

Rule 3.7. LAWYER AS WITNESS

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

(1) the testimony relates to an uncontested issue;

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

(3) disqualification of the lawyer would work substantial hardship on the client.

(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.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[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.

Advocate-Witness Rule

[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 as an analysis of the proof.

[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.

[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 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.

[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.

Conflict of Interest

[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 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."

[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.

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.7 is amended to conform to the changes in the Model Rule.

In *Record v. Kempe*, 2007 VT 39, ¶¶ 23-25, 182 Vt. 17, 928 A.2d 1199, the Court held that a motion relying on V.R.P.C. 3.7 to disqualify plaintiffs' attorney whom defendant intended to call as a witness was properly denied where motion came just before jury draw and defendant was not prejudiced by ruling.

The ABA Reporter's Explanation is as follows:

TEXT:

No change in substance is proposed in the Rule text.

COMMENT:

[1] A reference to a tribunal has been added to clarify that the prohibition in paragraph (a) is for the protection of the tribunal as well as the parties.

Caption. The new caption has been added to better reflect the subject of Comments [2] through [5].

[2] and [3] References to a tribunal have been added to clarify that the prohibition in paragraph (a) is for the protection of the tribunal as well as the parties.

[4] References to a tribunal have been added to clarify that the prohibition in paragraph (a) is for the protection of the tribunal as well as the parties. The last sentence has been modified to emphasize that the advocate-witness rule is distinct from the conflict of interest principles in Rules 1.7, 1.9, and 1.10.

[5] This new Comment explains why paragraph (b) permits a lawyer to 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 Rules 1.7 or 1.9.

Caption. The new caption has been added to better reflect the subject of Comments [6] and [7].

[6] The changes are intended to clarify that lawyers must be alert to the conflicts that may arise when they serve as an advocate in a matter in which they or a lawyer with whom they are associated is a necessary witness and that, if there is a conflict, it is to be resolved in accordance with Rules 1.7 or 1.9.

[7] This new Comment discusses the vicarious disqualification that may result if the lawyer-witness is precluded from serving as advocate by Rules 1.7 or 1.9.

Reporter's Notes

Under the present Vermont Code, a lawyer may not serve as an advocate in any case where "it is obvious" that the lawyer or the lawyer's associate "ought" to be called as a witness on the client's behalf. The rule gives more specific guidance. More importantly, the rule no longer automatically extends the prohibition to the lawyer's partners or associates.

ANNOTATIONS

1. Applicability. Defendants failed in their argument that the trial court erred in denying their motion to disqualify plaintiffs' attorney, which was grounded on defendants' intention to call him as a witness. The evidence solicited from plaintiffs' counsel was unnecessary and superfluous; accordingly, defendants were not prejudiced by its admission in violation of the ethical code. *Record v. Kempe*, 2007 VT 39, 182 Vt. 17, 928 A.2d 1199.