

1 Rule 3.7. Lawyer as Witness.

2 (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a
3 necessary witness ~~except where~~ unless:

4 (a)(1) ~~The the~~ testimony relates to an uncontested issue;

5 (a)(2) ~~The the~~ testimony relates to the nature and value of legal services rendered in
6 the case; or

7 (a)(3) ~~Disqualification-disqualification~~ of the lawyer would work substantial hardship
8 on the client.

9 (b) A lawyer may act as advocate in ~~the a~~ trial in which another lawyer in the
10 lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule
11 1.7 or Rule 1.9.

12 Comment

13 [1] Combining the roles of advocate and witness can prejudice the tribunal and the
14 opposing party and can also involve a conflict of interest between the lawyer and client.

15 Advocate-Witness Rule

16 [2] The tribunal has proper objection when the trier of fact may be confused or
17 misled by a lawyer serving as both advocate and witness. The opposing party has
18 proper objection where the combination of roles may prejudice that party's rights in the
19 litigation. A witness is required to testify on the basis of personal knowledge, while an
20 advocate is expected to explain and comment on evidence given by others. It may not
21 be clear whether a statement by an advocate-witness should be taken as proof or as an
22 analysis of the proof.

23 [3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously
24 servng as advocate and necessary witness except in those circumstances specified in
25 paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will
26 be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2)
27 recognizes that where the testimony concerns the extent and value of legal services
28 rendered in the action in which the testimony is offered, permitting the lawyers to testify
29 avoids the need for a second trial with new counsel to resolve that issue. Moreover, in
30 such a situation, the judge has ~~first hand~~ firsthand knowledge of the matter in issue;

31 hence, there is less dependence on the adversary process to test the credibility of the
32 testimony.

33 [4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is
34 required between the interests of the client and those of the tribunal and the opposing
35 party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer
36 prejudice depends on the nature of the case, the importance and probable tenor of the
37 lawyer's testimony, and the probability that the lawyer's testimony will conflict with that
38 of other witnesses. Even if there is risk of such prejudice, in determining whether the
39 lawyer should be disqualified, due regard must be given to the effect of disqualification
40 on the lawyer's client. It is relevant that one or both parties could reasonably foresee
41 that the lawyer would probably be a witness. The principle of imputed disqualification
42 conflict of interest principles stated in Rule Rules 1.7, 1.9 and 1.10 has have no
43 application to this aspect of the problem.

44 [5] Whether the combination of roles involves an improper Because the tribunal is
45 not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer
46 in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer
47 to do so except in situations involving a conflict of interest with respect to the client is
48 determined by Rule

49 Conflict of Interest

50 [6] In determining if it is permissible to act as advocate in a trial in which the lawyer
51 will be a necessary witness, the lawyer must also consider that the dual role may give
52 rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For
53 example, if there is likely to be substantial conflict between the testimony of the client
54 and that of the lawyer, or a member of the lawyer's firm, the representation is improper
55 the representation involves a conflict of interest that requires compliance with Rule 1.7.
56 This would be true even though the lawyer might not be prohibited by paragraph (a)
57 from simultaneously serving as advocate and witness because the lawyer's
58 disqualification would work a substantial hardship on the client. Similarly, a lawyer who
59 might be permitted to simultaneously serve as an advocate and a witness by paragraph
60 (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether
61 the lawyer is called as a witness on behalf of the client or is called by the opposing

62 party. Determining whether or not such a conflict exists is primarily the responsibility of
63 the lawyer involved. ~~See Comment to Rule 1.7. If a lawyer who is a member of a firm~~
64 ~~may not act as both advocate and witness by reason of~~ If there is a conflict of interest,
65 ~~Rule 1.10 disqualifies the firm also.~~ the lawyer must secure the client's informed
66 consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking
67 the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in
68 writing" and Rule 1.0(e) for the definition of "informed consent."

69 ~~[7] {Rule 3.8. Special responsibilities of a prosecutor.}~~ Paragraph (b) provides that a
70 lawyer is not disqualified from serving as an advocate because a lawyer with whom the
71 lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however,
72 the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from
73 representing the client in the matter, other lawyers in the firm will be precluded from
74 representing the client by Rule 1.10 unless the client gives informed consent under the
75 conditions stated in Rule 1.7.

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