

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 3.7 [5-210]**

### **Commission Drafting Team Information**

**Lead Drafter:** George Cardona

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### **I. CURRENT CALIFORNIA RULE**

#### **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. FINAL VOTES BY THE COMMISSION AND THE BOARD**

#### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.7 [5-210]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

**Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.7 [5-210]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

**III. COMMISSION'S PROPOSED RULE 3.7 (CLEAN)****Rule 3.7 [5-210] Lawyer as Witness**

- (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:
  - (1) the lawyer's testimony relates to an uncontested issue or matter;
  - (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 a trial before a jury, judge, administrative law judge or arbitrator. 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\* may be satisfied when the lawyer makes the required disclosure, and the client gives informed 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).

[3] Notwithstanding a client's informed written consent,\* courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. See, e.g., *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470 [175 Cal.Rptr. 918].

V. **COMMISSION'S PROPOSED RULE 3.7**  
**(REDLINE TO CURRENT CALIFORNIA RULE 5-210)**

Rule **3.7 [5-210] MemberLawyer** as Witness

- (a) A ~~member~~lawyer shall not act as an advocate ~~before a jury which will hear testimony from the member~~in a trial in which the lawyer is likely to be a witness unless:
- (A) ~~The~~(1)the lawyer's testimony relates to an uncontested issue or matter; ~~or~~
- (B) ~~The~~(2)the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
- (C) ~~(3) The member has~~the lawyer has obtained informed, written consent\* ~~offrom~~ 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:Comment**

~~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.~~

[1] This Rule applies to a trial before a jury, judge, administrative law judge or arbitrator. 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\* may be satisfied when the lawyer makes the required disclosure, and the client gives informed 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).

[\[3\] Notwithstanding a client's informed written consent,\\* courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. See, e.g., \*Lyle v. Superior Court\* \(1981\) 122 Cal.App.3d 470 \[175 Cal.Rptr. 918\].](#)

## **VI. 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 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 relate 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 a 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 was 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.)

## **VII. OCTC / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
(In response to 90-day public comment circulation):

1. OCTC supports this rule and its Comments.

RRC Response: No response required.

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

## **VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Six comments, including a comment from OCTC, were received and all agreed with the proposed rule. A public comment synopsis table, with the Commission’s responses to each comment, is provided at the end of this report.

## **IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

- 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 1/27/17]

- ABA Model Rule 3.7 is the 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 Model Rule 3.7 applies to any trial.
- Thirty-seven jurisdictions 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 jurisdictions have adopted a substantially different version of Model Rule 3.7.<sup>3</sup>

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<sup>1</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,

**X. 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 both jury and non-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 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.

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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 jurisdictions are: California and Texas.



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: Placing the concept in the black letter text highlights the limited scope of the rule. In addition, placing the concept in the text is the standard in the majority of jurisdictions that have adopted Model Rule 3.7.
  - Cons: There is no reason to change the approach of the current rule, which includes this limitation on the rule’s intended scope in its Discussion paragraphs.
5. Include a comment clarifying that the rule is limited to discipline and does not also govern civil disqualification. 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. (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: The rules are minimum standards of lawyer discipline. Courts have discretion in considering the rules when resolving public policy issues relating to disqualification, but a rule should not purport to bind a court’s discretion in this area. The proposed comment is consistent with current case law, which does not limit disqualification to situations falling within the scope of the disciplinary rule. Including the proposed comment provides notice that, in

connection with disqualification, lawyers need to look at relevant case law as well as the rule.

- Cons: That disqualification case law and the rule are not coextensive may lessen lawyer understanding of, and compliance with, the rule, and lessen the predictability of disqualification rulings. There is no reason lawyers or Courts should have to look beyond a rule adopted by the Board and approved by the Supreme Court.

## **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. See discussion under “Concepts Accepted,” Section IX.A.5.
  - Pros: See Cons under “Concepts Accepted,” Section IX.A.5.
  - Cons: See Pros under “Concepts Accepted,” Section IX.A.5.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

## **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.)

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

#### **Recommendation:**

That the Commission recommends adoption of proposed Rule 3.7 [5-210] in the form attached to this Report and Recommendation.

#### **Proposed Resolution:**

RESOLVED: That the Board of Trustees adopt proposed Rule 3.7 [5-210] in the form attached to this Report and Recommendation.

