**Counsel as Lay Witness**

**ABA Model Rule of Professional Conduct 3.7:**

* A lawyer cannot act as advocate at a trial in which the lawyer is *likely* to be a necessary witness unless (1) the testimony would relate to an uncontested issue or to the nature and value of legal services rendered in the case, or (2) disqualification of the attorney would work substantial hardship on the client.
  + The general prohibition against a lawyer serving as both an advocate and as a witness is based on a perceived need to prevent prejudice to the opposing party and to ensure that the trier of fact is not confused or misled by a lawyer serving as both advocate and witness. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. Comment 2 to Rule 3.7.
    - “The experience of the bar and its collective voice in the ABA Canons demands the separation of the roles of advocate and witness. Experience shows that one who combines both roles is not likely to be, as an officer of the court, helpful to the court. There is always danger that when he speaks he will forget whether he speaks as advocate or counsel, to the likely confusion of proceedings, as well as their embitterment. Experience teaches that embitterment between counsel does not conduce to just and speedy proceedings.” *Gen. Mill Supply Co. v. SCA Servs., Inc.*, 697 F.2d 704, 712 (6th Cir. 1982).
* Generally, for an attorney to be disqualified as a necessary witness, the attorney’s proposed testimony must be relevant, material, and not obtainable elsewhere. *Gen. Life Ins. Co. v. Superior Court*, 718 P.2d 985 (Ariz. 1986). If the attorney is deemed a necessary witness, the client’s willingness to forgo the attorney’s testimony will not prevent disqualification. *Freeman v. Vicchiarelli*, 827 F. Supp. 300 (D.N.J 1993). But, disqualification is a drastic measure to be imposed only when absolutely necessary. *Weeks v. Samsung Heavy Indus. Co. Ltd.,*  909 F. Supp. 582 (N.D. Ill. 1996).
* Substantial Hardship Exception
  + A balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. Comment 4 to Model Rule 3.7.
  + Foreseeability May Mitigate Hardship
    - “[S]ubstantial hardship to the client speaks to the situation where the potential for disqualification was not known to the parties in advance. Where the lawyer and client know, or should know, that the lawyer may be an indispensable witness in a potential suit they cannot continue, by their joint actions, to enlarge the dependence of the client upon the lawyer and thus increase the hardship to the client when the lawyer and his law firm may be disqualified. Hardship to the client because of the client's dependence upon the lawyer means hardship that the parties could not rationally foresee. Moreover, hardship is ameliorated since [a] disqualified lawyer and his firm may help new counsel if the client so desires. In addition, courts have generally rejected arguments that a lawyer's long-standing relationship with a client, involvement with the litigation from its inception or financial hardship to the client are sufficient reasons to invoke the “substantial hardship” exception to the advocate-witness rule.” *Jones v. City of Chicago*, 610 F. Supp. 350, 361 (N.D. Ill. 1984).
* Counsel Should Not Wait to The Raise the Prospect that Opposing Counsel May Be a Necessary Witness
  + *Compare Kenosha Auto Transp. Corp.*, 206 Ct. Cl. 888, 891 (1975) (“Defendant wasted more than 2 years after having been apprised of plaintiff's counsel's intent to testify in this case before seeking clarification of his status. During this period extensive pretrial investigations went forward, and other preparations were made for trial. Disqualification of plaintiff's counsel at this junction would thus ‘work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel’ in the case.”) *with Duffey v. Commissioner*, 91 T.C. 81, 84 (1988) (“Respondent properly and commendably brought this matter to the attention of petitioners and this Court well before the case was set for trial.”)
* Rule 3.7 does not itself preclude a lawyer from representing a client in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness. If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7. Comment 7 to Model Rule 3.7.
* Conflict of Interest Rules Should Be Considered Even if The Lawyer is Permitted to act as Counsel and Advocate under Rule 3.7

**Tax Court Rule 24(g):**

* If any counsel of record (1) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case, (2) represents more than one person with differing interests with respect to any issue in a case, or (3) is a potential witness in a case, then such counsel must either secure the informed consent of the client (but only as to items (1) and (2)); withdraw from the case; or take whatever other steps are necessary to obviate a conflict of interest or other violation of the ABA Model Rules of Professional Conduct, and particularly rules 1.7, 1.8, and 3.7 thereof. The Court may inquire into the circumstances of counsel’s employment in order to deter such violations. See Rule 201.

**Tax Rule 201(a):**

* Practitioners before the Court shall carry on their practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association.

**ABA Model Rule of Professional Conduct 1.7**:

* Except as permitted in Rule 1.7, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

If the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Comment 10 to Rule 1.7