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Advocate Yes; Witness No

Stephen A. Saltzburg

George Washington University Law School, SSALTZ@law.gwu.edu

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Advocate Yes; Witness No

BY STEPHEN A. SALTZBURG

A basic principle codified in Rule 3.7 of the Model Rules of Professional Conduct is that a lawyer generally cannot be both an advocate and a witness in the same case.

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.

The rule applies to all lawyers in civil and criminal cases and is equally applicable to prosecutors and defense lawyers. Some courts, however, have expressed a special concern that a government lawyer comply with the rule because it “expresses an institutional concern, especially pronounced when the government is a litigant, that public confidence in our criminal justice system not be eroded by even the appearance of impropriety.” (United States v. Prantil, 764 F.2d 548, 553 (9th Cir. 1985).)

In the typical criminal case it is unthinkable that the prosecuting attorney or the defense lawyer would seek to take the witness stand even if co-counsel were present to conduct an examination. But both prosecutors and defense counsel must recognize that it is possible for a lawyer to violate the ethical rule without ever officially becoming a witness.

An Illustrative Case

One case that illustrates how this can happen is *United States v. Rangel-Guzman*, 752 F.3d 1222 (9th Cir. 2014). The defendant was charged with and convicted



STEPHEN A. SALTZBURG is the Wallace and Beverley Woodbury University Professor at George Washington University School of Law in Washington, D.C. He is a past chair of the Criminal Justice Section and a regular columnist for *Criminal Justice* magazine. He is also author of the book *Trial Tactics*, Third Edition (American Bar Association 2013), an updated and expanded compilation of his columns.

of importation of marijuana. The first paragraph of the court’s opinion summarizes the case in a very catchy way, which is not unusual in opinions by Chief Judge Alex Kozinski:

It is said that every dog has its day. Unfortunately for Kevin Rangel-Guzman, the drug detection dog at the Otay Mesa Port of Entry was having a fine day on September 5, 2011, when Rangel-Guzman and a friend attempted to re-enter the United States. The dog alerted to their vehicle, and Customs and Border Protection officers conducted a search. Officers found 91.4 kilograms of marijuana, hidden in a compartment behind the backseat. Good dog! (*Id.* at 1223)

On these facts it is easy to believe that the defense of Rangel-Guzman was a challenge. It turns out that both he and his friend gave statements to border agents after their arrest. At trial, Rangel-Guzman testified to a very different account from the one he provided to the agents. He claimed at trial that (1) his Aunt Martha and a cousin invited him a month before the arrest to a wedding in Tecate, Mexico, so (2) he took a bus from Los Angeles to Tijuana and either a bus or taxi to Tecate and (3) returned to Los Angeles the same way; then (4) he decided to go back to Mexico to “have a good time,” at which point (5) Aunt Martha loaned him a car that (6) he and his friend drove to his cousin’s house in Tecate and (7) took a side trip by cab before (8) returning to Tecate to pick up the car. In short, his defense was “I didn’t know there was marijuana in the car.”

The Problem

Prior to trial, the assistant US attorney who prosecuted the case had a meeting attended by Homeland Security Agent Baxter, Rangel-Guzman, and Rangel-Guzman’s attorney. When Rangel-Guzman’s trial testimony departed from what he had said in the meeting, the prosecutor questioned him in a way that made clear that she believed he had made statements in the meeting inconsistent with his testimony. She interrogated him as follows:

You told us that you and your mother ran into Martha . . . You told us that four or five months before . . . That’s what you told us last week . . . Don’t you remember that I was shocked that you were saying it was four to five months before you got arrested? (*Id.* at 1224.)

Although the prosecutor clearly was referring to her reaction to what Rangel-Guzman said during the pretrial

meeting, defense counsel failed to object. For the first time on appeal, appellate counsel argued that the prosecutor improperly vouched and violated the advocate-witness rule. The absence of a timely trial objection left Rangel-Guzman with the chance for only plain error review.

The court of appeals explained that it held government lawyers to a high standard when it came to the advocate-witness rule:

We have previously found error where a prosecutor's actions might have "tak[en] advantage of the natural tendency of jury members to believe in the honesty of . . . government attorneys" even when those actions didn't "fit neatly under either the advocate-witness rule or the vouching rule." *United States v. Edwards*, 154 F.3d 915, 922 (9th Cir. 1998).

(*Rangel-Guzman*, 752 F.3d at 1225.)

The court concluded that the prosecutor "became her own rebuttal witness" as it described her cross-examination:

The prosecutor made a number of statements that used variations on "but you told us" and "I asked you and you said," as well as assertions of fact about what had occurred during the meeting: "Well, we went over and over it, Mr. Rangel," "[D]o you remember last week I specifically asked you multiple times who accompanied you to the Quinceanera?" And she left no doubt about her personal feelings during the meeting: "Don't you remember that I was shocked that you were saying that it was four to five months before you got arrested [that you met Martha]?" (*Id.*)

Avoiding the Problem

The court explained how prosecutors can avoid the advocate-witness problem, and its advice is equally applicable to defense counsel:

When a prosecutor interviews a suspect prior to trial, the "correct procedure" is to do so "in the presence of a third person so that the third person can testify about the interview." *United States v. Watson*, 87 F.3d 927, 932 (7th Cir. 1996). Here, Agent Baxter was present for the interview, so he could have taken the stand and testified that Rangel-Guzman had made the prior inconsistent statements. See *United States v. Hibler*, 463 F.2d 455, 461 (9th Cir. 1972).

(*Rangel-Guzman*, 752 F.3d at 1225.)

Relying on the cases cited above, the court found that the prosecutor violated the advocate-witness rule:

Instead of calling Baxter, the prosecutor became her own rebuttal witness. By phrasing the questions as she did, she essentially testified that Rangel-Guzman had made those prior inconsistent statements. Doing so clearly took "advantage of the natural tendency of jury members to believe" in a prosecutor, *Edwards*, 154 F.3d at 922, and required the jury to "segregate the exhortations of the advocate from the testimonial accounts of the witness," *Prantil*, 764 F.2d at 553. And, because the prosecutor wasn't *actually* a witness, Rangel-Guzman had no opportunity to cross-examine her about the accuracy or truthfulness of her account.

There can be no doubt that the AUSA was asking the jury to choose whether to believe her or the defendant. This was highly improper and unfair to the defendant.

(*Rangel-Guzman*, 752 F.3d at 1225.)

The Remedy and Lessons Learned

The government conceded that the prosecutor had violated the advocate-witness rule in her cross-examination, and the court commented favorably on the government's response to the violation:

After oral argument before us, the United States Attorney "concede[d] that [the] cross-examination of defendant was error" and advised us that she "has instituted—in addition to existing training—a semi-monthly training update for the Criminal Division regarding pre-trial and trial phases . . . in which prosecutorial error may occur." We commend the United States Attorney for the Southern District of California for her forthrightness and hope that her example will be followed by prosecutors across the circuit.

(*Id.*)

The court also chose to emphasize the importance of trial judges enforcing the advocate-witness rule:

We recognize the difficulty in identifying errors absent an objection. And we understand the district court's reluctance to intervene when the opposing party, perhaps strategically, declines to do so. But the prosecutor's invocation of her own personal knowledge during cross-examination was unquestionably improper. Even absent objection, the court should have recognized this and put

a stop to it. See *Henderson v. United States*, 133 S. Ct. 1121, 1129–30, 185 L. Ed. 2d 85 (2013). (*Rangel-Guzman*, 752 F.3d at 1225.)

In the end, the court found that the prosecutor’s erroneous questioning did not violate Rangel-Guzman’s substantial rights. The court concluded that there was no reason to believe that the jury would have believed his “convoluted tale” had there been no improper cross-examination. This, of course, is an application of the plain-error standard, which demands more of an appellant than can be delivered in most cases. The lesson for defense counsel is to make proper objections when there is a violation of the advocate-witness rule. A proper objection might have ended the

improper examination and, even if it did not, the standard on appeal would have been more favorable to the defendant/appellant.

So, there is something that all involved in criminal cases can learn from this case:

1. Prosecutors can violate the advocate-witness rule without ever taking the witness stand.
2. Trial judges must be alert to protect against violations of the rule.
3. Defense counsel also must be alert to detect violations, must make timely and proper objections, and must understand that they violate their duty to clients when they fail to recognize that a cross-examination has become a kind of rebuttal that makes the prosecutor a witness. ■