(3), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9) (emphasis added).

⁷⁹ *See id.*

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is sufficient to say the topic enjoys its share of controversy. Pertinent to this discussion, however, is the question of “why?”

Where a witness—expert or otherwise—has a contingent interest upon the outcome of a case, the concern is that the witness will “color” his or her testimony in order to secure or enlarge his or her share of the final award.⁸⁰ EC 7-28, illuminating former Texas CPR 7-109(c), stated that “witnesses should always testify truthfully and should be free from any financial inducements *that might tempt them to do otherwise*.”⁸¹ Where a lay witness is concerned, the prohibition against payment of a witness fee extends to those witnesses in civil cases who have a pecuniary interest in the case.⁸² Obviously, that witness’s interest has as much potential for “coloring” testimony as a contingent-fee contract.

This concern is heightened when the testimony in question is that of an expert witness. “[M]aintaining the independence of an expert witness is the chief reason why the common law has long recognized that an expert may not be paid with a contingency fee.”⁸³ The value of an expert witness is in that expert’s ability to assist the trier of fact in understanding the evidence or in determining a controverted fact.⁸⁴ “An expert witness who is paid based on a percentage of the recovery in a litigated matter would have an obvious stake in the outcome of the litigation, which is inconsistent with the expert’s role.”⁸⁵

This inconsistency becomes even more obvious where the witness—testifying either to fact or as an expert—is also the attorney representing a party in the litigation.

⁸⁰ See Schuwerk & Hardwick, *supra* note 42.

⁸¹ TEX. STATE BAR R., art X, § 9, EC 7-28 (Tex. Code of Prof’l Resp.) (1971, superseded 1990) (emphasis added).

⁸² Villanueva v. Rodriguez, 300 S.W.2d 668, 669 (Tex. Civ. App.—San Antonio, 1957, writ ref. n.r.e.).

⁸³ Sutherlin v. White, No. CH05-2065, 2006 WL 1737860, at *3 (Va. Cir. Ct. June 29, 2006) (not reported in S.E.2d), (citing Dupree v. Malpractice Research, Inc., 445 N.W.2d 498, 501 (Mich. Ct. App. 1989) (recognizing the concern that experts who testify on a contingency fee basis will become an advocate for the party, instead of a disinterested professional)).

⁸⁴ Tex. Comm. On Prof’l Ethics, Op. 553, 67 Tex. B.J. 982, 982–83 (2004).

⁸⁵ *Id.*

IV. THE CROSSROADS: ANDERSON PRODUCING INC. v. KOCH OIL Co.

In 1996, the Texas Supreme Court tackled the case of *Anderson Producing Inc. v. Koch Oil Co.*⁸⁶ In this case, which arose from a mineral lease dispute, an attorney for Anderson by the name of Campbell inadvertently became a material fact witness while taking the deposition of a Koch representative.⁸⁷ As a result of the deposition, Anderson amended its petition to include charges of fraud and conspiracy to its original garnishment action, and Campbell realized that he was a necessary witness.⁸⁸ At that point, Campbell stopped representing Anderson at any subsequent court appearances.⁸⁹ Campbell continued to work behind the scene, however, and participated in settlement negotiations and signed pleadings.⁹⁰ Three weeks before trial, Anderson designated Campbell as a testifying expert witness, to which Koch responded by seeking the disqualification of both Campbell and Campbell's firm under Rule 3.08.⁹¹ Koch's motion was denied.⁹²

At trial, Campbell appeared as Anderson's principal witness, testifying both as to facts of which he had personal knowledge and as an expert.⁹³ In fact, the majority of his testimony was as an expert witness.⁹⁴ Though Campbell did not act as Anderson's trial counsel in the hearing, the period of time which he did not spend on the witness stand was spent at counsel table.⁹⁵ The jury ultimately found for Anderson, assessing actual and punitive damages in excess of \$564,000 plus attorneys' fees.⁹⁶

The court of appeals reversed.⁹⁷ In its opinion, the court stated that the "Texas Disciplinary Rules of Professional Conduct are mandatory in

⁸⁶929 S.W.2d 416 (Tex. 1996).

⁸⁷*Id.* at 418–19.

⁸⁸*Id.* at 419.

⁸⁹*Id.* (Campbell did once provide a geographical location in response to a question posed in a pre-trial hearing).

⁹⁰*Id.*

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Koch Oil Co. v. Anderson Producing, Inc.*, 883 S.W.2d 784, 791 (Tex. App.—Beaumont 1994), *rev'd*, 929 S.W.2d 416 (Tex. 1996).

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character because they establish the minimum level of conduct below which no lawyer can fall,”⁹⁸ and is therefore “not a rule subject to lawyer compromise. . . .”⁹⁹

The Texas Supreme Court disagreed with the court of appeals.¹⁰⁰ Writing for a five-member majority, Justice Gonzalez pointed to the 1984 amendment to Rule 3.08, which added the requirement that the representation be “as an advocate before a tribunal” before such representation fell within the parameters of the rule.¹⁰¹ The court discounted Koch’s argument that Campbell had, in fact, represented himself as an advocate, both on the witness stand by revealing that he was a partner in the firm representing Anderson, as well as by actively engaging in pre-trial matters.¹⁰² In answer, the court relied upon Comment 8 to Texas Rule 3.08 in determining that Campbell did nothing to violate the rule.¹⁰³

Koch next argued that Campbell violated the rule by sitting at counsel table during the trial.¹⁰⁴ The court refused to pass judgment on the issue, contending that Koch had waived this objection by failing to object at trial.¹⁰⁵ Ultimately, the court reversed the decision of the court of appeals and remanded.¹⁰⁶

The majority opinion prompted two vigorous dissents, one written by Justice Phillips and joined by Justice Spector,¹⁰⁷ and the other written by Justice Owen and joined by Justice Hecht.¹⁰⁸ While the Phillips dissent

⁹⁸ *Id.* at 787 (citing *Warrilow v. Norrell*, 791 S.W.2d 515, 519 (Tex. App.—Corpus Christi 1989, writ denied).

⁹⁹ *Id.* at 787.

¹⁰⁰ *See generally Anderson Producing*, 929 S.W.2d 416.

¹⁰¹ *Id.* at 421–22.

¹⁰² *Id.* at 422.

¹⁰³ *Id.* (citing TEX. DISCIPLINARY R. OF PROF’L CONDUCT 3.08, cmt. 8, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9), which states “[t]his rule does not prohibit the lawyer who may or will be a witness from participating in the preparation of a matter for presentation to a tribunal. To minimize the possibility of unfair prejudice to an opposing party, however, the Rule prohibits any testifying lawyer who could not serve as an advocate from taking an active role before the tribunal in the presentation of the matter.”).

¹⁰⁴ *Anderson Producing*, 929 S.W.2d at 423.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 425.

¹⁰⁷ *Id.* at 425–27 (Phillips, J., dissenting).

¹⁰⁸ *Id.* at 427–35 (Owen, J., dissenting).

focused primarily on the issue of jury confusion,¹⁰⁹ it did concur with the Owen dissent on the issue that is central to this Comment: the issue of the lawyer-witness with a contingent interest in the outcome of the trial.¹¹⁰

A. *The Owen Dissent*

At the heart of Justice Owen's argument were the policy concerns inherent in permitting an attorney to testify on behalf of a client if that attorney also retains a contingent interest in the outcome of the case.¹¹¹ In her opinion, attorneys should not be permitted to do what Campbell and his partner had done: "sign on as counsel, prepare the entire case for trial, and then present the case to the jury through their own testimony."¹¹² According to Owen, beyond the danger of confusion for the fact-finder was the danger of confusion for the lawyer.¹¹³ Under the best of circumstances, where there is no contingency fee arrangement to muddy the waters, "it is difficult for the attorney to separate in his or her own mind the difference between the role of attorney and witness."¹¹⁴ By adding a contingent interest, Owen believed that there would be "a disincentive to do so where, as here, the attorney will not be paid a fee unless the outcome is favorable to the client."¹¹⁵ Owen pointed out that Campbell's financial interest in the outcome was substantial.¹¹⁶ According to the billing arrangement, the award would first be applied to pay hourly wages for Campbell and his firm, who would then receive 40 percent of the balance as a contingency fee.¹¹⁷ Should the case be lost, Campbell would receive a comparatively paltry \$5,900.¹¹⁸

According to Owen, Campbell's role was made even less appropriate by his domination of the trial record.¹¹⁹ Out of a total of 578 pages of trial

¹⁰⁹ *Id.* at 425–26 (Phillips, J., dissenting).

¹¹⁰ *Id.* at 427 ("I would affirm the judgment of the court of appeals with specific instructions that Campbell not be allowed to testify on remand as long as Campbell retains a fee interest, directly or indirectly, in the case.").

¹¹¹ *Id.*

¹¹² *Id.* at 429.

¹¹³ *Id.* at 429–30.

¹¹⁴ *Id.* at 429.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 428.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 429.

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testimony, Campbell produced 403 pages.¹²⁰ Owen accused Campbell of doing impermissible things as he sat upon the witness stand: “He funneled extensive commentary and allegations against Koch to the jury, and he made it clear to the jury that he was intimately involved at every turn in the case as the lawyer for Anderson.”¹²¹

Owen had two final objections to the majority’s opinion. First, she was of the opinion that Campbell’s failure to show just cause as to why no other witness could provide the testimony that he provided made his own expert testimony “particularly outrageous.”¹²² Second, she pointed out that Campbell failed to comply with Rule 3.08’s requirement that opposing counsel be promptly notified of his intent to take the stand, and that “[t]he obligation to identify witnesses in response to discovery requests does not supplant the requirement of notice.”¹²³

In rebuke of the court’s refusal to consider Rule 3.04 as grounds for disqualification, Owen said that the grievous nature of the violation demonstrated the need to consider other rules of procedure and conduct in disqualification cases, objection or not.¹²⁴ While she acknowledged the validity of the majority’s opinion that public opinion of the legal system was low, she believed the court had missed an opportunity.¹²⁵ She wrote, “At a time when courts should be taking strong measures to restore the public’s confidence in lawyers and the legal system, the Court moves in the opposite direction.”¹²⁶

Both the majority and Owen’s dissent relied upon several previous cases in writing their opinions. Part A will revisit these earlier opinions, while Part B moves ahead to examine what came after.

B. What Came Before: The Predecessors

Anderson Producing was startling in its permissiveness. Prior to that opinion, Texas courts were much more likely to take a hard stance against the lawyer-witness, as evidenced in the following cases.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 432.

¹²³ *Id.* at 435.

¹²⁴ *Id.* at 430.

¹²⁵ *Id.* at 427.

¹²⁶ *Id.*

1. *Warrilow v. Norrell* (1989)

This opinion was among the most widely cited for its interpretation of the lawyer-witness rule in Texas, and remains so today. This case arose from a wrongful death suit in which the appellee's husband was killed when his friend's hunting rifle accidentally discharged after being dropped.¹²⁷ Like Campbell in *Anderson Producing*, an attorney was designated both as a material fact witness and as an expert witness (he was both a hunter and had previous work experience as an insurance adjuster).¹²⁸ However, the case predated the Texas Rules, and was analyzed under the Texas CPR DR 5-102(A).¹²⁹

Under that rule, the court held that the attorney's testimony—both fact and expert—was a violation.¹³⁰ In reaching its decision regarding the lawyer's fact testimony, the court determined that the appellant failed to meet the then-common interpretation of the hardship exception to the lawyer-witness rule, which “generally contemplates some expertise in a specialized area of law such as patents, and the burden is on the attorney seeking to continue representation to prove distinctiveness.”¹³¹

As for his expert testimony, the court was faced with a question of first impression and sought guidance outside of the jurisdiction.¹³² The court turned to a Colorado case which relied heavily upon the issue of jury confusion.¹³³ The court agreed with the Colorado court's reasoning and likewise held that the lawyer's expert testimony was a violation of DR 5-102(A) and sustained the appellant's point of error.¹³⁴

Owen cited to this case in her dissent, arguing that *Warrilow* stood for the proposition that the roles of lawyer and witness are inconsistent because it is the lawyer's duty to provide zealous representation, while a witness has

¹²⁷ *Warrilow v. Norrell*, 791 S.W.2d 515, 517 (Tex. App.—Corpus Christi 1989, writ denied).

¹²⁸ *Id.* at 521–22.

¹²⁹ *Id.*

¹³⁰ *Id.* at 520. Though the court did find the attorney's fact testimony to be a violation of the rules, the issue was reviewed for abuse of discretion, and the court therefore did not reverse on this ground, holding that “the trial court's refusal to disqualify was not reasonably calculated to cause the rendition of an improper judgment.” *Id.*

¹³¹ *Id.* at 520.

¹³² *Id.* at 521.

¹³³ *Id.* (citing *FDIC v. Sierra Res., Inc.*, 682 F. Supp. 1167, 1170 (D. Colo. 1987)).

¹³⁴ *Id.*

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a duty to present evidence objectively.¹³⁵ The majority, however, distinguished this case from the facts presented in *Anderson Producing*, pointing out that the lawyer here had actively participated in presenting the case to the jury, where Campbell did not.¹³⁶

2. Ayres v. Canales (1990)

Another point of contention between Owen and the majority was the significance of *Ayres v. Canales*.¹³⁷ The issue before that court was whether an oral referral fee agreement existed between two attorneys.¹³⁸ The majority pointed directly to the language in the case, in which the court held that it was proper to refer to the Texas Rules as a guide when seeking relevant considerations to disqualification.¹³⁹ But Owen argued that the majority took the statement out of context.¹⁴⁰ She argued that *Ayres* stood for the proposition that “where there was a violation, the lawyer should be disqualified, and that in other situations, the rule serves as a guide.”¹⁴¹ She went on to point out the reason the rule did not apply to the lawyer-witness in *Ayres* was because “he was an attorney representing himself at trial.”¹⁴² According to Owen, the majority’s strict interpretation of Rule 3.08 flew in the face of the *Ayres* decision.¹⁴³

3. Mauze v. Curry (1993)

Owen also argued that the court’s “strict interpretation” contradicted its earlier holding in *Mauze v. Curry*.¹⁴⁴ This succinct opinion was one of the earliest to interpret the new Texas Rule 3.08, holding that the Rule applied to disqualify an attorney who signed a controverting affidavit in which he swore, as an expert witness, to his opinions in response to a motion for

¹³⁵ *Anderson Producing, Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 429–30 (Tex. 1996) (citing *Warrilow*, 791 S.W.2d at 521 n.6).

¹³⁶ *Id.* at 421–22.

¹³⁷ 790 S.W.2d 554 (Tex. 1990).

¹³⁸ *Id.* at 556.

¹³⁹ *Anderson Producing*, 929 S.W.2d at 421 (citing *Ayres v. Canales*, 790 S.W.2d 554, 556 n.2 (Tex. 1990)).

¹⁴⁰ *Id.* at 432.

¹⁴¹ *Id.* at 433.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See id.* (citing *Mauze v. Curry*, 861 S.W.2d 869, 870 (Tex. 1993)).

summary judgment.¹⁴⁵ In Owen's opinion, this summary disqualification announced a new standard in which even testimony by affidavit in pre-trial proceedings was grounds for disqualification.¹⁴⁶ She believed that this standard supported considerations of public policy, as cited within the body of the *Mauze* opinion, specifically that "'justice must satisfy the appearance of justice,' and the condemnation of attorneys furnishing the controlling testimony for their client."¹⁴⁷

In response, the majority denied that *Mauze* announced an "alternative standard," but rather supported disqualification on the basis that the lawyer's affidavit did not fall within any of the five enumerated exceptions in Rule 3.08(a).¹⁴⁸

C. What Followed: The Aftermath

Though the *Anderson Producing* court refused to answer the Big Question—can an attorney appear as a witness, either to establish an essential fact or to provide expert testimony, on behalf of the client if the attorney or the attorney's firm retains a contingent fee interest in the case?—they left a clue as to how they might hold should the issue ever present itself before the Texas Supreme Court. Buried in a footnote, the court simply stated: "The dissent offers several reasons about why Rule 3.08 should not be the controlling standard, *some of which we find intriguing*."¹⁴⁹ This tantalizing tidbit makes it clear that the court's decision should not be read to mean that Rule 3.04 would be ineffective in serving as grounds for disqualification. To reiterate, *Anderson Producing* may just be "an example of a party who snatched defeat from the jaws of victory by failing to complain that the attorney's conduct violated Texas Disciplinary Rule 3.04(b)."¹⁵⁰ As a result, courts wrestling with the issue since *Anderson Producing* have been cautious.

1. McKenna v. Wal-Mart (1998)

In 1998, a US District Court weighed in on the controversy. Sitting in diversity, the court considered a motion to disqualify the plaintiff's

¹⁴⁵ *Mauze*, 861 S.W.2d at 869–70.

¹⁴⁶ *Anderson Producing*, 929 S.W.2d at 433 (citing *Mauze*, 861 S.W.2d at 870).

¹⁴⁷ *Id.* at 430 (quoting *Mauze*, 861 S.W.2d at 870).

¹⁴⁸ *Id.* at 421 n.5 (citing *Mauze*, 861 S.W.2d at 870).

¹⁴⁹ *Id.* at 422 n.7 (emphasis added).

¹⁵⁰ *Masterson*, *supra* note 6, at 412.

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attorney, as well as his firm, because the attorney would be testifying as a material fact witness, either on the stand or by affidavit.¹⁵¹ The court had initially granted a partial summary judgment in favor of the plaintiffs based, in part, on the affidavit testimony of plaintiffs' counsel.¹⁵² The controversy arose when plaintiffs attempted to offer that lawyer's testimony at trial to prove up damages.¹⁵³

The court turned to *Anderson Producing* for its interpretation of Rule 3.08.¹⁵⁴ Like the *Anderson* holding, the court's analysis turned on whether the attorney had played any role "before a tribunal."¹⁵⁵ The court determined that as of the date of the disqualification hearing, the lawyer had not violated 3.08 and that the court had "no reason to believe that he would violate his ethical duties by choosing to do so."¹⁵⁶ The court went on to say that *Anderson Producing* made it clear that representing a client in an adjudicatory proceeding would be a violation of the rule, and further stated that the prohibition probably extended to the lawyer sitting at counsel table during the trial.¹⁵⁷ The court's parting shot related directly to the question of contingency fees, stating simply that "[t]he Court expressed no opinion on the relevance of Rule 3.04 in this case; it merely notes that Plaintiffs may wish to examine the rule, [*Anderson Producing*], and their own fee arrangement before proceeding."¹⁵⁸

2. *In re Bahn* (2000)

In 2000, the Fort Worth Court of Appeals revisited the issue in *In re Bahn*.¹⁵⁹ In this action brought against debt collectors for violation of state and federal debt collection statutes, the court affirmed the disqualification of the lawyer-witness, but refused to extend the rule to disqualify the lawyer-witness's firm.¹⁶⁰

¹⁵¹McKenna v. Wal-Mart Stores, Inc., No. CIV.A.SA-96-CA-1241, 1998 WL 1784216, at *1 (W.D. Tex. Nov. 12, 1998) (not reported in F.Supp.2d).

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴*Id.* at *1–2.

¹⁵⁵*Id.* at *2.

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸*Id.*

¹⁵⁹*See generally* 13 S.W.3d 865 (Tex. App.—Fort Worth 2000, no pet.).

¹⁶⁰*Id.*

In this case, the lawyer became a material fact witness following a telephone conversation with one of the defendants, in which the defendant allegedly violated several state and federal laws.¹⁶¹ Up until that point, the lawyer, Phelps, had been lead attorney.¹⁶² Several months later, a second attorney from Phelps' firm, Broussard, noticed herself as an attorney of record.¹⁶³ However, Phelps never withdrew and Broussard was never designated as lead counsel.¹⁶⁴ At a later deposition, Phelps disclosed his intent to testify as a material witness.¹⁶⁵

Defendants promptly filed a motion to disqualify Phelps as well as his firm.¹⁶⁶ Though the motion specifically requested the disqualification of Phelps and his firm (including "contract employees," which would include Broussard), the signed order disqualified only Phelps and one other attorney.¹⁶⁷ On a subsequent hearing for a motion *nunc pro tunc* relating to another matter, the defendants argued that the court's previous ruling was intended to disqualify Phelps, his firm, and all "contract employees" including Broussard.¹⁶⁸ The motion was granted.¹⁶⁹

Relator then filed a petition for writ of mandamus, requesting temporary relief.¹⁷⁰ In sum, the court granted mandamus as to the disqualification of the firm, as well as to that portion of the order against Phelps which prohibited him from participating in even pre-trial matters, citing that the order went beyond what was permissible under the Supreme Court's holding in *Anderson Producing*.¹⁷¹ The court stated that Rule 3.08 did not prevent the lawyer-witness from participating in the preparation of the case.¹⁷² The court held that the prohibition against Phelps' trial testimony, however, was proper for two reasons.¹⁷³ First, because defendants' argument based upon jury confusion presented a "compelling basis for

¹⁶¹ *Id.* at 869.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 869–70.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 870.

¹⁷¹ *Id.* at 874.

¹⁷² *Id.* at 873.

¹⁷³ *Id.*

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disqualification”¹⁷⁴; and, second, because Phelps did not follow the procedure set forth in Texas Rule 3.08(a)(5)—sending a letter promptly notifying opposing counsel of intent to testify—that would ensure Phelps’ ability to both represent and testify.¹⁷⁵

Following the *Anderson Producing* tradition, Rule 3.04 was treated in a footnote.¹⁷⁶ Appellees attempted to defend the trial court’s decision to disqualify the firm by citing Rule 3.04, but the court responded that the issue was not brought up at trial.¹⁷⁷ Because the argument was first raised at the hearing *nunc pro tunc*, the issue was not preserved.¹⁷⁸ Again, the question went unanswered.

Obviously, case law has not yet provided an answer, but that does not mean that the contingent lawyer who finds himself in this situation is necessarily on the horns of a dilemma. As the court in *McKenna v. Wal-Mart Stores, Inc.* alluded, some forethought, some careful examination of existing case law, and some planning will probably produce the best result.¹⁷⁹

V. WHERE DO WE GO FROM HERE?

As is clear from the cases reviewed in this Comment, courts will often look beyond the Rules when reviewing disqualification conduct.¹⁸⁰ But as is also clear, disqualification is by no means automatic.¹⁸¹

A. *The Case Against Disqualification*

The courts’ earlier hard-line approach to dealing with lawyer-witnesses led to gamesmanship and an increasing number of lawsuits seeking to disqualify opposing counsel as either a dilatory tactic or as a means to

¹⁷⁴ *Id.* (citing *Ayres v. Canales*, 790 S.W.2d 554, 556 (Tex. 1990)).

¹⁷⁵ *Id.* This was one of the grounds upon which Justice Owen would have disqualified the attorney in *Anderson Producing*. *Anderson Producing, Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 435 (Tex. 1996) (Owen, J., dissenting).

¹⁷⁶ *In re Bahn*, 13 S.W.3d at 875 n.3.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ No. CIV.A.SA-96-CA-1241, 1998 WL 1784216, at *1 (W.D. Tex. Nov 12, 1998) (not reported in F.Supp.2d).

¹⁸⁰ *See supra* Part IV.B.

¹⁸¹ *See supra* Part IV.A.–C.

simply deprive a party of the counsel of their choice.¹⁸² With the promulgation of the Texas Rules, it is understood that Rule 3.08 “should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice,” for doing so “would subvert its true purpose by converting it into a mere tactical weapon in litigation.”¹⁸³

With this admonition in mind, the Ft. Worth Court of Appeals court’s holding in *In re Bahn* is troubling.¹⁸⁴ Should subsequent courts hold that an argument based upon jury confusion is a sufficiently “compelling basis for disqualification,”¹⁸⁵ then the exception will swallow the rule, for the perceived “danger” of jury confusion will always exist. The result would be a return to the gamesmanship that the new Rule sought to avoid.

Justice Owen’s stance that an “attorney may not appear as a witness to establish an essential fact on behalf of the client . . . if the attorney or the attorney’s firm retains a contingent interest in the case” is equally troubling.¹⁸⁶ For the lawyer and the client with a contingency contract, Justice Owen presents a Hobson’s choice: either “the lawyer is not permitted to testify, or the lawyer and the lawyer’s firm are disqualified.”¹⁸⁷

This puts the client in a difficult situation. The client has a vested interest in keeping counsel of choice. After all, the client has already invested time and money in this particular lawyer. The client should not be forced to choose between keeping that lawyer or presenting the strongest case possible, or even presenting the case at all should the case turn on the lawyer’s testimony.

The lawyer and his or her firm are in an equally hard position: preserving the client’s interests by withdrawing, or going forward and being disqualified by the court. In either case, the lawyer and the firm lose their investment as well as their interest in the case. This is nothing more than a *de facto* disqualification.

The analysis changes when the lawyer-witness seeks to testify as an expert. It is clear that courts take a dim view of expert testimony provided on a contingent-fee contract. The Texas State Bar even went so far as to

¹⁸² See Lewis, *supra* note 10 at 88–90.

¹⁸³ TEX. DISCIPLINARY R. OF PROF’L CONDUCT 3.08, cmt. 10, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

¹⁸⁴ 13 S.W.3d 865, 875 (Tex. App.—Fort Worth 2000, no pet.).

¹⁸⁵ See *id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

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amend the rule in order to preclude the testimony of an employee of an entity with a contingent interest in the litigation.¹⁸⁸ The reason for this is the unique role that expert witnesses play in the course of a trial and the policy interest in preserving that expert's independence.¹⁸⁹

In August of 2004, the Commission issued Opinion 553, which addressed the question, "Is a lawyer prohibited from offering the testimony of an expert witness whose employer has entered into a contingent fee contract with the lawyer's client regarding the subject matter of the litigation?"¹⁹⁰ Here, a property tax consulting company had a contingent-fee contract with homeowners to file a notice of protest and to prepare and present appeals to the tax board on their behalf.¹⁹¹ When the case went to court, the consulting company informed the homeowners' lawyer that one of their employees, a real estate appraiser, could provide expert testimony at trial.¹⁹² The Commission determined that such an arrangement was a violation of Rule 3.04, pointing out that "[a]n expert witness who is paid based on a percentage of the recovery in a litigated matter would have an obvious stake in the outcome of the litigation."¹⁹³ The fact that the contingency was to be paid to the employer of the expert rather than the expert herself was not enough to remove the situation from the parameters of the prohibition, "in view of the fact that the employing entity could itself be a witness only through an employee or other agent."¹⁹⁴ There is every reason to believe that this prohibition extends to the firm itself.

However, even in the case of expert testimony supplied by the lawyer-witness, disqualification should not be automatic. Undoubtedly, there are those situations in which the expert testimony is as necessary and unique as any fact testimony. In such a circumstance, a compelling argument for substantial hardship can be made under Rule 3.08(a)(5), and such an argument should not be discarded out of hand merely because the nature of

¹⁸⁸TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.04(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

¹⁸⁹*See supra* Part II.

¹⁹⁰Tex. Comm. On Prof'l Ethics, Op. 553, 67 Tex. B.J. 982, 982-83 (2004).

¹⁹¹*Id.*

¹⁹²*Id.*

¹⁹³*Id.*

¹⁹⁴*Id.*

the lawyer-witness's testimony will be expert rather than fact.¹⁹⁵ The Rule itself does not make such a distinction.¹⁹⁶

Situations may also arise where the lawyer-witness's fact testimony requires some expert testimony in order to be understood by the jury. This is often the case with lawyer-witnesses, as the grievance arising from the facts to which they testify often require application of the law to those facts.¹⁹⁷ Even where the lawyer's fact testimony can be severed from expert testimony, a Rule 3.08(a)(5) argument can be made on the basis of economics. It's simply cheaper to have the one attorney testify.

Regardless of the rationale behind the lawyer-witness's expert testimony, the careful lawyer will be prepared to show just cause as to why no other expert witness can supply such testimony for as Justice Owen said in her dissent, failure to show any effort to secure the testimony of another expert witness is "particularly intolerable."¹⁹⁸

The bottom line is simply this: disqualification is a solution in search of a problem. In fact, the "solution" actually gives rise to more problems.

1. A return to Gamesmanship

Blind application of a rule that would automatically disqualify the lawyer-witness with a contingent interest would give rise to a new type of gamesmanship, providing a handy means by which defense counsel (who generally work on an hourly basis) could undermine the opposing party's case by disqualifying their attorneys (plaintiffs' lawyers frequently work on contingency). This in turn would also lead to unfair results, not only for the lawyer, but for the client and for the general public.

¹⁹⁵ RESTATEMENT OF THE LAW (THIRD) OF THE LAW GOVERNING LAWYERS § 108 cmt. h (2000) ("Relevant factors include the length of time the lawyer has represented the client, the complexity of the issues, the client's economic resources, the lawyer's care in attempting to anticipate or avoid the necessity of testifying, the extent of harm to the lawyer's client and opposing parties from the blending of the roles of advocate and witness, additional expense that disqualification would entail, and the effect of delay upon the interests of the parties and the tribunal.").

¹⁹⁶ TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.08(a)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

¹⁹⁷ *E.g., supra* Part I. Any lawyer who has taken the stand as a fact witness knows how easy it is to slip from fact testimony to expert testimony. While testifying as to some point of fact in a contractual negotiation, the lawyer-witness may be tempted to expound on what the proper course of negotiation should have been.

¹⁹⁸ *Anderson Producing, Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 432 (Tex. 1996).

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2. Injury to the Legal Community and to the Public

For the lawyer, the harsh result would be the loss of time and resources put into the case up to the point of disqualification, absent some contractual agreement that all expenses up to the point of disqualification would be borne by the client. Aside from being patently unfair, this in turn would lead to harsh results for the client: not only would the client lose his or her attorney of choice, that client would also bear the risk should the case ultimately be lost. Ultimately, this would be a disservice to the public. Public policy supports contingency contracts, for they are often the only means by which a plaintiff could afford to bring a meritorious suit.¹⁹⁹ However, considering the ease with which a lawyer can become a witness, automatic disqualification may lead to reluctance on the part of lawyers to take cases on a contingent basis.

3. No Possibility of “Trial by Ambush”

Furthermore, automatic disqualification is unnecessary. It may be argued that permissiveness on the part of the courts in allowing a lawyer-witness to take the stand would also lead to gamesmanship. “By concealing as long as possible the information about which he or his partner may have to testify, crafty counsel may increase the effectiveness of his argument that the substitution of other counsel will create a hardship for his client.”²⁰⁰ However, Rule 3.08 requires prompt notification to opposing counsel, and in so doing “prevents the testifying lawyer from creating a substantial hardship, where none once existed, by virtue of a lengthy representation of the client in the matter at hand.”²⁰¹ Should the lawyer-witness fail to promptly notify opposing counsel as required under Rule 3.08, prohibition against his or her testimony is a proper and wholly adequate cure, as the court properly held in *In re Bahn*.²⁰²

¹⁹⁹Robert L. Rossi, ATTORNEYS’ FEES § 2:3 (3d ed. 2002).

²⁰⁰Lewis, *supra* note 10, at 89.

²⁰¹TEX. DISCIPLINARY R. OF PROF’L CONDUCT 3.08 cmt. 7, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

²⁰²13 S.W.3d 865, 873 (Tex. App.—Fort Worth 2000, no pet.).

4. The Contingent Lawyer-Witness Does Not Present an Insurmountable Conflict of Interests

From a conflicts standpoint, an honest assessment of the lawyer-client relationship reveals that most elements of that relationship are marked by some conflict of interest.²⁰³ In fact, any billing practice creates some conflict between the interests of the client and that of the lawyer.²⁰⁴ Hourly billing can serve as incentive to drag feet to stretch out the hours.²⁰⁵ Flat-fee and pro bono lawyers have an incentive to cut corners.²⁰⁶ Contingency lawyers have incentive to dedicate more time and resources to those cases with greater promise for large recovery, often at the expense of smaller cases.²⁰⁷ There's no rational reason to view the contingency interest as a greater threat to the judicial system than any of these other potential conflicts of interest.

5. The Lawyer-Witness's Interest is a Permissible Form of Bias

Even when the contingency fee is factored into the equation, the court is not faced with an incurably prejudicial situation. The Restatement (Third) of the Law Governing Lawyers states that "[i]f an advocate testifies, under rules of evidence an opposing party may comment on the interest of the lawyer-witness and urge the fact-finder to discredit the lawyer's testimony on that ground."²⁰⁸ In other words, the lawyer-witness's interest in the case is a bias, and as such can be fully explored through cross-examination and discussed in closing argument. Therefore the lawyer's interest goes to the weight, and not to the competency, of that lawyer's testimony.²⁰⁹ The immediate argument goes back to jury confusion: a belief that the jury cannot perceive and adequately account for the bias simply because the witness also happens to be trial counsel.²¹⁰ However, there doesn't seem to

²⁰³ See generally Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87 (2003).

²⁰⁴ *Id.* at 118.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108 cmt. a (2000).

²⁰⁹ *Mentor Lagoons, Inc. v. Rubin*, 510 N.E.2d 379, 382 (Ohio 1987).

²¹⁰ See generally *supra* Part III.C.2.

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be any statistical support for this theory.²¹¹ In defense of the lawyer-witness's capacity to testify and the opposing counsel's ability to test the lawyer-witness's credibility through cross examination:

Almost every party to a civil lawsuit, including the party's agents, are suspect of stretching the truth for his own cause, and to the most cynical, the very service of the complaint is a prelude to perjury. When we deal with what the public thinks, we must be careful not to accept the view of the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical behavior.²¹²

6. Strict Interpretation of the Lawyer-Witness Rule May Cause More Harm than Good

This truly goes to the heart of Owen's dissent. Though the court has a very real interest in preserving the propriety of the judicial system, some very real consequences arise from a strict interpretation and application of the lawyer-witness and contingent interest rules—and they're not good.

For instance, those clients who lose their chosen counsel through strict application of the lawyer-witness rule will undoubtedly cast a jaundiced eye on the entire system as a result.²¹³ Those clients will come away with a sense of the judicial system as “an inflexible, impersonal process unconcerned with the client.”²¹⁴ Strict interpretation can also hurt the public's perception of the legal profession, since the rule necessarily assumes that lawyers “lack integrity” and are less inclined to be honest than other witnesses.²¹⁵ This in turn perpetuates the public's negative view of lawyers as a whole.²¹⁶

²¹¹ Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1145 (1993).

²¹² Steven C. Waterfield, *155 North High, Ltd. v. Cincinnati Insurance Co.: The Advocate-Witness Rule—Trying to Define Substantial Hardship in DR 5-101(B)(4)*, 57 OHIO ST. L.J. 1027, 1035 (1996) (quoting *Int'l Elecs. Corp. v. Flanzer*, 527 F.2d 1288, 1294 (2d Cir. 1975)).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* It also perpetuates bad lawyer jokes like “What do you call ten thousand lawyers at the bottom of the ocean? A good start.”

B. When Bad Things Happen to Good Lawyers

The issue of the contingent lawyer-witness will remain unsettled until the Texas Supreme Court chooses to take up the issue. Until then, the outcome remains uncertain. Such uncertainty leaves the lawyer who practices on a primarily contingent basis or with unpaid hourly billing at risk. Even more troubling, one court has turned back time and refused to admit lawyer-witness testimony as incompetent. In recent years, the 14th District Court of Appeals in Houston, rather than disqualify a lawyer-witness, chose instead to disallow the lawyer-witness's testimony on the basis of incompetence.²¹⁷ With this sort of uncertainty, careful lawyers must take steps to protect their interest.

Whether a lawyer chooses to withdraw or the decision is made by the court in the form of disqualification, the uncertainty remains a frustration for attorneys on a contingent fee basis. Courts must recognize that contingent lawyers have a valid interest which should be protected, not simply out of fairness, but also because public policy supports contingency contracts.²¹⁸ A couple of solutions are possible.

1. Disqualification as Discharge Without Cause

In the event that the contingent lawyer-witness is disqualified by the court or voluntarily withdraws with the consent of the client, that event may be treated as if the lawyer were discharged without cause. While many jurisdictions limit the lawyer's recovery to quantum meruit,²¹⁹ a recent Texas Supreme Court gave lawyers the choice to choose quantum meruit or wait until the client recovered and then sue on the contract.²²⁰ However, neither of these remedies would be very appealing to the lawyer caught in the situations described in this Comment. A better solution was set forth in *Rush v. Barrios*.²²¹ In this case, dealing specifically with the termination

²¹⁷ *Aghili v. Banks*, 63 S.W.3d 812, 818–19 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (upholding the trial court's decision to strike a lawyer-witness's affidavit on the basis of incompetence rather than disqualify the lawyer-witness); *Reliance Capital, Inc. v. G.R. Hmadden, Inc.*, No. 14-05-00061-CV, 2006 WL 1389539, at *5 (Tex. App.—Houston [14th Dist.] May 18, 2006, no pet.) (overruling the trial court's decision to admit the lawyer-witness's affidavit, holding the affidavit incompetent).

²¹⁸ Robert L. Rossi, *ATTORNEYS' FEES* § 2:3 (3d ed. 2002).

²¹⁹ 7 TEX. JUR. 3D *Attorneys at Law* § 272 (2006).

²²⁰ *Id.* (citing *Hoover Slovacek, L.L.P. v. Walton*, 206 S.W.3d 557, 565–66 (Tex. 2006)).

²²¹ 56 S.W.3d 88, 95 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

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without cause of a contingent lawyer, the court stated that the trial court had the responsibility of first determining “the highest ethical contingency to which the client contractually agreed in any of the contingency contract executed.”²²² Then the court should allocate that fee between the former and the subsequent counsel based on the following factors:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.²²³

This appears to provide a good means by which all counsel—the lawyer-witness as well as any subsequent lawyers—can be fairly compensated.

Treating the contingent lawyer-witness as a lawyer discharged without cause also has other advantages. First, the Rules as well as the case law clearly permit the lawyer-witness to continue working on the case for all purposes except for actions before the tribunal. This provides a fair means of splitting the contingency fee upon recovery. Furthermore, should the contingent lawyer-witness choose to withdraw altogether and forward the case to other counsel, this solution prevents the discharged or withdrawn attorney from running afoul of Texas Rule 1.04, which requires that the

²²² *Id.*

²²³ *Id.* (quoting *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102, 116 (La. 1979)).

forwarding attorney perform substantial services on the case in order to split the fee with the receiving attorney.²²⁴ By treating the lawyer-witness as a lawyer discharged without cause, he or she can disassociate from the case altogether without losing his or her contingent interest.

2. Self-Converting Contract

In December of 1994, the Commission issued Opinion 510, which asked the question, "May a Texas attorney provide legal services to a client under a contingent-fee arrangement in a litigation matter when the client also enters into a contingent-fee arrangement with a non-attorney investigator to perform investigation services in connection with the matter?"²²⁵ In that case, the lawyer had entered into a contingent-fee contract with a client that expressly permitted a contingent-fee arrangement with an investigator.²²⁶ The client then signed a contingent-fee contract with the investigator.²²⁷ In concluding that the arrangement would not violate Rule 3.04, the Commission pointed to a specific provision in the contract between the client and the investigator which provided that should the investigator become a fact witness in the matter for any reason, the contingent fee contract between them would become void and revert to a contract for an hourly fee.²²⁸

Though the Commission's opinion dealt with an investigator rather than with the lawyer, it is reasonable to believe that a similar contract would be possible between a lawyer and his or her client. This is certainly not an ideal situation, since the risk would ultimately shift to the client, subverting the very purpose of the contingent agreement. This may prove to be unsatisfactory to the lawyer as well, since his or her contingent interest is often significantly greater than the hourly fee. On the other hand, this solution would most completely remove any taint of contingency, since the lawyer's fees are guaranteed, and will not increase or decrease upon the outcome of the case.

²²⁴TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.04(g), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

²²⁵Tex. Comm. On Prof'l Ethics, Op. 510, 58 Tex. B.J. 1058, 1058 (1995).

²²⁶*Id.*

²²⁷*Id.*

²²⁸*Id.*

VI. CONCLUSION

As is the case in all situations in which a lawyer faces a potential ethical violation, the Rules provide guidance; but the Rules “are not designed to be standards for procedural decisions.”²²⁹ The best advice to guide each lawyer can be found in the final paragraph of the preamble to the Texas Rules:

Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.²³⁰

Of course, there is no guarantee that a lawyer’s conscience will lead to a conclusion with which the court also agrees. The case against the automatic disqualification of the lawyer-witness with a contingent interest in the case is strong, but qualification can and will still occur in some situations. In such circumstances, applying those rules which protect contingency interests in the event of a no-fault discharge will also serve to protect the interests of the lawyer-witness who is disqualified under Rule 3.04. Forwarding the case to another attorney and splitting the fee may also provide adequate protection. In any event, public policy and fundamental fairness require that the contingent lawyer’s interests be recognized and adequately preserved.

²²⁹TEX. DISCIPLINARY R. OF PROF’L CONDUCT, Preamble, cmt. 15, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

²³⁰*Id.* at cmt. 9.