

ORIGINAL

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE READINGS

**CALVIN "BILL" WOOD**  
Petitioner

v

DOAH Case No. 99-3595  
99083595-TL

**GTE FLORIDA, INC.**  
Respondent.

v.

990861-TL

**PUBLIC SERVICE COMMISSION**  
Intervener.

**RENEWED MOTION TO DISQUALIFY PSC  
ATTORNEYS FROM INSTANT CASE**

This 19<sup>th</sup> day of November, 1999, comes the Petitioner Calvin "Bill" Wood, pro se, and represents to the court as follows:

1. Petitioner filed a series of 9 complaints against GTE for providing substandard and defective telephone service to his house and his startup business, said complaints beginning on or about December, 1997 and ending about August, 1998 when GTE began to substantially provide standard non-defective telephone service;

2. PSC by and thru it's agents, including Attorney Donna Clemons, represented to the Petitioner that they would investigate and compel GTE to provide standard service, which they did not do;

3. During this time, PSC staff members represented to petitioner that they represented him (Petitioner) and would protect his interests against GTE (and Mr. Fulwood represented to Petitioner that the PSC was all he had to "take care of you") and Petitioner was sure that PSC was representing him, and he began giving them information which he would have ordinarily not supplied, and such information was substantially distorted by PSC personnel who then used said distorted information against Petitioner and for GTE;

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4. Ms. Donna Clemons filed a recommendation on behalf of the PSC for the July 27, 1999 Agency Hearing, and said recommendation was substantially false in areas to be pointed out at the hearing, and many of those false representations are countered by written documentation in the files of the three parties;

5. It is important that these misrepresentations be brought out, to show bad faith on behalf of both GTE who originated it and PSC who allowed it, and PSC attorney's will have to be called to give testimony as to why such false facts were given to the Agency, and how they became distorted and made false, and whether it was done by PSC or GTE, and in fact shows a form of illegal redlining by GTE, known and consented to by PSC;

6. Further, other PSC attorneys including John Plescow, allowed several requested and necessary "informal conferences" to **never be held**, and such delays are relevant to the issues at hand, and specifically to the amount of complaints called in by Petitioner, and which testimony will show that the problems were not fixed and such negligent service was caused by GTE and perhaps PSC and everyone knew they were not fixed;

7. Under the Rules Regulating the Florida Bar, Rule 4-3.7(a) (Attached) specifically prohibits Attorneys being witnesses unless one of four (4) listed exceptions are met and PSC attorneys do not meet any of these exceptions;

8. Rule 4-3.7(b) tells when other members of the firm may act as attorneys, when one attorney may be a witness and others in the firm may act as attorneys;

9. Rule 4-3.7 (b) first of all cites Rule 4-1.7 (a) (dealing with conflicts of interest in which an attorney in a firm can testify, and another member of the firm can act as attorney) "General Rule", and one of the items is that when there is a conflict, like there is here, "(2) each client consents after consultation" which has not been done;

10. Petitioner has not had consultation, and does not consent to PSC representation in the case;

11. The other exception that would prevent PSC attorneys to appear in the case is when they had formerly represented a client is 4-1.9 (a) states there shall be no representation unless the former client (Petitioner) consents, which he does not; and

12. 4-1.9(b) states the attorney shall not use information relating to the representation to the disadvantage of the client;

**13. IT WAS NOT THE PETITIONER WHO REPRESENTED THAT PSC WOULD REPRESENT HIS INTERESTS AGAINST GTE, BUT IT WAS THE PSC WHO SPECIFICALLY REPRESENTED TO PETITIONER THEY REPRESENTED HIM AND HIS INTERESTS AND FURTHER REPRESENTED THAT THE PSC WAS ALL HE HAD FOR PROTECTION AGAINST GTE;**

14. PSC attorneys clearly have an irreconcilable conflict of interest in appearing in this case in which they will necessarily have to appear as witnesses;

WHEREFORE, Petitioner respectfully MOVES the court to disqualify not only Donna Clemons but all attorneys in the PSC and if they remain a party, to retain outside counsel and that the attorney witnesses for PSC be prohibited from consulting with the new outside counsel, and not give any information supplied to them by petitioner unless petitioner consents. Petitioner requests any and all other relief to which he is entitled.

Petitioner, Pro Se

*Calvin W. Wood*

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## **RULE 4-3.7 LAWYER AS WITNESS**

**(a) When Lawyer May Testify.** A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

- (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; or
- (4) disqualification of the lawyer would work substantial hardship on the client.

**(b) Other Members of Law Firm as Witnesses.** 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 4-1.7 or 4-1.9.

### **Comment**

**Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.**

**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.**

**Subdivision (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Subdivisions (a)(2) and (3) recognize that, where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.**

**Apart from these 2 exceptions, subdivision (a)(4) recognizes that a balancing is required**

**between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in rule 4-1.10 has no application to this aspect of the problem.**

**Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by rule 4-1.7 or 4-1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether such a conflict exists is primarily the responsibility of the lawyer involved. See comment to rule 4-1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, rule 4-1.10 disqualifies the firm also.**

## **RULE 4-1.7 CONFLICT OF INTEREST; GENERAL RULE**

**(a) Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

**(1)** the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

**(2)** each client consents after consultation.

### **Comment**

#### **Loyalty to a client**

**Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. See also rule 4-2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.**

**As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.**

**Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.**

#### **Consultation and consent**

**A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary**

**RULE 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT**

**A lawyer who has formerly represented a client in a matter shall not thereafter:**

**(a)** represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

**(b)** use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

### **Lawyer's interests**

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

### **Conflicts in litigation**

Subdivision (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (b) and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivision (b) are met. Compare rule 4-2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.