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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Petition of James T. and)	
Elizabeth A. Gruba, and Leo G. and Jeanne R.)	REGULATORY DIVISION
Barsanti,)	
Complainants)	DOCKET NO. D2010.2.14
vs.)	
NorthWestern Energy,)	
Defendant)	

**NorthWestern Energy's Response to Complainants' Motion
for Leave to Amend Testimony**

NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") submits this timely Response to Complainants' Motion for Leave to Amend Testimony ("Response") for the Montana Public Service Commission's ("Commission") consideration when deciding Complainants' Motion for Leave to Amend ("Motion").¹ NorthWestern respectfully requests that the Commission deny the Motion with one exception.² Complainants' Motion and recently re-filed testimony is effectively an attempt to overturn the Hearing Examiner's decision in Order No. 7084i. If Complainants disagreed with the Hearing Examiner's decision in Order No. 7084i,

¹ By Notice of Staff Action issued April 16, 2015, the Commission determined that Complainants' Request for Declaratory Ruling would be "treated as a *Motion for Leave to Amend*." It further provided that any response to said Motion must be filed by April 27, 2015.

² As is noted below, NorthWestern does not object to Complainants' request to modify numbers/figures.

they had every right to seek reconsideration before the entire Commission.³ Complainants failed to do this and now have waived the right to challenge that decision. For these reasons as well as those noted below, the Commission should deny the Complainants' Motion.

Procedural Background

The following is the relevant procedural background for this specific issue. In March and April of 2014, Complainants filed written testimony of seven witnesses. NorthWestern filed Motions to Strike portions of this testimony.⁴ On February 6, 2015, the Commission-appointed Hearing Examiner for this case, Ms. Laura Farkas, issued an *Order Granting NorthWestern Energy's Motion to Strike Testimony and Motion to Strike Testimony of Edward Smalley* ("Order No. 7084i"). Specifically, Order No. 7084i, ¶ 39, held that

Complainants must refile their testimony in substantial compliance with the following guidelines:

- a. Testimony is to be focused on the sole issue in this case, whether or not the street lighting tariff is unreasonable or unjustly discriminatory[;]
- b. Testimony is not to contain any comments or dialogue of Complainants' attorney[;]
- c. Testimony is not to contain any 'attorney motions'; all motions must be made in separate filings[; and]
- d. Testimony is not to contain statements by lay witnesses offering expert witness testimony.

Paragraph 39 also provided a deadline for Complainants to re-file their testimony consistent with Order No. 7084i.⁵ On March 27, 2015, Complainants re-filed the testimony of all seven witnesses as well as new testimony from their attorney, Mr. Russell Doty.

³ See Notice of Commission Action issued on June 17, 2014.

⁴ See *NorthWestern's Motion to Strike Testimony filed by Complainants and Request for an Extension* filed on April 1, 2014, and *NorthWestern's Motion to Strike Testimony of Edward Smalley and Request for an Extension* filed on April 17, 2014.

⁵ By Notice of Staff Action issued on February 24, 2015, the Commission granted Complainants additional time to re-file their testimony. By agreement of all the parties, Complainants' deadline to re-file testimony was again extended by one additional week.

Concurrent with the re-filing of their testimony, Complainants filed the Motion requesting permission to amend their testimony in this docket to add information not previously included therein. Complainants assert that “[m]any numbers in the case have changed markedly in the year that has elapsed since Complainants first pre-filed their written testimony in March of 2014.” Motion, p. 3. Additionally, Complainants claim that “[s]ince some of Complainants[’] witnesses are not being allowed to testify about matters within the purview of experts, Complainants, not being able to afford to hire an expert witness, must file additional expert testimony.” *Id.*, pp. 3-4.

Argument

The Montana Supreme Court has repeatedly stated that a tribunal should permit a party to amend its pleadings, and denial of such request should be the exception. *Nesbitt v. City of Butte*, 118 Mont. 84, 90, 163 P.2d 251, 254 (1945); *see also Donaldson v. State*, 2012 MT 288, ¶ 12, 367 Mont. 228, 292 P.3d 364. The Commission has adopted an administrative rule addressing amendment of pleadings. Administrative Rule of Montana (“ARM”) 38.2.1207 provides that “[a]ny pleading or document may be amended prior to notice of the hearing.” The Supreme Court, however, has also noted that “amendments which would result in undue delay or undue prejudice to the opposing party or amendments which would be futile need not be permitted.” *Emanuel v. Great Falls School Dist.*, 2009 MT 185, ¶ 18, 351 Mont. 56, 209 P.3d 244 (citing *Reier Broadcasting Co. v. Montana State University-Bozeman*, 2005 MT 240, ¶ 8, 328 Mont. 471, 121 P.3d 549). In *Emanuel*, the Supreme Court found that the district court had not abused its discretion in denying plaintiff’s request to amend her complaint to add a third-party defendant. *Emanuel*, 2009 MT ¶ 19. The Court found that there was no error because the individual that plaintiff wanted to name as a third-party defendant “was acting within the scope

of his employment...[and therefore] enjoys statutory immunity from liability,” making plaintiff’s attempt to amend futile. *Id.* at ¶ 20. Recognizing the noted case law on the subject of pleading amendments as well as ARM 38.2.1207, NorthWestern, in this instance, does not take issue with Complainants’ request to modify numbers in the testimony given the passage of time, provided that NorthWestern will have an opportunity to conduct discovery on this amended information.

Complainants have improperly added testimony that responds to NorthWestern’s responses to discovery requests that were submitted after Complainants’ initial prefiled written testimony was filed in March and April of 2014. The Commission has already spoken on this issue. The Commission warned the Complainants “that it is inappropriate for them to add anything new to their testimony.” *See* Notice of Staff Action issued on February 24, 2015 (“NSA”). The NSA further added that

Complainants are being offered an opportunity to refile their testimony in order to comply with the Commission’s Order No. 7084i. Complainants are to refile their testimony after striking portions of their testimony in compliance with the Commission’s Order. Complainants are not authorized to add material to their written, prefiled testimony.

Complainants will have the opportunity to file rebuttal testimony, in which Complainants will be able to incorporate any discovery responses they receive.

See NSA, p. 2.

As to Complainants’ request to permit its attorney to file written testimony, Complainants allege this is necessary because some of their testimony was stricken as inappropriate expert opinion testimony and they cannot afford to hire an additional expert. Motion, pp. 3-4. This request to amend should be denied as futile if Mr. Doty intends to be Complainants’ attorney at

the hearing.⁶ Mr. Doty's prefiled written testimony attempts to justify the situation whereby an attorney is permitted to be a witness at a trial and does not simultaneously violate Rule 3.7 of the Montana Rules of Professional Conduct ("Mont. R. Prof. Cond.").⁷ The Doty Testimony claims that Montana State Bar Association Ethics Opinion 140519, which is an advisory opinion only, permits him to be a witness in this case without violating the Mont. R. Prof. Cond. The Doty Testimony however fails to recognize that the Ethics Opinion goes on to note that Rule 3.7 does not permit him to also then act as the Complainants' attorney at hearing. Ethics Opinion 140519, page 2, which has been attached hereto for the Commission's benefit, provides that "[c]ase law construing the rule generally limits disqualification of a lawyer-witness as trial counsel." The Ethics Opinion provides a litany of citations to case law and other ethics opinions that support the notion that Rule 3.7 is violated if an attorney is a witness at hearing and will also serve as trial counsel.

The Doty Testimony, pages 3-4, testifies⁸ that Rule 3.7 uses the phrase "at a trial" and that Commission proceedings are hearings not trials. This argument was already raised by Complainants and rejected by the Commission,⁹ and should correctly be rejected once again.¹⁰ As argued by NorthWestern in its Reply to Complainants' Opposition to Motion to Strike filed

⁶ If the Motion is granted and the Doty Testimony is allowed, NorthWestern will then need to determine whether such testimony is proper expert opinion testimony. If necessary, NorthWestern will file a motion to strike as soon as such a determination is made.

⁷ See Pre-filed Written Direct Testimony of Complainants' Witness, Russell L. Doty ("Doty Testimony"), pages 2-5.

⁸ Testimony is evidence submitted to a tribunal, who then weighs and considers all the evidence when making a decision. See Black's Law Dictionary, 1613 (9th ed. 2009). Evidence provides facts. *Id.*, at 635. The Doty Testimony improperly includes argument in testimony. Legal argument should be made by the lawyers and is not evidence. *Delaware v. K-Decorators, Inc.*, 1999 MT 13, ¶ 51, 293 Mont. 97, 973 P.2d 818 ("Statements of counsel, however, are not evidence.").

⁹ See Complainants' Brief Opposing NorthWestern's Motion to Strike Testimony filed on April 11, 2014, pp. 17-19. See also Order No. 7084i.

¹⁰ Given Complainants' attempt to reargue the same issue that the Commission has already ruled on, NorthWestern believes that Complainants are ignoring the Commission's caution in this case. The Commission cautioned the parties to "follow efficient use of motion practice, to avoid further delay in the proceeding." See Notice of Staff Action issued on January 21, 2015.

on April 30, 2014, the Commission has quasi-judicial powers. *See In re Montana Power Company*, Docket No. D2000.9.140, Order No. 6287a, ¶5 (March 23, 2001); *see also Cascade County Consumers Association v. Public Service Commission*, 144 Mont. 169, 185-186, 394 P.2d 856, 865 (1964). The Commission conducts contested cases subject to the rules of evidence. § 2-4-612, MCA. Additionally, the Commission’s administrative rules provide that when applying the rules of civil procedure any reference to “‘trial’ shall be considered references to hearing.” ARM 38.2.3301(1). Complainants also again cite to a Maryland Court of Special Appeals decision to support their position that the ethics rules for attorneys do not apply to administrative agency matters and thereby permit attorneys to give evidence at such hearings. Doty Testimony, p. 3. This is Maryland case law. Complainants have not cited to any Montana case law that would permit attorneys to give evidence at an administrative agency hearing. Based on the foregoing, the Commission should disregard Complainants’ argument that Rule 3.7 of the Rules of Professional Conduct does not apply to Commission hearings.

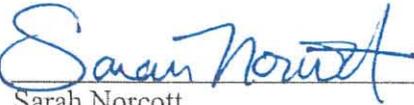
The Mont. R. Prof. Cond. prohibit Mr. Doty from being a witness in this docket and being Complainants’ attorney at the hearing. If Mr. Doty plans to be the hearing attorney in this case, Complainants’ Motion to add his testimony is futile.

Conclusion

The Commission should reject the Complainants’ attempt to circumvent the Hearing Examiner’s decision in Order No. 7084i and should deny the Motion as noted above.

Respectfully submitted this 27th day of April, 2015.

NORTHWESTERN ENERGY

By:  _____
Sarah Norcott
Attorney for NorthWestern Energy

ETHICS OPINION 140519

Facts:

The office of the Commissioner of Political Practices (“COPP”) is a small state agency with a limited budget and a staff of six people. Two of the six COPP staff are attorneys licensed to practice law in Montana. COPP staff attorneys are Jonathan Motl (also Commissioner) and Jaime MacNaughton.

The Commissioner investigates complaints that allege campaign practice violations. The Commissioner’s staff investigates these complaints and the Commissioner then drafts and writes a decision as to whether or not sufficient facts exist to show campaign practice violations. The final decision is a non-binding agency decision. The decision, however, can be a sufficient platform to allow the Commissioner and the candidate or political committee addressed by the complaint to settle the matter by the negotiation of a fine. The settlement is a final resolution of the complaint.

COPP is dealing with a number of complaints over Western Tradition Partnership, a nonprofit organization that is alleged to have been connected with “dark money” use in Montana’s 2010 elections. The Commissioner has issued a number of decisions on this issue, which have not been settled and must now be prosecuted in state district court. COPP has filed nine civil enforcement actions against nine 2010 candidates for public office, and anticipates filing more.

COPP files each enforcement action as a civil complaint in the 1st Judicial District. The complaints list “Jonathan Motl and Jaime MacNaughton” as attorneys for the Commissioner of Political Practices.

COPP intends to use Jonathan Motl in an active litigation role in all of the district court enforcement actions. Mr. Motl will take and defend depositions (other than his own), prepare and send discovery, interview and prepare witnesses, and generally work on the case. Mr. Motl will not appear as trial lawyer or advocate as a lawyer in any trial of any enforcement action. Jaime MacNaughton (who will also be involved in discovery) will act as the trial lawyer. Mr. Motl will appear in court as the representative of the party and will advocate as a witness for the party. COPP indicates that it does not have the resources to engage another attorney and it is therefore dependent on use of Jonathan Motl and Jaime MacNaughton in the manner set out above.

COPP requests a determination that its attorney, Jonathan Motl, is in compliance with Rule 3.7, Mont.R.Prof.Cond., when he acts as set out above.

Short Answer:

Yes, COPP's intention to use Mr. Motl in the civil enforcement actions as an advocate and witness is appropriate under Rule 3.7, Mont. R. Prof. Cond. (sometimes referred to as the "lawyer-witness rule" or the "advocate-witness rule.") Rule 3.7(a) addresses advocating "at trial." Case law construing the rule generally limits disqualification of a lawyer-witness as trial counsel but not from participating in pretrial matters. Rule 3.7(b) makes it clear that disqualification is not automatically imputed to partners and associates of the disqualified lawyer-witness at trial, unless a separate conflict of interest is present.

General Discussion:

Rule 3.7, Mont.R.Prof.Cond., states:

- (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.

As noted in Montana Formal Ethics Opinion 050317, the prohibition against a lawyer from serving as advocate and testifying as a witness in the same matter is essentially aimed at eliminating confusion about the lawyer's role. As an advocate, the lawyer's task is to present the client's case and to test the evidence and arguments put forth by the opposing side. A witness, however, provides sworn testimony concerning facts about which he or she has personal knowledge or expertise. When a lawyer takes on both roles, jurors are likely to be confused about whether a statement by an advocate witness should be taken as proof or as an analysis of the proof (see Comment 2, below).

Rule 3.7 is designed to preserve the distinction between advocacy and evidence and to protect the integrity of the advocate's role as an independent and objective proponent of rational argument. This is discussed in the Comments to the Model Rules:

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on 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.

See also *Restatement (Third) of the Law Governing Lawyers*, §108 cmt. b (2000) ("combined roles risk confusion on the part of the factfinder and the introduction of both impermissible advocacy from the witness stand and impermissible testimony from counsel table.")

Further, the rule protects trial counsel from having to cross-examine opposing counsel and impeach his or her credibility, even if only on the obvious ground of interest in the outcome of the case. See, e.g., *Ford v. State*, 628 S.W.2d 340 (Ark. Ct. App. 1982) (opposing counsel handicapped in cross-examining and arguing credibility of lawyer-witness); Model Code EC 5-9 ("If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case.")

As noted, Rule 3.7(a) prohibits a lawyer who is likely to be a necessary witness from "acting as an advocate at trial." The majority of courts and ethics committees construing the rule have permitted pretrial preparation work by an attorney who likely will serve as a witness at trial. See, e.g., *Culebras Enter. Corp. v. Rivera-Rios*, 846 F.2d 94 (1st Cir. 1988) (lawyers who performed substantial pretrial work in case in which, had it gone to trial, they would have been called as witnesses but would not have served as trial counsel did not violate Rule 3.7 because they did not assume, and did not plan to assume, "advocate at trial" role); *United States v. Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985) (lawyer for alleged organized

crime group may participate fully in pretrial stage even though he will probably be called as witness, and other defense counsel are free to consult with him during trial); *United States v. Johnston*, 690 F.2d 638 (7th Cir. 1982) (prosecutor who testified at pretrial suppression hearing is not automatically disqualified from trying case); *Merrill Lynch Bus. Fin. Servs. v. Nudell*, 239 F. Supp.2d 1170 (D. Colo. 2003) (since the rule's purpose is to avoid jury confusion at trial, it does not automatically require that lawyers be disqualified from pretrial activities, such as participating in strategy sessions, pretrial hearings, settlement conferences, or motions practice; however, continued pretrial involvement cannot be used later as basis to argue that disqualification at trial works undue hardship); *Main Events Prods. v. Lacy*, 220 F. Supp.2d 353 (D.N.J. 2002) (companies' attorney would be properly disqualified as necessary witness but was appropriately allowed to represent client in pretrial matters; disqualification rule is designed to avoid confusing jury about what is testimony and what is argument); *Massachusetts Sch. of Law at Andover Inc. v. Am. Bar Ass'n*, 872 F. Supp. 1346, 1377, *aff'd*, 107 F.3d 1026 (3d Cir. 1997) (while plaintiff law school's administrators and faculty were disqualified by Rule 3.7 from serving as trial counsel, they were not prohibited from "attending any and all depositions, acting as an advisor, or as a consultant, or making 'the snowballs for somebody else to throw'"); *DiMartino v. Dist. Court*, 66 P.3d 945 (Nev. 2003) (rule doesn't necessarily disqualify counsel from pretrial proceedings; holding otherwise to permit total disqualification would invite rule's misuse as tactical ploy); *Cunningham v. Sams*, 588 S.E.2d 484, 487 (N.C. Ct. App. 2003) ("even though an attorney may be prohibited from being an advocate during trial, the attorney may, nevertheless, represent his client in other capacities, such as drafting documents and researching legal issues"); *Heard v. Foxshire Assocs.*, 806 A.2d 348 (Md. Ct. Spec. App. 2002) (rule applies only to trials and does not preclude giving of evidence by attorney of record for party before administrative agency). See also ABA Informal Ethics Op. 89-1529 (1989) (lawyer who expects to testify on contested issue at trial may represent party in pretrial proceedings, provided that client consents after consultation and lawyer reasonably believes that representation will not be adversely affected by client's interest in expected testimony); Colorado Ethics Op. 78 (revised 1997) (rule permits lawyer who may be necessary witness to continue to represent client "in all litigation roles short of trial advocacy"); Michigan Informal Ethics Op. CI-1118 (1985) ("advocate" in context of Rule 3.7 is best defined as person who "participates as a spokesperson for the client in open court"; lawyer who in his capacity as certified public accountant will be providing expert testimony in divorce case may also serve as co-counsel to lawyer from another firm); Utah Ethics Op. 04-02 (2004) (if pretrial representation is not forbidden by another rule, lawyer who is necessary witness may represent client in pretrial stage and retain another lawyer to handle trial).

The Committee agrees with the majority of courts and ethics committees construing Rule 3.7(a). If Mr. Motl is a necessary witness, Rule 3.7(a) prohibits him from “acting as an advocate at trial.” However, even though it is likely he will serve as a witness at trial, Mr. Motl is permitted to participate in pretrial matters such as pleadings, motions, and other papers, taking and defending depositions (other than his own), preparing and sending discovery, interviewing and preparing witnesses, appearing at and participating in hearings, and other work leading up to trial.

Rule 3.7(b) does not extend the prohibition on lawyer-witnesses to the partners and associates of the testifying lawyer such as other counsel for COPP. Comment [5] to Model Rule 3.7 notes that the Rule does not automatically forbid lawyers to act as advocates in a trial where other lawyers from the same firm are testifying as necessary witnesses. The comment explains that it is unlikely the trier of fact will be misled under these circumstances. Comments [6] and [7], however, encourage lawyers to stay alert to the conflicts of interest that may arise when an attorney, or a lawyer with whom the attorney is associated, is a necessary witness. Counsel ought to resolve such conflicts in accordance with Rules 1.7 and 1.9.

Cases construing the rule generally support the position that disqualification is not imputed to other associated attorneys. *See, e.g., Brown v. Daniel*, 180 F.R.D. 298 (D.S.C. 1998) (no disqualification of entire firm even though partner in firm would be necessary witness); *Ramsay v. Boeing Welfare Benefit Plan Comm.*, 662 F. Supp. 968 (D. Kan. 1987) (guided by Rule 3.7(b), court refused to disqualify firm from representing plaintiff whose wife was firm member and likely witness; any perception of testifying lawyer’s interest is “attributable to her role as spouse,” rather than her status as lawyer); *Syscon Corp. v. United States*, 10 Cl. Ct. 200 (Cl. Ct. 1986) (refusing to disqualify lawyer whose partner was general counsel and major stockholder in plaintiff company, where partner’s testimony, if any, would be peripheral); *Owen & Mandolfo v. Davidoff of Geneva Inc.*, 602 N.Y.S.2d 369 (N.Y. App. Div. 1993) (under post-rules amendment to state’s code, no disqualification of law firm in arbitration proceeding; even though lawyer who was closely involved in design and construction project at issue would be testifying, colleague who was “of counsel” to firm would be handling proceeding); see also *Restatement (Third) of the Law Governing Lawyers*, §108 cmt. b (2000) (any other lawyer in testifying lawyer’s firm may serve as advocate despite disqualification so long as representation would not involve other conflict of interest such as giving adverse testimony).

Where, as here, the result would be to bar an entire government office from prosecuting cases, courts generally are even more hesitant to impute disqualification of a lawyer-witness to other lawyers in the office. See, e.g., *U.S. v. Watson*, 87 F.3d 927 (7th Cir. 1996) (U.S. attorney's office may prosecute cases where the office has interviewed a suspect and the statement is at issue); *In re Harris*, 934 P.2d 965 (Kan., 1997) (Rule does not disqualify deputy disciplinary counsel from prosecuting case in which another disciplinary counsel is a witness); *State ex rel. Macy v. Owens*, 934 P.2d 343 (Okla. Crim. App. 1997) (where two district attorneys were likely to be necessary witnesses, the entire district attorney's office could not be disqualified because the office is required by law to prosecute all crimes within the district and Rule 3.7(b) specifically allows other lawyers in the office to handle trial); *State v. Schmitt*, 102 P.3d 856 (Wash. Ct. App. 2004) (*ibid*).

For these reasons, under Rule 3.7(b), disqualification of Mr. Motl from serving as trial counsel is not imputed to other COPP counsel, unless a separate conflict of interest is present. The facts presented do not suggest that COPP's trial counsel would have a conflict in calling Mr. Motl as a witness at trial. However, counsel are encouraged to be mindful of any circumstances that might give rise to such conflicts.

Finally, as other authorities note, Rule 3.7 is used in disqualification motions far more than it is used in discipline. In this regard, paragraph 21 of the Preamble to the Montana Rules is an appropriate reminder that:

The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies....
Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.

Disqualification motions can be extremely burdensome, expensive, and time-consuming. So, the potential for abuse as a litigation tactic is well-recognized. See, e.g., *Kalmanovitz v. G. Heileman Brewing Co.*, 610 F. Supp. 1319 (D. Del. 1985) (motions to disqualify "are often disguised attempts to divest opposing parties of their counsel of choice"), *aff'd*, 769 F.2d 152 (3d Cir. 1985); *Council for Nat'l Register of Health Serv. Providers v. Am. Home Assurance Co.*, 632 F. Supp. 144 (D.D.C. 1985) (noting potential for tactical abuse of disqualification motions, court held that where lawyers testimony may be relevant but not necessary, "totality of circumstances," including client's desires, must be considered); *Devins v. Peitzer*, 622 So. 2d 558 (Fla. Dist. Ct. App. 1993) (refusing to disqualify lawyer

for estate merely because contestants announced intention to call him as adverse witness on their own behalf, court rejected use of rule as means of removing opposing counsel by calling him as witness); *Klupt v. Krongard*, 728 A.2d 727 (Md. 1999) (courts “will take a hard look” at disqualification motions out of concern that movant will use motion as tactical ploy); *May v. Crofts*, 868 S.W.2d 397 (Tex. App. 1993) (refusing to disqualify lawyer who represented proponents of a will in a will contest against allegations of their, and his, undue influence despite plaintiff’s assertion that she would be calling him as witness; court expressed disapproval of “tactical” use of lawyer-witness rule, and cited insufficient showing of prejudice).

Conclusion

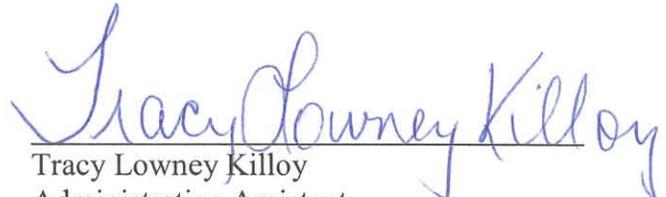
If Mr. Motl is a necessary witness in the various civil enforcement actions, counsel for COPP are not violating Rule 3.7 as long as Mr. Motl does not act as trial counsel. Even though it is likely he will serve as a witness at trial, Mr. Motl is permitted to participate as counsel in pretrial proceedings. The disqualification of Mr. Motl as a witness-advocate at trial is not imputed to other attorneys for COPP, absent some other conflict of interest not described in the facts presented here.

THIS OPINION IS ADVISORY ONLY

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Response to Complainants' Motion for Leave to Amend Testimony in Docket No. D2010.2.14 has been hand delivered to the Montana Public Service Commission and the Montana Consumer Counsel this date. This will be e-filed on the PSC website and served on the most recent service list by mailing a copy thereof by first class mail, postage prepaid. This will also be emailed to appropriate parties per Procedural Order No. 7084h.

Date: April 27, 2015


Tracy Lowney Killoy
Administrative Assistant
Regulatory Affairs

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