Trial Counsel as Witness: The Code and the Model Rules

By Richard C. Wydick*

When may a lawyer serve as both trial counsel and as a witness in a law suit? The ABA Code of Professional Responsibility gives clear answers to that question, but critics have argued that some of the answers do not make sense. The proposed ABA Model Rules of Professional Conduct provide a new approach to the question. This article explores the new approach and explains why it is preferable to the Code's.

Introduction

Suppose you are a lawyer, on your way to lunch one day. While walking along the street, you see Pedestrian run over by Driver. A few months later, Driver asks you to defend him in the personal injury suit brought by Pedestrian. Driver has come to you because you are one of several good trial lawyers in town, not because of any prior relationship, nor because of the fortuity of your having seen the accident. Do the rules of legal ethics bar you from becoming Driver's trial counsel because you are a potential witness? Does the answer depend on whether your testimony would favor Driver's version of the facts rather than Pedestrian's version? Does the answer depend on whether other people witnessed the accident and could testify to the same things you saw? Would the problem be different if one of your law partners, rather than you, were to serve as Driver's trial counsel?

Or, suppose this case. As a lawyer, you regularly represent Distributor in business matters. Over the years you have gained Distributor's confidence and have become thoroughly familiar with the details of her business. One day you accompany her to

* Professor of Law, University of California, Davis; B.A., 1959, Williams College; LL.B., 1962, Stanford Law School. The author wishes to thank Roderic Cathcart, of the Class of 1982, University of California, Davis, School of Law, for his patient and thoughtful legal research.

negotiate a supply contract with Producer. In your presence, they confer, dicker, and reach an agreement. Later, their agreement turns sour. You expend some 450 hours advising Distributor about various aspects of her relationship with Producer. Ultimately, Producer sues Distributor, claiming that Distributor misrepresented a key fact at the negotiating session you attended. Distributor asks you to serve as her trial counsel in the suit. Does your status as a potential witness bar you from accepting? Again, does the answer depend on whether your testimony would favor Distributor rather than Producer? Does it depend on whether other observers were present at the negotiating session and heard the same things you did? Would the problem be different if one of your law partners, rather than you, were to serve as Distributor's trial counsel?

In the American Bar Association Model Code of Professional Responsibility (the Code), you could find answers to these questions under Canon 5, which governs conflicts of interest.[1] The answers would be fairly clear cut, but not all of them would make good sense. In 1977, the ABA appointed a commission to rethink and rewrite the Code.[2] In 1981, the commission presented its work to the bar as a Proposed Final Draft of the Model Rules of Professional Conduct (the Model Rules).[3]

The answers to some of the questions posed above would be

---

[1] MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

[2] The ABA Commission on Evaluation of Professional Standards is composed of distinguished lawyers, judges, law teachers, and leaders of the bar. Its Chairman is Robert J. Kutak, Esq., of Omaha, Nebraska, and its Reporter is Professor Geoffrey C. Hazard, Jr., of the Yale Law School.

[3] MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981). The format of the Model Rules is different from that of the Model Code. The Model Code is divided into Canons (general statements of principle), Disciplinary Rules (specific, mandatory rules), and Ethical Considerations (aspirational goals). In contrast, the Model Rules follow the format used by the American Law Institute in the Restatements of the Law. The Model Rules consist of specific rules, followed by Comments and Notes that explain the rules and discuss the authorities on which they are based. Some of the rules are imperative; the lawyer must follow them or be disciplined. Others are instructive; they give the lawyer a range of professional discretion. Still others are descriptive; they define the relationships between lawyers and other persons. *See* MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981), at 3.

The format of the Model Rules was approved by the American Bar Association House of Delegates in January, 1982. The substance is to be considered by the House of Delegates in August, 1982. L.A. Daily Journal, Jan. 27, 1982, at 1, col. 6.

different under the Model Rules than under the Code. The purpose of this article is to point out these differences in the hope that doing so will be useful to lawyers and judges, whether or not the Model Rules are adopted.

Part I of this article reviews the historical prohibition against serving as both trial counsel and witness. Part II discusses the provisions of the Code and the Model Rules. Part III discusses the hypothetical questions posed above and explains where and how the answers would be different under the Model Rules than under the Code.

I. Background of the Trial Counsel Witness Rule

A. Testimony on Behalf of the Client

Canon 19 of the 1908 American Bar Association Canons of Professional Ethics provided as follows:

> When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client.[4]

This was a rule of professional propriety, not evidence law. Under ancient evidence law, a litigant, and anyone else with a personal interest in the outcome of the case, was incompetent to testify at a trial.[5] The theory was that an interested witness was likely to lie, and that it was better not to hear him than to hear him and be misled.[6] When that rule was abandoned in the mid-1800s,[7] trial counsel became competent to testify,[8] but doubt was expressed about the propriety of testifying on behalf of a

---

[4] The ABA Canons of Professional Ethics were adopted in 1908 and remained in effect until they were replaced by the Model Code in 1970. They are reprinted in T. Morgan & R. Rotunda, Professional Responsibility, 1981 Selected Standards Supplement 461-71 (1981).

[5] *See* 2 J. Wigmore, Evidence §§ 575-577 (3d ed. 1940).

[6] *Id.* § 576.

[7] *See* C. McCormick, Handbook on the Law of Evidence § 65 (2d ed. 1972).

[8] Under modern evidence law, all persons are competent as witnesses if they promise to tell the truth and have personal knowledge (or expertise) about a relevant fact. Neither the trial judge nor a juror is competent as a witness at that trial, but there is no parallel rule to disqualify trial counsel. *Compare* Fed. R. Evid. 601-606 *with* Cal. Evid. Code §§ 700-704 (West 1966 and Cum. Supp. 1982). *See generally* C. McCormick, *supra* note 7, at §§ 68-69.

client. For instance, in *French v. Hall*,[9] French sued Hall to collect a $5,000 brokerage fee. Hall testified that he had never promised French anything. Then French's lawyer offered to testify that he had heard Hall admit the $5,000 promise. The trial judge refused to allow this, because the lawyer was also trial counsel for French. In reversing the trial judge, the Supreme Court said:

> There is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client. *In some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the practice, therefore, may very properly be discouraged;* but there are cases, also, in which it may be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong.[10]

This admonition was fashioned into a general rule in Canon 19: Generally, trial counsel should not testify on behalf of their own clients. But Canon 19 recognized two exceptions to the general rule. First, trial counsel could testify about "merely formal matters."[11] Courts split over whether this meant matters that were uncontested,[12] or matters relating to the technical, mundane tasks of attorneys, such as custody of an exhibit.[13] Second, as in *French v. Hall*, trial counsel could be a witness if the testimony was "essential to the ends of justice."[14] This came to mean that the testimony had to be vital, not just useful,[15] as where the lawyer was the only person who could supply a key fact.[16] Fur-

---

[9] 119 U.S. 152 (1886).

[10] *Id.* at 154-55 (emphasis added).

[11] ABA CANONS OF PROFESSIONAL ETHICS No. 19 (1908).

[12] *See, e.g.*, State v. Spencer, 186 Kan. 298, 349 P.2d 920 (1960) (prosecutor could testify about redeeming diamond rings from pawnshop when defendant admitted they were stolen and pawned).

[13] *See, e.g.*, Branom v. Smith Frozen Foods of Idaho, Inc., 83 Idaho 502, 365 P.2d 958 (1961) (trial counsel could testify that an exhibit, a jar of seed peas, was in the same condition at trial as when it was delivered to him).

[14] ABA CANONS OF PROFESSIONAL ETHICS No. 19 (1908).

[15] *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 50 (1931). The Formal Opinions are printed in ABA, OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES (1957) and in supplements to that volume [hereinafter cited as "ABA Formal Opinion ___ (19__)"].

[16] *See, e.g.*, American Trust Co. v. Fitzmaurice, 131 Cal. App. 2d 382, 386-87, 280 P.2d 545, 547-48 (1st Dist. 1955) (plaintiff's counsel was apparently the only witness to a key admission made by defendant).

ther, it meant that the need for the testimony had to be unforeseeable. If a lawyer should have foreseen the necessity at the outset, then he should have declined to serve as trial counsel.[17]

On its face, Canon 19 did not forbid a lawyer to testify when a different lawyer in the same firm was trial counsel.[18] Instead, a rule of vicarious disqualification was fashioned by case law. *Erwin M. Jennings Co. v. Di Genova*[19] held that if a lawyer can foresee that her testimony is essential to her client's cause, neither she nor her law partner should serve as the client's trial counsel. The *Di Genova* court said:

> If it be a wrong practice for an advocate in the conduct of a trial to be at once the advocate and a witness in the trial, we see no legal nor logical difference between the position of a partner who is the advocate in the cause and the partner who is a sharer in the fees obtained but who does not appear as an attorney in the conduct of the case.[20]

To support this conclusion, the court adopted and expanded an argument made by Professor Wigmore.[21] Wigmore had argued that the most potent rationale for Canon 19 was to avoid the appearance of impropriety — even if trial counsel do not lie to help their clients, the public may *think* they do.[22] *Di Genova* took Wigmore's argument one step farther: The public may also think that lawyers will lie to help *their partner's* clients.[23] Moreover, *Di Genova* said, this appearance of impropriety persists even if the testifying lawyer had agreed not to share the fee in the case.[24]

In 1931, three years after *Di Genova,* the ABA Committee on Professional Ethics also read vicarious disqualification into Ca-

---

[17] *See* ABA Formal Opinion 50 (1931), *supra* note 15 ("A lawyer cannot . . . properly accept employment in any matter in which he knows, or has reason to believe, his testimony will be essential to the prospective client's case.").

[18] *See* ABA CANONS OF PROFESSIONAL ETHICS No. 19 (1908).

[19] 107 Conn. 491, 141 A. 866 (1928).

[20] *Id.* at 493, 141 A. at 868.

[21] *Id.* at 493, 141 A. at 868-69.

[22] 6 J. WIGMORE, EVIDENCE § 1911, at 775-80 (Chadbourn rev. 1976).

[23] Erwin M. Jennings Co. v. Di Genova, 107 Conn. 491, 493, 141 A. 866, 868-69 (1928).

[24] "Proof of this fact [that an agreement not to share a fee existed] would not allay the public distrust; it would merely inject into the case another issue concerning the verity of the private agreement of the partners." *Id.* at 494, 141 A. at 869.

non 19.[25] Earlier that same year, the committee had ruled that lawyers in a firm should be treated as a single unit in conflict of interest situations; if a lawyer had a conflict of interest and could not take a case, no other lawyer in his firm could take the case either.[26] The Ethics Committee said the same principle should apply when one partner was trial counsel and the client needed another partner's testimony. As the lawyer cannot properly accept employment in any matter in which he knows he will be a material witness for the party seeking to employ him, his partner cannot properly accept employment for that party.[27]

A decade later, in 1941, the Ethics Committee softened its view by ruling that vicarious disqualification was not *automatically* required. Instead, each case should be governed by its own particular facts.[28] In the test case posed to the Ethics Committee, the testifying partner had a long and intimate familiarity with the client's legal affairs, and his testimony concerned a legal transaction that he had planned and executed. Further, the client would have been substantially disadvantaged by having to retain a different law firm for the trial. On these facts, the Ethics Committee ruled that it would be proper for one partner to serve as trial counsel while the other partner testified for the client.[29]

B. Testimony on Behalf of the Adversary

Canon 19 spoke only to trial counsel testifying "*for* his client."[30] It made no mention of the trial counsel who was a potential witness for the adversary. That situation was governed instead by Canon 6, the general provision on conflicts of interest,[31]

---

[25] ABA Formal Opinion 50 (1931), *supra* note 15.

[26] ABA Formal Opinion 33 (1931), *supra* note 15. For example, if an attorney once received confidential information from a client, then neither the lawyer nor any of his law partners could oppose that client in a later case in which the confidential information might be relevant.

[27] ABA Formal Opinion 50 (1931), *supra* note 15.

[28] ABA Formal Opinion 220 (1941), *supra* note 15.

[29] *Id.*

[30] ABA CANONS OF PROFESSIONAL ETHICS No. 19 (1980).

[31] ABA CANONS OF PROFESSIONAL ETHICS No. 6 (1908) provided as follows:

> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

which required lawyers to serve their clients with "undivided fidelity."[32] This posed an obvious problem for a trial counsel who might be called to the witness stand by the adversary. On one hand, he owed loyalty to his client's cause. On the other hand, he was obliged to tell the truth if sworn as a witness.

A good illustration of the problem came before the ABA Ethics Committee in 1938.[33] A lawyer was an eyewitness to a murder allegedly committed by X. The lawyer's partner was retained to defend X at the trial. The lawyer himself was scheduled to testify as a principal witness for the prosecution, and if the jury believed his testimony, X could have been convicted and executed. Because the partner might have been reluctant to attack the lawyer's credibility, or to argue to the jury that his testimony was false, the Ethics Committee ruled that Canon 6 forbade the partner to serve as X's trial counsel.[34]

II. Comparison of the Code with the Model Rules

A. What the Code Provides

In 1970, the Canons of Professional Ethics were replaced by the Model Code of Professional Responsibility.[35] The Code covers the trial counsel/witness problem with three Disciplinary Rules (DR).[36] The thrust of the rules is this:

> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

[32] *Id.*

[33] ABA Formal Opinion 185 (1938), *supra* note 15.

[34] *Id.*

[35] In August, 1969, the ABA House of Delegates adopted the Code, effective January 1, 1970. The Code is intended as a model for states and other bodies that have the authority to regulate the practice of law. The Code seeks to be both "an inspirational guide to the members of the profession and . . . a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards . . . ." Model Code of Professional Responsibility Preamble and Preliminary Statement (1981).

[36] Model Code of Professional Responsibility DR 5-101(B), DR 5-102(A),

1) If a potential client asks you to serve as trial counsel, and if it is obvious from the *outset* that you (or another lawyer in your office) ought to be a witness at the trial — on behalf of the client or the adversary —[37] then you must not serve as trial counsel, unless:

a) The testimony will relate solely to an uncontested matter; or

b) The testimony will relate solely to a formality unlikely to be in substantial dispute; or

c) The testimony will relate solely to the nature and value of legal services performed in the case by you or your firm; or

d) Refusal to serve as trial counsel will work a substantial hardship on the client because of the distinctive value of you or your firm as counsel in the particular case.[38]

2) If you agree to serve as trial counsel, and it *later* becomes obvious that you (or another lawyer in your office) ought to be a witness *on behalf of your client,* you must withdraw as trial counsel, unless one of the same four exceptions applies.[39]

---

and DR 5-102(B) (1981). The Model Code contains three kinds of provisions. First, the Canons are brief, general statements of principle. (For example, Canon 4 states that "A Lawyer Should Preserve the Confidences and Secrets of a Client.") Second, the Disciplinary Rules are specific, mandatory standards. In a jurisdiction that has adopted the Model Code, a lawyer is subject to professional discipline for violating a Disciplinary Rule. Third, the Ethical Considerations are presented as aspirational goals. They are said to represent the objectives toward which every lawyer should strive. Conduct that falls short of these goals is not grounds for discipline, unless it also violates a Disciplinary Rule. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1981). The Ethical Considerations have been criticized as too mixed a bag. *See* MODEL RULES OF PROFESSIONAL CONDUCT, (Chairman's Introduction) at iv-v (Proposed Final Draft 1981). Some of the Ethical Considerations simply restate what is said in the Disciplinary Rules. Others explain, comment on, or state the rationale for Disciplinary Rules. Still others recommend conduct that goes beyond what is required in the Disciplinary Rules. Finally, some Ethical Considerations cover ground that is untouched in the Disciplinary Rules. *Id.*

[37] For simplicity's sake, this article speaks of only two types of testimony — testimony on behalf of the client, and testimony on behalf of the adversary. But the Disciplinary Rules also cover testimony on behalf of other litigants, such as co-parties, interveners, and third-party defendants. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) and DR 5-102(B) (1981).

[38] *See id.* DR 5-101(B).

[39] *Id.* DR 5-102(A).

3) If you agree to serve as trial counsel, and it *later* becomes obvious that you (or another lawyer in your office) may be called as a witness *on behalf of the adversary,*[40] you may continue as trial counsel until it becomes apparent that the testimony may *prejudice* your client.[41]

Under this scheme, if the client needs your testimony, it makes no difference *when* the need for the testimony becomes apparent.[42] But timing does make a difference if the testimony will be on behalf of the adversary. If the need is obvious from the outset, you must not accept employment as trial counsel (unless one of the four exceptions applies). But, if the need becomes obvious only later, you may continue as trial counsel until it becomes apparent that the testimony may prejudice your client.[43]

B. The Reasons Behind The Rules

Ethical Consideration (EC) 5-9 states the reasons behind the three Disciplinary Rules:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If the lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. 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.[44]

Over the years, numerous commentators have pointed out that the reasons listed in EC 5-9 are overlapping, sometimes conflicting, and not entirely convincing.[45] One way to sort out the rea-

---

[40] *See* note 37 *supra.*

[41] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) (1981).

[42] *Id.* DR 5-101(B) and DR 5-102(A).

[43] *Id.* DR 5-101(B) and DR 5-102(B). With respect to the timing question, *see generally* Sutton, *The Testifying Advocate,* 41 TEX. L. REV. 477, 484-91 (1963).

[44] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 (1981).

[45] *See* Brown & Brown, *Disqualification of the Testifying Advocate—A Firm Rule?* 57 N.C.L. REV. 597, 608-13 (1979); Enker, *The Rationale of the Rule That Forbids a Lawyer to Be Advocate and Witness in the Same Case,*

sons is to look at who may be harmed if a trial counsel (or another lawyer from the same office) serves as a witness. Sometimes there may be harm to the client. Other times there may be harm to the adversary. Further, there may be an appearance of impropriety that could harm the legal profession or the judicial system. These three kinds of harm are considered separately below.

1. Harm to the Client

EC 5-9 identifies two potential kinds of harm to the client where you, as trial counsel, take the witness stand on the client's behalf. First, you may be ineffective as a witness[46] because as trial counsel, you are obviously partisan. Your testimony is open to attack for bias, and your client is placed in a worse position than if the testimony had been presented through a disinterested witness.[47]

This "ineffective witness" rationale offers sound support for the trial counsel/witness rule, but is subject to two limitations. First, barring your service as trial counsel may not transform you into a disinterested witness. You may have a long-standing

---

1977 A.B.F. RES. J. 455, 456-465; Sutton, *supra* note 43 at 480-84 (1963); Comment, Comden v. Superior Court: *Disqualification of the Testifying Advocate,* 67 CALIF. L. REV. 824, 827-834 (1979); Comment, *The Attorney as Both Advocate and Witness,* 4 CREIGHTON L. REV. 128, 143-44 (1970). Note, *The Advocate-Witness Rule: If Z, then X. But Why?* 52 N.Y.U. L. REV. 1365, 1384-97 (1977) [hereinafter cited as *The Advocate-Witness Rule*]; Note, *Professional Ethics—Disciplinary Rule 5-102(A) — Disqualification of Law Firms Under the Attorney-Witness Rule,* 54 TUL. L. REV. 521, 524-27 (1980) [hereinafter cited as *Disqualification of Law Firms*]; Comment, *Disqualification of Counsel Under the Advocate-Witness Rule: Fair or Futile?* 48 U. CIN. L. REV. 794, 796-98 (1979); Comment, *The Rule Prohibiting an Attorney From Testifying at Client's Trial: An Ethical Paradox,* 45 U. CIN. L. REV. 268, 269-271 (1976) [hereinafter cited as *An Ethical Paradox*].

[46] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 (1981).

[47] In explaining EC 5-9, ABA Formal Opinion 339 (1975), *supra* note 15, at 2, states:

> The fact that a witness may be interested, even financially, in the outcome of the case, does not necessarily mean that he will testify falsely or will color or slant his testimony to favor the party with whom his interest rests. But given a choice between two or more witnesses competent to testify as to contested issues, and other factors being equal, a client's cause is best served by having the testimony from the witness not subject to impeachment for interest in the outcome of the trial.

relationship with the client, and you may have advised her on the very matter in litigation. If the relationship alone demonstrates bias, perhaps your client is not significantly worse off if you serve also as trial counsel.[48] Second, the ineffective witness rationale does not allow a fully informed client to waive the prohibition. If your client understands that a dual role may lessen your credibility as a witness, are there not some instances in which the client should be allowed to decide whether that does or does not outweigh the benefits of having you as trial counsel?[49]

The second kind of possible harm identified by EC 5-9 arises where you, as trial counsel, testify on your client's behalf, and are put in the "unseemly and ineffective" position of arguing your own credibility.[50] Moreover, witnesses are supposed to be objective reporters of facts, but advocates are supposed to be vigorous champions of their client's position. This inconsistency may render you ineffective in either role.[51]

This "inconsistent roles" rationale also has its limitations. First, what about waiver by a fully informed client? If the client truly understands the extent to which inconsistency of roles may hamper your effectiveness as witness for her cause, are there not some instances when she should be allowed to decide whether that is outweighed by the benefits of having you as trial counsel?[52] Second, the inconsistent roles rationale seems unpersuasive if different members of the same firm serve as witness and trial counsel.[53] If you are trial counsel, your modesty (or lack of it) may spoil your efforts to convince the trier of fact that your testimony ought to be believed. But what if another lawyer from your office serves as trial counsel? Lawyers routinely argue for the credibility of *clients* with whom they have close personal and financial ties. Is the situation markedly different when the witness is another lawyer from the same office?

2. Harm to the Adversary

The traditional arguments suggest several ways in which an

---

[48] *See* Brown & Brown, *supra* note 45, at 609-11.
[49] *See* Enker, *supra* note 45, at 457.
[50] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 (1981).
[51] *Id.*
[52] *See The Advocate-Witness Rule, supra* note 45, at 1396-97.
[53] *Id.* at 1389.

adversary can be harmed when you, as trial counsel, serve also as a witness on behalf of your client. First, an adversary may be inhibited in challenging your credibility as a witness[54] because professional courtesy — deference to a colleague at the bar — may cause opposing counsel to hold back in cross-examination and impeachment.[55] But if this is indeed a problem, the trial counsel/witness rule does not solve it. You remain a colleague at the bar, whether or not you serve as trial counsel.[56] Moreover, counsel for the adversary is unlikely to elevate professional courtesy over the ethical duty to be zealous in protecting his client's interests.[57]

Second, an adversary may be harmed if your role as trial counsel makes you *too* effective as a witness: the trier of fact may be dazzled by your performance as advocate and thus give undue credence to your words from the witness stand.[58] Note

---

[54] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 (1981).

[55] In International Elec. Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975), the court observed: "It is difficult, indeed, to cross-examine a witness who is also an adversary *counsel* concerning matters of fact, and, more particularly, on matters impeaching his credibility, within the bounds of propriety and courtesy owed to professional colleagues." *Id.* at 1294.

[56] *See An Ethical Paradox, supra* note 45, at 271.

[57] Under MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 and DR 7-101(A)(1) (1981) a lawyer must represent a client zealously within the bounds of the law. The duty of zeal does not license a lawyer to intentionally and needlessly degrade *any* witness, whether the witness is a lay person or another lawyer. *See id.* DR 7-106(C)(2). The duty of professional courtesy is an appropriately limited one, set forth in *id.* EC 7-37:

> In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feelings should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Id.

As the court noted in Greenbaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348 (D. Colo. 1976):

> Opposing counsel might be hesitant to cross-examine a brother of the bar quite as harshly as he would a lay witness. We believe, however, that the duty of an attorney to his client, to represent the client competently and zealously as required by Canons 6 and 7, easily outweighs and overcomes any professional loyalty.

Id. at 1354.

[58] One variant of this argument is commonly accepted in criminal litigation.

that this argument can as easily cut the opposite way — if the trier of fact finds you obnoxious as an advocate, your testimony may receive too little weight. Further, the argument is at odds with the ineffective witness rationale,[59] which assumes that the trier of fact will discount your testimony because of probable bias. Finally, one respected commentator suggests that the argument is simply unrealistic:

> Whenever a lawyer's testimony is given unusual weight by a particular jury or judge, the lawyer's demeanor and his standing in the community and similar factors are likely responsible. The circumstance that he is both advocate and witness does not in itself enhance his standing as a witness or make his advocacy more appealing. The appearance of a particular lawyer as either a witness or an advocate may be influential with judge and jury, by reason of reputation or personal magnetism, but it is difficult to see how the fact that he simultaneously appears as both could increase his influence on the trier of fact.[60]

Third, an adversary may be harmed because your dual role may impel violation of the rule against asserting personal opinions when arguing the case to the trier of fact.[61] Part of this rea-

---

Generally, a prosecutor should not testify on behalf of the prosecution because jurors "will accord far greater weight to his testimony than to that of an ordinary witness, by virtue of the prosecutor's personal prestige and official status." People v. Langdon, 91 Ill. App. 3d 1050, 415 N.E.2d 578, 583 (1980). *See* Robinson v. United States, 32 F.2d 505, 510 (8th Cir. 1928); State v. Mercer, 625 P.2d 44, 48 (Mont. 1981). For that reason, careful prosecutors try to have a third party present when they interview witnesses, so that the third party's testimony will be available if needed for impeachment. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION § 3.1(f) (Approved Draft 1971). Wigmore notes, but seems unconvinced by, a second variant of the argument: Where trial counsel testifies, the trier of fact may mistakenly give testimonial credit to his subsequent speeches as advocate. *See* 6 J. WIGMORE, EVIDENCE § 1911, at 780 (Chadbourn Rev. 1976).

[59] *See* text accompanying notes 48-49 *supra*.

[60] Sutton, *supra* note 45, at 480.

[61] *See* People *ex rel.* Younger v. Superior Court, 86 Cal. App. 3d 180, 197, 150 Cal. Rptr. 156, 166 (4th Dist. 1978). The rule about personal opinions and beliefs is stated in MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(1981).

> In appearing in his professional capacity before a tribunal, a lawyer shall not . . . assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

soning is circular. EC 7-24 explains that personal opinion is "improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony."[62] Thus, to the extent that trial counsel may properly testify to factual matters, there is no reason to apply the rule against personal opinion when those factual matters are argued to the trier of fact.

EC 7-24 goes on to explain why personal opinion is improper as to other than factual matters (for example, personal opinion about the "justness of the client's cause"). It is because, "were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client."[63] This part of the rule is technical, perhaps hyper-technical,[64] and there seems to be no reason to presume that it will be violated more frequently by lawyers who testify than by lawyers who do not testify.

Note one final point about the three potential harms to the adversary. Each assumes that the witness and the trial counsel are the same person. But none seems likely to occur if the witness and the trial counsel are different lawyers from the same law office. Thus, none of the three seems persuasive to support the vicarious disqualification feature of the Disciplinary Rules.

3. Harm to the Legal Profession or the Judicial System

EC 5-9 does not mention an additional reason some courts have used to support the trial counsel/witness rule. It is the reason found persuasive by Professor Wigmore.[65] The public may think, correctly or not, that lawyers will lie to help their clients, and this appearance of impropriety can harm the legal profession and the judicial system.[66] This view draws on the Code's

---

Id.

[62] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-24 (1981).

[63] *Id.*

[64] *Compare* United States v. Garza, 608 F.2d 659 (5th Cir. 1979), *with* United States v. Alanis, 611 F.2d 123 (5th Cir. 1980), *cert. denied,* 445 U.S. 955 (1981). *See generally* Annot., 88 A.L.R.3d 449 (1979); Annot, 41 A.L.R. Fed. 10 (1979).

[65] *See* 6 J. WIGMORE, EVIDENCE § 1911, at 775-88 (Chadbourn rev. 1976); text accompanying notes 21-24 *supra.*

[66] The California Supreme Court stated the argument this way in Comden v. Superior Court, 20 Cal. 3d 906, 912, 576 P.2d 971, 973, 145 Cal. Rptr. 9, 11 *cert. denied,* 439 U.S. 981 (1978):

> [W]e must be mindful of the possibility that testimony by a mem-

catch-all provision, Canon 9: "A lawyer should avoid even the appearance of impropriety."[67]

Like the ineffective witness rationale, this one loses force when the lawyer has served the client prior to the lawsuit at hand. If the lawyer has a long-standing relationship with the client, or if he acted as the client's advisor in the transaction in dispute, then his testimony may be suspect. But the trial counsel/witness rule cannot erase that suspicion. It will persist even if the lawyer does not serve as the client's trial counsel.[68]

Further, the precept of Canon 9 should not be invoked uncritically. As the court observed in *International Electronics Corp. v. Flanzer:*[69]

> Almost every party to a civil lawsuit (and his agents) is suspect of stretching the truth for his own cause, and to the most cynical, the very service of the complaint is a prelude to perjury. When we deal with what the public thinks, we must be careful not to accept the view of the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct.

The proper use of Canon 9 is to caution lawyers against conduct that in appearance (but not reality) violates a rule. (Do not bend over in your neighbor's canteloupe patch, even to tie your shoe.) But it should not be used "promiscuously as a convenient tool . . . when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules."[70]

> ber of trial counsel's firm may lead the public to be skeptical of lawyers as witnesses, thereby diminishing the public's respect and confidence toward the profession. 'Where doubt may becloud the public's view of the ethics of the legal profession and thus impugn the integrity of the judicial process, it is the responsibility of the court to ensure that the standards of ethics remain high.' (U.S. *ex rel.* Sheldon El. Co. v. Blackhawk Htg. & Plmg. (S.D.N.Y. 1976) 423 F. Supp. 486, 489.)

[67] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981).

[68] *See* Brown & Brown, *supra* note 45, at 612-13.

[69] 527 F.2d 1288, 1294 (2d Cir. 1975).

[70] *Id.* at 1295. *See* ABA Formal Opinion 342 n.17 (1975), *supra* note 15; O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline,* 62 MARQ. L. REV. 313 (1979).

C. How the Code Has Been Interpreted

1. "Ought to be a Witness"

Disciplinary Rules 5-101(B) and 5-102(A) come into play only if the lawyer "ought to be called as a witness."[71] The ambiguity of that phrase has created a split of authority. Most courts interpret "ought to be called as a witness" to mean that the lawyer is a "necessary" or "indispensable" witness — the lawyer is the only person available to testify about a crucial fact.[72] Under this view, when the lawyer's potential testimony is on the client's behalf, the lawyer and client together decide whether the testimony is necessary.[73] They are in the best position to make that decision, and their judgment should not ordinarily be second guessed by the trial judge.[74] This approach has one clear advantage. It minimizes the chances that the adversary will be able to use a disqualification motion to deprive the client of chosen trial counsel.[75]

A few courts, however, have interpreted "ought to be a witness" to mean that the lawyer is "potentially" or "conceivably" a witness. For instance, in *Comden v. Superior Court*,[76] actress Doris Day contracted with a distributing company, allowing use of her name in marketing pet food. A dispute arose under the contract, and she hired a corporate lawyer to advise her in negotiations with the distributing company. When the negotiations subsequently failed, she sued the company for breach of contract, choosing one of her attorney's law partners to serve as

---

[71] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) and DR 5-102(A) (1981). *See* text accompanying notes 36-39 *supra*.

[72] *See* Davis v. Stamler, 494 F. Supp. 339, 341-43 (D.N.J. 1980); *accord* Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp., 546 F.2d 530, 538-39 n.21 (3d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977); J. P. Foley & Co. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975).

[73] *See* Davis v. Stamler, 494 F. Supp. 339, 342 (D.N.J. 1980); J. D. Pflaumer, Inc. v. United States Dept. of Justice, 465 F. Supp. 746, 747-48 (E.D. Pa. 1979).

[74] *See* Davis v. Stamler, 494 F. Supp. 339, 342 (D.N.J. 1980).

[75] If the adversary moves to disqualify, the client can oppose the motion on the ground that his lawyer will not be a necessary witness on his behalf. But if the trial judge denies the disqualification motion for that reason, the lawyer can be forbidden to testify on the client's behalf (except as to matters that would fall within one of four exceptions to DR 5-101(B)). *See* J. D. Pflaumer, Inc. v. United States Dept. of Justice, 465 F. Supp. 746, 749 (E.D. Pa. 1979).

[76] 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9, *cert. denied*, 439 U.S. 981 (1978).

trial counsel.[77]

At a preliminary stage of the case, Miss Day filed a declaration of the corporate lawyer about a statement he had heard at one of the negotiating sessions. If true, the statement would help prove that the distributing company had breached the contract.[78] The corporate lawyer was not the only available witness. While others present at the session denied that the statement had been made, still others confirmed that it had.[79]

The distributing company moved to disqualify Miss Day's trial counsel on the ground that one of his law partners, the corporate lawyer, was likely to be a witness at trial.[80] Miss Day resisted the motion, arguing that subsequent discovery could make the corporate lawyer's testimony unnecessary.[81] Indeed, Miss Day offered to retain new trial counsel if it turned out that the corporate lawyer would have to testify at trial.[82] But the trial judge disqualified her trial counsel, saying: "I cannot see how I can say with any degree of security or in good conscience that [the corporate lawyer] will not be called as a witness."[83]

---

[77] Comden v. Superior Court, 20 Cal. 3d 906, 911-13, 576 P.2d 971, 973, 145 Cal. Rptr. 9, 11, *cert. denied,* 439 U.S. 981 (1978).

[78] Comden v. Superior Court, 20 Cal. 3d 906, 911-13, 576 P.2d 971, 973, 145 Cal. Rptr. 9, 11, *cert. denied,* 439 U.S. 981 (1978).

[79] Comden v. Superior Court, 20 Cal. 3d 906, 911-13, 576 P. 2d 971, 973, 145 Cal. Rptr. 9, 11, *cert. denied,* 439 U.S. 981 (1978).

[80] Comden v. Superior Court, 20 Cal. 3d 906, 911-13, 576 P. 2d 971, 973, 145 Cal. Rptr. 9, 11, *cert. denied,* 439 U.S. 981 (1978). The distributing company's motion was based on CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-111(A)(4) (1978), which was, at that time, identical in substance to the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) and DR 5-102(A). After the *Comden* decision, the California rule was changed. *See* note 129 *infra.*

[81] Comden v. Superior Court, 20 Cal. 3d 906, 912, 576 P.2d 971, 973, 145 Cal. Rptr. 9, 11, *cert. denied,* 439 U.S. 981 (1978). The issue for trial was whether the distributing company had breached the contract, not whether the statement had been made at the negotiation session. The statement was evidence of the breach, but discovery could provide other, independent evidence of the breach. 20 Cal. 3d at 912, 576 P.2d at 973, 145 Cal. Rptr. at 11.

[82] Comden v. Superior Court, 20 Cal. 3d 906, 912, 576 P.2d 971, 973, 145 Cal. Rptr. 9, 11, *cert. denied,* 439 U.S. 981 (1978). If the corporate lawyer's testimony had been needed, it would undoubtedly have been on behalf of Miss Day, not on behalf of the distributing company. Nothing in the case suggests that the distributing company would have called the corporate lawyer to testify on its behalf.

[83] Comden v. Superior Court, 20 Cal. 3d 906, 912, 576 P.2d 971, 973, 145 Cal. Rptr. 9, 11, *cert. denied,* 439 U.S. 981 (1978).

Miss Day sought a writ of mandate to overturn the trial judge's ruling. In California, a writ will issue only if the trial judge is patently wrong.[84] The California Supreme Court refused to issue the writ, implying that the trial judge was not patently wrong in disqualifying Miss Day's counsel on the ground that the judge could not be certain that the corporate lawyer's testimony would be unnecessary.[85] In other words, "*ought* to be a witness" can be read to mean "*might* be a witness."[86]

Furthermore, according to the California Supreme Court, it is the trial judge, not the client, who decides whether the client needs the lawyer's testimony.[87] To make that decision, the trial judge considers "all pertinent factors," including the importance of the disputed issue, the weight the lawyer's testimony would carry, and the availability of other witnesses or documents to resolve the issue.[88]

The fundamental disadvantage of the approach taken in *Comden* is that it increases the chances that a client's chosen trial counsel can be unhorsed by an adversary's motion to disqualify. Indeed, after *Comden*, California lawyers began to use motions to disqualify as a routine tactical weapon in both civil and crimi-

---

[84] One common formulation of the rule is that a writ of mandate will not issue to control a trial judge's discretion, but if the facts are such that discretion could be exercised only one way, then a writ can be issued. *See* 5 B. WITKIN, CALIFORNIA PROCEDURE 3856-57 (1971).

[85] *See* Comden v. Superior Court, 20 Cal. 3d 906, 913, 576 P.2d 971, 974, 145 Cal. Rptr. 9, 12, *cert. denied*, 439 U.S. 981 (1978).

[86] *See also* Supreme Beef Processors, Inc., v. American Consumer Indus., Inc., 441 F. Supp. 1064 (N.D. Tex. 1977). There the trial judge discovered, just before the trial was to start, that a law partner of plaintiff's trial lawyer would be testifying on plaintiff's behalf about some business negotiations that had preceded the lawsuit. The trial judge disqualified plaintiff's trial counsel and issued this sweeping command to lawyers in future cases:

> So that this problem will not arise again, all attorneys with cases on my docket shall be required to notify the Court as soon as it appears that they or members of their firms have any testimony that *could conceivably* be used at trial. The Court should be notified regardless of whether the individual attorney believes one of the four exceptions specified in DR 5-101(B) applies.

Id. at 1069 (Emphasis in original).

[87] *See* Comden v. Superior Court, 20 Cal. 3d 906, 913, 576 P.2d 971, 974, 145 Cal. Rptr. 9, 12, *cert. denied*, 439 U.S. 981 (1978).

[88] *See* Comden v. Superior Court, 20 Cal. 3d 906, 913, 576 P.2d 971, 974, 145 Cal. Rptr. 9, 12, *cert. denied*, 439 U.S. 981 (1978).

nal litigation.[89] Ultimately, the California Supreme Court had to change California's version of the trial counsel/witness rule to undo the ill effects of *Comden*.[90]

2. The "Formality" and "Uncontested Matter" Exceptions

The Code provides four exceptions to the trial counsel/witness rule.[91] The first one allows testimony by a trial counsel if it will "relate solely to an uncontested matter."[92] The second allows the testimony if it 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."[93]

These two exceptions overlap, and there is scant authority to explain how they differ, if they do.[94] One explanation for the

---

[89] *See, e.g.*, Harris v. Superior Court, 97 Cal. App. 3d 488, 158 Cal. Rptr. 807 (1st Dist. 1979); People *ex rel.* Younger v. Superior Court, 86 Cal. App. 3d 180, 150 Cal. Rptr. 156 (4th Dist. 1978) (motion to disqualify entire prosecutorial staff of district attorney's office). *See also* Dreibelbis, *Supplemental Report and Recommendations of Board* [of Governors, State Bar of California] *Committee on Lawyer Services, Proposed Amendments to Rule 2-111(A)(4), Rules of Professional Conduct (Withdrawal from Employment—Lawyer Acting as Witness), reprinted in* CONFLICTS OF INTEREST AND DISQUALIFICATION 113, 121-24 (Cal. Cont. Ed. Bar 1980). After *Comden*, the State Bar of California began to hear complaints from judges, lawyers, and the public that the trial counsel/witness rule was frustrating the practice of preventive law, was disrupting clients' choice of counsel, was delaying or thwarting litigation, and was making justice more expensive when clients were forced to change counsel in midstream. *See id.* at 121. *See generally* Brown & Brown, *supra* note 45; *Disqualification of Law Firms, supra* note 45.

[90] *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-111(A)(4) (as amended effective Novemeber 1, 1979). The new California rule is explained at note 129 *infra*.

[91] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(1)-(4) and DR 5-102(A) (1981).

[92] *Id.* DR 5-101(B)(1).

[93] *Id.* DR 5-101(B)(2).

[94] Canon 19 of the ABA CANONS OF PROFESSIONAL ETHICS (1908) provided that trial counsel could testify on behalf of a client as to a "merely formal matter, such as the attestation or custody of an instrument and the like." *See also* text accompanying notes 11-13 *supra*. Some courts interpreted that language quite narrowly. For example, in Levas v. Dewey, 33 Wash. 2d 232, 213 P.2d 933 (1950), the Supreme Court of Washington said that an attorney could testify about the execution and delivery of some legal documents, because those were mere formalities. But, the court said, the attorney should not have testified about the terms of an oral contract that accompanied the execution and delivery of the legal documents; that was not a formality, even though

paucity of authority is that modern trial practice allows litigants to avoid the need for testimony by using other techniques to dispose of uncontested matters. These techniques include drafting careful pleadings, using requests for admissions of fact, stipulating on points not in dispute, honing the issues in the final pretrial order, and using the doctrine of judicial notice where it is appropriate. When these techniques do not obviate the need for trial counsel's testimony, then either or both of the exceptions ought to allow the testimony unless there is reason to doubt its accuracy and credibility.[95]

3. The "Services Rendered" Exception

The Code's third exception to the trial counsel/witness rule allows a trial counsel's testimony if it will relate "solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client."[96]

One illustration of the usefulness of this exception is private antitrust litigation. Section 4 of the Clayton Act provides that a victorious treble damage plaintiff is entitled to collect reasonable

---

there was "no substantial conflict of evidence regarding the oral contract," and even though the adversary did not bother to cross-examine the attorney about the terms of the oral contract. *Id.* at 233, 213 P.2d at 934-35. The authors of the Code of Professional Responsibility may have been seeking to avoid this kind of narrow interpretation when they drafted DR 5-101(B)(1) and (2). *See generally* Sutton, *supra* note 45, at 491-92.

[95] *See* Sutton, *supra* note 45, at 491-92. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1405 (1977) provides a good illustration. The question posed was whether a lawyer in a state attorney general's office could represent a state agency at an administrative hearing. The purpose of the hearing was to determine whether an employee of the agency had been properly terminated for cause. A different lawyer in the state attorney general's office had prepared the legal documents that effected the termination, and the agency needed that lawyer's testimony to establish that it had followed the proper procedures. The Ethics Committee ruled that DR 5-101(B)(2) was applicable. The first lawyer could represent the agency, and the second lawyer could testify, provided that the testimony was limited "solely to the formal procedural steps followed to terminate the employee." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1405 (1977). *See also* Haaek v. Great Atl. & Pac. Tea Co., 603 S.W.2d 645, 656 (Mo. Ct. App. 1980) (partner of client's trial counsel could testify to dates that certain negotiations were held, where adversary admitted negotiations and did not challenge accuracy of testimony about dates).

[96] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(3) (1981).

attorney fees from the defendant.[97] At the close of the trial on the merits, if the plaintiff wins, the trial judge must determine how much to award in attorney fees.[98] Among the many factors that judges consider are the allocation of tasks and responsibilities among the various lawyers who worked on the case, the number of hours each lawyer spent, and the precise nature of the work each lawyer did.[99] Obviously the plaintiff's lawyers themselves are the most knowledgeable source of this information. It makes good sense to allow them to present their information to the court, either in live testimony or by affidavit. It would be wasteful to require the plaintiff to hire a new band of lawyers to act as advocates at the fee-setting stage of the case. Further, since the trial judge has usually lived through the case along with the lawyers, the trial judge's own personal knowledge helps to assure that counsel's representations will receive neither greater nor lesser weight than they deserve.[100]

4. The "Substantial Hardship" Exception

The Code's fourth exception allows you to be trial counsel and to testify about "any matter" if your client would suffer "substantial hardship" in getting substitute trial counsel because of your "distinctive value" as trial counsel in the particular case.[101]

For instance, suppose you represent the patentee in a complex infringement suit involving genetic engineering. During five years of pretrial discovery, you have immersed yourself in the law of patents as it relates to genetic engineering, and you have developed an encyclopedic knowledge of the facts and legal theories relevant to the case. Then, shortly before trial, you find that you must be a witness on some contested issue. The fourth exception ought to apply. Your knowledge of the case has given you a "distinctive value," and to replace you as trial counsel would impose a "substantial hardship" on your client because of

---

[97] *See* 15 U.S.C. § 15 (1980).

[98] *See, e.g.*, International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1273-78 (8th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1980).

[99] *See* Knutson v. Daily Review, Inc., 479 F. Supp. 1263, 1268-72 (N.D. Cal. 1979).

[100] The *Knutson* case, *id.*, offers a good illustration. The trial judge used his intimate knowledge of the case to assess the work done and the fees claimed by plaintiffs' counsel. *Id.* at 1272-79.

[101] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(4) (1981).

the delay and the cost of bringing a substitute lawyer up to your level of sophistication.[102]

If the substantial hardship exception were liberally applied by the courts, it would remove much of the sting from the trial counsel/witness rule. But the courts have been far from liberal. For example, in *Draganescu v. First National Bank of Hollywood,*[103] the court disqualified a lawyer whose testimony was needed at trial on behalf of his clients. The clients were Romanians. They opposed the disqualification, arguing that their lawyer was "uniquely qualified" to represent them because he spoke Romanian and had many years experience in representing Romanian clients. Further, they argued, he was representing them for a contingent fee, and "other lawyers are reluctant to take cases involving Romanians on a contingent fee basis."[104] The court was unmoved. If the clients needed someone able to speak their language, they could hire the lawyer as a translator, but not as a lawyer. Further, the court found no special value in the lawyer's years of experience with Romanian clients, and apparently it simply disbelieved their plea that other lawyers would not represent them for a contingent fee. In short, there was neither "distinctive value" nor "substantial hardship," and the exception therefore did not apply.[105]

The same hard-boiled attitude prevailed in *United States ex rel. Sheldon Electric Co. v. Blackhawk Heating & Plumbing*

---

[102] *See* ABA Formal Opinion 339 (1975), *supra* note 15. In this opinion, the Ethics Committee offers other illustrations of situations in which the "substantial hardship" exception ought to apply. One is where

> a long or extensive professional relationship with a client may have afforded a lawyer, or a firm, such an extraordinary familiarity with the client's affairs that the value to the client of representation by that lawyer or firm in a trial involving those matters would clearly outweigh the disadvantages of having the lawyer, or a lawyer in the firm, testify to some disputed and significant issue.

Id. at 3. Another example suggested by the Committee is where a trial counsel gains "knowledge of misconduct of a juror during the trial of a case." *Id.* In that situation, the lawyer ought to be allowed to testify about the misconduct without having to withdraw as trial counsel. *Id.*

[103] 502 F.2d 550 (5th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975).

[104] Draganescu v. First Nat'l Bank of Hollywood, 502 F. 2d 550, 552 (5th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975).

[105] Draganescu v. First Nat'l Bank of Hollywood, 502 F. 2d 550, 552 (5th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975).

Co.[106] There, the plaintiff needed the testimony of a partner in the law firm that was acting as plaintiff's trial counsel. On the very day of trial, the defendant moved to disqualify the law firm. The plaintiff argued that the law firm had represented the plaintiff for ten years and had worked for some 450 hours on the matters that gave rise to its suit against the defendant. But the court disqualified the law firm, stating that the facts did not establish the "distinctive value" required by the exception.[107]

A few cases do recognize "distinctive value" in a law firm's long involvement with the client and with the case at hand.[108] But the prevailing view is to the contrary.[109] This rigidity plays right into the hands of a litigant who wants to delay and harass. Through a motion to disqualify opposing counsel, such a litigant can put off an impending trial and often saddle the opponent with enormous added expense.[110]

---

[106] 423 F. Supp. 486 (S.D.N.Y. 1976).

[107] *Id.* at 490. *Accord* Supreme Beef Processors, Inc. v. American Consumer Indus., Inc., 441 F. Supp. 1064, 1068-69 (N.D. Tex. 1977) (substantial hardship exception is to be "very narrowly construed" and generally applies only to legal specialists, such as patent lawyers).

[108] *See, e.g.*, Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1352-55 (D. Colo. 1976). *Cf.* Miller Elec. Constr., Inc. v. Devine Lighting Co., 421 F. Supp. 1020 (W.D. Pa. 1976) (ruling on disqualification motion postponed to see if discovery would make lawyer's testimony unnecessary). *See also* Harris v. Superior Court, 97 Cal. App. 3d 488, 158 Cal. Rptr. 807 (1st Dist. 1979), in which the appeals court held that the trial judge had abused his discretion by granting defendant's motion to disqualify plaintiffs' lawyer. The plaintiffs said that lawyer was the only one they knew and trusted, that he was representing them for a contingent fee, that they had no money to pay a regular legal fee, and that they would either have to represent themselves or abandon their case if he were disqualified. That, said the appeals court, was "substantial hardship."

[109] In addition to *Draganescu* and *Sheldon*, discussed in notes 103 & 106, *supra, see* General Mill Supply Co. v. SCA Servs., Inc., 505 F. Supp. 1093, 1098-1100 (E.D. Mich. 1981); Comden v. Superior Court, 20 Cal. 3d 906, 914-16, 576 P.2d 971, 974-75, 145 Cal. Rptr. 9, 12-13, *cert. denied*, 439 U.S. 981 (1978); Stagen Realty & Mgmt., Inc. v. Superior Court, 88 Cal. App. 3d 302, 151 Cal. Rptr. 742 (2d Dist. 1979), *appeal dismissed as moot*, 601 P.2d 1319, 159 Cal. Rptr. 601 (1979). *See also* Universal Athletic Sales v. American Gym, Recreational & Athletic Equip. Corp., 546 F.2d 530, 538-39 (3d Cir. 1976); Norman Norell, Inc. v. Federated Dept. Stores, Inc., 450 F. Supp. 127 (S.D.N.Y. 1978).

[110] The opportunities for delay and harassment were aggravated in those federal circuits that formerly allowed an interlocutory appeal from the denial of a motion to disqualify the opponent's counsel. *See* Armstrong v. McAlpin,

D. What the Model Rules Provide

Three of the Model Rules are pertinent to the trial counsel/witness problem. The first is Rule 3.7, which provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (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) Rule 1.7 relating to conflict of interest determines whether a lawyer may act as advocate in a proceeding in which a member of the lawyer's firm is likely to be called as a witness.[111]

The second pertinent rule is Rule 1.7, which provides as follows:

> (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.
> (b) When a lawyer's own interests or other responsibilities might adversely affect the representation of a client, the lawyer shall not represent the client unless:
>
> (1) The lawyer reasonably believes the other responsibilities or interests involved will not adversely affect the best interest of the client; and
> (2) The client consents after disclosure . . . .[112]

The third pertinent rule is Rule 1.10, which provides as follows:

> (a) When lawyers are associated in a firm, none of them shall undertake or continue representation when a lawyer practicing alone would be prohibited from doing so under the provisions regarding conflict of interest stated in [Rule 1.7] . . . .
>
> . . . .
>
> (c) Subject to the limitations of Rule 1.7, a disqualification prescribed by this rule may be waived by the consent of the affected

---

625 F.2d 433 (2d Cir. 1980), *overruling* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc). But the Supreme Court put an end to such interlocutory appeals in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).

[111] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (Proposed Final Draft 1981).

[112] *Id.* Rule 1.7.

client after disclosure.[113]

E. Why the Model Rules Are Different

The authors of the Model Rules seem to have two major goals in mind in departing from the Code's version of the trial counsel/witness rule.

First, they want to trim the rule to fit the rationales that they find persuasive in support of it.[114] From the tangle of rationales stated in EC 5-9,[115] they find only two to be persuasive:

(1) A trial counsel who serves as a witness can harm the client, either by testifying to facts inconsistent with the client's story, or by being ineffective as a witness (because of the appearance of bias) when testifying in support of the client's story.[116] Either situation poses an ordinary conflict of interest problem, and the Model Rules treat both under the general conflict of interest provision, Rule 1.7. The client can be harmed even if the trial counsel and the witness are different lawyers from the same office,[117] and that explains the relevance of Rule 1.10, the vicarious disqualification provision that applies to conflicts of interest.[118]

(2) A trial counsel who serves as a witness can harm the adversary, and perhaps also the integrity of the legal profession, in two related ways:[119]

> (a) First, the trier of fact may be confused by the dual role.[120] *Testimony* is supposed to be a candid presentation of a witness's personal knowledge,[121] and the trier of fact is supposed to weigh testimony by the credibility of the witness.[122] In contrast, *advocacy* is supposed to explain and analyze, and the trier of fact is supposed to weigh it by the

---

[113] *Id.* Rule 1.10.

[114] *See id.* Rule 3.7, notes, at 150-53.

[115] This tangle is discussed in text accompanying notes 44-70 *supra.*

[116] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 comment & note, at 149, 152 (Proposed Final Draft 1981). See the discussion of the "ineffective witness" rationale in text accompanying notes 46-49 *supra.*

[117] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 note, at 152 (Proposed Final Draft 1981).

[118] *Id.* Rule 1.10 and Rule 3.7 note, at 152.

[119] *Id.* Rule 3.7 note, at 151-52.

[120] *See* text accompanying notes 58-60 *supra.*

[121] *See* FED. R. EVID. 602 & 603.

[122] *See* Enker, *supra* note 45, at 463.

standards of reason and logic.[123] When a single person serves as both advocate and witness, the trier of fact may be confused about whether a particular statement "should be taken as proof or as an analysis of the proof."[124]

(b) Second, the dual role of trial counsel and witness may cause the lawyer to break the rule against stating personal opinions when arguing the case to the trier of fact.[125] The trial counsel/witness rule "eliminates the opportunity to mix argument and fact."[126]

Points (a) and (b), above, both assume that the trial counsel and the witness are the same person; neither point is valid if the trial counsel and the witness are different lawyers, albeit from the same law office.[127] That is why Rule 3.7(a) contains no vica-

---

[123] *Id.*

[124] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 comment, at 149 (Proposed Final Draft 1981). Professor Enker, *supra* note 45, explains why it is important to avoid this kind of confusion:

> This distinction between the two roles of advocate and witness is essential to enable the lawyer to maintain independence from his client while advocating his cause. Were the lawyer to combine the two roles, the assessment of his integrity and credibility in evaluating his testimony would likely affect the evaluation of his argument. Trial would become a contest over whose lawyer possessed greater credibility rather than which argument was stronger. The fear is not so much that the jury might be swayed (in either direction) by the combination of argument and testimony but that the argument would be judged in an improper frame of reference.

Id. at 463-64. Thus, Enker explains, the trial counsel/witness rule helps keep the lawyer independent from the client. That independence is what allows a lawyer, in good conscience, to represent the guilty and the repugnant. *Id.* Note that Enker's concern is broader than merely avoiding harm to the adversary; he is concerned with protecting the integrity of the legal profession.

[125] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 note, at 151 (Proposed Final Draft 1981). Model Rule 3.4(e) states the rule against personal opinion this way:

> In trial . . . [a lawyer shall not] assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused. . . .

Id. Rule 3.4(e).

[126] *Id.* Rule 3.7 note, at 151. This argument is criticized in text accompanying notes 61-64 *supra*.

[127] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 note, at 152 (Proposed Final Draft 1981).

rious disqualification provision — it is written to apply only when one lawyer serves as both trial counsel and witness.[128]

The second main goal that the authors of the Model Rules apparently have in mind is to minimize the use of the trial counsel/witness rule as a tactical weapon by an adversary who wants to harass or delay. They do this in four ways:[129]

1) They use the general conflict of interest provision, Rule 1.7, to deal with the possibility of harm to the client.[130] Unlike the Code,[131] Rule 1.7 allows for consent by the client, assuming that she is fully informed about the drawbacks of the dual role,[132] and that the dual role "reasonably appears to be compatible" with the client's best interests.[133] If the client consents, only in an extraordinary case would the adversary be allowed to premise a disqualification motion on the possibility of harm to the cli-

---

[128] *Id.* Rule 3.7 comment & note, at 149-53.

[129] The authors of the Model Rules apparently considered and rejected an alternative remedy for misuse of disqualification motions — the remedy chosen by the State Bar of California in its 1979 amendments to the CALIFORNIA RULES OF PROFESSIONAL CONDUCT. *See* text accompanying notes 89-90 *supra*. In its 1978 decision in Comden v. Superior Court, 20 Cal. 3d 906, 576 P.2d 791, 145 Cal. Rptr. 9, *cert. denied*, 439 U.S. 981 (1978), the California Supreme Court not only stretched "ought to be called as a witness" to mean "might be called as a witness," but also adopted the rigid view of the "undue hardship" exception. *See* text accompanying notes 71-90 and 103-110 *supra*. This unfortunate combination caused widespread abuse of disqualification motions. *See* note 89 *supra*. *See also* Brown & Brown, *supra* note 45. To remedy this abuse, the State Bar of California proposed, and the California Supreme Court ultimately adopted, a major revision of the trial counsel/witness rule. *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-111(A)(4) (as amended effective November 1, 1979). In substance, the revision allows trial counsel to testify on behalf of his client, provided only that the client consents after full disclosure with an oportunity to consult outside counsel. *See id.* The authors of the Model Rules reject the California approach because they want to protect not just the client (Model Rule 1.7), but also the adversary and the integrity of the legal profession (Model Rule 3.7). *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 note, at 151-52 (Proposed Final Draft 1981); text accompanying notes 119-28 *supra*.

[130] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 comment, at 149 (Proposed Final Draft 1981).

[131] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A) and DR 5-101(B) (1981).

[132] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (Proposed Final Draft 1981).

[133] *Id.* Rule 1.7 note, at 51.

ent.[134] The Comment and Notes to Rule 1.7 warn courts to be wary of the motives of an adversary who seeks to become the client's protector — just as one might suspect a wolf who seeks to guard the chicken coop.[135]

2) They use Rule 3.7(a) to deal with the possibility of harm to the adversary and to the integrity of the legal profession.[136] Under Rule 3.7(a), the adversary can complain only if the trial counsel is "likely to be a *necessary* witness."[137] Their object is to require the adversary "to bear a higher burden on a disqualification motion," and to permit the court to delay a ruling on a disqualification motion "until it can be determined that *no other witness* could testify."[138] If the trial counsel's testimony would be merely cumulative, then disqualification is not appropriate.[139]

3) They reject the rigid interpretation courts have given to the Code's "substantial hardship" exception.[140] They accomplish this, first, by deleting the Code's "distinctive value" requirement.[141] Second, they recommend that the courts use a balanc-

---

[134] In their Comment to Rule 1.7, the authors of the Model Rules state:

> Resolving questions of conflict of interest is *primarily the responsibility of the lawyer undertaking the representation.* In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Id. Rule 1.7 comment, at 50-51 (emphasis added).

[135] *See id. See also id.* Rule 1.7 note, at 57.

[136] *See* text accompanying notes 119-128 *supra.*

[137] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a) (Proposed Final Draft 1981) (emphasis added).

[138] *Id.* Rule 3.7 note, at 153 (emphasis added). The authors of the Model Rules thus seek to bury the notion that the trial counsel/witness rule should apply whenever a trial counsel might conceivably be a witness. *See* Comden v. Superior Court, 20 Cal. 3d 906, 576 P.2d 791, 145 Cal. Rptr. 9, *cert. denied,* 439 U.S. 981 (1978), discussed in text accompanying notes 71-90 *supra.*

[139] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 note, at 153 (Proposed Final Draft 1981).

[140] *See* text accompanying notes 103-110 *supra.*

[141] *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(4) (1981), *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a)(3) (Proposed Final Draft 1981).

ing test when applying the "substantial hardship" exception.[142] Thus, when the adversary moves to disqualify the client's trial counsel, the court should grant the motion only if the risk of harm to the adversary outweighs the client's interest in being represented at trial by the counsel of his choice.[143]

4) They limit the role of vicarious disqualification.[144] Because they see no risk of harm to the adversary, or to the integrity of the legal profession, when the trial counsel and the witness are different lawyers from the same office, they omit vicarious disqualification from Rule 3.7(a).[145] Thus, so long as Rule 1.7 is satisfied,[146] one lawyer can testify, and another lawyer from the same office can serve as trial counsel,[147] and the adversary will ordinarily have no standing to complain.[148]

---

[142] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 comment, at 150 (Proposed Final Draft 1981).

[143] Whether 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.

Id. Rule 3.7 comment, at 150.

[144] *Compare id.* Rule 3.7(a) *with id.* Rule 1.7 and Rule 1.10. *See id.* Rule 3.7 comment, at 150 and note, at 152.

[145] *See* text accompanying notes 119-28 *supra.*

[146] To satisfy Rule 1.7, two conditions must be met:

(a) It must "reasonably appear to be compatible" with the client's best interests to have two lawyers from the same office, one as trial counsel, and the other as witness. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(1) & note, at 51 (Proposed Final Draft 1981); and

(b) The client must consent after full disclosure. *Id.* Rule 1.7(b)(2).

[147] This scheme might appear to give an advantage to multi-lawyer firms over solo practitioners. But a solo practitioner can accomplish almost the same thing by satisfying Rule 1.7 and obtaining the client's consent to associate an outside lawyer as trial counsel. The two lawyers can then divide the fee in accordance with Rule 1.5(d). *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 note, at 152 (Proposed Final Draft 1981).

[148] *See id.* Rule 1.7 comment, at 50-51; *id.* Rule 1.7 note, at 57; text accompanying notes 132-135 *supra.*

F. How to Apply the Model Rules

If you are faced with a trial counsel/witness question, there is a simple, two-step method for finding the answer under the Model Rules — although the method may not be readily apparent from the face of the Rules.

Step One

If you are even potentially a witness in a case, ask yourself whether the conflict of interest provisions (Rules 1.7 and 1.10) bar both you and the other lawyers in your office from serving as trial counsel. If you conclude that they do not, then move to the second step.

Step Two

Ask yourself whether Rule 3.7(a) bars you from serving as trial counsel. It will bar you in only one combination of circumstances: If you are a necessary (not just a potential) witness *and* if none of the three exceptions to Rule 3.7(a) is applicable.

Part III of this article uses the hypothetical cases posed in the introduction to illustrate how this method works and how the Model Rules differ from the Code.

III. Application of the Model Rules and the Code

Hypothetical One

Suppose that you are a lawyer, on your way to lunch one day. While walking along the street, you see Pedestrian run over by Driver. A few months later, the defendant, Driver, asks you to defend him in the personal injury suit brought by the plaintiff, Pedestrian. In that suit, Pedestrian claims that she was exercising due care, but Driver claims that Pedestrian was acting carelessly. Driver has come to you because you are one of several good trial lawyers in town, not because of any prior relationship, nor because of the fortuity that you saw the accident. Assume that:

- You were the only bystander who saw what happened; and,
- You saw Pedestrian crossing the street against a red light and outside the crosswalk.

May you serve as Driver's trial counsel?

The Model Rules Answer

No, Rule 1.7(a) bars you from serving as Driver's trial counsel.[149] You are a necessary witness on behalf of Driver. Other good trial lawyers are available and can represent Driver as well as you can. If you serve as Driver's trial counsel, your testimony will be less credible because of your apparent bias. A candid lawyer would have to advise Driver not to consent to using you in the dual role of witness and trial counsel.[150]

The Code Answer

No, you may not serve as Driver's trial counsel. Under DR 5-101(B), you "ought to be a witness" on Driver's behalf.[151] The exceptions in DR 5-101(B)(1)(3) do not apply, and neither does the exception in DR 5-101(B)(4).[152] Your services as trial counsel have no "distinctive value" to Driver, and he will suffer no "substantial hardship" in retaining someone else as trial counsel.[153]

Hypothetical Two

Assume the same facts as Hypothetical One, except that:

---

[149] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (Proposed Final Draft 1981).

[150] *See id.* Rule 1.7 comment, at 48-49, which explains the situation as follows:

> Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are whether the conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accomodate the other interests involved. *However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.*

Id. (Emphasis added).

[151] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (1981).

[152] *See id.* DR 5-101(B)(1)-(4).

[153] *See* text accompanying notes 101-110 *supra*.

• Driver asks your law partner to serve as his trial counsel. May your partner serve as Driver's trial counsel?

The Model Rules Answer

No, your partner may not serve as Driver's trial counsel. Hypothetical One explains why Rule 1.7(a) bars you from being Driver's trial counsel. Since you are barred by Rule 1.7(a), your partner is barred by the vicarious disqualification provision, Rule 1.10(a).[154] If your partner were not Driver's trial counsel, you would be a disinterested witness on behalf of Driver, but the connection between you and your partner reduces the credibility of your testimony.[155] Other good trial lawyers are available and can represent Driver as well as your partner can. Therefore, a candid lawyer would have to advise Driver not to consent to using your partner as trial counsel in light of your role as witness.[156]

The Code Answer

No, your partner may not serve as Driver's trial counsel. Hypothetical One explains why DR 5-101(B) bars you from serving as Driver's trial counsel, and that rule applies not just to you but to your partner as well.[157]

Hypothetical Three

Assume the same facts as Hypothetical One, except that:
•You were the only bystander who saw what happened; and,
•You saw Pedestrian crossing the street with a green light and inside the crosswalk.
May you serve as Driver's trial counsel?

The Model Rules Answer

No, you may not. Again, you are barred by Rule 1.7(a).[158] Pedestrian will need your testimony to establish that she was using

---

[154] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (Proposed Final Draft 1981).

[155] *See id.* Rule 3.7 note, at 152.,

[156] *See id.* Rule 1.7 comment, at 48-49, quoted in note 150 *supra.*

[157] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (1981).

[158] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (Proposed Final Draft 1981).

due care. Your duty to tell the truth under oath would conflict with your duty of loyalty to Driver, and serving as Driver's trial counsel would increase the sting of your adverse testimony.[159] Driver would be better off to hire one of the other available trial lawyers. Therefore, a candid lawyer would have to advise Driver not to consent to using you as trial counsel in light of your role as witness for Pedestrian.[160]

The Code Answer

No, DR 5-101(B) again bars you from serving as Driver's trial counsel.[161] Pedestrian will need your testimony to establish that she was using due care. The exceptions in DR 5-101(B)(1)-(3) do not apply, nor does the exception in DR 5-101(B)(4).[162] Your services as trial counsel have no "distinctive value" to Driver, who will suffer no "substantial hardship" by using one of the other available trial lawyers.[163]

Hypothetical Four

Assume the same facts as Hypothetical Three, except that:
•Driver asks your law partner to serve as his trial counsel.
May your partner serve as Driver's trial counsel?

The Model Rules Answer

No, your partner may not serve as Driver's trial counsel. Hypothetical Three explains why Rule 1.7(a) bars you from being Driver's trial counsel. Since you are barred by Rule 1.7(a), your partner is barred by the vicarious disqualification provision, Rule 1.10(a).[164] Your connection with your partner may increase the sting of your testimony against Driver; further, in trying to cross-examine and impeach you, your partner may be torn be-

---

[159] *See id.* Rule 3.7 comment, at 149. Furthermore, if Driver wants to testify that Pedestrian was walking against a red light and outside the crosswalk, you will face a problem under Rule 3.3(a)(4), which prohibits you from offering evidence that you know is false. *Id.* Rule 3.3(a)(4); *id.* Rule 3.3 comment, at 125-26.

[160] *See id.* Rule 1.7 comment, at 48-49, quoted in note 150 *supra.*

[161] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (1981).

[162] *See id.* DR 5-101(B)(1)-(4).

[163] *See* text at notes 101-110 *supra.*

[164] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (Proposed Final Draft 1981).

tween her loyalty to you as a law partner and her loyalty to Driver as a client.[165] Driver would be better off to employ one of the other available trial lawyers. Therefore, a candid lawyer would have to advise Driver not to consent to using your partner as trial counsel in light of your role as witness for Pedestrian.[166]

The Code Answer

No, your law partner may not serve as Driver's trial counsel. Hypothetical Three explains why DR 5-101(B) bars you from serving as Driver's trial counsel, and that rule applies not just to you but to your partner as well.[167]

Hypothetical Five

Assume the same facts as Hypothetical One, except that:
- You are one of five bystanders who saw what happened; and,
- All five of you are available as witnesses,[168] and all of you have equal powers of perception, memory, and narration, and equal qualities of credibility;[169] and,
- All five of you saw Pedestrian crossing the street against a red light and outside the crosswalk.

May you serve as Driver's trial counsel?

The Model Rules Answer

Yes, you may serve as Driver's trial counsel, but the trial judge might prohibit you from testifying on Driver's behalf. The first step in the analysis is to determine whether the conflict of interest provision, Rule 1.7, would bar you from serving as Driver's trial counsel. You are merely a potential witness for Driver. He has four other, equally able witnesses available. If you testify for Driver, your role as his trial counsel will make your testimony less credible than if you were a disinterested witness, but Driver can easily do without your testimony. There-

---

[165] *See id.* Rule 3.7 notes, at 152; *accord* ABA Formal Opinion 185 (1938), *supra* note 15 (where a lawyer saw defendant kill victim, the lawyer's law partner could not serve as defense counsel at the murder trial).

[166] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment, at 48-49 (Proposed Final Draft 1981), quoted in note 150 *supra*.

[167] *See* MODEL CODE OF PROFESSIONAL CONDUCT DR 5-101(B) (1981).

[168] *See* FED. R. EVID. 804(a).

[169] *See* C. MCCORMICK, *supra* note 7, at § 245, at 581.

fore, serving as Driver's trial counsel "reasonably appears to be compatible" with Driver's best interests.[170] If you explain to Driver the drawbacks of using you as trial counsel, and if Driver consents, Rule 1.7(b) is satisfied.[171]

The second step in the analysis is to determine whether Rule 3.7(a) would bar you from serving as Driver's trial counsel. It would not. It applies only if you are a "necessary" witness,[172] and you are not.

Suppose, however, that you decide to testify for Driver at trial, and that Pedestrian asks the trial judge to exclude your testimony on the ground that its probative value is outweighed by the danger that it might mislead the jury.[173] In ruling on Pedestrian's motion, the trial judge might consider the theory behind Rule 3.7(a): allowing you to testify might cause the jury to confuse your advocacy with your testimony, and it might tempt you to stir in some personal opinion when you argue the case to the jury.[174] Since Driver has other, equally able witnesses available, the trial judge might grant Pedestrian's motion and preclude you from testifying. This is one of the risks you should disclose to Driver under Rule 1.7(b), but if Driver consents, you ought to be allowed to serve as his trial counsel.[175]

The Code Answer

Whether you may serve as Driver's trial counsel depends on the interpretation of "ought to be a witness" in DR 5-101(B).[176] Most courts do not follow the *Comden* case;[177] they read DR 5-

---

[170] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 note, at 51 (Proposed Final Draft 1981).

[171] *See id.* Rule 1.7(b).

[172] *See id.* Rule 3.7(a); text accompanying notes 136-139 *supra*.

[173] *See* FED. R. EVID. 403.

[174] *See* text accompanying notes 119-126 *supra*. *See also* text accompanying notes 61-64 *supra*.

[175] *Cf.* J. D. Pflaumer, Inc. v. United States Dept. of Justice, 465 F. Supp. 746 (E.D. Pa. 1979) (trial counsel was potential witness for client, motion to disqualify denied, on condition that trial counsel not testify); Harris v. Superior Court, 97 Cal. App. 3d 488, 158 Cal. Rptr. 807 (1st Dist. 1979) (trial counsel was potential witness for client, motion to disqualify denied, and "substantial hardship" exception applied where client promised not to use trial counsel as witness).

[176] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (1981).

[177] Comden v. Superior Court, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9, *cert. denied*, 439 U.S. 981 (1978), discussed in text accompanying notes 76-90

101(B) as applying only to a "necessary" or "indispensable" witness, not a mere "potential" witness.[178] Thus, most courts would find DR 5-101(B) inapplicable, and most would allow you to serve as Driver's trial counsel.

As in the Model Rules Answer, above, the trial judge might prohibit you from testifying on Driver's behalf. But the reasons for doing so might be vague. For example, in *J. D. Pflaumer, Inc. v. United States Justice Department*,[179] the court prohibited the testimony because of concern for "the integrity of the entire judicial system."[180]

Hypothetical Six

Assume the same facts as Hypothetical Five, except that:
- Driver asks your law partner to serve as trial counsel.

May your partner serve as Driver's trial counsel?

The Model Rules Answer

Yes, your law partner may serve as Driver's trial counsel. Hypothetical Five explains why Rule 1.7 would not bar you from serving as Driver's trial counsel. Since you may serve, so may your partner.[181] Rule 3.7(a) does not apply for two reasons. First, you are not a "necessary" witness.[182] Second, Rule 3.7(a) applies only when the same person serves as both trial counsel and witness.[183]

Finally, as in Hypothetical Five, suppose Pedestrian moves for discretionary exclusion of your testimony, invoking the theory behind Rule 3.7(a). The trial judge should deny the motion; Rule 3.7(a) omits vicarious disqualification because its authors see no risk of harm to the adversary or the profession when the trial counsel and the witness are different people, albeit from the same law office.[184]

---

supra.

[178] *See* cases cited at note 72 *supra*.

[179] 465 F. Supp. 746 (E.D. Pa. 1979).

[180] *Id.* at 749.

[181] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (Proposed Final Draft 1981).

[182] *See id.* Rule 3.7(a); text accompanying notes 136-139 *supra*.

[183] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a) (Proposed Final Draft 1981); text accompanying notes 119-128 and 144-148 *supra*.

[184] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a) (Proposed Final

The Code Answer

Most courts would allow your partner to serve as Driver's trial counsel for the same reasons stated in the Code Answer to Hypothetical Five. But, again, the trial judge might prevent you from testifying on Driver's behalf, based on some vaguely articulated notion of harm to the judicial system.[185]

Hypothetical Seven

Assume the same facts as Hypothetical One, except that:

- You are one of five bystanders who saw what happened; and,
- All five of you are available as witnesses, and all of you have equal powers of perception, memory, and narration, and equal qualities of credibility;[186] and
- All five of you saw Pedestrian crossing the street with a green light and inside the crosswalk.

May you serve as Driver's trial counsel?

The Model Rules Answer

No. Rule 1.7(a) would bar you from serving as Driver's counsel; you are one of five potential witnesses for Pedestrian on a point that will clearly harm Driver's defense.[187] If Pedestrian elects to call you as a witness, rather than (or in addition to) some of the other potential witnesses, your duty to tell the truth under oath will conflict with your duty of loyalty to Driver. Further, as in Hypothetical Three, your role as trial counsel for Driver would increase the sting of your adverse testimony.[188]

Draft 1981).

[185] *See* J. D. Pflaumer, Inc. v. United States Dept. of Justice, 465 F. Supp. 746 (E.D. Pa. 1979); text accompanying notes 179-180 *supra*.

[186] *See* notes 168-169 *supra*.

[187] This hypothetical attempts to illustrate the situation where a lawyer can foresee at the outset that adverse testimony by him would clearly harm his client. In contrast is the situation where litigant *A* tries to disqualify litigant *B*'s trial counsel by threatening to call the trial counsel to testify on some point that may or may not prejudice *B*. In this latter situation, *B*'s trial counsel should be disqualified only if *A* demonstrates precisely and convincingly that the trial counsel's testimony will prejudice *B*. *See* Zions First Nat'l Bank v. United Health Clubs, Inc., 505 F. Supp. 138, 139-41 (E.D. Pa. 1981); Freeman v. Kulicke & Soffa Indus., Inc., 449 F. Supp. 974, 977-78 (E.D. Pa. 1978), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B).

[188] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 comment, at 149

Other good trial lawyers are available, and Driver gains no benefit by using you rather than one of them.

To avoid the conflict, you might move for a ruling in advance of trial that Pedestrian cannot call you as a witness.[189] But the court will be loath to grant your motion early in the case,[190] particularly since other good trial lawyers are available to Driver. Therefore, a candid lawyer would have to advise Driver not to consent to using you as trial counsel in light of your potential role as a witness.[191]

The Code Answer

The answer ought to be no, you may not serve as Driver's trial counsel,[192] but the Code is murky on the point. Under DR 5-101(B), if you can foresee at the outset that you "ought to be a witness" for Pedestrian, then you must not accept employment as Driver's trial counsel.[193] Clearly that bars you if you are a necessary witness for Pedestrian.[194] But here you are only a potential witness for Pedestrian. As noted above,[195] most courts in-

---

(Proposed Final Draft 1981). Furthermore, if Driver wants to testify that Pedestrian was walking against a red light and outside the crosswalk, you will face a problem under Rule 3.3(a)(4), which prohibits you from offering testimony that you know is false. *Id.* Rule 3.3(a)(4); *id.* rule 3.3 comment, at 125-26.

[189] *See* FED. R. EVID. 403; Annot., 63 A.L.R.3d 311 (1975). The argument for exclusion of your testimony would be that Pedestrian has other, equally able witnesses who can establish the point, and that your testimony would thus be either cumulative or needlessly harmful to Driver.

[190] *See, e.g.,* Wilson v. Winstead, 470 F. Supp. 263, 267 (E.D. Tenn. 1978); Ory v. Libersky, 40 Md. App. 151, 153, 389 A.2d 922, 930-31 (1978).

[191] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment, at 48-49 (1981).

[192] The reason that the answer ought to be "no" is the conflict of interest between you and Driver, as explained in the Model Rules Answer to Hypothetical Seven. One could reach that answer under the Code by applying the general conflict of interest provision, DR 5-101(A). *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1981). But the courts have never invoked DR 5-101(A) in dealing with trial counsel/witness problems. Since DR 5-101(B) and DR 5-102 contain very specific rules on that subject, resort to DR 5-101(A) would violate the principle that specific provisions override genera' es. *See, e.g.,* CAL. CIV. CODE § 3534 (West Cum. Supp. 1981).

[193] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) (1981).

[194] *See* text accompanying notes 161-163 *supra.* Note that none of the exceptions to DR 5-101(B) apply to this hypothetical. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(1)-(4) (1981).

[195] *See* text accompanying notes 72-75 and 176-178 *supra.*

terpret "ought to be a witness" to mean "necessary" or "indispensible" witness, not "potential" witness. But the cases that so hold are all cases in which the trial counsel would testify on behalf of the *client,* not on behalf of the *adversary.*[196] Should the interpretation be the same in both situations? Or is a different interpretation appropriate where the adversary, not the client, gets to decide which of several potential witnesses to call?

The wording of DR 5-102(B) offers a clue. Under that rule, if you accept employment as Driver's trial counsel, and if you discover later in the case that you "*may* be called as a witness"[197] by Pedestrian, then you may continue as Driver's trial counsel until it is apparent that your testimony "is or may be prejudicial" to Driver.[198] In other words, if you undertake employment and later discover that Pedestrian *may* call you as a witness, and if you know that your testimony will prejudice Driver, then you must withdraw as Driver's trial counsel.[199] From this, can we not infer that if you can foresee at the outset that Pedestrian *may* call you as a witness, and if you know that your testimony will prejudice Driver, then you should not accept employment as Driver's trial counsel?[200]

---

[196] *See* cases cited in note 72 *supra.*

[197] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) (1981) (emphasis added).

[198] *Id.* In this context, the term "prejudicial" means that the projected testimony of a lawyer or firm member must be sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony. Freeman v. Kulicke & Soffa Indus., Inc., 449 F. Supp. 974, 977 (E.D. Pa. 1978), *aff'd mem.,* 591 F.2d 1334 (3d Cir. 1979). In the present hypothetical, that definition is met because Driver contends that Pedestrian was not exercising due care, but you would have to testify that Pedestrian was inside a crosswalk while crossing the street with a green light.

[199] If there is no reason to believe that your testimony will prejudice Driver, then Pedestrian cannot have you disqualified simply by threatening to call you as a witness. On a motion to disqualify, Pedestrian must demonstrate precisely and convincingly why your testimony will prejudice Driver. *See* Davis v. Stamler, 494 F. Supp. 339, 342-43 (D.N.J. 1980). *See also* cases cited in note 188 *supra.*

[200] *Cf.* ABA Formal Opinion 339 (1975), *supra* note 15. There, the Ethics Committee construed the "substantial hardship" exception (DR 5-101(B)(4)) and stated:

> In the Committee's opinion, if it can be anticipated that the lawyer's testimony will be adverse to the client there will be very few situations in which accepting employment as trial counsel could be

Hypothetical Eight

Assume the same facts as Hypothetical Seven, except that:
• Driver asks your law partner to serve as his trial counsel.
May your partner serve as Driver's trial counsel?

The Model Rules Answer

No, your partner may not serve as Driver's trial counsel. Hypothetical Seven explains why Rule 1.7(a) bars you from being Driver's trial counsel. Since you are barred by Rule 1.7(a), your law partner is barred by the vicarious disqualification provision, Rule 1.10(a).[201] If Pedestrian does call you as a witness, your connection with your partner may increase the sting of your testimony against Driver. Further, in trying to cross-examine and impeach you, your partner may be torn between her loyalty to you as a law partner and her loyalty to Driver as a client.[202] Driver would be better off to employ one of the other available trial lawyers. Therefore, a candid lawyer would have to advise Driver not to consent to using your partner as trial counsel in light of your role as a potential witness.[203]

> justified under the controlling standard of DR 5-101(B)(4). Because there are degrees of "adverse" evidence, however, we are not prepared to hold that it would *never* be ethically permissible, but we note that with such employment the lawyer also accepts a heavy responsibility. The most skilled advocate cannot always accurately assess the impact of any testimony upon the trier of facts and the prejudice likely to result from the prospect of unfavorable testimony being elicited from a party's trial advocate must be carefully considered with the client. In this connection, the lawyer must, of course, consider carefully the effect on the client's cause of fulfilling his obligation as a witness to testify truthfully while honoring his correlative duty to maintain inviolate the client's secrets and confidences.
>
> Any doubt about the answer to the ethical question, whether it arises when employment is tendered or after representation has been undertaken, should be resolved in favor of the lawyer's testifying and against his becoming or continuing as counsel.

ABA Formal Opinion 339 (1975), *supra* note 15, at 4-5.

[201] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (Proposed Final Draft 1981).

[202] *See id.* Rule 3.7 notes, at 152; *accord* ABA Formal Opinion 185 (1938), *supra* note 15 (where a lawyer sees a defendant kill a victim, the lawyer's partner may not serve as defense counsel at the murder trial).

[203] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment, at 48-49

The Code Answer

The Code is murky on this point, for the reasons given in the answer to Hypothetical Seven.[204] But if the argument made there is sound (that you could not serve as Driver's trial counsel), then your partner could not serve either. Both DR 5-101(B) and DR 5-102(B) apply equally to you and the other lawyers in your firm.[205]

Hypothetical Nine

[In the first eight hypotheticals, your role as witness arose from a fortuity — you were standing on a street corner when an accident happened. You had no prior relationship with Driver, and other trial lawyers could represent him as well as you could. Hypotheticals Nine through Sixteen are parallel to the first eight, but they add one important complication. In Hypotheticals Nine through Sixteen, you have a long prior relationship with the defendant, Distributor, and your role as witness arises from your work as Distributor's business law counselor. That gives Distributor good reason to prefer you over other trial counsel, despite the drawbacks created by your role as witness.][206]

Suppose that for many years you have represented Distributor in business matters. Over those years, you have gained her confidence and have become familiar with the details of her business. One day you accompany Distributor to advise her in negotiating a supply contract with the plaintiff, Producer. In your presence, Producer and Distributor confer, dicker, and reach an agreement. You are present during the entire negotiating session, and you hear everything that is said. Later, the agreement turns sour. You expend some 450 hours advising Distributor about various aspects of her relationship with Producer. Ultimately, Producer sues Distributor, claiming that at the negotiating session Distributor made a statement that was materially misleading. Distributor claims that she did not make the statement, and that, even if she did, it was not materially misleading. Assume that:

(Proposed Final Draft 1981).

[204] *See* text accompanying notes 192-200 *supra*.

[205] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) and DR 5-102(B) (1981).

[206] *See generally* Brown & Brown, *supra* note 45, at 608-13.

- You were the only outsider at the negotiating session; and,
- You are sure that Distributor did not make the alleged statement.

May you serve as Distributor's trial counsel?

The Model Rules Answer

The answer is uncertain, depending on whether Distributor consents to the dual role under Rule 1.7(b), whether Producer moves to disqualify you under Rule 3.7(a), and whether the judge concludes that the "substantial hardship" exception applies.[207] First, you must determine whether the general conflict of interest provision, Rule 1.7(a), bars you from becoming Distributor's trial counsel. You are a necessary witness for Distributor, and your testimony is open to attack for bias. But that is true even if you do not serve as Distributor's trial counsel. Your long relationship with Distributor, and your involvement in the very matter in dispute, give Producer plenty of bias ammunition; serving as Distributor's trial counsel may not make the situation significantly worse. Further, Distributor has a competing concern here. You can represent her better and more efficiently than any other trial counsel because of your long experience with her business and your knowledge of the matter at hand. On balance, your serving as her trial counsel "reasonably appears to be compatible"[208] with Distributor's best interests. If you disclose the drawbacks of the dual role, and if Distributor consents, then Rule 1.7(b) is satisfied.[209]

Second, if Distributor consents to your serving as her trial counsel, then Producer may move to disqualify you under Rule 3.7(a). Since you are a necessary witness, Rule 3.7(a) bars you, unless the "substantial hardship" exception applies.[210] That calls

---

[207] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, Rule 3.7(a), and Rule 3.7(a)(3) (Proposed Final Draft 1981).

[208] *Id.* Rule 1.7 comment, at 51.

[209] *See id.* Rule 1.7(b). One of the drawbacks that you will need to disclose to Distributor is the possibility that, at some point before trial, Producer may ask the judge to disqualify you under Rule 3.7(a). Further, you will need to explain to Distributor that the outcome of Producer's motion cannot be predicted with confidence. *See* text accompanying notes 210-215 *infra*.

[210] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a) (Proposed Final Draft 1981). Since your testimony does not concern an uncontested issue or the nature and value of your legal services, the exceptions in Rule 3.7(a)(1) and (2) cannot apply. But the "substantial hardship" exception, Rule 3.7(a)(3), may

upon the judge to use the balancing test recommended by the authors of the Model Rules.[211] Is Distributor's interest in having you as her trial counsel outweighed by the risk that the dual role may cause the trier of fact to confuse your advocacy with your testimony, or tempt you to stir in some personal opinion when you argue the case to the jury?[212]

The authors of the Model Rules suggest five factors that the judge should weigh:[213]

(1) *The nature of the case.* Our hypothetical case is a routine commercial dispute.

(2) *The importance and probable tenor of the lawyer's testimony.* Here, your testimony will be important, perhaps determinative.

(3) *The probability that the lawyer's testimony will conflict with that of other witnesses.* Here, your testimony will no doubt conflict with Producer's testimony.

(4) *The foreseeability to both parties that the lawyer would have to testify.* Here, both parties could foresee the need for your testimony.

(5) *The effect of disqualification on the lawyer's client.* Here, that will depend on the availability of other trial counsel, the amount Distributor will have to pay out in legal fees to bring other counsel up to your level of knowledge, and the importance to Distributor of having the case resolved promptly.

In some types of litigation, one or more of these factors may stand out as especially compelling, and the judge may find it easy to decide where the balance lies.[214] But in our hypothetical case, the five factors do not seem to help much — some point one way, and others the opposite way. The judge may be left in a quandary.

There is a sixth factor that may help: *Who will be the trier of fact?* Perhaps a jury can be confused about the difference between advocacy and testimony, and perhaps a jury can be misled

---

apply.

[211] *See id.* Rule 3.7 comment, at 150.

[212] *See id. See also* text accompanying notes 119-126 and 140-143 *supra.*

[213] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 comment, at 150 (Proposed Final Draft 1981).

[214] *See* General Mill Supply Co. v. SCA Servs., Inc., 505 F. Supp. 1093 (E.D. Mich. 1981) (abuse of process and malicious prosecution action; disqualification ordered where plaintiff's lawyers were key witnesses against defendant and the law firm that represented defendant in prior suit).

if counsel mixes personal opinion into closing argument. But is a judge likely to be similarly confused and misled?

If this sixth factor leaves the judge still undecided, then perhaps Producer's motion to disqualify should be resolved by a primitive but prudent rule of thumb: When forced to choose between a harm that is certain and immediate and a harm that is uncertain and tentative, pick the latter.[215] If you are disqualified, the harm to Distributor is certain and immediate. She must find a new lawyer, pay to educate him about the case, and suffer the delay. But if you remain as trial counsel, the other harm may never come to pass. The case may settle, or a trial may be averted by summary judgment, or the trier of fact may not be confused or misled by your dual role.

In short, you may serve as Distributor's trial counsel if Distributor consents under Rule 1.7(b). If Producer moves to disqualify you under Rule 3.7(a), the judge probably should apply the "substantial hardship" exception and deny the motion.

The Code Answer

The answer is also uncertain under the Code. You "ought to be a witness" for Distributor. Thus, DR 5-101(B) will bar you from serving as Distributor's trial counsel unless the "substantial hardship" exception applies.[216] That exception ought to apply here,[217] but if the court follows the prevailing hard-boiled approach,[218] your long relationship with Distributor, and your familiarity with the matter at hand, will not be enough to establish your "distinctive value."[219] Thus, you will probably be disqualified as Distributor's trial counsel.

---

[215] To test the wisdom of this rule of thumb, suppose you must jump into one of two pools. The first contains a hungry great white shark. The second contains a number of shapeless creatures of unknown temperament and dietary preference. Which pool would *you* choose?

[216] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(4) (1981).

[217] *See* ABA Formal Opinion 339 (1975), *supra* note 15. *See also* text accompanying notes 101-102 *supra*.

[218] *See* text accompanying notes 103-10 *supra*.

[219] *See, e.g.*, United States *ex rel.* Sheldon Elec. Co. v. Blackhawk Htg. & Plmg. Co., 423 F. Supp. 486, 490 (S.D.N.Y. 1976).

Hypothetical Ten

Assume the same facts as Hypothetical Nine, except that:

- Distributor asks your law partner to serve as her trial counsel.

May your partner serve as Distributor's trial counsel?

The Model Rules Answer

Yes, your law partner may serve as Distributor's trial counsel, provided that Distributor consents after full disclosure under Rule 1.7(b).[220] Hypothetical Nine explains how Rule 1.7(b) can be satisfied if you serve as Distributor's trial counsel. Presumably, your partner is less familiar than you are with Distributor's business and with the matter in dispute. But the close working relationship between you and your partner may make it more advantageous for Distributor to use your partner than to employ a complete stranger as trial counsel. That is for Distributor to decide after full disclosure. If she consents after full disclosure, then your partner may serve as her trial counsel.[221]

Producer cannot have your partner disqualified under Rule 3.7(a).[222] That rule applies only where one person serves as both witness and trial counsel.[223]

The Code Answer

As in Hypothetical Nine, the Code answer is uncertain. DR 5-101(B) bars your partner from serving as Distributor's counsel at trial, unless the "substantial hardship" exception applies.[224] Under the prevailing view, it will not,[225] and your partner probably will be disqualified as Distributor's trial counsel.

Hypothetical Eleven

Assume the same facts as Hypothetical Nine, except that:

- You were the only outsider at the negotiating session; and,

---

[220] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (Proposed Final Draft 1981).

[221] *See id.* Rule 1.7(b) and Rule 1.10.

[222] *See id.* Rule 3.7(a).

[223] *See id.* Rule 3.7(a) and (b).

[224] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) and DR 5-101(B)(4) (1981).

[225] *See* text accompanying notes 103-110 and 216-219 *supra*.

• You clearly heard Distributor make the alleged statement. May you serve as Distributor's trial counsel?

The Model Rules Answer

Rule 1.7(a) will almost certainly bar you from serving as Distributor's trial counsel.[226] Producer will need your testimony to prove that Distributor did make the alleged statement. If Distributor insists that she did not make it, and if you remember clearly that she did, your duty to tell the truth under oath is in conflict with your duty of loyalty to Distributor.[227] Furthermore, serving as Distributor's trial counsel will increase the sting of your testimony against her.

Could a candid lawyer advise Distributor that these adversities are outweighed by your knowledge of Distributor's business and your familiarity with the matter in dispute?[228] Almost certainly not. In a similar context, the ABA Ethics Committee was unwilling to say *never* — but it did say *almost never.*[229]

The Code Answer

The answer under the Code is the same: Almost certainly you would be barred from serving as Distributor's trial counsel. Since you "ought to be a witness" for Producer, DR 5-101(B) will bar you from serving unless the "substantial hardship" exception applies,[230] and the ABA Ethics Committee has said that the exception should *almost never* apply to facts like these.[231]

---

[226] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (Proposed Final Draft 1981).

[227] *See id.* Rule 1.7(a); *id.* Rule 1.7 comment, at 48-49. Further, if Distributor insists on testifying that she did not make the alleged statement, you will face a problem under Rule 3.3(a)(4), which prohibits you from offering evidence that you know is false. *Id.* Rule 3.3(a)(4); *id.* Rule 3.3 comment, at 125-26.

[228] *See id.* Rule 1.7 comment, at 48-49.

[229] *See* ABA Formal Opinion 339 (1975), *supra* note 15, quoted in note 200 *supra.*

[230] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) and DR 5-101(B)(4) (1981).

[231] *See* ABA Formal Opinion 339 (1975), *supra* note 15, quoted in note 200 *supra.*

Hypothetical Twelve

Assume the same facts as Hypothetical Eleven, except that:

- Distributor asks your law partner to serve as her trial counsel.

May your partner serve as Distributor's trial counsel?

The Model Rules Answer

If you would almost certainly be barred from serving as Distributor's trial counsel by Rule 1.7(a) (as Hypothetical Eleven suggests), then your partner would almost certainly be barred by the vicarious disqualification provision, Rule 1.10(a).[232] The connection between you and your partner will increase the sting of your testimony against Distributor. Further, in trying to cross-examine and impeach you, your partner may be torn between her loyalty to you as a law partner and her loyalty to Distributor as a client.[233] Finally, the benefit to Distributor is less here than in Hypothetical Eleven, since your partner presumably knows less than you do about Distributor's business and about the matter in dispute. Thus, a candid lawyer would almost certainly have to advise Distributor not to consent to using your partner as trial counsel in light of your role as a witness for Producer.[234]

The Code Answer

DR 5-101(B) would almost certainly bar your partner from serving as Distributor's trial counsel, for the reasons stated in the answer to Hypothetical Eleven.[235]

Hypothetical Thirteen

Assume the same facts as Hypothetical Nine, except that:

- You are one of five outsiders who attended the negotiating session between Producer and Distributor; and,
- All five of you are available as witnesses, and all of you have equal powers of perception, memory, and narration, and

---

[232] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (Proposed Final Draft 1981).

[233] *See* note 165 *supra*.

[234] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment, at 48-49 (Proposed Final Draft 1981).

[235] *See* text accompanying notes 230-231 *supra*.

equal qualities of credibility;[236] and,
- All five of you are sure that Distributor did not make the alleged statement.

May you serve as Distributor's trial counsel?

The Model Rules Answer

Yes, you may serve as Distributor's trial counsel. But, as in Hypothetical Five, the trial judge may prohibit you from testifying on Distributor's behalf. Your testimony is open to attack for bias, but it would be even if you did not serve as Distributor's trial counsel. Further, since you are only one of five equally able witnesses, Distributor can easily do without your testimony. Thus, your serving as Distributor's trial counsel "reasonably appears to be compatible" with Distributor's best interests.[237] If Distributor consents after full disclosure, Rule 1.7(b) will be satisfied.[238]

Producer cannot have you disqualified under Rule 3.7(a), because you are not a necessary witness. But, as in Hypothetical Five, Producer may convince the judge to prohibit you from testifying for Distributor; that is one of the risks you should disclose to Distributor under Rule 1.7(b).[239]

The Code Answer

As in Hypothetical Five, most courts would allow you to serve as Distributor's trial counsel because they interpret DR 5-101(B) as limited to "necessary" or "indispensible" witnesses.[240] But, again, you may be prohibited from testifying on Distributor's behalf.[241]

Hypothetical Fourteen

Assume the same facts as Hypothetical Thirteen, except that:
- Distributor asks your law partner to serve as her trial counsel.

---

[236] *See* notes 168-169 *supra.*

[237] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 note, at 51 (Proposed Final Draft 1981).

[238] *See id.* Rule 1.7(b).

[239] *See* text accompanying notes 173-175 *supra.*

[240] *See* text accompanying notes 71-75 and 176-178 *supra.*

[241] *See* text accompanying notes 179-180 *supra.*

May your partner serve as Distributor's trial counsel?

The Model Rules Answer

Yes, your partner may serve as Distributor's trial counsel. Hypothetical Thirteen explains why you may serve. Since you may serve, your partner may also, provided that Distributor consents after full disclosure.[242] Producer cannot have you disqualified under Rule 3.7(a), since you are not a necessary witness, and since one person is not serving as both trial counsel and witness.[243] If Producer tries to invoke the spirit of Rule 3.7(a) to have your testimony excluded at trial, the judge should deny the motion. The authors of the Model Rules see no risk of harm to the adversary or the legal profession when the trial counsel and the witness are different lawyers from the same office.[244]

The Code Answer

Most courts would allow your partner to serve as Distributor's trial counsel because they interpret DR 5-101(B) as limited to a "necessary" or "indispensible" witness.[245] But, as in Hypotheticals Five and Thirteen, the trial judge may prohibit you from testifying, based on a vaguely articulated concern for "the integrity of the entire judicial system."[246]

Hypothetical Fifteen

Assume the same facts of Hypothetical Nine, except that:

- You are one of five outsiders who attended the negotiating session between Producer and Distributor, and
- All five of you are available as witnesses, and all of you have equal powers of perception, memory, and narration, and equal qualities of credibility,[247] and
- All five of you clearly heard Distributor make the alleged statement.

---

[242] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7 and 1.10 (Proposed Final Draft 1981).

[243] *Id.* Rule 3.7(a).

[244] *See* text accompanying notes 119-128, 144-148, & 184 *supra.*

[245] *See* text accompanying notes 71-75, 176-178 *supra.*

[246] *See* text accompanying notes 179-180 *supra.*

[247] *See* notes 168-169 *supra.*

May you serve as Distributor's trial counsel?[248]

The Model Rules Answer

Hypothetical Eleven suggests that when you are Producer's only witness, Rule 1.7(a) would almost certainly bar you from serving as Distributor's trial counsel.[249] The same is true here, even though Producer has four other equally able witnesses. As the ABA Ethics Committee has observed, no skilled advocate can accurately predict the extent to which the trier of fact may be influenced by a piece of damaging evidence extracted from the client's own trial counsel.[250] In light of that uncertainty, a candid lawyer would almost certainly advise Distributor not to consent to using you as trial counsel.[251]

The Code Answer

As in Hypothetical Seven, the answer ought to be no, you may not serve as Distributor's trial counsel, but the Code is murky for the reasons explained there.[252]

Hypothetical Sixteen

Assume the same facts as Hypothetical Fifteen, except that:

- Distributor asks your law partner to serve as her trial counsel.

May your partner serve as Distributor's trial counsel?

The Model Rules Answer

Hypothetical Twelve suggests that when you are Producer's only witness, Rule 1.7(a) would almost certainly bar your partner from serving as Distributor's trial counsel.[253] The same is true here, even though Producer has four other equally able wit-

---

[248] The hypothetical is, of course, far-fetched. The trial counsel/witness problem would not arise in practice, because the lawyer could doubtless convince the client of the folly in denying the statement when five witnesses (including her own lawyer) remember that she made it.

[249] *See* text accompanying notes 226-229 *supra*.

[250] *See* ABA Formal Opinion 339 (1975), *supra* note 15.

[251] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment, at 48-49 (1981).

[252] *See* text accompanying notes 192-200 *supra*.

[253] *See* text accompanying notes 232-234 *supra*.

nesses available.[254]

The Code Answer

As in Hypothetical Eight, the answer ought to be no, your partner may not serve as Distributor's trial counsel, but the Code is murky for the reasons explained there.[255]

Conclusion

As the hypothetical cases in Part III demonstrate, the Model Rules and the Code reach the same result in all but a few cases.[256] But in those few cases, the Model Rules result seems the wiser of the two. These are cases in which the lawyer's role as witness on behalf of the client arises from the lawyer's service as the client's pre-litigation advisor, and that is precisely where the Code has been most severely criticized.[257]

The hypothetical cases suggest that the method of analysis required by the Model Rules is often more tedious than that required by the Code. By analogy, the Model Rules offer us a scalpel where the Code offers us a garden spade. One's preference between those two implements depends on the task at hand. Over the years, critics have argued that the Code attempts brain

---

[254] *See* text accompanying notes 249-251 *supra*. Note that when your partner, rather than you, serves as Distributor's trial counsel, the risk of harm from your adverse testimony is somewhat less. But Distributor also has less to gain, since presumably your partner is less familiar than you are with Distributor's business and the matter in dispute.

[255] *See* text accompanying notes 204-205 *supra*.

[256]

Hypothetical	#1	#2	#3	#4	#5	#6	#7	#8
Model Rules	No	No	No	No	Yes	Yes	No	No
Code	No	No	No	No	Yes	Yes	No?	No?

Hypothetical	#9	#10	#11	#12	#13	#14	#15	#16
Model Rules	Yes?	Yes	No	No	Yes	Yes	No	No
Code	No?	No?	No	No	Yes	Yes	No?	No?

Yes = Lawyer may serve as trial counsel
No = Lawyer may not serve as trial counsel
? = Uncertainty

[257] *See* commentary cited in note 45 *supra*.

surgery with a garden spade,[258] and that is why the authors of the Model Rules recommend change.[259]

A minor criticism of the Model Rules is that, on the printed page, Rule 3.7 strongly resembles its predecessors in the Code.[260] This may create a trap for unwary readers who are familiar with the Code and who fail to study what the authors of the Model Rules say in their Notes and Comments. But, if the Model Rules are adopted, that problem will be cured by time and experience.

---

[258] *See* sources cited in note 45 *supra*, especially Brown & Brown, *supra* note 45.

[259] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 note (Proposed Final Draft 1981).

[260] *Compare id.* Rule 3.7 *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B) and DR 5-102 (1981).