

A Guide To Researching Issues In Legal Ethics

BY ROGER T. MANWARING



"I thought this might be coming," the attorney told his associate. "The other side is seeking to call me as a fact witness and has moved to disqualify me as trial counsel."

"But you've handled this case from the beginning and they could obtain the same information from other witnesses. Can they really force you out?" the associate asked.

Although an attorney can attempt to determine his ethical obligations by researching how courts, administrative boards and bar associations have interpreted the applicable rules, such research can be complex, requiring a thorough awareness of the many sources that interpret the ethical rules, and a strong knowledge of the research process.

Fortunately, by following the steps identified here, anyone can effectively research ethical issues.

Know Your Issue And Use Multiple Approaches

An effective research strategy aims to locate all relevant material but as little irrelevant information as possible in a cost-effective manner.

A critical first step in any research project is to identify the legal issue clearly and specifically. Once the issue is clear, identify sources that are likely to yield relevant information. After reviewing each source, consider whether the information found suggests additional sources or new avenues of research to pursue.

Always examine multiple sources. In particular, diversify your research by using sources that access or organize information differently from one another.

For example, treatises and digests providing concept-based indexes differ substantially from electronic databases that offer full text, keyword-based searching.

Diversifying increases the likelihood of locating relevant information (e.g., finding a judicial opinion via a digest that a keyword search would have missed due to the atypical language used in the opinion).

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FOCUS ON Professional Responsibility

Starting From Scratch

Suppose you have no idea which ethical rule, if any, applies to the potential disqualification of a lawyer who will appear as a trial witness. An excellent place to begin is the ABA/BNA Lawyer's Manual on Professional Conduct.

This loose-leaf publication has three parts: A manual, current reports and volumes of ethics opinions. To identify or read an analysis of the applicable rule, use the two-volume manual.

One part of the manual provides the text of the rules as adopted in each state, high-

Examining Rule 3.7

Research concerning an ethical rule should begin with the rule itself. Rule 3.7 appears, with the other MRPC rules, in Rule 3:07 of the Supreme Judicial Court rules.

The MRPC rules also appear online at the bar counsel's website, www.mass.gov/obcbbo/rpncnet.htm.

Rule 3.7 states, in part: "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 except where:

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lighting any differences between state provisions and those of the American Bar Association Model Rules of Professional Conduct.

Another part of the manual is divided into topics and subtopics. Each of those is divided in to a practice guide, which summarizes the applicable rule(s); a background section that provides a detailed analysis of the rule with citations to caselaw and ethical opinions; and an applications section that gives examples of how the rules have been applied in practice.

The ABA-BNA Manual on Professional Conduct is available in print at law libraries and on both Lexis (Library:BNA_File:MRPC) and Westlaw (ABA-BNA), though neither online service covers older current reports as fully as the print version.

The manual indicates that the lawyer as witness issue is governed by Rule 3.7 of the MRPC or Disciplinary Rules (DR) 5-101 and 5-102 of the Code of Professional Responsibility (Code) (which applied in Massachusetts until Dec. 31, 1997, when the MRPC was adopted).

"(3) disqualification of the lawyer would work substantial hardship on the client..." (emphasis added).

In many cases, then, the focus of research will be what constitutes a "necessary witness" and what is "substantial hardship." Rule 3.7 does not define these critical terms.

Next, look at the comments to the rule, as they have also been adopted by the SJC and are "intended as guides to interpretation." MRPC Preamble and Scope at [9]. Unfortunately, the comments do not define "necessary witness" and "substantial hardship."

Having reviewed Rule 3.7 and its comments, the next step is to locate interpretations of the rule by Massachusetts courts and the Board of Bar Overseers' Office of Bar Counsel, as well as ethical opinions issued by the Massachusetts Bar Association.

Researching Massachusetts Caselaw

A good starting place to find Massachusetts caselaw is West's Massachusetts Digest (second). West digests matters of attorney

ethics under the topic "Attorney and Client."

"Key numbers" relevant to the lawyer as witness situation include No. 22 ("Acting in different capacities; counsel as witness"). Similarly, the attorney could use the Lexis "Search Advisor" to search within the topic/subtopic "Civil Procedure/Counsel."

The cases digested under either the West key number or the Lexis subtopic are likely to concern Rule 3.7 or its predecessors under the Code. You can also locate Massachusetts caselaw by Shepardizing Rule 3.7 using Shepard's Professional and Judicial Conduct Citations to locate Massachusetts citations.

Both the digest method and Shepard's have limitations. The digest lists only cases that the West editors deemed relevant to the lawyer as witness issue. Neither includes Superior Court decisions.

A full text search of Massachusetts caselaw on Westlaw (MA-CS) or Lexis (Library:Mass File:MA-CTS), using key words, will diversify the search methods and give access to selected Superior Court opinions. (Selected Superior Court opinions are also available through Lawyers Weekly's online Archives, www.masslawyersweekly.com.)

An example of such a search is: (attorney or advocate or counsel or lawyer)/p (disqualify! or withdraw!)/p witness/p "3.7". The same search could be performed in the databases for the 1st U.S. Circuit Court of Appeals (CTA1 on Westlaw and Library:GENFED File:1ST on Lexis) and the U.S. District Court (DCTMA on Westlaw and Library:MEGA File:MA-DIST on Lexis), in order to locate federal cases interpreting Massachusetts Rule 3.7.

Researching Disciplinary Rulings, Ethical Opinions

Opinions of the Massachusetts bar counsel since 1974 are published in bound volumes entitled Massachusetts Attorney Discipline Reports. These opinions arise from disciplinary proceedings against attorneys. In addition to law libraries, you can obtain decisions of the BBO beginning in 1999 at the bar counsel's website (www.mass.gov/obcbbo/decisions.htm) and on Westlaw (in the METH-DISP database), also beginning with 1999.

Lawyers Weekly subscribers can access decision summaries of the BBO, beginning in 1993, through www.masslawyersweekly.com. Full-text decisions are also available through Lawyers Weekly's Automated Opinion Service.

Opinions of the MBA Committee on Professional Ethics are another important source interpreting the MRPC. The full text of these opinions, keyword searchable, is

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available at the MBA website (www.massbar.org/publications/ethics_opinions/) or can be obtained in print at law libraries. They are abstracted in the ethical opinions volume of the ABA-BNA Manual and Lexis also offers selected MBA ethical opinions beginning in 1992 (Library:MASS File:MAETHOP).

ABA Ethics Opinions

In addition to interpretations of Rule 3.7 by Massachusetts courts, the BBO and the MBA, you should review the formal and informal opinions of the American Bar Association. Because the MRPC is based on the ABA Model Rules of Professional Conduct, ABA interpretations of a particular rule are often highly relevant.

ABA opinions are printed as a separate ABA publication, and also appear in full in the ethical opinions volumes of the ABA-BNA Manual, in Westlaw (ABA-ETHOP) and in Lexis (Library:ABA File:ETHICS).

Locate Mass. Interpretations Of Code DRs That Preceded Rule 3.7

If examination of MRPC 3.7, its comments,

Massachusetts caselaw, disciplinary decisions and ethical opinions fails to produce a definitive answer concerning the disqualification issue, the next logical step is to compare the present Rule 3.7 with its predecessor Code sections, DRs 5-101 and 5-102.

Both Rule 3.7 and DRs incorporate the concept of "substantial hardship." Thus, interpretations of "substantial hardship" under the Code may shed light on the requirements of Rule 3.7.

The same methods discussed above for locating caselaw, disciplinary decisions and ethical opinions interpreting Rule 3.7 can be used to locate interpretations of DRs 5-101 and 5-102.

Look For Other States'

Interpretations Of Rule 3.7

Because most states have adopted, in one form or another, the ABA Model Rules of Professional Conduct, on which the MRPC is based, a version of Rule 3.7 similar or identical to the Massachusetts rule exists in many states. Interpretations of those similar rules may shed light on Massachusetts Rule 3.7.

There are a number of approaches to lo-

calating interpretations of other states' ethical rules. First, the ABA-BNA manual section dealing with a given ethical rule includes citations to cases and ethical opinions from across the nation. In addition, the manual offers a subject index to state ethical opinions.

The ABA's Annotated Model Rules of Professional Conduct is another good source, providing a rule-by-rule analysis and extensive citations to caselaw and ethical opinions.

You can also expand the West Digest search to examine headnotes nationwide under the relevant key number (Attorney & Client 22) or can accomplish the same thing more efficiently using Westlaw to search only for headnotes under that key number that also refer to "3.7" (e.g., di(45k22)/p he("3.7") in the "ALLCASES" database).

Likewise, the Lexis Search Advisor search of Massachusetts law could be performed nationwide on Lexis (Library:MEGA File:MEGA). And, of course, you could run in the ALLCASES database the same full text search as was previously run in the Massachusetts (MA-CS) database, or do the same on Lexis.

Both Westlaw and Lexis offer access to ethical opinions from other states. Westlaw's

METH-EO database offers ethical opinions from about 20 states (not including Massachusetts), and Lexis, through the National Reporter on Legal Ethics and Professional Responsibility database (Library:ETHICS File:ETHOP) offers access to opinions from 42 states and the District of Columbia.

Other avenues to obtain out-of-state cases and ethical opinions include: (1) Shepardizing authorities already obtained through other research (of course, all relevant authorities should be updated using Shepard's or Westlaw's Keycite); (2) locating a relevant section of the Restatement (Third) of the Law Governing Lawyers and following its annotations; and (3) the Internet and telephone, because many state bar associations either post their opinions or will provide them upon request.

You Can Master Ethics Research

Although researching issues in legal ethics can be challenging, there are many good sources of information that help an attorney determine his ethical obligations. By following the steps and consulting the sources identified in this article, you can have confidence that you understand the ethical lay of the land. ■■■