

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-210 [3.7]**

**Lead Drafter:** Cardona  
**Co-Drafters:** Chou, Inlender, Stout  
**Meeting Date:** May 6 – 7, 2016

### **I. CURRENT CALIFORNIA RULE 5-210**

#### **Rule 5-210 Member as Witness**

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.

#### **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.

### **II. DRAFTING TEAM'S RECOMMENDATION AND VOTE**

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

### **III. PROPOSED RULE 3.7 (CLEAN)**

#### **Rule 3.7 Lawyer as Witness**

- (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a necessary witness unless:
  - (1) the lawyer's testimony relates to an uncontested issue or matter;

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- (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
  - (3) the lawyer has obtained informed written consent from 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] This Rule applies to both bench and jury trials. This Rule does not apply to other adversarial proceedings. This rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.

[[2] A lawyer's obligation to obtain informed 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 or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in Rule 1.0.1(n).]<sup>1</sup>

## IV. PROPOSED RULE 3.7 (REDLINE TO CURRENT CALIFORNIA RULE 5-210)

### Rule ~~5-210~~3.7 ~~Member~~Lawyer as Witness

- (a) A ~~member~~lawyer shall not act as an advocate ~~before a jury in a trial in~~ which ~~will hear testimony from~~ the ~~member~~lawyer is likely to be a necessary witness unless:
- (A1) the lawyer's testimony relates to an uncontested issue or matter; ~~or~~
  - (B2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
  - (C3) the ~~member~~lawyer has obtained informed written consent from 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.

<sup>1</sup> Placeholder pending determination whether to add a comment to Rule 1.0.1(n) making clear that informed written consent encompasses informed consent done on the record before a licensed court report or recorder who prepares a transcript or recording of the disclosure and consent.

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(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:~~Comment

~~[1] 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. This Rule applies to both bench and jury trials. This Rule does not apply to other adversarial proceedings. This rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.~~

~~Rule 5-210 is not intended to apply to circumstances in which a lawyer in an advocate's firm will be a witness.~~

[[2] A lawyer's obligation to obtain informed 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 or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in Rule 1.0.1(n).]<sup>2</sup>

### V. PUBLIC COMMENTS SUMMARY

- Richard Zitrin and Law Professors, 3/3/2014:**

Recommend retention of the current California rule over MR 3.7, but suggest substituting "tribunal" for "jury" so that the rule application is not limited to jury trials.

### VI. OCTC / STATE BAR COURT COMMENTS

- JAYNE KIM, OCTC, 3/25/2016:**

**Rule 5-210 [Member as Witness]**

Rule 5-210 should apply to non-jury trials as well as jury trials. (See *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1209 [The roles of an advocate and of a witness are inconsistent. The function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively. "Most of the difficulties inherent in an attorney's

<sup>2</sup> Placeholder pending determination whether to add a comment to Rule 1.0.1(n) making clear that informed written consent encompasses informed consent done on the record before a licensed court report or recorder who prepares a transcript or recording of the disclosure and consent.

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taking on the role of both advocate and witness are present regardless of whether the attorney's testimony will be given in front of a jury or a judge."].)

- **RUSSELL WEINER, OCTC, 6/15/2010:**

### **Rule 3.7. Lawyer as Witness.**

1. While this is the current law, OCTC does not understand why the client's informed written consent only applies to jury trials. It seems that clients in non-jury matters should also be advised of the risks of this situation and give their informed written consent. Comment 2 seems more appropriate for a treatise, law review article, or ethics opinion.

- **State Bar Court:** No comments received from State Bar Court.

## **VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)**

### **Model 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.

The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.7: Lawyer as Witness," revised May 6, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_7.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_7.authcheckdam.pdf) [Last visited 4/14/16]
- ABA Model Rule 3.7 is the Model Rules counterpart to current rule 5-210. There are two key differences between the current California rule and the Model Rule. First, rule 5-210 provides that the lawyer may obtain the client's informed written consent to act as a witness. Second, rule 5-210 is limited to cases presented to a jury while the Model Rule counterpart

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applies to any trial.

- Thirty-seven jurisdictions have adopted Model Rule 3.7 verbatim.<sup>3</sup> Twelve jurisdictions have adopted a slightly modified version of Model Rule 3.7.<sup>4</sup> Two jurisdictions have adopted a substantially different version of Model Rule 3.7.<sup>5</sup>

### VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

#### A. Concepts Accepted (Pros and Cons):

1. Expand the scope of the current rule to encompass bench trials. The current rule is limited by its terms to lawyer conduct in connection with a jury trial. The proposed rule would apply to both bench and jury trials. It would not apply to other adversarial proceedings or non-adversarial proceedings.
  - Pros: The public protection the rule is intended to foster applies equally to bench trials. A client's interest is promoted by requiring lawyers to obtain the client's informed written consent where required by the rule. The nature and extent of the disclosure might vary between a bench and jury trial setting, but that does not alter the benefits of requiring client consent. Comments from OCTC and the group of law professors support this broader public protection. In addition, the rule's application to jury trials is the standard in the majority of jurisdictions that have adopted Model Rule 3.7.
  - Cons: Judges should be presumed to be sufficiently experienced and sophisticated to distinguish the various roles that a lawyer might play in a trial. There is no evidence that in the case of bench trials, clients have not been adequately protected by the lawyer's duty to communicate a significant development. Mandating informed written consent for bench trials might lead to potential time-consuming tactical disqualification motions where the consent was not obtained despite there being no evidence of the client being prejudiced.
2. Clarify the trigger for rule. The current rule merely refers to situations where testimony will be heard from a member. The proposed rule would, instead, refer to situations where a lawyer is "likely to be a necessary witness."
  - Pros: The revised language is clearer than the current language by focusing on the

<sup>3</sup> The thirty-seven jurisdictions are: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

<sup>4</sup> The twelve jurisdictions are: Arkansas, District of Columbia, Florida, Georgia, Mississippi, New York, North Dakota, Ohio, Oregon, South Dakota, Virginia, and Washington.

<sup>5</sup> The two jurisdictions are: California and Texas.

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- likelihood and necessity of a lawyer acting as a witness. This formulation also promotes foresight in recognizing and, responding to, an attorney as witness issue. In addition, this recommended standard is the rule in the majority of jurisdictions that have adopted Model Rule 3.7.
- Cons: There appears to be no known problem with the language used in the current rule.
3. Clarify that both an “uncontested matter” and an “uncontested issue” fall within one of the limited exceptions. In describing one of the permitted circumstances for a lawyer to act as a witness, the current rule refers to an “uncontested matter,” while Model Rule 3.7 refers to an “uncontested issue.”
- Pros: Revising the rule language to include both terms should avoid an overly narrow interpretation of this exception. Using both terms is preferable in part because “uncontested issue” alone might be read to exclude a lawyer’s uncontested testimony about a different or related legal case or transaction. The revised language clarifies that a discrete uncontested issue as well as an uncontested matter are within the exception.
  - Cons: The broader interpretation appears to be implied in the use of the current term “uncontested matter” so there is no compelling need for this change.
4. Address the concept of testimony by other lawyers in the advocate’s firm in the black letter of the rule, rather than in a comment. The current rule has two Discussion paragraphs, one of which is a single sentence stating that the rule “is not intended to apply to circumstances in which a lawyer in an advocate’s firm will be a witness.” The proposed rule would relocate this concept to be a part of the black letter text.
- Pros: Under the Commission’s Charter, this concept belongs in the black letter as it might be viewed as an exception to the rule itself.
  - Cons: This concept is not an exception. It is an explanation of the intended scope of the rule and, under the Charter, is appropriately placed in a comment.

### B. Concepts Rejected (Pros and Cons):

1. Include a statement that the rule represents a public policy determination in this area of lawyer conduct and governs civil disqualification as well as disciplinary issues. Current rule 5-210 does not address the authority of a judicial officer to disqualify a lawyer for acting as a witness in a client’s matter. Case law on this issue is not necessarily coextensive with the rule and this may be a deficiency in regards to lawyer understanding of, and compliance with the rule, and in regards to predictability of outcome in a disqualification situation. (See *Comden v. Superior Court* (1978) 20 Cal.3d 906, *Smith, Smith & Kring v. Superior Court (Oliver)* (1997) 60 Cal.App.4th 573, 579-582 and *Colyer v. Smith* (1999) 50 F.Supp.2d 966.) Compare *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197 [135 Cal.Rptr.3d 545] (Applying Model Rule 3.7 rather than rule 5-210 in support of court’s decision to disqualify lawyer-witness).
- Pros: Courts in California should not look to the Model Rules for resolving public policy determinations about lawyer conduct when there is a clearly applicable

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- California rule adopted by the Board and approved by the California Supreme Court.
- Cons: The rules are minimum standards of lawyer discipline. Courts have discretion in considering the rules when resolving public policy issues but a rule should not purport to bind a court's discretion.

### C. Changes in Duties/Substantive Changes to the Current Rule:

1. The changes to paragraph (a) are substantive. (See section VIII.A, above.)
2. All other changes are non-substantive. (See Section VIII.D, below.)

### D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
  - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Moving the concept of testimony by other lawyers in the advocate's firm to the black letter text is a non-substantive clarifying change. (See section VIII.A.4, above.)

### E. Alternatives Considered:

1. The main alternative considered was retaining the scope of the current rule that is limited to jury trials. (See section VIII.A.1, above.)



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### **IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

(1) See bracketed Comment [2] that is intended to clarify that the obligation to obtain informed written consent is satisfied when the disclosure and consent occurs in a proceeding before a court reporter or where another method of recording is used. The drafting team identifies this as an open issue pending a Commission determination of whether this clarification should appear in this rule or as a comment to the terminology rule, Rule 1.0.1(n). Rule 1.0.1(n) provides that:

“Writing” or “written” has the meaning stated in Evidence Code section 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

### **X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS**

**Cardona**

- [Date]: Email Comment

**Inlender**

- [Date]: Email Comment

**Chou**

- [Date]: Email Comment

**Stout**

- [Date]: Email Comment

### **XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

**Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended Rule 3.7 [5-210] in the form attached to this report and recommendation.

**Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended Rule 3.7 [5-210] in the form attached to this Report and Recommendation.



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<b>Lead Drafter:</b> Cardona <b>Co-Drafters:</b> Chou, Inlender, Stout <b>Meeting Date:</b> May 6 – 7, 2016
<b>XII. DISSENTING POSITION(S)</b>
None.
<b>XIII. FINAL COMMISSION VOTE/ACTION</b>
Date of Vote:  Action:  Vote: X (yes) – X (no) – X (abstain)



**CURRENT CALIFORNIA RULE 5-210**  
**"Member as Witness"**

***I. Text of Current Rule:***

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.

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.

***II. Background/Purpose:***

A. Rule History

Prior to current rule 5-210, the issue of an attorney acting as a witness was first included in the 1975 rule concerning a lawyer's withdrawal from employment.

Operative January 1, 1975, rule 2-111(A)(4) and (5) provided as follows:

Rule 2-111. Withdrawal from Employment

(A) In general.

\* \* \* \* \*

(4) If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in this firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter

of the such employment he shall withdraw from the conduct of the trial and his firm may continue the representation and he or a lawyer in his firm may testify in the following circumstances:

- (a) If the member's testimony will relate solely to an uncontested matter; or
  - (b) If the member's testimony will relate solely to a matter of formality and there is not reason to believe that substantial evidence will be offered in opposition to the testimony; or
  - (c) If the member's testimony will relates solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; or
  - (d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.
- (5) If, after undertaking employment in contemplated or pending litigation, a member of the State Bar learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The 1975 rule appears to be derived from the ABA Model Code of Professional Responsibility, DR 5-102 (A) and (B). Although the 1972 final report of the State Bar's Special Committee to Study the ABA Code of Professional Responsibility lists those Model Code sections as provisions that the special committee was not recommending for adoption, rule 2-111(A)(4) and (5) were a part of the rules adopted by the State Bar Board of Governors on June 22, 1974 and submitted to the Supreme Court for approval on August 15, 1974. (See *In re Proposed New Rules of Professional Conduct*, Supreme Court case number BM3664, order approving proposed rules filed December 31, 1974.)

Operative November 1, 1979, former rule 2-111 was revised. There were various revisions but two main changes in duties. The first one was to strike all references to "a lawyer in the member's firm," leaving the rule to regulate only the conduct of the member who was representing the client. The explanation for this revision was as follows:

During a trial before a jury, the danger to the appearance of impropriety or confusion is minimal where one member of the firm is called to testify on behalf of the client and another member conducts the trial. Our adversary system and rule of evidence providing for testing the credibility of witnesses and for impeaching a witness for interest in the outcome of litigation protect against any such abuse. Any confusion on the part of the jury can be cured by instructions.

(See Supplemental Report and Recommendation of the Board Committee on Lawyer Services – Proposed Amendments to Rule 2-111(A)(4), Rules of Professional Conduct (Withdrawal from Employment - - Lawyer Acting as Witness), February 5, 1979, Appendix A, at p. 1. A copy is on file with the State Bar's Office of Professional Competence.)

The second main amendment operative in 1979 was to require that the member obtain the "written consent of the client" after the client has been fully advised about the implications of the lawyer's dual role and after the client has been afforded a "reasonable opportunity to seek the advice of independent counsel on the matter." These changes further provided that the written consent in a civil case should be filed with the court no later than the commencement of trial and in a criminal case, the consent need not be filed with the court but the attorney has the duty, before testifying, of satisfying the court that the consent has been obtained. Also regarding criminal matters, a new paragraph (D) was added providing that a member who is "representing the People" may obtain requisite consent from the "head of the particular office representing the People" and so long as continued representation is "not inconsistent with principles of recusal." These amendments were made in response to the Supreme Court's decision in *Comden v. Superior Court* (1978) 20 Cal.3d 906. In this case, the Supreme Court cited rule 2-111(A)(4) and held that the authority of a trial court to disqualify an attorney where the attorney knows or should know that the attorney ought to be called as a witness on behalf of the attorney's client is not limited to the breaches of standards of conduct for which discipline may be imposed. The written consent protocol was intended to protect a client's right to choice of counsel and to mitigate the potential for tactical use of a motion to disqualify notwithstanding the lawyer's compliance with the rule. (See Supplemental Report and Recommendation of the Board Committee on Lawyer Services – Proposed Amendments to Rule 2-111(A)(4), Rules of Professional Conduct (Withdrawal from Employment - - Lawyer Acting as Witness), February 5, 1979, Attachment 8. A copy is on file with the State Bar's Office of Professional Competence.)

Operative May 27, 1989, former rule 2-111 was renumbered as rule 3-700 and the issue of an attorney as a witness in a client's matter was placed in a new standalone rule, rule 5-210 (Member as Witness). The provisions of this new rule were streamlined and two discussion paragraphs were added. There were two main changes in duties. First, the scope of the rule was narrowed to only those situations in which the attorney acts as witness before a jury. Second, the distinction as to whether the attorney would be testifying on behalf of the client or other than on behalf of the client was deleted. In either situation, as revised the attorney was permitted to continue in the representation and testify if the rule's requirements were satisfied. The explanation of these changes are as follows:

Proposed rule 5-210 specifies the member's duties when called upon to testify while acting as an advocate in the same proceeding. As this is a distinct topic, it was determined to remove it from current rule 2-111, which deals with withdrawal from and termination of employment, and to create a

separate rule which deals only with the member as witness. This division will make it easier to locate the rule.

Rule 5-210 removes the distinction found in rule 2-111(A)(4) and (5) as to whether the member is testifying on behalf of the client or other than on behalf of the client. Here, in either case, the member may continue the representation and testify if the client gives an informed written consent, if the testimony relates to an uncontested matter or if the testimony relates to the nature and value of legal services in the case.

Rule 5-210 is limited to those situations in which the member acts as an advocate and testifies before a jury. Historically, the harm sought to be prevented by rules of this type is that it will be difficult or impossible for the trier of fact to be able to differentiate between the roles of advocate and of witness. Concern about this potential problem is well-founded when the advocacy and testimony are before a jury. The potential for this harm is not present if the advocacy and testimony are before a judge. Presumably, a judge is able to accommodate the various roles the attorney will play. The rule as proposed reflects this view.

(See of Bar Misc. No. 5626, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987 at pp. 31-32.)

Rule 5-210 was last revised operative September 14, 1992. No substantive changes were made. A comma was deleted in paragraph (C) and the discussion paragraphs were conformed to the use of defined terms for "member" and "lawyer." (See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991, Supreme Court number 24408, at pp. 19 - 20.)

### ***III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):***

#### ***A. 2016 Comment***

In a [REDACTED], 2016 memorandum to the Commission, OCTC provided the following comment regarding rule 5-210:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

#### ***B. 2010 Comment***

In a June 15, 2010 memorandum to the first Commission, OCTC provided the following comment on proposed rule 3.7:

### **Rule 3.7. Lawyer as Witness.**

1. While this is the current law, OCTC does not understand why the client's informed written consent only applies to jury trials. It seems that clients in non-jury matters should also be advised of the risks of this situation and give their informed written consent. Comment 2 seems more appropriate for a treatise, law review article, or ethics opinion.

#### **C. 2001 Comment**

In a September 27, 2001 memorandum to the first Commission, OCTC did not comment on rule 5-210.

### **IV. *Initial Public Comments Received:***

At its April 24, 2015 meeting, the Board of Trustees Regulation and Discipline Committee authorized a 45-day public comment period to seek general input on possible amendments to the Rules of Professional Conduct that ought to be considered by the Commission. The Commission received one public comment specific to rule 5-210. A group of law professors who teach legal ethics commented that: (1) the rule 5-210 limitation to jury trials should be abandoned in favor of the broader scope of Model Rule 3.7; and (2) the rule 5-210 option for obtaining a client's informed written consent to act as a witness seeking should be retained. For further discussion, see section VI.B of this memorandum, below.

### **V. *Potential Deficiencies in the Current Rule:***

A. See above input from OCTC. As noted, in 2010, OCTC seemed to suggest that the jury trial limitation was a deficiency because "clients in non-jury matters should also be advised of the risks of this situation and give their informed written consent." Accordingly, the current limited scope of the rule to trials presented to a jury may be a deficiency. (See *In re Mortgage & Realty Trust* (1996) 195 B.R. 740, 757 [1996 WL 238695].) A minority of the prior Commission also asserted this position that the rule should abandon the jury trial limitation. The majority of the prior Commission disagreed observing that: (1) 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; and (2) as a sophisticated evaluator of testimony and evidence, a bench officer would not be expected to be confused by the lawyer's dual role.

B. In describing one of the permitted circumstances for a lawyer to act as a witness, current rule 5-210 refers to an "uncontested matter," while Model Rule 3.7 refers to an "uncontested issue." The prior Commission recommended that the rule refer to both as follows: "the testimony relates to an uncontested issue or matter." The reasoning was that issue alone would be too narrow might not include a lawyer's uncontested testimony about a different or related legal case or transaction.



C. Current rule 5-210 includes an option for obtaining informed written consent of the client but it is silent on whether this requirement is satisfied in circumstances where client consent is documented as a part of a transcribed proceeding. The prior Commission recommended a clarifying comment stating that such transcription satisfies the requirement for written disclosure and consent.

D. Current rule 5-210 does not address the authority of a judicial officer to disqualify a lawyer for acting as a witness in a client's matter. Case law on this issue is not necessarily coextensive with the rule and this may be a deficiency in regards to understanding and compliance by lawyers. (See *Comden v. Superior Court* (1978) 20 Cal.3d 906, *Smith, Smith & Kring v. Superior Court (Oliver)* (1997) 60 Cal.App.4th 573, 579-582 and *Colyer v. Smith* (1999) 50 F.Supp.2d 966.)

E. Case law articulates an exception neither rule 5-210 nor Model Rule 3.7 explicitly codifies. Although acting as both advocate and witness "is a situation to be avoided if possible," a prosecutor can do so "in extraordinary circumstances and for compelling reasons, usually where the evidence is not otherwise available." (United States v. Johnston (7th Cir.1982) 690 F.2d 638, 644.) After testifying, however, the prosecutor should "withdraw from any further participation" in the case. (Id. at p. 645.) This might suggest that the current rule is misleading or confusing as to this specific criminal law situation. (See *People v. Donaldson* (2001) 93 Cal.App.4th 916.)

## **VI. California Context:**

### **A. A client's right to choice of counsel.**

The restrictions imposed by rule 5-210 reflects a strong interest in the fair administration of justice. (See e.g., *United States v. Prantil* (9th Cir.1985) 764 F.2d 548, 553.) However, this public policy should be balanced against the important right of a client to be represented by counsel of choice. (See e.g., *Fracasse v. Brent* (1972) 6 Cal. 3d 784, 790; and *Comden v. Superior Court* (1978) 20 Cal.3d 906, 917-918 (dissenting opinion of Justice Manual.)

### **B. Case law re disqualification and special circumstances for prosecutors.**

See section V above, discussion of potential deficiencies and the cases cited therein.

## **VII. Approach In Other Jurisdictions (National Backdrop):**

### **A. ABA Model Rule 3.7.**

ABA Model Rule 3.7 is the Model Rules counterpart to current rule 5-210. There are two key differences. One is that rule 5-210 includes an option for obtaining a client's informed written consent to act as a witness. The second difference is that rule 5-210 is limited to cases presented to a jury while the Model Rule counterpart applies to any trial.

- B. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.7: Lawyer as Witness,” revised May 6, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_7.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_7.authcheckdam.pdf)

Thirty-seven states have adopted Model Rule 3.7 verbatim.<sup>1</sup> Twelve jurisdictions have adopted a slightly modified version of Model Rule 3.7.<sup>2</sup> Two states have adopted a substantially different version of Model Rule 3.7.”<sup>3</sup>

\*\*\*\*\*stopped here\*\*\*\*\*

### ***VII. Public Comment Received by the First Commission:***

The clean text of proposed rule 3.1 drafted by the first Commission and adopted by the Board to replace rule 5-210 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 5-210, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the first Commission’s proposed rule showing changes to rule 5-210 is also enclosed with the public comments received. However, given the Board’s charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and enforceable articulation of disciplinary standards,” a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

### ***VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:***

Bearing in mind the Commission’s Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and

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<sup>1</sup> The thirty-seven states are: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

<sup>2</sup> The twelve jurisdictions are: Arkansas, District of Columbia, Florida, Georgia, Mississippi, New York, North Dakota, Ohio, Oregon, South Dakota, Virginia, and Washington.

<sup>3</sup> The two states are: California and Texas.

enforceable articulation of disciplinary standards,” Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

1. Whether the rule’s prohibition against “seeking” employment should be removed as an unnecessary or ineffective addition to the protections against advertising misconduct added with the 1979 amendments.
2. Whether the rule’s introductory paragraph should retain the knowledge standard (“knows or should know”), which requires proof of the lawyer’s knowledge and may require the lawyer to be able to discern the client’s motivation.
3. Whether the rule should retain the malicious purpose element, which would require proof of both lack of probable cause and an improper purpose, and may require the lawyer to be able to discern the client’s motivation.
4. Whether the rule should add a provision specific to lawyers representing clients in a criminal proceeding or one that could result in incarceration to make clear that the rule is not intended to constrain the lawyer from defending the proceeding to ensure every element of the case is established.
5. As noted above in Section II.B.2 of this memo, the first Commission’s proposed Rule 3.1 was submitted to the California Supreme Court and, in a letter dated April 15, 2014, the Supreme Court referred the rule back to the State Bar for redrafting. The Court stated that the rule should be modified to limit its scope to “attorney conduct in proceedings before a tribunal.” The Court also stated that the rule should be modified to “retain the long-standing aspect of California law prohibiting attorneys from asserting claims, defenses, or contentions for an improper purpose or motive to harass or maliciously injure another as embodied in current rule 5-210.” If the drafting team considers utilizing the first Commission’s language, then the Court’s views should be considered.

#### **IX. Research Resources:**

- Business and Professions Code, section 6068, subdivisions (c) and (g)
- Code of Civil Procedure, section 128.7
- *Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576

- *Sorensen v. State Bar* (1991) 52 Cal.3d 1036 [277 Cal.Rptr. 858]
- *Zamos v. Stround* (2004) 32 Cal.4th 958 [12 Cal.Rptr.3d 54]

