

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

(Draft #7, 12/12/09)

**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.

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

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## 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)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

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

Vote (see tally below)

Favor Rule as Recommended for Adoption   7  

Opposed Rule as Recommended for Adoption   3  

Abstain   0  

Approved on Consent Calendar

Approved by Consensus

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

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

One commenter, LACBA, 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

December 2009

(Draft rule revised following consideration of public comment)

### *INTRODUCTION:*

1. The Commission is recommending that much of the substance and language of ABA Model Rule 3.7(a) not be adopted. Instead, the Commission recommends continued adherence to the more limited scope of the California rule.
2. First, the Commission recommends carrying forward current rule 5-210's limitation of the Rule to jury trials. The Commission has concluded 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.
3. Second, the Commission recommends that Model Rule 3.7(a)(3) be 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. Instead, the Commission recommends carrying forward current rule 5-210(C), which protects the client's autonomy by ensuring the client is fully informed to decide whether to consent to the lawyer's dual role. See Explanation of Changes for paragraph (a)(3).
4. Third, the Commission for the most part 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 which relate to disqualification issues. See Explanation of Changes for Model Rule 3.7, cmts. [1] – [6], below.
5. *Minority.* A minority of the Commission disagrees with the recommendation to carry forward current rule 5-210's limitation of the proposed Rule to jury trials and with the recommendation to carry forward Rule 5-210(C). The minority prefers Model Rule approach, which emphasizes protecting and ensuring the integrity of the judicial process. See Explanation of Changes for paragraphs (a)(1) and (a)(3), and Explanation of Changes for rejected Model Rule Comments [1] – [3], below. See also, a separately provided minority statement.

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\* Proposed Rule 3.7, Draft 7 (12/12/09).

<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 <del>at</del><u>before</u> a <del>trial</del><u>jury</u> in which the lawyer is likely to be a necessary witness unless:</p>	<p>The Commission recommends retaining the approach in current California rule 5-210, whose application is limited to jury trials. The Commission notes that any threat 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><i>Minority.</i> A minority of the Commission believes that the Rule should also apply to bench trials, as in every other jurisdiction in the country. See complete Dissent, below.</p>
<p>(1) the testimony relates to an uncontested issue;</p>	<p>(1) the testimony relates to an uncontested issue <u>or matter</u>;</p>	<p>Adopted the ABA Model Rule with addition:</p> <p>Added "matter" in addition to "issue" for public protection. Issue is too narrow if standing alone and might not include a lawyers' uncontested testimony about a different or related legal case or transaction.</p>

\* Proposed Rule, Draft 7 (12/12/09). 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><del>(3) disqualification of the lawyer would work substantial hardship on the client.</del></p> <p><u>(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.</u></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 &amp; 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><b>Minority.</b> 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"><b><u>ABA Model Rule</u></b> <b>Rule 3.7 Lawyer as a Witness</b> <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 3.7 Lawyer as a Witness</b> <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></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><del>[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.</del></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><b>Minority.</b> 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><b>Advocate-Witness Rule</b></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</p>	<p><del><b>Advocate-Witness Rule</b></del></p> <p><del>[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</del></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 &amp; 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"><b>ABA Model Rule</b> <b>Rule 3.7 Lawyer as a Witness</b> <b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b> <b>Rule 3.7 Lawyer as a Witness</b> <b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>should be taken as proof or as an analysis of the proof</p>	<p><del>should be taken as proof or as an analysis of the proof</del></p>	<p>(App. 5 Dist. 2001) 113 Cal.Rptr.2d 548, 93 Cal.App.4th 916. <b>Minority.</b> 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><del>[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.</del></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. <b>Minority.</b> 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><del>[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</del></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>

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 3.7 Lawyer as a Witness</b> <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 3.7 Lawyer as a Witness</b> <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></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><del>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.</del></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><del>[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.</del></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><b>Conflict of Interest</b></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><b><del>Conflict of Interest</del></b></p> <p><del>[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</del></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>

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 3.7 Lawyer as a Witness</b> <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 3.7 Lawyer as a Witness</b> <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></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><del>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."</del></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><del>[7]</del> 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"><b><u>ABA Model Rule</u></b>  <b>Rule 3.7 Lawyer as a Witness</b>  <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 3.7 Lawyer as a Witness</b>  <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
	<p><a href="#">[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.</a></p>	<p>Proposed Comment [2] has been added to clarify that the Rule is not applicable in legislative proceedings, when that body is not acting in a quasi-adjudicative role. This comment is carried over from current rule 5-210, Discussion ¶. 1.</p>
	<p><a href="#">[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)].</a></p>	<p>Proposed Comment [3] has been added to address circumstances where client consent is documented as a part of a transcribed proceeding. The comment clarifies that this transcription satisfies the requirement for written disclosure and consent.</p>

## Rule 3.7 Lawyer as a Witness

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) A lawyer shall not act as an advocate ~~at~~before a ~~trial~~jury in which the lawyer is likely to ~~testify~~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 ~~non-adversarial~~ proceedings before legislative, administrative or other entities when not acting as where 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].

**Rule 5-210 Member As 3.7 Lawyer as Witness**  
(Comparison of the Current Proposed Rule to Current California Rule)

- (a) A ~~member~~lawyer shall not act as an advocate before a jury ~~in which will hear testimony from the member~~in which the lawyer is likely to be a necessary witness unless:
- (1) ~~(A) The~~the testimony relates to an uncontested issue or matter; ~~or~~
  - (2) ~~(B) The~~the testimony relates to the nature and value of legal services rendered in the case; or
  - (3) ~~(C) The member~~the lawyer has obtained the informed, written consent of the client. If the ~~member~~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 ~~member~~lawyer is employed ~~and shall be consistent with principles of recusal.~~
- (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].

***Discussion:-***

~~Rule 5-210 is intended to apply to situations in which the member knows or should know that he or she ought to be called as a witness in litigation in which there is a jury. This rule is not intended to encompass situations in which the member is representing the client in an adversarial proceeding and is testifying before a judge. In non-adversarial proceedings, as where the member testifies~~

~~on behalf of the client in a hearing before a legislative body, rule 5-210 is not applicable.~~

~~Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness. (Amended by order of Supreme Court, operative September 14, 1992.)~~

**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 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)].

**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.

## 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 and Roy D. Simon. 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 5R 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."

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

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

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	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 situations 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>	<p>As indicated above, the Commission has revised the rule to track the scope of the existing California rule which applies only to proceedings before a jury.</p> <p>The Commission agrees that the trier of fact in a bench trial is capable of understanding a lawyer's dual role as advocate and witness.</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>As indicated above, the Commission has revised the rule to track the scope of the existing California rule which applies only to proceedings before a jury.</p>

<sup>1</sup> 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 <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	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 "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</p>	<p>As indicated above, the Commission has revised the rule to track the scope of the existing California rule which applies only to proceedings before a jury.</p> <p>The Commission agrees and has made this proposed change.</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</p>

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

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

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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>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>
4	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 style="padding-left: 40px;">(1) the testimony relates to an uncontroverted <i>issue or</i> matter; . . . “</p> <p>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 <b><i>uncontroverted</i></b> subject may do so under this Rule, in all circumstances.</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 <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	William Wesley Patton	M		3.7(a)	Proposed Rule 3.7 has several serious ambiguities that will either confuse attorneys or fail to provide them with sufficient guidance.	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.
				3.7(a)	I agree that the rule should apply to both jury and bench trials.	After reviewing the public comment received, the Commission reconsidered and reversed its decision to recommend expanding the scope of California's existing rule to cover both jury and bench trials. The Commission now believes 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.
				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?	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

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

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

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				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 term provides clients with broader protection? What are the ramifications of this particular change?	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.  The Commission revised the rule to delete “testify” and substituted the comparable Model Rule phrase “is likely to be a necessary witness.”
				3.7(a)(3)	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?	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

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

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

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.7(b)(1)	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.	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 established law.  The Commission has defined the elements of informed consent in the definitions set forth in rule 1.0.1, as did the ABA Model Rules. Proposed rule 1.0.1 was not published concurrently published with this rule. With the defined term, the Commission has concluded that no further change is needed.
				Comment [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.

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

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

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [2]	<p>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.”</p> <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 that the term “non-adversarial” proceeding is ambiguous and has amended Comment [2] to clarify this issue.</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>
6	San Diego County Bar Association Legal Ethics Committee	M		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>	

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

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

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	Santa Clara County Bar Association	A			No comments added.	