‘Scopes’: Subpoenaed by Your Adversary

Darrow’s co-counsel called to the stand prosecutor Bryan himself, as a leading student of the Bible. Bryan belittled fellow prosecutors’ warnings that he should not testify and demanded only that he be allowed to later examine the defense attorneys. Actually, truth be told, wild horses couldn’t have kept Bryan off the stand. Such an opportunity to articulate and pronounce the “literal truth” of the Bible was precisely why he came to Dayton in the first place—in order to “strut his stuff” and object to the teaching of evolution as “sacrilegious.” At day’s end, the incredible exchange that lasted two hours, and was depicted in “Inherit the Wind,” a fictionalized account of the trial, was just a show.

The following morning, the judge ruled that Bryan’s testimony was flatly irrelevant and simply “expunged it.” Acting at Darrow’s urging, the jury convicted Mr. Scopes who was promptly sentenced to a simple fine. The case was ultimately reversed on appeal, but on purely technical, nonconstitutional grounds having nothing to do with the First Amendment’s Establishment Clause.

But putting aside the questionably trumped-up—“collusive”—prosecution, didn’t Darrow also stray far from his ethical obligations in calling Bryan to testify? And did Bryan act irresponsibly—even unethically—in allowing himself to be called?

What Rule Applies?

Interestingly, it does not seem that Darrow’s defense team—it was actually his co-counsel that called Bryan to the stand (for Darrow to examine)—violated its ethics by calling Bryan to testify.

Although today one might imagine a trial judge going ballistic if a litigator during trial tried to spring such a subpoena ad testificandum on his adversary, the relevant ethical rule is addressed to something altogether different. Yes, as a matter of trial management, the judge would undoubtedly bar such testimony, as the subpoenaed adversary would typically move to quash the in-trial subpoena. However, such a motion would probably be based on surprise—not the subpoenaing party’s ethical lapse, assuming, of course, that the ambush itself is not an ethical lapse.

Assuming the trial judge had not demanded a witness list before trial, which would have precluded such a sandbag, the only disciplinary rules addressing lawyer-witness testimony address the bar against a lawyer at trial testifying on behalf of his client. For example, under DR 5-102(A), “[a] lawyer shall not serve as an advocate on issues pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client….”

Similarly, under DR 5-102(C), “[i]f, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal…”. Both rules have exceptions, as always, contained in the footnote, and not pertinent here, but these rules would have only prohibited Bryan (or Bryan’s prosecution team) from calling Bryan to testify, not Darrow’s defense team from calling him.

There is another ethical rule, DR 5-102(D),
that deals with a lawyer called, or likely to be called by his adversary—but again, the rule deals with the ethical problem of the subpoenaed or likely-to-be-subpoenaed lawyer. It provides that “[i]f, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the law firm must withdraw from acting as an advocate before the tribunal.”

Putting aside the reality that no sane judge would have allowed Darrow to call Bryan without his consent in the middle of a trial, and that Bryan’s testimony wasn’t substantive but rather “show” on both sides—under this rule, theoretically, if Bryan realized that he would be called by Darrow “on a significant issue” at trial (which he wouldn’t have been in the Scopes trial), Bryan would have been obliged to move to withdraw, at penalty of violating the rule.

**Justification for the Rule**

The reason for the rule is somewhat clear-cut, and is fleshed out in Ethical Consideration (EC) 5-9. Basically, if the lawyer is both counsel and witness on a particular issue, even if he is not asked about privileged matters, “the lawyer becomes more easily impeachable for interest and thus may be a less-effective witness…. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or own credibility. The roles of an advocate on issues of fact and of a witness are inconsistent…. It makes sense. Though, it does seem a bit inconsistent with the rationale for the rule barring a lawyer from calling himself to testify—the view that because the witness is the trial lawyer in the case, that fact will actually “bolster” his testimony (perhaps a dubious rationale given the often low esteem in which trial lawyers are held by the general population, which may or may not apply to the lawyers in an individual case).”

**Ethical Rule for Subpoenaing?**

But, again, what about Darrow? Forget Bryan’s obligations. Would it have been ethical for Darrow to pull this stunt? Theoretically, if Bryan was ethically barred from testifying, one supposes an argument could be made that Darrow had “aider and abettor” liability for causing the ethical breach—since Darrow was clearly not looking for a mistrial only to start the trial all over.

We find nothing on the ethics of Darrow calling Bryan midtrial. The closest thing, described in Professor Roy Simon’s excellent two-part piece on deposition subpoenas addressed to opposing counsel, addresses pretrial “deposition” subpoenas to an adversary litigator. Mr. Simon describes how the Second Circuit in *In re Subpoena Issued to Dennis Friedman* assigned four factors in deciding whether such a subpoena should be allowed: 1) the need to depose the lawyer; 2) the lawyer’s role in connection with the matter and in relation to the pending litigation; 3) the risk of encountering privilege and work product issues; and 4) the extent of discovery already conducted. These are obviously litigation-management considerations, and surely the factors in a deposition scenario are quite different than at trial. Friedman, importantly, doesn’t advance any particular ethical proscription against the lawyer who issues the subpoena, except to say that deposing an opposing lawyer disrupts the adversary process and “lowers the standards of the profession” in part by “chilling” truthful communication from the client to the attorney.

Suppose that, rather than ambush Bryan by calling him to testify on a substantive issue—if it can be characterized as an “ambush,” given Bryan’s enthusiasm to testify, Darrow’s defense team had subpoenaed Bryan shortly before trial. What consideration would apply? Note that DR 5-102(A)(4), an exception to the general rule requiring withdrawal or declaration of the representation, does enable a lawyer subpoenaed, or likely to be subpoenaed, to ethically testify as to any matter “if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel to the particular case.”

Here, again, this rule addresses the lawyer’s ethical duty, not what a court might do as a matter of trial management if such a subpoena were issued.

Since the Scopes trial was a criminal prosecution, and most defense lawyers (and maybe some judges) see prosecutors like Bryan as fungible and replaceable (making typical litigation economic considerations inapplicable), it might be hard to fathom Bryan’s potential disqualification as working a hardship to the state of Tennessee.

But suppose it was a civil litigation. Bryan, as lawyer for the proponent of creationism, was obviously a valued persona as a “movement lawyer” (to coin a 1960s phrase). Accordingly, his client would have likely been prejudiced by the loss of Bryan (just as surely as O.J. would have been prejudiced by the loss of Johnnie Cochran), even though able prosecutors were the principal team that had subpoenaed Bryan shortly before trial.

**Conclusion**

The decision to subpoena or call one’s adversary to testify is not to be lightly made, given that the appearance of an ambush will typically not succeed nowadays. The bigger issue faces the litigator who has good reason to believe that his adversary’s client is going to call him to testify. That lawyer may face not only an ethical quandary, but also a judge displeased with the development if a subpoena eventuates. He or she needs to address that possibility early in the game, lest the client be forced to change counsel in midstream of the litigation or as trial impends, much to his financial and other prejudice. That can make for an extremely troubled court indeed.

Just remember, “He that troubleth his own house, shall inherit the wind.” The Bible, particularly the Book of Proverbs, tells you so!

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1. U.S. Constitution, Article III, §3. See e.g., New York Insurance Law §3420(g) (McKinney’s Ed.).
3. Id.
4. Id.
7. Id.
8. See n. 4, supra, at 305.
9. See n. 6, supra, at 305.
10. In 1990, the ABA amended Rule 3.6 of the Model Rules of Professional Conduct to include §(f) restrictions when a prosecutor could subpoena defense counsel to limit invasion of the attorney-client relationship. The amendment required an adversary hearing and court order. The ABA later withdrew the pre-approval requirement. See Stern v. U.S. District Court, 214 F.3d 4 (1st Cir. 2000). But no rule addressessubpoenas issued by non-prosecutors. Model Rule 3.8(e), as amended, prohibits prosecutors from issuing subpoenas to deter attorneys unless the evidence is essential and there is no other feasible alternative to obtaining the information.
11. DR 5-102(A)(2002)
12. DR 5-102(C)(1); see generally Lamborn v. Dittmer, 873 F.3d 522 (2d Cir. 1989); FDIC v. U.S. Fire Ins. Co., 50 F.3d 1304 (5th Cir. 1995).
13. The exceptions are, if the testimony a (1) relates to an uncontested issue; (2) relates largely to an issue of formality; (3) relates to the nature or value of legal services; or (4) disqualification could work a hardship to the client because of “the distinctive value of the lawyer as counsel in the particular case. DR 5-102(A)(4)-(4).
14. DR 5-102(D) (emphasis added).
15. EC 5-9. See People v. Paperno, 90 AD2d 168 (1st Dep’t 1982).
16. See generally, U.S. v. Locascio, 6 F.3d 924 (2d Cir. 1993); U.S. v. Arrington, 867 F.2d 122 (2d Cir. 1999); U.S. v. Defezo, 899 F.2d 626 (7th Cir. 1990).
18. Id.
19. In re Scopes Issued to Dennis Friedman, 350 F3d 63, 70 (2d Cir. 2005).