

Lee, Mimi

From: Marlaud, Angela
Sent: Tuesday, November 24, 2009 3:25 PM
To: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwwapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: FW: "Final RRC Agenda Submission for Agenda Item III.F, Rule 3.7"
Attachments: Rule 3.7 Public Comment Chart - By Commenter.doc; Rule 3.7 Comments Combined (11-09-09).pdf; Proposed Rule 3.7.doc; RRC - 5-210 3-7 - Dashboard - DFT1 (11-05-09) ML.doc; RRC - 5-210 [3-7] - Compare - Introduction - DFT4 (11-24-09).doc; RRC - 5-210 [3-7] - Compare - Rule Explanation - DFT4 (11-24-09).doc; RRC - 5-210 [3-7] - Compare - Comment Explanation - DFT4 (11-24-09).doc; 3.7 State Variations.doc

-----Original Message-----

From: Ellen R. Peck [mailto:pecklaw@prodigy.net]
Sent: Tuesday, November 24, 2009 3:23 PM
To: Marlaud, Angela; Stan Lamport (E-mail)
Cc: JoElla Julien (E-mail); JoElla Julien (E-mail); 'Kevin Mohr'; 'Harry Sondheim'; Mark L. Tuft (E-mail); Mark Tuft; Paul W. Vapnek (E-mail); Difuntorum, Randall; McCurdy, Lauren
Subject: "Final RRC Agenda Submission for Agenda Item III.F, Rule 3.7"

Angela:

This memorandum will be the cover of this agenda item. I have enclosed the following materials for the Commission's consideration at the December meetings:

1. Rule 3.7 commenters chart;
2. Public comments on rule 3.7;
3. Proposed 3.7 in light of public comment;
4. Dashboard;
5. Introduction;
6. Comparison between the proposed rule and the ABA rule.
7. Comparision between the proposed comments and the ABA rule.
8. 3.7 State Variations.

I encourage members to focus on items 1-3 regarding proposed changes to the rule following comment.

Respectfully submitted, Ellen Peck

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Ellen R. Peck, Lawyer
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**Rule 3.7 Lawyer as Witness.
[Sorted by Commenter]**

TOTAL =7 **Agree = 2**
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	William Wesley Patton	M		3.7(a)	<p>Proposed Rule 3.7 has several serious ambiguities that will either confuse attorneys or fail to provide them with sufficient guidance.</p> <p>I agree that the rule should apply to both jury and bench trials.</p> <p>3.7(a) I am uncertain about the meaning of "testify." Is it being used in its technical sense of only "that evidence which comes from living witnesses who testify orally"? (<i>Mann v. Higgins</i> (1890) 83 Cal. 66, 69; <i>In re Jessica B.</i> 254 Cal.Rptr. 883 (1989). Or does it apply to more informal contexts in contested cases in which an attorney may provide the court with a recommendation, possibly based upon the attorney's personal knowledge?</p> <p>3.7(a) Under ABA Model Rule 3.7, the standard applies when an attorney "is likely to be a necessary witness. . . ." How exactly do the terms "witness" and "testify" differ? Which</p>	<p>As noted below, Professor's Patton's concerns relate to how the rule may be applied in particular practices, which involve the application of the law in that field, not professional responsibility or ethics.</p> <p>No further comment necessary.</p> <p>The Commission believes that further clarification is unnecessary. The word "testify" is understood to apply to giving evidence under oath, whether given live, by electronic means or in a writing. Professor Patton's second question concerns lawyer advocacy which is not testimony. Lawyer advocacy can be based upon a lawyer's knowledge of the facts and circumstances of a particular case, including in some cases, personal knowledge or observations of the lawyer. Advocacy of this nature is not within the scope of the rule. Other than this comment, the Commission knows of no case, ethics opinion, article or other commentary which has suggested a need to make a distinction between lawyer as witness and lawyer as advocate.</p> <p>The Commission concluded that ABA Model Rule 3.7 use of "is likely to be a necessary witness" is more ambiguous and therefore, provides less public protection. A person can be a witness to events</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 =7 **Agree = 2**
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.7(a)(3)	<p>term provides clients with broader protection? What are the ramifications of this particular change?</p> <p>The rule does not address the frequent question of what happens when (1) the client is an incompetent adult or a child without the capacity to make a knowing choice among alternatives. For instance, if the adult client lacks capacity to consent, can the attorney merely use the attorney's substitute judgment that if the client were competent that the client would have consented? Or must the attorney for the incompetent adult seek the appointment of guardian ad litem and then be bound by the guardian's decision regarding whether or not the attorney has consent to testify?</p>	<p>and never testify in litigation. Therefore, using the word "testify" was more precise. Moreover, the Commission concluded that determining when a lawyer would be a "necessary" witness was so vague a standard as to give little guidance to judges, lawyers, clients, the public or disciplinary prosecutors.</p> <p>The Commission has concluded to make no changes to the rule to address this issue. The Commission recognizes that representing minors or other clients who may lack capacity to consent present special challenges to legal representation. However, whether consent can be obtained or by whom depends upon the facts and circumstances of the underlying procedural and substantive law in which the need for consent arises (e.g., in a personal injury matter, a Guardian ad Litem is appointed for the minor and the consent must be obtained from the GAL; in a parental termination proceeding, where the lawyer is appointed to represent the best interests of the child, a social welfare department representative may function as a GAL or the lawyer may seek consent from the appointing judge.) Because the determination of who can consent is so varied and depends upon law other than professional responsibility and ethics, trying to address consent issues in this rule could detrimentally interfere with existing</p>

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

TOTAL =7 **Agree = 2**
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.7(a)(3)	The proposed rule of testifying provides attorneys in each of these types of cases no guidance on the proper ethical procedure for determining whether and how an attorney can seek or determine whether there is sufficient informed written consent or substitute judgment to permit the attorney to testify.	established law. The Commission has defined the elements of informed consent in the definitions set forth in rule 1.0, as did the ABA Model Rules. Proposed rule 1.0 was not published concurrently published with this rule. With the defined term, the Commission has concluded that no further change is needed.
				3.7(b)(1)	Rule 3.7(b)(1) eliminates the ABA language regarding the potential conflict of interest between the client and the testifying attorney. However, as discussed above, in many types of California cases, especially where there is a debate regarding the client's capacity to consent, there is a real potential for a conflict of interest developing. Therefore, the Committee should retain the ABA language regarding the potential for conflicts of interest.	The Commission has concluded that the issues of conflicts raised by this comment are adequately covered by Comment [1]. The Commission declined to create a competing conflict of interest rule other than those set forth in 1.7 – 1.11, which apply to the conflict raised by this commenter.
				Comment [2]	Comment [2] states 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." The Committee's explanation is that this addition is to clarify that the Rule "is not applicable in legislative proceedings."	The Commission agrees that the term "non-adversarial" proceeding is ambiguous and has amended Comment [2] to clarify this issue.

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

TOTAL =7 **Agree = 2**
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>The language is ambiguous as it is not known what constitutes a “non-adversarial proceeding” and from whose vantage point is that term defined?</p> <p>Because of the ambiguities inherent in the term “non-adversarial”, the Committee should either replace that term with the term “contested by any party” or define in a comment that the term “non-adversarial” applies only to proceedings where no party “contests a matter.”</p>	<p>The Commission agrees and has redrafted Comment [2] to delete “non-adversarial” and illustrate when the rule applies to proceedings before a legislative body not acting as a tribunal.</p>
2	COPRAC	A			<p>Suggest a Comment be added that clarifies whether the term “trial” includes other trial-like evidentiary judicial and administrative proceedings. An appropriate definition would be “Any judicial or administrative proceeding over which a judicial or quasi-judicial officer presides where live testimony is offered from which facts will be found.”</p>	<p>The Commission agrees that proposed rule 3.7(a) needs clarification and has added the words “before a tribunal.” Proposed rule 1.01 defines tribunal consistent with the definition that COPRAC would have given to trial.</p>
3	San Diego County Bar Association Legal Ethics Committee	M			<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</p>	<p>The Commission’s majority disagrees. It has determined that the rule should apply to any trial before a tribunal, whether that be a jury, bench, arbitrator or administrative law judge trial.</p> <p>The Commission has clarified Comment [2]</p>

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

TOTAL =7 **Agree = 2**
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body.	consistent with this recommendation.
4	California Public Defenders Association	M			<p>We believe that any proposed rule restricting an attorney from acting both as an advocate and as a witness should be limited to jury trials as is reflected in current Rule 5-120, and for this reason, we think that Proposed Rule 3.7 should be redrafted to limit its application to jury trials.</p> <p>We believe that when the court is the trier of fact, it can give appropriate consideration to the testimony of an attorney who is forced to serve as a witness in those few situation when that does occur.</p> <p>We agree with the position of a minority of the Commission that Comments {1} through [3] of the ABA Model Rules should be included with the Proposed Rule.</p>	The Commission's majority disagrees. It has determined that the rule should apply to any trial before a tribunal, whether that be a jury, bench, arbitrator or administrative law judge trial.
5	Orange County Bar Association	M		Subsection (a)(1)	<p>The OCBA suggests modifying the Rule as follows (Insertions are underscored and italicized):</p> <p>“(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to testify unless:</p> <p>(1) the testimony relates to an uncontested <i>issue or</i> matter; . . . “</p>	The Commission agrees and has made this change.

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

TOTAL =7 **Agree = 2**
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					We believe that the use of both “issue” and “matter” would eliminate any possible confusion and ensure that a lawyer who is called to testify at a trial on an uncontested subject may do so under this Rule, in all circumstances.	
6	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		Subsection (a)(1)	<p>We strongly recommend that the Proposed Rule be revised in subsection (a) to restore the concept from the current rule that this prohibition be applicable only to jury trials. The rationale behind the rule is not served by disciplining a lawyer for giving relevant testimony in a court trial or arbitration, where an attack on the lawyer’s credibility as witness is far less likely to be prejudicial to the lawyer’s client. Thus, we agree with the minority view of the Commission that the rule should be applicable only to jury trials.</p> <p>We are also concerned that there is ambiguity in the terminology “uncontested matter” in subsection (a)(1). An uncontested matter could be construed to refer to an issue in a proceeding or to an entire proceeding. To avoid ambiguity and prevent the language from being to limiting, it should be expanded to include an</p>	<p>The Commission’s majority disagrees. It has determined that the rule should apply to any trial before a tribunal, whether that be a jury, bench, arbitrator or administrative law judge trial.</p> <p>The Commission agrees and has made this proposed change.</p>

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

TOTAL =7 **Agree = 2**
Disagree = 0
Modify = 5
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>“uncontested issue or matter.” This is also more in line with the ABA Rule.</p> <p>Finally, we are concerned about the requirement that informed consent be obtained in writing. This is an unnecessary burden that is impracticable when it arises during trial where it is possible that not all of the clients are even present to sign a consent. It is sufficient if the client provides informed consent, which is more than the ABA Rule requires. There is no need to depart from the ABA Rule by requiring a written consent.</p> <p>Documenting the client's consent in writing is an unnecessary burden that may not be feasible under the circumstances. It would be unfair to discipline a lawyer merely because he or she does not have a computer and printer in the courtroom to be able to type a letter, when the client has been adequately informed of the risks and provides an oral consent.</p>	<p>The Commission disagrees. Informed written consent has been a part of the predecessor rule since 1989. Public protection requires that a client be advised in writing of the relevant circumstances and the actual and reasonably foreseeable consequences to the representation when a lawyer serves in the dual advocate/witness role and that the client give a knowing and intelligent consent. Because Courts may inquire into these matters, written documentation facilitates the process.</p> <p>The Commission is unaware that the informed written consent provision has created any problems for lawyers, clients or courts in the intervening twenty years.</p>
7	Santa Clara County Bar Association	A			No comments added.	No action needed.
8						

File List - Public Comments – Batch 4 – Proposed Rule 3.7

D-2009-262 Prof. Patton [3.7]

D-2009-270 COPRAC [3.7]

D-2009-276f Robert Gerber SDCBA Legal Ethics Comm [3.7]

D-2009-277a California Public Defenders Association [3.7]

D-2009-283e Orange County Bar [3.7]

D-2009-286e James Ham LACBA [3.7]

D-2009-287f Santa Clara County Bar [3.7]



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.8.6 \[3-310\(F\)\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the  next to **Attachment**.

Attachment 

file: [ProposedRuleEthics37.doc \(33k\)](#)

Attachment 

Attachment 

COMMENTS ON THE COMMISSION FOR THE REVISION OF THE RULES
OF PROFESSIONAL CONDUCT, PROPOSED RULE 3.7 LAWYER AS A
WITNESS

By

Professor William Wesley Patton

I have commented frequently on various proposed changes to the California Rules of Professional Conduct. I have written extensively on professional conduct, including *LEGAL ETHICS IN CHILD CUSTODY AND DEPENDENCY PROCEEDINGS: A GUIDE FOR JUDGES AND LAWYERS* (Cambridge University Press, 2006).

Although I agree in concept to many of the proposed changes in California's "Lawyer As A Witness Rule", Proposed Rule 3.7, the new draft has several serious ambiguities that will either confuse attorneys or fail to provide them with sufficient guidance.

1. Rule 3.7 (a):

I agree that the rule should apply to both **jury** and **bench trials**, and disagree with the minority position that all judges in all contexts will not be confused by the attorney's hybrid roles. See, e.g., *United States v. Dyess*, 21 F. Supp. 2d 493, 496 (2002): "While the danger is greater when matters are tried to a jury, it does not disappear when the lawyer testifies in matters tried to the bench."

I am uncertain about the meaning of "testify". Is it being used in its technical sense of only "that evidence which comes from living witnesses who testify orally"? *Mann v. Higgins* (1890) 83 Cal. 66, 69; *In re Jessica B.* 254 Cal. Rptr. 883 (1989). Or does it apply to more informal contexts in contested cases in which an attorney may provide the court with a recommendation, possibly based upon the attorney's personal knowledge? See, e.g., *Welfare & Institutions Code § 317 (e)* which permits an abused child's attorney to make recommendations to the court. Under ABA Model Rule 3.7 the standard applies when an attorney "is likely to be a necessary witness...." How exactly do the terms "witness" and "testify" differ? Which term provides clients with broader protection? I understand why the committee deleted the ABA term "necessary" from the term "witness"; however, I do not fully comprehend the substitution of the word "testify" for "witness". What are the ramifications of that particular change?

2. Rule 3.7 (a) (3) provides an exception for the attorney testifying if counsel obtains the written informed consent of the client.

But the rule does not address the frequent question of what happens when (1) the client is an incompetent adult or a child without the capacity to make a knowing choice among alternatives. For instance, if the adult client lacks capacity to consent, can the attorney merely use the attorney's substitute judgment that if the client were competent that the client would have consented? Or must the attorney for the incompetent adult seek the appointment of a guardian ad litem and then be bound by the GAL's decision regarding whether or not the attorney has consent to testify?

Just so, what rule applies to the attorney who represents a minor pursuant to *Welf. & Inst. § 317(e)* in which the attorney is appointed as a hybrid dual-role professional who serves both as a zealous advocate and as the *CAPTA* guardian *ad litem*? Since the attorney's initial roles are already full of contradictions between zealous advocate and best interest protector, permitting that dual role attorney to use substitute judgment in providing consent to testify under Proposed Rule 3.7(a) (3) raises significant conflicts of interest issues with the rights of the child client who by statute has been declared a party in the litigation.

Similar problems of informed consent permeate many other types of proceedings such as guardianships and conservatorships. However, the proposed rule of testifying provides attorneys in each of these types of cases no guidance on the proper ethical procedure for determining whether and how an attorney can seek or determine whether there is sufficient informed consent or substitute judgment to permit the attorney to testify.

3. Rule 3.7(b) (1) eliminates the ABA language regarding the potential conflict of interest between the client and the testifying attorney. However, as was demonstrated, *supra.*, in many types of California cases, especially those in which there is a debate regarding the client's capacity to consent, there is a real potential for a conflict of interest developing. Therefore, the Committee should retain the ABA language regarding the potential for conflicts of interest.

4. Rule 3.7(b) (6) is rejected by the Committee because the Committee thinks that the conflicts of interest have been satisfied by the informed consent section in section (a) (3). Again, as demonstrated, *supra.*, the informed consent provision does not address the inherent conflicts of interest issues inherent in the representation of an allegedly incompetent client who cannot provide informed consent. For instance, what rule of professional conduct protects a client who is allegedly incompetent when his or her attorney decides, based upon substitute consent, that the client would consent to that attorney testifying for what the attorney thinks is in that client's "best interest", but which is against the incompetent client's stated preferences and goals of the litigation?

5. Rule 3.7 (2) states 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." And the Committee's explanation is that this addition is to clarify that the Rule "is not applicable in legislative proceedings."

The problem is that the language goes well beyond merely stating that the rule does not apply in legislative proceedings" by providing the ambiguous term "non-adversarial proceedings." What is a "non-adversarial hearing" and from whose vantage point is that term determined? Again, assume that an attorney represents a 3 ½ year old child in a *W & I § 300* dependency case. The child tells her attorney that she wants to return home, but her attorney who serves both as her lawyer and *CAPTA* guardian *ad litem* agrees with County Counsel that the child should be placed outside her parents' home with foster parents. Even though the child is sufficiently verbal to express her placement desire, her attorney under the statute does NOT even have to tell the court of the child's wishes, and the attorney can argue for a placement that is diametrically opposed to the young child's wishes. Is this an adversarial or non-adversarial proceeding? Since the child's attorney agrees with County Counsel's position that the child should be removed from

home, the child is not contesting the government's recommendation. The only parties contesting the placement are the child's parents. Therefore, how are the terms "adversarial" and "non-adversarial" determined? In terms of the issue of a client's consent to her attorney testifying does the definition of the hearing as adversarial or as non-adversarial depend on the actual client's contest in the case, or does it merely depend upon whether some other party is contesting an issue in the case?

Because of the ambiguities inherent in the term "non-adversarial", the Committee should either replace that term with the term "contested by any party" or define in a comment that term "non-adversarial" applies only to proceedings where no party "contests a matter" [referring back to Proposed Rule 3.7(a)(1) which changed the ABA word "issue" for "matter". However, since this Committee's Explanation of the changes in Rule 3.7(2) states that the change is to make clear that the rule is inapplicable in "legislative proceedings", the wiser course may be to redraft Rule 3.7(2) with the following language:

"This Rule is not applicable in legislative proceedings where the lawyer testifies on behalf of a client in a hearing before a legislative body."

That change will eliminate the ambiguity in the term "non-adversarial".

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**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

October 22, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 3.7

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight ("RAD") for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.7 and offers the following comments.

COPRAC supports the proposed rule as written and does not suggest any changes to the text of the actual rule. COPRAC does suggest the addition of a definition of the word "trial" in a comment.

COPRAC has reviewed the explanation of certain minority views with respect to the rule. COPRAC agrees with the majority that the rule should 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.

COPRAC supports the majority view concerning proposed rule 3.7(a)(3). California has for many years considered the attorney-as-witness circumstance to pose an issue between the client and the attorney. The ABA rule provides to an opposing party the power to seek to disqualify its opponent's chosen counsel through misuse of the advocate-witness rule. See *Cottonwood Estates, Inc. v. Paradise Builders, Inc.* (Az. 1981) 128 Ariz. 99, 105; 624 P.2d 296, 302 (applying the ABA Code of Professional Responsibility); see also *McElroy v. Gaffney* (N.H. 1987) 129 N.H. 382, 390-91; 529 A.2d 889, 894 (applying ABA Model Rule 3.7). COPRAC is concerned that the ABA Model Rule version of rule 3.7 could encourage abusive, tactical/strategic disqualification motions.

Since willful violation of rules of professional conduct subjects an attorney to discipline, COPRAC favors drafting such rules as clearly as possible. For this reason, COPRAC suggests a

comment be added that clarifies whether the term “trial” includes other trial-like evidentiary judicial and administrative proceedings. An appropriate definition would be “Any judicial or administrative proceeding over which a judicial or quasi-judicial officer presides where live testimony is offered from which facts will be found.”

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): _____ Robert S. Gerber _____

Old Rule No./Title: _____ Rule 5-210/Member as Witness _____

Proposed New Rule No./ Title: _____ Rule 3.7/Lawyer as Witness _____

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.

Yes [] No [X]

I agree with the minority position on this Rule in one respect.

The revised rule now precludes a lawyer as a witness not just in jury trials, but in all trials. Rule 5-210 was adopted to overturn *Comden v. Superior Court* (1979) 20 Cal.3d 907 where the trial court disqualified a law firm when an attorney filed declarations of his communications with opposing representatives. By adopting Rule 5-210 (former Rule 2-111(A)), the Supreme Court effectively overruled its own decision in *Comden*. Part of the approach in Rule 5-210 was to limit its application to situations in which an advocate would testify as a witness before a *jury*. As the dissent in *Comden* suggested, in a bench trial a judge should be able to screen out any prejudicial or self-serving aspect of testimony by an attorney for one of the parties.

No California decisions of which I am aware have criticized current Rule 5-210, nor have there been any significant disciplinary complaints or legal malpractice cases relating to it (according to the Commission).

It should be noted, however, that some 29 other states have not limited the Rule to jury trials, so California stands alone on this issue. Nevertheless, I believe the existing language limiting application of the rule to jury trials should be retained. I would propose adding the word "jury" before the word "trial" in the first line of part (a) of the new Rule.

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.
Yes [X] No []

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.
Yes [X] No []

See No. 1 above.

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Yes. The Rule would now include a provision with commentary to the effect that it is not applicable in non-adversarial proceedings, as where the lawyer testifies on behalf of the client in a hearing before a legislative body. This is a valuable addition and I would agree with it.

CONCLUSIONS (pick one):

[] We approve the new rule in its entirety.

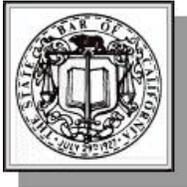
[X] We approve the new rule with modifications.*

[] We disapprove the new rule and support keeping the old rule.

[] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.8.6 \[3-310\(F\)\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please see attached letter.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We **do not** accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the  next to **Attachment**.

Attachment 

file: [comment 3.7.pdf \(96k\)](#)

Attachment 

Attachment 

Receive Mass Email?

To receive e-mail notifications regarding the rules revision project, check the box indicating that you would like to be added to the Commission's e-mail list and enter your email address below. Email addresses will be used only to deliver the requested information. We will not use it for any other purpose or share it with others.



CPDA

California Public Defenders Association
10324 Placer Lane
Sacramento, CA 95827
Phone: (916) 362-1690 x 8
Fax: (916) 362-3346
e-mail: cpda@cpda.org

A Statewide Association of Public Defenders and Criminal Defense Counsel

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Gary Mandinach, 2005-2006
Barry Melton, 2006-2007
Kathleen Cannon, 2007-2008
Leslie McMillan, 2008-2009

October 22, 2009

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Dear Ms. Hollins:

The California Public Defenders Association believes that any proposed rule restricting an attorney from acting both as an advocate and as a witness should be limited to jury trials as is reflected in current Rule 5-210, and for this reason, we think that Proposed Rule 3.7 should be redrafted to limit its application to jury trials.

The California Public Defenders Association (CPDA) is the largest public defender organization in the nation with a membership of over 4,000 public defenders and private defense counsel. CPDA attorney members act as legal counsel for the overwhelming majority of the indigents accused of criminal conduct in California. The association, established in 1969, is the state-designated continuing legal education provider for all local public defender offices in the state of California, and also represents the interests of CPDA's criminal defense attorney members in legislative and on significant issues at the appellate court levels.

We believe that there is the possibility that a jury might be confused when an attorney acts as both an advocate and as a witness in a trial. There is also the possibility that the attorney serving in such a dual capacity may err in maintaining strict boundaries between those roles. The case of *People v. Donaldson* (2001) 93 Cal. App. 4th 916 is illustrative of the pitfalls that an attorney must avoid when trying to serve in dual capacities. In *Donaldson*, a prosecutor ended up testifying as a witness in the case to impeach a witness. During the testimony, the prosecutor expressed a personal belief in the guilt of the accused and then compounded the problem by arguing his own credibility as a witness and his personal belief in the guilt of the accused. The case was reversed by the Court of Appeals.

October 22, 2009
Audrey Hollins
State Bar of California
Re: Proposed Rule 3.7
Page Two

We believe, however, that when the court is the trier of fact, it can give appropriate consideration to the testimony of an attorney who is forced to serve as a witness in those few situations when that does occur.

We agree with the position of a minority of the Commission that comments 1 through 3 of the ABA Model Rules should be included with the Proposed Rule.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bart Sheela', is written over a horizontal line. The signature is stylized and cursive.

Bart Sheela
President,
California Public Defenders Association

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* Date

10/22/2009 

Period

PC

File :

D-2009-277a California Public Defenders Association [3.7].pdf

Commented On:

Specify:

Submitted via:

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* Required

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7

Aggregate Settlements [3-310(D)]

Rule 1.15

Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

Rule 3.3

Candor Toward the Tribunal [5-200]

Rule 3.6

Trial Publicity [5-120]

Rule 3.7

Lawyer as Witness [5-210]

Rule 6.3

Membership in Legal Services Organization [n/a]

Rule 6.4

Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE

Executive Director

Orange County Bar Association

Orange County Bar Association Charitable Fund

(949)440-6700, ext. 213

MEMORANDUM

Date: September 4, 2009

To: Special Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 3.7 – Lawyer as a Witness**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject proposed Rule:

The OCBA supports the adoption of Proposed Rule 3.7, but believes that a minor change to subsection (a)(1) is appropriate in order to ensure that a lawyer may present testimony on any uncontested matters *or issues* at trial. Thus, the OCBA suggests modifying the Rule as follows (insertions are underscored and italicized):

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to testify unless:

(1) the testimony relates to an uncontested *issue or* matter;

Although the section titled "*Explanations of Changes to the ABA Model Rule*" for this Rule indicates that the word "issue," as proposed in the ABA Model Rule, should be deleted and replaced with the word "matter" in order to broaden public protection, we believe that the use of both words would eliminate any possible confusion, and ensure that a lawyer who is called to testify at a trial on an *uncontested* subject may do so under this Rule, in all circumstances.



LACBA

LOS ANGELES COUNTY
BAR ASSOCIATION

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NORMA J. WILLIAMS
ROBIN L. YEAGER

October 21, 2009

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Rule 3.7 – Lawyer as Witness

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 3.7:

After extensive discussion and near unanimous approval (excluding only those abstentions of members of the Commission or the Board of Governors), PREC strongly recommends that the Proposed Rule be revised in subsection (a) to restore the concept from the current rule that this prohibition be applicable only to jury trials. The rationale behind the rule is not served by disciplining a lawyer for giving relevant testimony in a court trial or arbitration, where an attack on the lawyer's credibility as a witness is far less likely to be prejudicial to the lawyer's client. Thus, PREC agrees with the minority view of the Commission that the rule should be applicable only to jury trials.

PREC is further concerned that there is ambiguity in the terminology "uncontested matter" in subsection (a)(1). An uncontested matter could be construed to refer to an issue in a proceeding or to an entire proceeding. To avoid ambiguity and prevent the language from being too limiting, it should be expanded to include an "uncontested issue or matter." This is also more in line with the ABA Rule.

Finally, PREC is concerned about the requirement that informed consent be obtained in writing. This is an unnecessary burden that is impracticable when it arises during trial where it is possible that not all of the clients are even present to sign a consent. It is sufficient if the client provides informed consent, which is more than the ABA Rule requires. There is no reason to further depart from the ABA Rule by requiring a written consent.

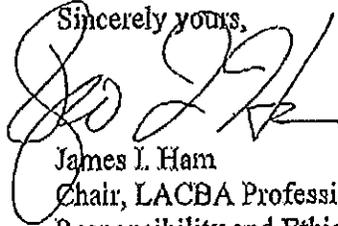
The necessity documenting the client's consent in writing is an unreasonable burden that may not be feasible under the circumstances. It would be unfair to discipline a lawyer merely because he or she does not have a computer and printer in the courtroom to be able type a letter, when the client has been adequately informed of the risks and provides an oral consent. Excluding the

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
October 21, 2009
Page 2

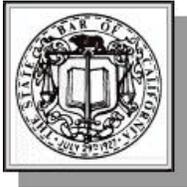
abstentions, PREC members again voted nearly unanimously in favor of
eliminating the requirement of a writing.

Thank you for the opportunity to comment on this batch of proposed new
and amended Rules of Professional Conduct.

Sincerely yours,



James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

- Yes
 No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- [Rule 1.8.6 \[3-310\(F\)\]](#)
- [Rule 1.8.7 \[3-310\(D\)\]](#)
- [Rule 1.15 \[4-100\]](#)

- [Rule 3.3 \[5-200\]](#)
- [Rule 3.6 \[5-120\]](#)
- [Rule 3.7 \[5-210\]](#)

- [Rule 6.3 \[n/a\]](#)
- [Rule 6.4 \[n/a\]](#)
- [Batch 4 Discussion Draft \(All rules\)](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

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D-2009-287f Santa Clara County Bar [3.7].pdf

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Proposed Rule 3.7 Lawyer as a Witness

(Commission's Proposed Rule Compared with Public Comment Draft– Redline Version)

- (a) A lawyer shall not act as an advocate at a trial before a tribunal¹ in which the lawyer is likely to testify unless:
- (1) the testimony relates to an uncontested issue or² 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].

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].
- [2] This Rule is not applicable in ~~non-adversarial~~³—proceedings before legislative, administrative or other entities when not acting as a tribunal. For example, the rule would not apply, —as— where the lawyer testifies on behalf of the client in a hearing before a legislative body concerning the

¹ This change is recommended consistent with COPRAC's recommendation that the word trial be defined to include arbitration and administrative "trials". Because the term "tribunal" is defined in proposed 1.0 consistent with COPRAC's suggestion, the word tribunal was inserted here.

² This change is recommended consistent with the recommendations of the Orange County Bar Association and the Los Angeles County Bar Association Professional Responsibility and Ethics Committee

³ This term has been deleted because it is vague and overbroad, consistent with Professor Patton's last comments.

1 adoption of legislation; but would apply to a lawyer's testimony in
2 impeachment hearings before Congress.⁴
3

⁴ These examples illustrate the application of the rule to proceedings before a legislative body when not acting as a tribunal and when it is. This change is consistent with the recommendations of the San Diego County Bar Association and Professor Patton.

Proposed Rule 3.7 [5-210] “Lawyer as Witness”

(Draft #4, 11/24/09)

Summary: The Commission has recommended much of the substance and language of ABA Model Rule 3.7(a). However, with the substitution of the more client-protective provision in current California rule 5-210(C) for Model Rule 3.7(a)(3), the Commission is recommending continued adherence to the more limited scope of the California rule.

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input checked="" type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

RPC 5-210

Statute

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

A number of commenters agree with the minority, i.e., that the application of the Rule should be limited to jury trials only. Additionally, LACBA PREC urges the State Bar to drop the informed written consent of the client in favor of the ABA Model Rule approach.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.7 Lawyer as a Witness

November 2009

(Draft rule revised following consideration of public comment)

INTRODUCTION:

1. The Commission has recommended much of the substance and language of ABA Model Rule 3.7(a). However, with the substitution of the more client-protective provision in current California rule 5-210(C) for Model Rule 3.7(a)(3), the Commission is recommending continued adherence to the more limited scope of the California rule.
2. Specifically, Model Rule 3.7(a)(3) was deleted because it refers to principles of disqualification for substantial hardship to the client. Because authority over disqualification does not reside with the State Bar but rather with the courts, a disciplinary rule should not limit the right of judiciary to protect the fair administration of justice nor improperly intrude on the judicial function.
3. For public protection of the consumer of legal services, proposed Rule 3.6(a)(3) was added to require full disclosure to the client and written consent. This principle is not part of the ABA Model Rule.
4. For the most part, the Commission recommends rejecting the ABA Model Rule comments, which reflect the broader scope of the ABA Rule and thus are not pertinent to the proposed Rule, or relate to disqualification issues. (See below).
5. There are two separate minority views. One group has urged retention of the current California rule in its entirety, in particular its application only to jury trials. The other group prefers following the Model Rule approach with an emphasis on protecting and ensuring the integrity of the judicial process. These views are expanded upon in the Explanation of Changes, below.

<p align="center"><u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:</p>	<p>(a) A lawyer shall not act as <u>an</u> advocate at a trial <u>before a tribunal</u> in which the lawyer is likely to be a necessary witness <u>testify</u> unless:</p>	<p>Adopted the substance and language of the ABA Model Rule with this revision:</p> <p>Substituted “testify” for “be a necessary witness” for public protection to create a bright line for disciplinary enforcement. The word “necessary” creates more difficulties of proof.</p> <p><u>The words “before a tribunal” have been added to clarify that testimony before a non-tribunal is not within the scope of the rule.</u></p> <p>Minority. One minority group of Commissioners would retain current California rule 5-210, whose application is limited to <i>jury</i> trials. This group notes that any threat to of the trier of fact being confused by a lawyer’s dual role as advocate and witness is substantially diminished in a bench trial. As a sophisticated evaluator of testimony and evidence, a bench officer would not be expected to be confused by the lawyer’s dual role.</p>
<p>(1) the testimony relates to an uncontested issue;</p>	<p>(1) the testimony relates to an uncontested <u>issue or</u> issue <u>matter</u>;</p>	<p>Adopted the ABA Model Rule with addition:</p> <p>Added “matter” in <u>addition to</u> stead of “issue” for public protection. Issue is too narrow <u>if standing alone</u> and might not include a lawyers’ uncontested testimony about a different or related legal case or transaction.</p>

* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(2) the testimony relates to the nature and value of legal services rendered in the case; or</p>	<p>(2) the testimony relates to the nature and value of legal services rendered in the case; or</p>	<p>Adopted the ABA Model Rule.</p>
<p>(3) disqualification of the lawyer would work substantial hardship on the client.</p>	<p>(3) disqualification of the lawyer would work substantial hardship on the client. (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.</p>	<p>Rejected the ABA Model Rule to increase public protection and retained the provision in current California rule 5-210(C):</p> <p>Disqualification is not relevant to discipline. California courts have the inherent authority to disqualify an advocate/witness irrespective of compliance with the rule. See <i>Smith, Smith & Kring v. Superior Court (Oliver)</i> (App. 4 Dist. 1997) 60 Cal.App.4th 573, 581, 70 Cal.Rptr.2d 507.</p> <p>In place of Model Rule 3.7(a)(3), the Commission has substituted current California rule 5-210(C). If the role of advocate/witness creates conflicts of interest, for public protection reasons, the client should be fully informed in writing of those conflicts, the facts and circumstances necessary to make an informed and intelligent decision and consent in writing, as is required in the first sentence of the Commission's proposed paragraph (a)(3). A substantial hardship alone should not be the determinative issue without client consent. The second sentence of proposed paragraph (a)(3) identifies the required source of consent in a governmental entity context.</p> <p>Minority. A second minority group of Commission members takes the position that the one of the purposes of the Rules in general and this Rule in particular is to protect the judicial process and the administration of justice. Permitting a lawyer to be both advocate</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.7 Lawyer as a Witness</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.7 Lawyer as a Witness</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>and witness based only on the consent of a client who could likely be benefited by any confusion caused by the lawyer's dual role, poses a threat to the fair administration of justice. This minority believes that Model Rule 3.7(a)(3) provides the appropriate balancing of interests by permitting a lawyer to engage in such dual roles when the court has determined the client would otherwise suffer a hardship if the lawyer were disqualified.</p>
<p>(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.</p>	<p>(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].</p>	<p>Adopted the ABA Model Rule. Brackets have been placed around "Rule 1.7" and "Rule 1.9" pending the Commission's final recommendation concerning these rules.</p>

<p align="center"><u>ABA Model Rule</u> Rule Lawyer as a Witness Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[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.</p>	<p>Rejected ABA Model Rule 3.7. Comment [1], because the comment's overbreadth is not a meaningful explanation of the Rule. As noted in the Rule Explanation, California's rule is more limited in scope than the Model Rule. There have been no published California cases criticizing the rule as being prejudicial. There have not been significant disciplinary complaints or legal malpractice cases concerning the current California rule. The California policy has worked well and should be continued.</p> <p>Minority. The same minority group of Commission members that opposes the substitution of current California rule 5-210(C) for Model Rule 3.7(a)(3) because of its potentially deleterious effect on the fair administration of justice, see Explanation of Changes for paragraph (a)(3), objects to the deletion of MR 3.7, cmts. [1]-[3]. The minority notes that these comments contain important statements of the policies that underlie the Rule, regardless of whether Model Rule 3.7(a)(3) is rejected.</p>
<p>Advocate-Witness Rule</p> <p>[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</p>	<p>Advocate-Witness Rule</p> <p>[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</p>	<p>Rejected ABA Model Rule 3.7, Comment [2] because the issues addressed do not relate to enforcing a disciplinary rule but rather to a judge's consideration of principles in furtherance of the fair administration of justice, including disqualification, limitation of witness testimony, and the use of judicial instruction. In California, the principles for the guidance of judges are set forth in more detail in case law. (See e.g., See, e.g. for civil cases: <i>Smith, Smith & Kring v. Superior Court (Oliver)</i> (App. 4 Dist. 1997) 60 Cal.App.4th 573, 579-582, 70 Cal.Rptr.2d 507 and for criminal cases: <i>People v. Dunkle</i> (2005), 36 Cal.4th 861,32 Cal.Rptr.3d 23, rehearing denied, certiorari denied 126 S.Ct. 1884, 547 U.S. 1100, 164 L.Ed.2d 571; <i>People v. Donaldson</i></p>

<p align="center">ABA Model Rule Rule Lawyer as a Witness Comment</p>	<p align="center">Commission's Proposed Rule Rule 3.7 Lawyer as a Witness Comment</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>as an analysis of the proof</p>	<p>as an analysis of the proof</p>	<p>(App. 5 Dist. 2001) 113 Cal.Rptr.2d 548, 93 Cal.App.4th 916. Minority. See Explanation of Changes, Comment [1].</p>
<p>[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes 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.</p>	<p>[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes 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.</p>	<p>The Commission recommends omitting ABA Model Rule 3.7, Comment [3]. It is inconsistent with the Rule the Commission recommends and would usurp the judiciary's own authority and role to control the proceedings before it in its duty to the fair administration of justice. These aspects, as set forth above, are the subject of case law unrelated to disciplinary proceedings and are therefore inappropriate for a disciplinary rule. Minority. See Explanation of Changes, Comment [1].</p>
<p>[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or 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</p>	<p>[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or 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</p>	<p>Rejected ABA Model Rule comment [4], which is an explanation for ABA Model Rule 3.7(a)(3), which in turn was rejected because it addresses disqualification. As already noted in the Rule Explanation for paragraph (a)(3), disqualification is an inappropriate subject for disciplinary purposes, because it concerns the reasons and factors relating to a court's inherent power to disqualify a lawyer.</p>

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<p>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 conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.</p>	<p>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 conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.</p>	
<p>[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.</p>	<p>[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.</p>	<p>Rejected ABA Model Rule 3.7, Comment [5] because the comment merely suggests the reason for paragraph (b), rather than provide guidance in its application.</p>
<p>Conflict of Interest</p> <p>[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even</p>	<p>Conflict of Interest</p> <p>[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even</p>	<p>Rejected ABA Model Rule comment [6] because the concepts discussed are already addressed in the Commission's proposed paragraph (a)(3). The concept of compliance with conflict of interest rules has been adopted as part of the informed written consent of the client contained in paragraph (a)(3).</p> <p>Moreover, because the Commission's proposed Rule 1.7 does not include "material limitations" conflicts, the reference to it would be inappropriate because the scope is limited to conflicts among concurrent clients.</p>

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<p>though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. 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 or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."</p>	<p>though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. 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 or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."</p>	
<p>[7] 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.</p>	<p>[7] 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].</p>	<p>Adopted ABA Model Rule, Comment [7], with Rules 1.7, 1.9, and 1.10 bracketed, pending the Commission's final recommendation concerning.</p>

<p align="center"><u>ABA Model Rule</u> Rule Lawyer as a Witness Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.7 Lawyer as a Witness Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[2] <u>This Rule is not applicable in non-adversarial proceedings, before legislative, administrative or other entities when not acting as a tribunal. For example, the rule would not apply as where the 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.</u></p>	<p>Proposed Comment [2] has been added to clarify that the Rule is not applicable in legislative proceedings, <u>when that body is not acting in a quasi-adjudicative role</u>. This comment is carried over from current rule 5-210, Discussion ¶. 1.</p>

Rule 3.7: Lawyer as Witness

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2008 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8 is highlighted)

California. Rule 5-210 provides as follows:

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

(A) The testimony relates to an uncontested matter;
or

(B) The testimony relates to the nature and value of legal services rendered in the case; or

(C) The member has the informed written consent of the client. If the member 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 member is employed and shall be consistent with principles of recusal.

District of Columbia: Rule 3.7(b) provides that a lawyer may not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness "if the other lawyer would be precluded from acting as advocate in the trial by Rule 1.7 or Rule 1.9," D.C. also adds that the provisions of Rule 3.7(b) "do not apply if the lawyer who is appearing as an advocate is employed by, and appears on behalf of, a government agency."

Florida: Rule 3.7(a) applies when a lawyer is likely to be a necessary witness "on behalf of the client" and creates an exception when "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." Florida adopts ABA Model Rule 3.7(b) verbatim.

Illinois: Rule 3.7 distinguishes between a witness on behalf of a client and a witness not on behalf of a client, Illinois Rule 3.7(a) essentially tracks DR 5-101(B) of the ABA Model Code of Professional Responsibility, and Illinois Rule 3.7(b) essentially tracks DR 5-102(B).

New Mexico: deletes the "substantial hardship" exception in subparagraph (a)(3).

New York: DR 5-102 provides as follows.

(A) A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify:

(1) If the testimony will relate solely to an uncontested issue.

(2) If 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) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client.

(4) 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 in the particular case.

(B) Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.

(C) If, 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, except that the lawyer may continue as an advocate on issues of fact and may testify in the circumstances enumerated in DR 5-102(a)(1) through (4).

(D) If, 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 firm must withdraw from acting as an advocate before the tribunal.

Ohio: Adds a new Rule 3.7(c), which provides as follows: "A government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applies or where permitted by law."

Texas: Rule 3.08(a) disqualifies a lawyer if the lawyer knows or believes that the lawyer is or may be a witness "necessary to establish an essential fact on behalf of the lawyer's client," unless specified exceptions apply. The exceptions are substantially identical to DR 5-101(B)(1)-(3) of the ABA Model Code of Professional Responsibility, but Texas adds an exception if "(4) the lawyer is a party to the action and is appearing pro se," and Texas applies the "substantial hardship" exception only if "the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter...." Texas Rules 3.08(b) and (c) provide as follows:

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Virginia: In Rule 3.7(a), Virginia substitutes "adversarial proceeding" for "trial." In Rule 3.7(b), Virginia incorporates language from DR 5-102(B) of the ABA Model Code of Professional Responsibility to deal with situations in which a lawyer learns that he or she may be called as a witness "other than on behalf of the client" after accepting the representation.

Washington: Washington adds a new Rule 3.7(a)(4), which creates an exception where "the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate." A new Comment 8 explains that when a lawyer is called to testify as a witness by the adverse party, "there is a risk that Rule 3.7 is being inappropriately used as a tactic to obtain disqualification of the lawyer. Paragraph (a)(4) is intended to confer discretion on the tribunal in determining whether disqualification is truly warranted in such circumstances."