

**Rule 3.7 Lawyer as Witness.
[Sorted by Commenter]**

TOTAL = 5 Agree = 2
 Disagree =
 Modify = 3
 NI =

| No. | Commentator | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|---|-----------------------|-----------------------------|----------------|---|--------------|
| 1 | San Diego County Bar Association Legal Ethics Committee | M | Yes | 3.7(a) | <p>Propose adding the word "jury" before the word "trial" in the first line of part (a) of the new rule.</p> <p>Add a Comment illustrating that the rule is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body.</p> | |
| 2 | Toby Rothschild | A | No | Comment [2] | <p>Comment [2] addresses the lawyer as witness in non-tribunal proceedings. This comment was necessary when the draft rule covered all proceedings. When it was limited to testimony before a jury, Comment {2} became unnecessary.</p> | |
| 3 | COPRAC | M | Yes | | <p>The Proposed Rule has been revised from the prior Rule, which applied to all trials, not just jury trials. COPRAC continues to support a version of Rule 3.7 that would apply to both bench and jury trials. COPRAC does not agree that bench officers would not be confused by a lawyer's dual role since practice background when taking the bench and length of time on the bench vary greatly, and both may impact how any given judge perceives an attorney who also acts as a witness.</p> | |

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 3.7 Lawyer as Witness.
[Sorted by Commenter]**

TOTAL = 5 Agree = 2
Disagree =
Modify = 3
NI =

| No. | Commentator | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--|-----------------------|-----------------------------|----------------|---|--------------|
| 4 | Office of Chief Trial Counsel | A | Yes | Comment [2] | <p>While this is the current law, OCTC does not understand why the client's informed written consent only applies to jury trials. It seems that clients in non-jury matters should also be advised of the risks of this situation and give their informed written consent.</p> <p>Comment [2] seems more appropriate for a treatise, law review article, or ethics opinion.</p> | |
| 5 | Zitrin, Richard (law professors group) | M | Yes | | <p>"We agree with California construction(of proposed rule)...the client <u>should</u> be able to get the full assistance of counsel, including testimony, <u>so long as</u> informed consent is given.</p> <p>Nevertheless, conflicts of interest can and may occur...The issue is the conflict of interest by virtue of the lawyer's testimony, not the forum. The rule should be modified to strike the word 'jury' and add the word 'tribunal.'"</p> <p>We note that the definition of "tribunal" as proposed is seriously flawed in its narrow construction.(see infra.)</p> | |
| | | | | | | |
| | | | | | | |

**Rule 3.7 Lawyer as Witness.
[Sorted by Commenter]**

**TOTAL = 5 Agree = 2
Disagree =
Modify = 3
NI =**

| No. | Commentator | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-------------|-----------------------|-----------------------------|----------------|---------|--------------|
| | | | | | | |

Rule 3.7 Lawyer as Witness
(Commission’s Proposed Rule – Clean Version)

- (a) A lawyer shall not act as an advocate before a jury in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue or matter;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) the lawyer has obtained the informed written consent of the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.
- (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].

[2] This Rule is not applicable in proceedings before legislative, administrative or other entities when not acting as a tribunal. See Rule 3.9. For example, the Rule would not apply where a lawyer testifies on behalf of the client in a hearing before a legislative body concerning the adoption of legislation; but would apply to a lawyer’s testimony in impeachment hearings before Congress.

[3] A lawyer’s obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the client gives consent, on the record in court before a licensed court reporter who transcribes the disclosure and consent. See the definition of “written” in [Rule 1.0.1(n)].

COMMENT

[1] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by [Rule 1.7] or [Rule 1.9] from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by [Rule 1.10] unless the client gives informed consent under the conditions stated in [Rule 1.7].