



Winter 2006

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Recommended Citation

Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. Rev. 47 (2006).
Available at: <https://digitalrepository.unm.edu/nmlr/vol36/iss1/4>

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LAWYERS AS WITNESSES

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I. INTRODUCTION

Lawyers dread serving as fact witnesses. The mere possibility that a lawyer may be a witness often suggests that something has gone seriously awry in the lawyer's representation of the client for or against whom the lawyer may be testifying. Perhaps the lawyer drafted transactional documents for a client that become the focal point in resulting litigation when the deal unravels or the client believes itself to have been shortchanged.¹ Alternatively, a lawyer may witness events on which a client's liability turns in litigation, making the lawyer a valuable source of proof for the client or an adversary. Regardless, lawyers and courts alike are uncomfortable with the dual roles of lawyer and fact witness.²

On the other hand, lawyers welcome the opportunity to serve as expert witnesses, and they commonly do so. Although lawyers are often asked to serve as experts in legal malpractice litigation and professional responsibility matters,³ they also appear as experts in insurance and reinsurance cases, intellectual property litigation, securities litigation, tax controversies, and many other kinds of disputes.⁴ So long as lawyer-experts are qualified to offer their opinions, testify reliably, have a satisfactory foundation for their opinions, and do not testify on pure questions of law, their appearance on a witness stand is unremarkable. To the extent that their testimony is deficient as an evidentiary matter, courts can deal with it just as they do when experts in other disciplines offer flawed testimony.⁵ Unfortunately, lawyers' service as expert witnesses sometimes gives rise to conflicts of interest if, in serving as experts, lawyers have clients to whom they owe duties of loyalty, as they do in other aspects of their practices.

This Article examines the ethics issues attending lawyers serving as both fact and expert witnesses. Section II examines the so-called "advocate-witness rule" or "lawyer-witness rule," under which lawyers generally are believed to be disqualified from representing clients in cases where lawyers may be called to testify as fact witnesses. Courts frequently decide advocate-witness rule issues, but their

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1. See Eric G. Luna, *Avoiding a "Carnival Atmosphere": Trial Court Discretion and the Advocate-Witness Rule*, 18 WHITTIER L. REV. 447, 452 (1997) (explaining that lawyers often become witnesses when they handle business transactions for clients that go sour and ultimately lead to litigation).

2. See *id.* at 452-53 (noting judicial opposition to lawyers doubling as fact witnesses).

3. See Nancy J. Moore, *The Ethical Role and Responsibilities of a Lawyer-Ethicist: The Case of the Independent Counsel's Independent Counsel*, 68 FORDHAM L. REV. 771, 771 (1999) ("Lawyers and law professors are increasingly being asked to render opinions and advice as ethics experts or consultants.").

4. See, e.g., *Waco Int'l, Inc. v. KHK Scaffolding Houston Inc.*, 278 F.3d 523, 532-33 (5th Cir. 2002) (discussing lawyer's expert testimony in a trademark case); *N. Pacifica, LLC v. City of Pacifica*, 335 F. Supp. 2d 1045, 1047-50 (N.D. Cal. 2004) (disqualifying lawyer-experts on real estate development and property value); *Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F. Supp. 2d 938, 940 (N.D. Ill. 2001) (involving a lawyer testifying as an expert on a company's "insurance litigation strategy" and "pursuit of insurance coverage").

5. See, e.g., *Greenberg Traurig, P.C. v. Moody*, 161 S.W.3d 56, 90-100, 102 (Tex. App. 2004) (reversing judgment against law firm based in part on improper expert testimony by former law professor and retired judge).

application of the rule is often confusing.⁶ Section II therefore clarifies key aspects of the rule.

Section III examines lawyers' service as expert witnesses and, more particularly, (a) whether lawyer-experts have "clients" within the meaning of the conflict of interest provisions of ethics rules, or (b) whether other legal principles impose a duty of loyalty on them. These are points on which there is scarce and conflicting case law. Unfortunately, courts dealing with these issues are likely to rely on a flawed formal opinion by the American Bar Association's (ABA) Standing Committee on Professional Responsibility, where the issues were insufficiently analyzed.⁷ Ultimately, this Article argues that lawyer-experts who violate their duty of loyalty as agents for the parties retaining them may be disciplined for conduct prejudicial to the administration of justice even if their actions are outside the scope of ethics rules specifically addressing conflicts of interest.

II. LAWYERS AS FACT WITNESSES

A. *Lawyers as Fact Witnesses Under the Model Rules*

The advocate-witness rule is rooted in evidence law, but it is now a matter of legal ethics.⁸ It is embodied in Model Rule 3.7(a), which provides that a lawyer "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness" except in three instances.⁹ The three exceptions to this ban are (1) where the lawyer's testimony "relates to an uncontested issue,"¹⁰ (2) where the lawyer's testimony "relates to the nature and value of legal services rendered in the case,"¹¹ and (3) where the lawyer's disqualification "would work substantial hardship on the client."¹²

The general ban on lawyers testifying as witnesses in trials in which they are also advocates, expressed in Rule 3.7(a), protects the fact-finder from confusion.¹³ As a comment to the rule explains: "It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof."¹⁴ The rule

6. Luna, *supra* note 1, at 451 (asserting that "confusion as to [the advocate-witness rule's] purpose and application has been obliquely generated over the past century").

7. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997) [hereinafter Formal Op. 97-407].

8. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 33.4, at 33-5 (3d ed. 2001).

9. MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (2003) [hereinafter MODEL RULES]. Other ethics codes also address lawyers serving as witnesses. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101 (1980) ("Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment"); *id.* DR 5-102 ("Withdrawal as Counsel When the Lawyer Becomes a Witness"); RULES OF PROF'L CONDUCT OF THE STATE BAR OF CAL. R. 5-210 (2003) ("Member as Witness"), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2005 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 443 (2005).

10. MODEL RULES, *supra* note 9, R. 3.7(a)(1).

11. *Id.* R. 3.7(a)(2).

12. *Id.* R. 3.7(a)(3).

13. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 3.7-1(a), at 715 (2005) (describing this as the "primary rationale" supporting Model Rule 3.7(a)).

14. MODEL RULES, *supra* note 9, R. 3.7 cmt. 2.

also protects the opposing party from any unfair prejudice accompanying the lawyer's dual roles,¹⁵ as best explained this way:

The act of taking an oath does not change the fact that the lawyer is an advocate and may be less than fully objective when testifying. The act of taking the oath also may enhance the lawyer's credibility as an advocate. A lawyer testifying as a witness may explain evidence rather than offering it, unfairly influencing the jury in the process.¹⁶

Finally, Rule 3.7(a) protects a lawyer-witness's client from conflicts of interest in the lawyer's dual roles:

If the lawyer (or a member of his firm) must give testimony that is adverse or ambivalent with respect to the client's cause, the cause may be damaged. Moreover, even where the lawyer's testimony is helpful to the client, the lawyer may have a difficult time representing his client zealously while simultaneously trying to protect his own reputation as a truthful witness.¹⁷

Of course, Rule 3.7(a) does not impose an absolute prohibition on lawyers serving as fact witnesses even without reaching any of the three exceptions to the rule.¹⁸ We now turn to the scope and reach of Rule 3.7(a).

1. The Scope and Reach of Rule 3.7(a)

Again, Rule 3.7(a) provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness,"¹⁹ subject to certain exceptions. Rule 3.7(a) applies without regard for which party the lawyer will testify on behalf of.²⁰ Because the lawyer-witness rule applies where a lawyer representing a client "before a jury seeks to serve as a fact witness in that very proceeding,"²¹ the fact that a client's *former* attorney will likely be a necessary witness at trial provides an opponent with no basis to object to the testimony.²² Rule 3.7(a) operates only to disqualify attorneys in their representational capacity; it does not bar their testimony as witnesses.²³

Breaking down the rule, the first aspect to be addressed is its limitation to trials. Even in a case in which a lawyer-witness would be disqualified at trial, the lawyer generally may represent the client in other ways, such as preparing documents,

15. The opposing party's problem "is most acute" when the lawyer-witness will "testify for his client. If the opposing party...desires that the advocate testify *against* his client, the prejudice to the opposing party *may* be less, but that party still has grounds to complain." Klupt v. Krongard, 728 A.2d 727, 740 (Md. Ct. Spec. App. 1999) (citation omitted).

16. Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 52 (2001) [hereinafter *Rude Question*] (footnotes omitted).

17. 2 HAZARD & HODES, *supra* note 8, § 33.5, at 33-6 (footnote omitted).

18. *Id.* § 33.7, at 33-7.

19. MODEL RULES, *supra* note 9, R. 3.7(a).

20. Weigel v. Farmers Ins. Co., 158 S.W.3d 147, 152-53 (Ark. 2004).

21. Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers, 378 F.3d 269, 282 (2d Cir. 2004) (emphasis omitted) (mentioning no ethics rules).

22. First Constitution Bank v. Caldrello, 656 A.2d 1053, 1055-56 (Conn. App. Ct. 1995) (discussing Rule 3.7); see also Ramey, 378 F.3d at 282-83 (mentioning no ethics rules).

23. See *First Constitution Bank*, 656 A.2d at 1055; see also Ramey, 378 F.3d at 283 (discussing the lawyer-witness rule without mentioning Rule 3.7).

researching legal issues, handling pretrial negotiations, and appearing at settlement conferences.²⁴ In addition, a lawyer-witness may represent a client in non-evidentiary pretrial hearings.²⁵ A lawyer may even testify at a pretrial hearing without being disqualified.²⁶ If a lawyer-witness is disqualified from representing the client at trial, the lawyer-witness remains able to consult with substitute counsel and assist with trial preparation.²⁷ Furthermore, a lawyer who is disqualified from representing a client at trial because the lawyer is a necessary witness may nevertheless represent the client in post-trial proceedings,²⁸ including appeals.²⁹

Although the plain language of Rule 3.7(a) clearly limits it to trials, and it is generally true that lawyers who are disqualified from serving as advocates at trial may nonetheless represent their clients in pretrial activities, some courts hold that pretrial disqualification is appropriate where the activity “includes obtaining evidence which, if admitted at trial, would reveal the attorney’s dual role.”³⁰ Depositions therefore pose a special problem. Because depositions often are read into evidence at trial—deposition transcripts may be used at trial to impeach witnesses, and videotaped depositions are regularly played for juries—a lawyer may be disqualified from representing clients in depositions if those depositions cannot be used at trial without revealing the lawyer’s dual roles.³¹ This problem is most acute where depositions are videotaped because the jury may see the lawyer or recognize the lawyer’s voice when the videotapes are played at trial.³² It is more likely that stenographic deposition transcripts can be read into evidence or used to impeach witnesses without revealing a lawyer’s dual roles.³³

Some courts have gone so far as to expand the rule to preclude lawyers’ testimony in affidavits at summary judgment.³⁴ Other courts decline to do so,³⁵

24. *Jackson v. Adcock*, No. Civ. A. 03-3369, 2004 WL 1661199, at *4 (E.D. La. July 22, 2004); *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 239 F. Supp. 2d 1170, 1174 (D. Colo. 2003) (proposing that a lawyer-witness may be disqualified from pretrial activities if those activities include “obtaining evidence which, if admitted at trial, would reveal the lawyer’s dual role” (quoting *World Youth Day v. Famous Artists Merch. Exch.*, 866 F. Supp. 1297, 1303 (D. Colo. 1994))); *Main Events Prods., LLC v. Lacy*, 220 F. Supp. 2d 353, 356 (D.N.J. 2002); *Caplan v. Braverman*, 876 F. Supp. 710, 711 (E.D. Pa. 1995); *Fognani v. Young*, 115 P.3d 1268, 1272 (Colo. 2005); *Columbo v. Puig*, 745 So. 2d 1106, 1107 (Fla. Dist. Ct. App. 1999); *DiMartino v. Eighth Judicial Dist. Court*, 66 P.3d 945, 946–47 (Nev. 2003); *Cunningham v. Sams*, 588 S.E.2d 484, 487 (N.C. Ct. App. 2003).

25. *Lowe v. Experian*, 328 F. Supp. 2d 1122, 1127 (D. Kan. 2004) (declining, however, to allow attorney to appear at evidentiary hearings).

26. *State v. Van Dyck*, 827 A.2d 192, 195 (N.H. 2003).

27. *ROTUNDA & DZIENKOWSKI*, *supra* note 13, § 3.7-4, at 720.

28. *Columbo*, 745 So. 2d at 1107; *see, e.g., People ex rel. S.G.*, 91 P.3d 443, 450 (Colo. Ct. App. 2004) (holding that the Colorado equivalent to Rule 3.7(a) did not apply to a motion seeking relief from judgment).

29. *See United States v. Berger*, 251 F.3d 894, 906–07 (10th Cir. 2001). *But cf. Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 955 (7th Cir. 2005) (expressing “serious concerns” with argument by appellate advocate who was fact witness in underlying dispute, but not disqualifying the witness or urging his disqualification).

30. *World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc.*, 866 F. Supp. 1297, 1303 (D. Colo. 1994).

31. *Lowe v. Experian*, 328 F. Supp. 2d 1122, 1127 (D. Kan. 2004) (prohibiting lawyer from defending depositions in addition to taking them).

32. *See id.*

33. *Id.*

34. *See, e.g., Int’l Res. Ventures, Inc. v. Diamond Mining Co. of Am., Inc.*, 934 S.W.2d 218, 220 (Ark. 1996) (“We have held that Rule 3.7 is applicable to a lawyer’s giving evidence by affidavit as well as by testimony in open court.”). In *Aghili v. Banks*, 63 S.W.3d 812 (Tex. App. 2001), the court affirmed a trial court’s decision striking defense counsel’s affidavit supporting his clients’ summary judgment motion. *Id.* at 819. It is important to note, however, that Rule 3.08(a) of the Texas Disciplinary Rules of Professional Conduct, which was at issue

however, and those courts that broadly hold that Rule 3.7(a) does not apply to lawyers' pretrial activities would presumably hold that the rule does not preclude lawyers from offering affidavits at summary judgment.³⁶

In addition to its clear language, there is no policy reason commending the rule's application to lawyers' affidavit testimony at summary judgment. Because it is the judge who reads motions, there is no chance that the lawyer's dual roles will be confusing.³⁷ It is equally unlikely that a judge, as compared to a jury, will be unfairly influenced by the lawyer's dual roles.³⁸ To the extent that the rule focuses on client protection, it is difficult to see how a lawyer's submission of an affidavit could create a conflict of interest. If the lawyer faces a conflict because the lawyer has testimony to offer that is harmful to the client's cause, the lawyer will not offer that testimony in an affidavit; that sort of conflict is a problem where the opposing party seeks to call the lawyer as a witness, not where the lawyer volunteers testimony. In short, it is inappropriate for courts to extend Rule 3.7(a) to lawyers' affidavit testimony at summary judgment.

Looking further at the rule, what does it take to establish that a lawyer who intends to advocate for a client at trial is "likely to be a necessary witness?"³⁹ Clearly, disqualification cannot be ordered upon an opponent's mere representation that the lawyer identified is a necessary witness⁴⁰ or will be called as a witness.⁴¹ A

in that case, differs significantly from Model Rule 3.7(a), inasmuch as it is not limited to trials. Rather, the Texas rule provides that a lawyer "shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client," subject to five exceptions. *Id.* at 817 (quoting Texas rule).

35. See, e.g., *Carroll v. Town of Univ. Park*, 12 F. Supp. 2d 475, 486 (D. Md. 1997); *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 556 (Ky. 2001).

36. See *Jackson v. Adcock*, No. Civ. A. 03-3369, 2004 WL 1661199, at *4 (E.D. La. July 22, 2004); *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 239 F. Supp. 2d 1170, 1174 (D. Colo. 2003) ("[Rule 3.7(a)] does not automatically require that a lawyer be disqualified from pretrial activities, such as...motions practice."); *Caplan v. Braverman*, 876 F. Supp. 710, 711 (E.D. Pa. 1995) (stating that Rule 3.7 "only prevents a lawyer who will be a witness from acting as an 'advocate at trial'"); *Columbo v. Puig*, 745 So. 2d 1106, 1107 (Fla. Dist. Ct. App. 1999); *DiMartino v. Eighth Judicial Dist. Court*, 66 P.3d 945, 946-47 (Nev. 2003) (adopting the view that a lawyer who is likely to be a necessary witness may still represent a client in pretrial matters).

37. See *State v. Van Dyck*, 827 A.2d 192, 195 (N.H. 2003) (observing that, "[u]nlike a jury, a judge is unlikely to confuse the roles of advocate and witness or to deem an attorney credible simply because he is an attorney"); see also *Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 282 (2d Cir. 2004) (explaining that the lawyer-witness rule applies "first and foremost" where the lawyer-witness is representing a client "before a jury"); *Roberts v. State*, 840 So. 2d 962, 970 (Fla. 2003) (finding no basis for Rule 3.7 disqualification where prosecutor testified in a post-conviction evidentiary hearing before a judge); *DiMartino*, 66 P.3d at 947 (noting that pretrial disqualification of lawyer-witness generally is not necessary because there is no danger of the confusion and prejudice that may result from a lawyer appearing as an advocate and a witness before a jury).

38. See *Van Dyck*, 827 A.2d at 195 (asserting that a judge is unlikely to deem an attorney credible as a witness simply because he is an attorney); see also *Roberts*, 840 So. 2d at 970 (noting that lawyer's dual role would not prejudice opponent in a hearing before a judge); *DiMartino*, 66 P.3d at 947 (noting that pretrial disqualification generally is not warranted because the lawyer-witness rule is intended to eliminate confusion and prejudice resulting from lawyer's dual roles in front of the jury).

39. See MODEL RULES, *supra* note 9, R. 3.7.

40. *Bradford v. State*, 734 So. 2d 364, 369 (Ala. Crim. App. 1999) ("The necessity standard requires more than mere speculation that counsel will be required to testify."); *Hiatt v. Estate of Hiatt*, 837 So. 2d 1132, 1133 (Fla. Dist. Ct. App. 2003); *Quality Developers, Inc. v. Thorman*, 31 P.3d 296, 306 (Kan. Ct. App. 2001) (noting that plaintiff could not point to any testimony that lawyers might give that would be adverse to client's interests and stating that "[m]ere speculation is not a sufficient basis...to disqualify an attorney" as a necessary witness);

court cannot disqualify a lawyer “solely on the word” of an opponent.⁴² Rather, a party seeking to disqualify a lawyer under Rule 3.7(a) bears the burden of proving that the lawyer’s proposed testimony “is relevant, material, not merely cumulative, and unobtainable elsewhere.”⁴³ Thus, if the lawyer’s intended testimony is irrelevant,⁴⁴ immaterial,⁴⁵ cumulative,⁴⁶ or can be obtained from other sources,⁴⁷ the lawyer is not a necessary witness, and Rule 3.7(a) does not operate to disqualify the lawyer as trial counsel.

Some courts apply a different standard when an opposing party desires to call a lawyer as a witness, holding that disqualification is warranted upon “a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney’s client.”⁴⁸ The standard for showing prejudice is stringent to prevent adverse parties from attempting to call opposing

McKenzie v. City of Omaha, 668 N.W.2d 264, 269 (Neb. Ct. App. 2003); *DiMartino*, 66 P.3d at 946–47.

41. *Humphrey v. McLaren*, 402 N.W.2d 535, 541 (Minn. 1987); *Van Dyck*, 827 A.2d at 194 (quoting *Humphrey*, 402 N.W.2d at 541); *Thompson v. Goetz*, 455 N.W.2d 580, 587 (N.D. 1990) (quoting *Sec. Gen. Life Ins. v. Supreme Court*, 718 P.2d 986, 988 (Ariz. 1986)); *Spence v. Flynt*, 816 P.2d 771, 779 (Wyo. 1991) (citing *Humphrey*).

42. *McKenzie*, 668 N.W.2d at 269.

43. *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 239 F. Supp. 2d 1170, 1173 (D. Colo. 2003). Determining whether a lawyer is likely to be a necessary witness “involves a consideration of the nature of the case, with emphasis on the subject of the lawyer’s testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues.” *Fognani v. Young*, 115 P.3d 1268, 1274 (Colo. 2005); see *State v. Schmitt*, 102 P.3d 856, 859 (Wash. Ct. App. 2004) (stating that a lawyer should be disqualified under Rule 3.7 only upon a showing of “compelling circumstances,” and that “[t]o demonstrate compelling circumstances, a party must show that the attorney will provide material evidence unobtainable elsewhere”).

44. See, e.g., *In re Estate of Susser*, 657 N.W.2d 147, 152 (Mich. Ct. App. 2002) (holding that trial court did not err in refusing to disqualify lawyer where lawyer would have testified about an irrelevant issue).

45. See, e.g., *Gateway Family Worship Ctrs., Inc. v. H.O.P.E. Found. Ministries, Inc.*, 535 S.E.2d 286, 289 (Ga. Ct. App. 2000) (holding that attorney should not have been disqualified because two other witnesses could testify to key facts, thus making attorney’s testimony unnecessary, and because his testimony was immaterial and would amount to hearsay); *LeaseAmerica Corp. v. Stewart*, 876 P.2d 184, 193 (Kan. Ct. App. 1994) (holding that attorney should not be disqualified where potential testimony was not material to issues in the lawsuit).

46. See, e.g., *Horaist v. Doctor’s Hosp. of Opelousas*, 255 F.3d 261, 267 (5th Cir. 2001) (deciding issue under Louisiana Rule 3.7(a)); *Martinez v. Housing Auth.*, 590 S.E.2d 245, 250 (Ga. Ct. App. 2003) (“[The defense attorney] was not needed as a witness because other witnesses testified about the events in which he was involved and were fully available for cross-examination by [the plaintiff].”); *Van Dyck*, 827 A.2d at 194 (reversing disqualification where attorney’s intended testimony was cumulative).

47. See, e.g., *Utley v. City of Dover*, 101 S.W.3d 191, 202 (Ark. 2003) (rejecting disqualification where movant did not show that testimony by lawyer could not be gained from any other source); *Cerillo v. Highley*, 797 So. 2d 1288, 1289 (Fla. Dist. Ct. App. 2001) (quashing disqualification order where lawyer was not sole witness to battery at issue); *State v. Werneke*, 958 S.W.2d 314, 321 (Mo. Ct. App. 1997) (holding that trial court did not err in overruling defendant’s motion to disqualify prosecutor where there were two other witnesses to the event about which the prosecutor might testify); *Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 11, 916 P.2d 836, 840 (holding that lawyer who accompanied client to meeting at issue should not have been disqualified absent showing that similar testimony could not have been obtained from others at meeting); *Harter v. Plains Ins. Co.*, 579 N.W.2d 625, 632 (S.D. 1998) (holding that lawyer was not necessary witness where documentary evidence on subject of his intended testimony was admitted into evidence at trial); *Smithson v. U.S. Fid. & Guar. Co.*, 411 S.E.2d 850, 856 (W. Va. 1991) (finding that disqualification was not warranted where defendant failed to show that testimony to be offered by plaintiff’s counsel could not be developed by other witnesses); see also *Env’tl. Network Corp. v. TNT Rubbish Disposal, Inc.*, 751 N.E.2d 502, 505 (Ohio Ct. App. 2001) (holding that trial court erred in disqualifying lawyers under Model Code DR 5-102 when other witnesses’ testimony made lawyers’ testimony unnecessary).

48. *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 871 (N.D. 1993); see also *Weigel v. Farmers Ins. Co.*, 158 S.W.3d 147, 153 (Ark. 2004); *LeaseAmerica Corp.*, 876 P.2d at 192; *Smithson*, 411 S.E.2d at 856.

counsel as witnesses solely to disqualify them.⁴⁹ The moving party must clearly establish the adverse testimony the lawyer-witness will offer. Speculation that the lawyer's testimony will adversely affect the lawyer's client will not support disqualification.⁵⁰ As to where a client seeks to call its own lawyer as a witness, a party seeking to call opposing counsel will be unable to disqualify that lawyer if the lawyer's intended testimony is irrelevant, immaterial, cumulative, or obtainable from other sources.⁵¹

Three final points about Rule 3.7(a) bear mentioning. First, a lawyer who is likely to be a necessary witness at trial probably cannot avoid disqualification by stipulating to the facts on which the testimony would rely, thus rendering the testimony unnecessary.⁵² Regardless of whether the lawyer testifies in person or by way of a written stipulation, the lawyer is still a necessary witness and remains "in the unseemly position of arguing his own credibility, notably in opening and closing statements."⁵³ The lawyer's credibility may further be at issue in cross-examination, where the lawyer must cross-examine witnesses on his communications with them.⁵⁴

Second, a court asked to disqualify a lawyer under Rule 3.7(a) need not rush to judgment because circumstances may change. For example, the case may settle, the case may be resolved on a dispositive motion, other evidence may be available in place of the lawyer's testimony, or the issue requiring the attorney's testimony may disappear from the case by way of motion or amended pleadings. A court can therefore delay ruling until it can determine whether the lawyer's testimony is truly necessary.⁵⁵ Indeed, given the hardship typically visited on the party whose lawyer is disqualified, this is a wise course.⁵⁶

The fact that a court may proceed cautiously when ruling on a lawyer-witness's potential disqualification does not mean, however, that the moving party must establish with absolute certainty that the lawyer-witness will, in fact, testify at trial. The moving party meets its burden when it establishes that the lawyer-witness's testimony is "likely" to be necessary.⁵⁷ The likelihood of a lawyer-witness's testimony being deemed necessary requires case-specific inquiry.⁵⁸

49. *Sargent County Bank*, 500 N.W.2d at 871; *In re Sanders*, 153 S.W.3d 54, 57–58 (Tex. 2004) (discussing the Texas analog to Rule 3.7).

50. *Quality Developers, Inc. v. Thorman*, 31 P.3d 296, 306 (Kan. Ct. App. 2001); *see, e.g., Zutler v. Driversshield Corp.*, 790 N.Y.S.2d 485, 486 (N.Y. App. Div. 2005) (reversing trial court's disqualification order where the plaintiff's disqualification motion "was supported by affidavits that were speculative and conclusory").

51. *Quality Developers, Inc.*, 31 P.3d at 306 (declining to disqualify counsel under Rule 3.7(a) because moving party could not show that counsel's testimony was material or could not be obtained from other sources).

52. *See, e.g., Weigel*, 158 S.W.3d at 155.

53. *Id.*

54. *Id.*

55. *Standard Quimica de Venez. v. Cent. Hispano Int'l, Inc.*, 179 F.R.D. 64, 65–66 (D.P.R. 1998); *Chapman Eng'rs, Inc. v. Natural Gas Sales Co.*, 766 F. Supp. 949, 958 (D. Kan. 1991); *In re Estate of Waters*, 647 A.2d 1091, 1097 (Del. 1994); *Nat'l Bank of Andover, N.A. v. Aero Standard Tooling, Inc.*, 49 P.3d 547, 553 (Kan. Ct. App. 2002).

56. A court weighing disqualification before trial might consider setting a deadline by which a party must declare its intention to call its lawyer as a witness. Assuming that the deadline is reasonable, the court can then decide the issue at a time calculated to minimize disruption to the parties and to the court. *See Barbee v. Luong Firm, P.L.L.C.*, 107 P.3d 762, 767–68 (Wash. Ct. App. 2005) (suggesting this approach).

57. *Fognani v. Young*, 115 P.3d 1268, 1274 (Colo. 2005).

58. *See id.* ("The likelihood of [a lawyer-witness's] testimony is based, not on the [opponent's] subjective trial strategy, but rather, on the circumstances of the particular case.").

Third, courts should carefully scrutinize motions to disqualify lawyers as witnesses because they hold great potential for tactical abuse.⁵⁹ A party can easily use a disqualification motion premised on Rule 3.7(a) as a ploy to cripple its opponent's case.⁶⁰

2. The Substantial Hardship Exception to Rule 3.7(a)

Where Rule 3.7(a) applies, it becomes necessary to determine if any of its three exceptions spares the lawyer-witness from disqualification. Of these, Rule 3.7(a)(1), addressing testimony on an uncontested issue,⁶¹ and Rule 3.7(a)(2), governing testimony related to the nature and value of the legal services rendered in the case,⁶² are straightforward. That leaves the third exception, found in Rule 3.7(a)(3), which allows a lawyer who is likely to be a necessary witness to nonetheless represent the client at trial if "disqualification of the lawyer would work substantial hardship on the client."⁶³ The term "disqualification" in Rule 3.7(a)(3) refers to a lawyer's disqualification as an advocate; it does not suggest the exclusion of a lawyer's testimony.⁶⁴ The "client" the exception seeks to protect is, of course, the client of the testifying attorney, not the opponent.⁶⁵

In essence, Rule 3.7(a)(3) allows a lawyer-witness's representation of a client any time the detriment to the client, caused by the lawyer's disqualification, outweighs the prejudice to the opponent, caused by the lawyer's dual roles.⁶⁶ Courts must perform the Rule 3.7(a)(3) balancing test in all cases in which neither of the other two exceptions apply.⁶⁷

Courts narrowly construe the substantial hardship exception.⁶⁸ To avoid its lawyer's disqualification on undue hardship grounds, a party must demonstrate prejudice beyond the normal inconvenience and expense associated with changing counsel.⁶⁹ A court is unlikely to find substantial hardship where the client is easily able to hire replacement counsel⁷⁰ or where the client already has substitute counsel in place.⁷¹ Courts also may consider the time and money the client has invested in

59. *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 560 (Ky. 2001); *Klupt v. Krongard*, 728 A.2d 727, 740 (Md. Ct. Spec. App. 1999); *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 871 (N.D. 1993); *In re Sanders*, 153 S.W.3d 54, 57 (Tex. 2004).

60. *See Weigel v. Farmers Ins. Co.*, 158 S.W.3d 147, 155 (Ark. 2004) (overruling *Purtle v. McAdam*, 879 S.W.2d 401, 404 (Ark. 1994)).

61. MODEL RULES, *supra* note 9, R. 3.7(a)(1).

62. *Id.* R. 3.7(a)(2).

63. *Id.* R. 3.7(a)(3).

64. *Smith v. Wharton*, 78 S.W.3d 79, 84 (Ark. 2002).

65. *People v. Donaldson*, 113 Cal. Rptr. 2d 548, 557 (Ct. App. 2001).

66. 2 HAZARD & HODES, *supra* note 8, § 33.7, at 33-8.

67. *See DiMartino v. Eighth Judicial Dist. Court*, 66 P.3d 945, 947 (Nev. 2003) (discussing the Nevada equivalent of Rule 3.7(a)(3)); *Thompson v. Goetz*, 455 N.W.2d 580, 588 (N.D. 1990); *Mount Rushmore Broad., Inc. v. Statewide Collections*, 42 P.3d 478, 482 (Wyo. 2002).

68. *Brown v. Daniel*, 180 F.R.D. 298, 302 (D.S.C. 1998).

69. *Id.*

70. *See, e.g., DeBiasi v. Charter County of Wayne*, 284 F. Supp. 2d 760, 772 (E.D. Mich. 2003) (noting that there were "many competent, experienced trial lawyers" in the area who were well-versed in the kinds of issues presented in the case).

71. *See, e.g., Standard Quimica de Venez. v. Cent. Hispano Int'l, Inc.*, 179 F.R.D. 64, 66 (D.P.R. 1998); *USX Corp. v. TIECO, Inc.*, 929 F. Supp. 1455, 1459 (N.D. Ala. 1996); *Int'l Res. Ventures, Inc. v. Diamond Mining Co. of Am., Inc.*, 934 S.W.2d 218, 222 (Ark. 1996); *Fognani v. Young*, 115 P.3d 1268, 1271 (Colo. 2005); *Penna*

the lawyer to be disqualified, as well as the proximity to trial.⁷² The less time or money the client has invested, or the more remote the trial date, the less likely a court is to find substantial hardship. In *Stewart v. Bank of America*,⁷³ for example, the court found that the plaintiff would suffer no hardship from lawyer-disqualification because “[d]iscovery ha[d] not yet taken place, no dispositive motions ha[d] been filed and a trial date ha[d] not been set.”⁷⁴

Additionally, courts often evaluate the party’s foreseeability of the likelihood that the lawyer will be a necessary witness.⁷⁵ If it is apparent early on that the lawyer is likely to be a necessary witness, the lawyer’s disqualification as an advocate typically will not be deemed a substantial hardship to the client.⁷⁶ Any hardship in that instance is treated as self-inflicted. Thus, a client’s remedy for financial loss due to its lawyer’s labor under a known threat of disqualification is reimbursement from its lawyer rather than shelter under the exception.⁷⁷

On the other hand, a court should not disqualify a lawyer who has special knowledge of the case or in whom the party has unusual confidence and trust.⁷⁸ In *Brown v. Daniel*,⁷⁹ for example, the court declined to disqualify the plaintiff’s lawyers because the case was “quite complex with a remarkable set of facts and an intricate time line,” and the firm was intimately familiar with the facts, such that the firm had “unique experience and extensive knowledge” particular to the case.⁸⁰ To disqualify the firm would have caused the plaintiff substantial hardship.⁸¹ *Brown* illustrates the importance that courts attach to lawyers’ special knowledge of a case and the factual complexities that make it difficult to engage new counsel.⁸²

Generally, the longer a matter is litigated and the greater the client’s investment in the litigation, the more likely that a lawyer’s disqualification will create substantial hardship sufficient to overcome disqualification.⁸³ A court should be

v. Margolis, No. CV030475408S, 2004 WL 377010, at *7 (Conn. Super. Ct. Feb. 9, 2004); Collins Entm’t, Inc. v. White, 611 S.E.2d 262, 271 (S.C. Ct. App. 2005).

72. Freeman v. Vicchiarelli, 827 F. Supp. 300, 304–05 (D.N.J. 1993) (finding no hardship where motion to disqualify was filed one month after complaint was filed); *Penna*, 2004 WL 377010, at *7 (disqualifying lawyer in early stages of case where no discovery had occurred).

73. 203 F.R.D. 585 (M.D. Ga. 2001).

74. *Id.* at 587.

75. See, e.g., Weigel v. Farmers Ins. Co., 158 S.W.3d 147, 156 (Ark. 2004) (discussing trial court’s observations when disqualifying the lawyer and affirming the trial court); Klupt v. Krongard, 728 A.2d 727, 740–41 (Md. Ct. Spec. App. 1999); Senu-Oke v. Modern Moving Sys., Inc., 978 S.W.2d 426, 433 (Mo. Ct. App. 1998); Mount Rushmore Broad., Inc. v. Statewide Collections, 42 P.3d 478, 482 (Wyo. 2002).

76. See Weigel, 158 S.W.3d at 156 (discussing trial court’s observations and concluding that trial court did not abuse its discretion in disqualifying lawyer); *Fognani*, 115 P.3d at 1277; *Klupt*, 728 A.2d at 740–41.

77. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.5, at 387 (1986).

78. See, e.g., Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 560 (Ky. 2001); *State ex rel. Wallace v. Munton*, 989 S.W.2d 641, 647 (Mo. Ct. App. 1999).

79. 180 F.R.D. 298 (D.S.C. 1998).

80. *Id.* at 302.

81. *Id.*

82. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108 cmt. h (2000) [hereinafter RESTATEMENT] (listing “the complexity of the issues” as one factor to consider when analyzing substantial hardship in lawyer-witness controversies).

83. See, e.g., Nat’l Union Fire Ins. Co. v. L.E. Myers Co. Group, 937 F. Supp. 276, 280–81 (S.D.N.Y. 1996) (finding substantial hardship where law firm had represented client in action spanning twelve years and noting financial hardship to client if law firm were disqualified); D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C., 113 P.3d 1022, 1023–24 (Utah Ct. App. 2005) (affirming trial court’s finding of substantial hardship where case had

reluctant to disqualify a lawyer when discovery is complete, or nearly so, or when trial is near, unless it is willing to mitigate the related hardship by reopening or extending discovery or by continuing the trial date to allow substitute counsel time to adequately prepare the case.⁸⁴ Certainly a party would experience substantial hardship if its lawyer were disqualified during trial.⁸⁵

Furthermore, a court weighing substantial hardship must account for the expertise and skill of the lawyer to be disqualified and the likelihood that available replacement counsel will measure up.⁸⁶ It is not enough, however, that the challenged lawyer enjoys a sterling reputation.⁸⁷ To invoke the substantial hardship exception to avoid disqualification based on the lawyer's expertise and skill, the client or lawyer must relate these traits to the case at hand.⁸⁸ A lawyer can most likely avoid disqualification by practicing in a specialized area and demonstrating that the client recognized the lawyer's special expertise or skill before soliciting the lawyer's services.

3. Disqualifying the Lawyer Versus Excluding the Testimony

The lawyer-witness rule is generally understood to restrict who can serve as a trial advocate.⁸⁹ The rule disqualifies lawyers in their representational capacity; it does not bar their testimony as witnesses.⁹⁰ In some cases, however, courts applying Rule 3.7(a) bar a lawyer-witness from testifying while allowing the lawyer-witness to represent a client at trial.⁹¹ Courts seem more likely to apply Rule 3.7(a) this way in cases in which the lawyer's potential appearance as a witness is first revealed at trial, such that disqualifying the lawyer is a disagreeable option in terms of judicial economy in addition to causing the client substantial hardship.⁹²

Although excluding a lawyer's testimony as a witness instead of disqualifying the lawyer as an advocate seems backwards in light of courts' traditional approach to resolving lawyer-witness controversies and the phrasing of Rule 3.7(a), nothing in the rule prohibits this approach.⁹³ That does not mean, however, that an exclusionary approach is necessarily desirable or workable. Consider the situation

been on file for almost three years, the parties had litigated an extraordinary number of legal issues, almost all key witnesses had been deposed, and the parties had exchanged written discovery).

84. See *LeRoy v. State*, No. 074, 1993, 1994 WL 637310, at *2 (Del. Super. Ct. Jan. 21, 1994) (disqualifying lawyer but continuing hearing to allow client to locate new counsel and thus avoid substantial hardship otherwise caused by disqualification).

85. See, e.g., *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 450 S.E.2d 66, 75 (S.C. Ct. App. 1994) (affirming trial court decision denying disqualification of plaintiff's lawyer in midst of trial because it would create substantial hardship).

86. See *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 945 F. Supp. 1470, 1476-78 (D. Colo. 1996) (finding undue hardship where attorney was one of only a handful of attorneys in the country willing to litigate against the Church of Scientology and was "one of the two most experienced and successful").

87. WOLFRAM, *supra* note 77, § 7.5, at 388.

88. See *Religious Tech. Ctr.*, 945 F. Supp. at 1476-77 (involving attorney with resolve and expertise in litigation against Church of Scientology).

89. ROTUNDA & DZIENKOWSKI, *supra* note 13, § 3.7-1(a), at 716.

90. *Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 282 (2d Cir. 2004).

91. *Mount Rushmore Broad., Inc. v. Statewide Collections*, 42 P.3d 478, 482 (Wyo. 2002).

92. See *id.* at 479 (involving a defense lawyer who sought to testify after the plaintiff rested its case).

93. MODEL RULES, *supra* note 9, R. 3.7(a) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless [one of the three exceptions is satisfied].").

in which a client wishes to have its lawyer offer favorable testimony at trial. If the court excludes the testimony instead of disqualifying the lawyer, the opponent cannot complain because the court has prevented the lawyer from mixing the roles of advocate and witness to the opponent's detriment. The risk of confusing the fact-finder is avoided just as surely as if the lawyer-witness were disqualified as an advocate. If the client always intended to call its lawyer as a friendly witness, the exclusion of the lawyer's testimony is a self-inflicted wound because the client should have anticipated the ruling and engaged substitute counsel before trial. Difficulty arises when the client's need for its lawyer's favorable testimony comes as a surprise at trial, perhaps because of another witness's unexpected testimony, the opponent's introduction of new documentary evidence, or the injection of new theories into the case that the judge deems to be tried by consent. Here the client cannot avail itself of the substantial hardship exception in Rule 3.7(a)(3), which expressly deals with a lawyer's disqualification as an advocate.⁹⁴ The client is thus left to move for a mistrial or to argue for some sort of relief based on principles of fairness. Neither approach is a reliably good option.

Because so few courts invoke Rule 3.7(a) to exclude a lawyer-witness's testimony rather than disqualifying the lawyer as an advocate, those cases should be treated as aberrations or as limited to their facts. Disqualification of the lawyer-witness as an advocate is the preferred method of enforcing Rule 3.7(a).⁹⁵

4. Personal Disqualification versus Imputed Disqualification

A lawyer serving as an advocate, who will likely be a necessary witness in a trial and who cannot find refuge in any of the Rule 3.7(a) exceptions, will be disqualified from representing the client at trial. Is it then permissible for another lawyer in the disqualified lawyer's firm to try the case?

Imputed disqualification generally is not appropriate in lawyer-witness cases.⁹⁶ This is clear from the language of Rule 3.7(b),⁹⁷ which states, "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."⁹⁸ Thus, where a lawyer-witness who is expected to testify favorably for the client cannot escape disqualification by way of Rule 3.7(a)(3), any harm attributable to the lawyer-witness's disqualification can be lessened by allowing another lawyer within the same firm to take over the case.⁹⁹ The opposing party cannot complain because there is no danger that the lawyer-witness will argue her own credibility to the jury

94. *Smith v. Wharton*, 78 S.W.3d 79, 84 (Ark. 2002) (making clear that substantial hardship is linked to the lawyer's disqualification as an advocate, not the exclusion of the lawyer's testimony as a witness); see MODEL RULES, *supra* note 9, R. 3.7(a)(3) (allowing a lawyer to act as an advocate at a trial where the lawyer is likely to be a necessary witness if "disqualification of the lawyer would work substantial hardship on the client").

95. See, e.g., *First Constitution Bank v. Caldrello*, 656 A.2d 1053, 1055-56 (Conn. App. Ct. 1995) (reversing trial court's exclusion of lawyer's testimony based on Rule 3.7).

96. *Fleitman v. McPherson*, 691 So. 2d 37, 38 (Fla. Dist. Ct. App. 1997); *Spence v. Flynt*, 816 P.2d 771, 778-79 (Wyo. 1991).

97. *Spence*, 816 P.2d at 778 ("One function of Rule 3.7(b) is to make clear that 3.7(a) is personal to the client's trial advocate and will not be imputed to other members of the firm.")

98. MODEL RULES, *supra* note 9, R. 3.7(b).

99. See, e.g., *Collins Entm't, Inc. v. White*, 611 S.E.2d 262, 271 (S.C. Ct. App. 2005) (finding no substantial hardship where lawyer-witness's partner could take over client's representation at trial).

or that she will enhance her effectiveness as an advocate by taking the oath as a witness.

But as Rule 3.7(b) further expresses, imputed disqualification is appropriate where the lawyer-witness is also disqualified from representing the client by a conflict of interest under Rule 1.7 or Rule 1.9.¹⁰⁰ Under Model Rule 1.10(a), lawyers practicing in a firm generally are disqualified from representing a client “when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9.”¹⁰¹ Thus, “if the conflict rules alone would preclude the testifying lawyer from acting as both advocate and witness, then no one in the testifying lawyer’s firm may serve as an advocate in the case.”¹⁰²

Rule 3.7(b) is only implicated where there is a conflict of interest.¹⁰³ It was implemented so that clients would be protected when their former lawyer is expected to testify against them, most often where the opponent calls the lawyer as an involuntary witness.¹⁰⁴ As the North Dakota Supreme Court once explained, a conflict contemplated by Rule 3.7(b) arises “when an attorney’s testimony would prejudicially contradict or undermine his client’s factual assertions.”¹⁰⁵ Of course, a client may waive the conflict of interest.¹⁰⁶ Allowing the client to consent to the representation notwithstanding the conflict of interest prevents “the power of the client to control the progress of his or her case from being placed into the hands of opposing counsel.”¹⁰⁷ If the client waives the conflict, the opposing party cannot halt the representation. Because only the client stands to be hurt by its lawyer’s testimony, the opponent lacks standing to disqualify the lawyer-witness or other lawyers within the same firm.¹⁰⁸

In *Hagood v. Sommerville*,¹⁰⁹ a bicyclist, Hagood, sued a motorist, Sommerville. Attorney James Moss represented Hagood, and Moss designated an investigator and accident reconstructionist belonging to the same law firm, Adams, as an expert witness.¹¹⁰ Sommerville moved to disqualify Adams as an expert, arguing that Rule 3.7 prohibited Moss from testifying at trial and therefore prohibited Adams from testifying as well.¹¹¹ The trial court agreed¹¹² and thus offered Moss two choices: (1) drop Adams as an expert and continue representing Hagood; or (2) withdraw from the case, allowing Hagood’s new lawyer to continue using Adams as an expert

100. MODEL RULES, *supra* note 9, R. 3.7 cmt. 7.

101. *Id.* R. 1.10(a).

102. *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 870 (N.D. 1993).

103. *Cunningham v. Sams*, 588 S.E.2d 484, 488 (N.C. Ct. App. 2003).

104. 2 HAZARD & HODES, *supra* note 8, § 33.8, at 33-8 to -9.

105. *Sargent County Bank*, 500 N.W.2d at 871.

106. 2 HAZARD & HODES, *supra* note 8, § 33.8, at 33-9; *see, e.g.*, *Jackson v. Adcock*, No. Civ. A. 03-3369, 2004 WL 1661199, at *4 (E.D. La. July 22, 2004).

107. *LeaseAmerica Corp. v. Stewart*, 876 P.2d 184, 192 (Kan. Ct. App. 1994).

108. *FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1315 (5th Cir. 1995); *USX Corp. v. TIECO, Inc.*, 929 F. Supp. 1455, 1459 (N.D. Ala. 1996).

109. 607 S.E.2d 707 (S.C. 2005).

110. *Id.* at 708.

111. *Id.* at 710.

112. *Id.*

witness.¹¹³ Moss withdrew¹¹⁴ and the case quickly made its way to the Supreme Court of South Carolina. The supreme court reversed the trial court.¹¹⁵

The court in *Hagood* observed that Rule 3.7 was never intended to prevent a lawyer's employee from testifying in a case the lawyer is handling where, as here, there was no conflict of interest.¹¹⁶ Adams' testimony while Moss was acting as an advocate was unlikely to confuse the jury, especially since Somerville's lawyer could be expected to emphasize Adams' employment by Moss as evidence of bias.¹¹⁷ Finally, if Rule 3.7(b) permits another lawyer in a lawyer-witness's firm to represent a client where there is no conflict of interest, it surely permits a lawyer to function as an advocate in a conflict-free case in which one of the lawyer's employees is a witness.¹¹⁸

The South Carolina Supreme Court reached the correct result. Somerville's Rule 3.7 argument was frivolous. If the court in *Hagood* is to be faulted for anything, it is for arguably implying that Rule 3.7 might apply where a lawyer's lay employee is a witness and either the lawyer or the employee has a conflict of interest with the client.¹¹⁹ That cannot be. By its plain terms, Rule 3.7(a) applies only to lawyers acting as advocates at trials in which they are likely to be necessary witnesses,¹²⁰ and Rule 3.7(b) just as clearly applies only to situations in which another lawyer in the same firm as the trial advocate is likely to be called as a witness.¹²¹ The use of the words "lawyer" and "lawyers" in subsections (a) and (b) is not accidental. Rule 3.7 simply does not apply to non-lawyer employees of lawyers or law firms who also are witnesses.¹²²

III. LAWYERS AS EXPERT WITNESSES

When lawyers are employed as expert witnesses, the lawyer-witness rule no longer is an issue.¹²³ This Part will examine the lawyer-expert context, where conflicts of interest, the duty of loyalty, and threats to confidentiality are major concerns. Case law in this area is scarce and conflicting, and the analysis and direction provided by the American Bar Association's respected Standing Committee on Ethics and Professional Responsibility is insufficient.¹²⁴

Assume for the moment that you represent one of two defendants in a suit in which the plaintiffs allege that the defendants defrauded them by misrepresenting

113. *Id.* at 708.

114. *Id.*

115. *Id.*

116. *Id.* at 711.

117. *See id.*

118. *Id.*

119. *See id.* ("Nothing in Rule 3.7 or the accompanying comments indicates it is intended to prohibit an employee of an attorney from testifying in a case...in which there exists *no conflict of interest* between the attorney and client, or between the attorney's employee and client." (emphasis added)).

120. MODEL RULES, *supra* note 9, R. 3.7(a).

121. *Id.* R. 3.7(b).

122. *See* RESTATEMENT, *supra* note 82, § 108 cmt. j (asserting that the lawyer-witness rule "does not apply to an advocate's nonlawyer employees or agents who do not sit at counsel table or otherwise visibly function in support of advocacy before the factfinder").

123. *See supra* notes 3–5 and accompanying text.

124. *See supra* note 7.

the tax treatment of cash value life insurance policies that they sold. Although your client and the codefendant share an interest in defeating the plaintiffs' claims, their interests are not otherwise aligned. You hire, as an expert witness, a lawyer, Smith, who is an authority on the tax implications of life insurance. Months later, you learn that your codefendant intends to replace its existing counsel with Jones, a partner in Smith's firm. This disturbs you because Smith will be rendered worthless as an expert; the plaintiffs will impeach Smith's testimony by asserting that he is biased by virtue of Jones' representation of the codefendant. You thus convene a conference call with Smith and Jones and remind them that their firm cannot assume your codefendant's representation because of the conflict of interest attributable to Smith's expert service for your client. Nonsense, Smith and Jones say. Representing your codefendant will be far more profitable than Smith's expert witness work in the matter, and, of course, there is no conflict of interest because Smith never shared an attorney-client relationship with your client. What do you do now?

Alternatively, assume that you are defending a client in a patent case. You engage Adams, a superior intellectual property litigator, to testify as an expert witness at trial on behalf of your client, ABC Corporation. You are thus shocked when ABC's general counsel calls to tell you that ABC has been sued in another patent case in which Adams represents the plaintiff. You immediately call Adams to protest the obvious conflict of interest. Rather than seeing things your way, Adams asserts that it is ethical to function as an expert in your case and still sue ABC in the second case because in your case he is merely serving as an expert witness, not "representing" ABC, and thus there is no conflict of interest. Is this correct?

Courts do not hesitate to disqualify expert witnesses in litigation where a party previously engaged the expert, a confidential relationship existed between them, and the party disclosed confidential or privileged information to the expert.¹²⁵ But those cases typically involve non-lawyer experts, and courts do not apply legal ethics rules or standards to them.¹²⁶ Moreover, in the examples above (and in lawyer-expert cases generally), the issue is not just whether the expert or another law firm can be disqualified, but whether the lawyer-expert's conduct is ethical. Consideration of that issue begins with a 1997 formal opinion by the American Bar Association's Standing Committee on Ethics and Professional Responsibility (the Committee).¹²⁷

A. *The Committee's Treatment of Lawyers as Witnesses for Non-Clients*

In Formal Opinion 97-407, the Committee was asked whether, under the Model Rules, "a lawyer who is retained to testify as an expert witness on behalf of a party who is another firm's client may undertake a representation directly adverse to that

125. See *Turner v. Thiel*, 553 S.E.2d 765, 768 (Va. 2001) (setting forth the expert disqualification test applied in most jurisdictions); see also Douglas R. Richmond, *Expert Witness Conflicts and Compensation*, 67 TENN. L. REV. 909, 910-33 (2000) [hereinafter *Expert Witness Conflicts*] (discussing expert witness conflicts).

126. *Grant v. Lewis/Boyle, Inc.*, 557 N.E.2d 1136, 1138 (Mass. 1990).

127. Formal Op. 97-407, *supra* note 7.

party.”¹²⁸ The Committee was further asked whether the lawyer-expert could undertake the adverse representation after testifying on behalf of the party even if the lawyer-expert could not undertake it while currently serving as the party’s expert.¹²⁹ Finally, the Committee was asked, “if the lawyer in either situation is disqualified, may another lawyer [in the lawyer-expert’s] firm nevertheless undertake the representation?”¹³⁰

The Committee noted that the answers to these and related questions depend in part on whether the lawyer-expert shares an attorney-client relationship with the party or whether the expert is providing a “law-related service” within the meaning of Model Rule 5.7.¹³¹ In either case, the lawyer-expert would be subject to Model Rules 1.7 (current client conflicts) and 1.9 (former client conflicts).¹³² The Committee began its analysis with the assumption that a lawyer engaged as an expert serves one of two distinct roles: (a) as a “testifying expert”—in other words, as an expert expected to testify at trial or in a hearing; or (b) as a non-testifying “expert consultant.”¹³³ With respect to lawyers as testifying experts, the Committee reasoned that the lawyer-expert and the party for whom the expert is testifying do not ordinarily share an attorney-client relationship.¹³⁴ This is because:

The testifying expert provides evidence that lies within his special knowledge...and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm’s side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates. A duty to advance a client’s objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert. Moreover, if an expert may testify at trial and his name has been provided to opposing counsel...he may be deposed by the opposing party. Communications between the expert and the retaining law firm or its client employed by the expert in preparing his testimony ordinarily are discoverable.¹³⁵

128. *Id.* at 1101:132.

129. *Id.*

130. *Id.*

131. Under the current version of Model Rule 5.7(a)(1), a lawyer is “subject to the Rules of Professional Conduct with respect to the provision of law-related services,” provided that the law-related services are provided “by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients.” MODEL RULES, *supra* note 9, R. 5.7(a)(1). “The term ‘law-related services’ denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.” *Id.* R. 5.7(b). The current versions of Model Rules 5.7(a)(1) and (b) were identical with the versions in effect in 1997 when the Committee issued Formal Op. 97-407. Compare Formal Op. 97-407, *supra* note 7, at 7 n.5 (quoting version of Model Rule 5.7 in effect then), with MODEL RULES, *supra* note 9, R. 5.7 (stating the current version of the rule).

132. Formal Op. 97-407, *supra* note 7, at 3.

133. *Id.*

134. *Id.* at 3–4.

135. *Id.* at 4.

In contrast, a consulting expert does share an attorney-client relationship with the party, functioning as the client's co-counsel, and is therefore subject to obligations imposed by legal ethics rules.¹³⁶ The Committee explained the difference between testifying experts and consulting experts and, thus, its divergent opinions on the existence of an attorney-client relationship between the lawyer-expert and the subject party in this way:

[P]rotection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy are characteristic of an expert consultant, who ordinarily is not expected to testify. That role at least implicitly promises the client all the traditional protections under the Model Rules, including those governing counseling and advocacy, confidentiality of information and loyalty to the client. In short, a legal consultant acts like a lawyer representing the client, rather than as a witness. Unlike the testifying expert, the expert consultant need not be identified, and her legal advice and communications with the client and trial counsel are not expected to be disclosed, absent client consent after consultation.¹³⁷

After distinguishing between testifying experts and consulting experts, the Committee wavered, noting the obvious truth of litigation practice: "The distinction between the role of the testifying expert and the role of the expert consultant can, of course, become blurred in actual practice."¹³⁸ Parties may discuss their strategies or tactics with their testifying experts or share confidential information with them.¹³⁹ "When this blending of roles occurs,"¹⁴⁰ the Committee stated:

[T]he lawyer whose principal role is to testify as an expert nevertheless may become an expert consultant and as such, bound by all of the Model Rules as co-counsel to the law firm's client. The lawyer expert then must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer's expert testimony by undermining its objectivity. The lawyer also is bound by the Model Rules relating to conflicts of interest and imputed disqualification with respect to service as an expert consultant.¹⁴¹

Having rubbed out the line between testifying and consulting experts, the Committee marched on to Model Rule 5.7 and the issue of whether a testifying expert provides "law-related services," so as to become subject to all of the Model Rules, without sharing an attorney-client relationship with the party for whom the expert testifies.¹⁴² In addressing this issue, the Committee found it "significant" that Model

136. *Id.* at 5-6; *see also* *Herrick Co. v. Vetta Sports, Inc.*, No. 94 CIV. 0905(RPP), 1998 WL 637468, at *1 (S.D.N.Y. Sept. 17, 1998) (assuming that a consulting expert shares an attorney-client relationship with the party that retains the expert).

137. Formal Op. 97-407, *supra* note 7, at 5-6.

138. *Id.* at 6.

139. *Id.*

140. *Id.*

141. *Id.* (footnote omitted).

142. *Id.* at 7.

Rule 5.7 is intended to address conflicts arising out of lawyers' ancillary business, and nowhere in related literature did an author suggest that conflicts might attend the work of lawyer-experts.¹⁴³ Of course, the Committee might have considered the possibility that its literature review was not exhaustive—that because many law professors practice only briefly before teaching, they might not identify lawyer-expert conflicts as a subject for scholarship, or that at the time only one jurisdiction had adopted Model Rule 5.7,¹⁴⁴ such that it was therefore not ripe for scholarly discussion given the lack of related case law. The Committee apparently did not consider any of these possibilities. Regardless, it was of “greater significance” that:

[T]he way in which testifying experts provide their services eliminates as a practical matter the need for the protection that Model Rule 5.7 was designed to afford recipients of law-related services in order to avoid any misperception by the recipient of the services that the protections normally part of the client-lawyer relationship apply. As noted [earlier in the opinion], the testifying expert should appropriately define his role at the outset of the engagement so that the law firm's client will not be confused that the Rules of Professional Conduct apply in the relationship with the testifying expert.¹⁴⁵

So, does the fact that a lawyer-expert *should* send the retaining party an engagement letter describing the nature and scope of her engagement mean that all experts do? Of course, lawyers running ancillary businesses should also send appropriate engagement letters in both their law practices and their ancillary businesses; does the existence of Rule 5.7 evidence the fact that all of them do not?

Ultimately, the “clear majority” of the Committee concluded that the plain language of Rule 5.7(a)(1) showed its inapplicability to lawyer-experts.¹⁴⁶ Rule 5.7(a)(1) provides that a lawyer “shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided...by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients.”¹⁴⁷ Rule 5.7(b) states that “law-related services” are services “that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”¹⁴⁸ Because, according to the Committee, “[r]arely does a testifying expert provide services directly to a client[,] [t]he client invariably [being] represented by its own trial counsel, who manages the role to be played by the testifying expert,” it must be that “testifying expert services and trial counsel services always remain distinct with regard to a particular matter.”¹⁴⁹

143. *Id.*

144. *Id.* at 7 n.5 (noting Model Rule 5.7's adoption in a single jurisdiction).

145. *Id.* at 7–8 (footnote omitted).

146. *Id.* at 8.

147. *Id.* at 7 n.5; MODEL RULES, *supra* note 9, R. 5.7(a)(1). The ABA amended Model Rule 5.7 as part of its Ethics 2000 initiative, but the amendments did not change Rule 5.7(a)(1) or (b). See ABA, THE 2002 CHANGES TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 92 (2003) [hereinafter THE 2002 CHANGES] (showing changes to Model Rule 5.7). Thus, any differences between Rule 5.7 as it existed when Formal Op. 97-407 was issued and its current form are immaterial.

148. Formal Op. 97-407, *supra* note 7, at 7 n.5; MODEL RULES, *supra* note 9, R. 5.7(b).

149. Formal Op. 97-407, *supra* note 7, at 8.

The Committee's Rule 5.7(a)(1) analysis is off-base. For starters, recall the Committee's acknowledgment that a testifying expert may blend that role with a consulting expert role, and, when that happens, the testifying expert becomes a consulting expert.¹⁵⁰ The testifying-expert-turned-consulting-expert becomes "bound by all of the Model Rules as co-counsel to the law firm's client."¹⁵¹ How exactly does that analysis square with the Committee's observation with respect to Rule 5.7(a)(1) that testifying expert services and trial counsel services are always distinct? The short answer is that it does not.

The Committee also concluded that Model Rule 5.7(a)(1) does not apply to lawyer-experts because "testifying expert services and trial counsel services" are always distinct.¹⁵² Yet, the Committee noted that testifying experts review discovery materials, suggest factual support for their testimony, share and review legal authority supporting their testimony, define areas for potential expert inquiry, and present their testimony in the light most favorable to their side.¹⁵³ Trial counsel also do all of those things; the only difference is that trial counsel profoundly shape experts' testimony rather than testifying themselves.¹⁵⁴ How then are their services so distinct as to escape application of Rule 5.7(a)(1)? It is no answer to say that the client should draw a distinction based on other experience with lawyer-experts or on the particular lawyer-expert's work in other matters in which the lawyer-expert functioned exclusively as a lawyer. This is because most clients do not repeatedly employ expert witnesses. A client is unlikely to employ as an expert witness a lawyer who represented the client in other matters, and Rule 5.7 applies to the provision of law-related services even where the lawyer has never provided legal services to the party for whom she is working as an expert.¹⁵⁵

Furthermore, if a testifying expert works only with trial counsel, the client will never know that the expert's services are distinct, especially if the client is unsophisticated. To avoid this problem, by imputing the trial lawyer's knowledge to the client as the client's agent, requires one to assume without support that every trial lawyer can always distinguish the nature of the lawyer-expert's services.¹⁵⁶ If a testifying expert meets with a client to gather facts to form an opinion and discusses the importance of certain facts or events in the context of the litigation, how is that different, from the client's perspective, than any lawyer doing the same thing?

150. *Id.* at 6.

151. *Id.*

152. *Id.* at 8.

153. *Id.* at 4.

154. See Stephen D. Easton, *Damages: Expert Witnesses*, 2004 J. DISP. RESOL. 37, 46–47 (2004) ("Although attorneys differ in the extent to which they use these tools to shape expert testimony, all or substantially all attorneys use at least some of them to acquire the opinion testimony needed by the client."); Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 471 (1999) (explaining how trial lawyers can favorably shape experts' testimony without instructing them to offer particular opinions).

155. MODEL RULES, *supra* note 9, R. 5.7 cmt. 2.

156. See *Orius Telecomms., Inc. v. D.C. Dep't of Employment Servs.*, 857 A.2d 1061, 1069 (D.C. 2004) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962)) (explaining that a lawyer's knowledge about a matter acquired in the representation of a client is imputed to the client); *Kline v. Bd. of Parks & Rec. Comm'rs*, 73 S.W.3d 63, 67 (Mo. Ct. App. 2002) (citing *Fitzgerald v. State ex rel. Adamson*, 987 S.W.2d 534 (Mo. Ct. App. 1999)) (standing for the same proposition).

After wandering lost through the attorney-client and Rule 5.7 analyses, the Committee provided better analysis when it came to Model Rule 1.7(b). At the time, Model Rule 1.7(b) provided:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.¹⁵⁷

The Committee assumed that a testifying expert owes a duty of confidentiality, among other duties, to the party retaining the expert.¹⁵⁸ Accordingly, if those duties might materially limit a testifying expert's concurrent representation of a client in a matter adverse to the party for whom the expert is to testify, Rule 1.7(b) applies.¹⁵⁹ Furthermore, "where the party's material confidential information clearly would be useful in the representation of the client... the testifying lawyer could not reasonably believe that the representation of the client would not be adversely affected and, therefore, client consent is no cure."¹⁶⁰

With respect to successive matters, the Committee concluded that Rule 1.9 (governing former client conflicts) did not apply because a testifying expert does not share an attorney-client relationship with the party for which the expert testifies.¹⁶¹ The Committee did note, however, that the expert's receipt of confidential information might create problems, and that with respect to the client in the new matter, Rule 1.7(b) and Rule 1.10 might bar both the expert and other lawyers at the same firm from undertaking the representation.¹⁶²

B. Into the Swamp, After the Committee

At least one court has agreed with the Committee that a testifying expert does not share an attorney-client relationship with the party the expert testifies for,¹⁶³ while another court has apparently assumed that a lawyer-expert shares an attorney-client relationship with the party retaining him as an expert,¹⁶⁴ and still another has held that a conflict of interest can arise where no attorney-client relationship exists.¹⁶⁵

157. Formal Op. 97-407, *supra* note 7, at 10 n.10. The ABA significantly revised Rule 1.7 in 2002. See THE 2002 CHANGES, *supra* note 147, at 22-23 (showing changes).

158. Formal Op. 97-407, *supra* note 7, at 9.

159. *Id.* at 9-10.

160. *Id.* at 10.

161. *Id.* at 11.

162. *Id.* at 12.

163. Commonwealth Ins. Co. v. Stone Container Corp., 178 F. Supp. 2d 938, 939, 943-45 (N.D. Ill. 2001).

164. Abbott v. IRS, 399 F.3d 1083, 1085-87 (9th Cir. 2005) (finding no conflict of interest under Model Rule 1.7 in a case involving a tax lawyer who represented a taxpayer in a dispute with the IRS at the same time that he was serving as an expert for the IRS in an unrelated case).

165. Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, 117 Cal. Rptr. 2d 685, 696-99 (Ct. App. 2002).

Courts should never assume that testifying lawyer-experts do not share attorney-client relationships with the parties for whom they testify. Formal Opinion 97-407 is no basis for that position.¹⁶⁶ Like an orienteer who makes a two-degree error at the start of a hike and ends up in a swamp instead of at the intended destination, the Committee's flawed assumptions when reading its ethics compass led it off a sensible path.

At the outset, the Committee assumed that lawyer-experts serve "one of two distinct roles," those being either a testifying expert or a consulting expert.¹⁶⁷ From this footing the Committee determined that a testifying expert does not share an attorney-client relationship with a party while a consulting expert does, a consulting expert becoming co-counsel to the retaining party's trial counsel.¹⁶⁸ In fact, experts' roles rarely are so clear. Instead, it is typically the case that a lawyer searching for a testifying expert initially retains the expert as a consultant.¹⁶⁹ If the expert reviews the case and forms preliminary opinions that are not favorable to the lawyer's client, the lawyer keeps the expert as a non-testifying consultant and never discloses the expert as a testifying expert.¹⁷⁰

If a consulting expert shares an attorney-client relationship with the party, what happens to that relationship if the expert offers favorable preliminary opinions and thus passes from consultant to testifier? Does the expert's mere transformation from consultant to testifier terminate the expert's attorney-client relationship with the party? That hardly seems right.

Assume here that which is true: an attorney-client relationship may end because the client discharges the lawyer, the contract establishing the relationship provides for termination in certain circumstances, or the lawyer completes the contemplated services.¹⁷¹ The party is not discharging the consulting expert by disclosing the expert to testify, it is simply announcing that the expert is expected to perform the additional service of testifying. The expert and the party could provide in an engagement letter that the change in the expert's role terminates their attorney-client relationship, but that is unlikely, and what if they do not?¹⁷² Reality prevents

166. See Formal Op. 97-407, *supra* note 7, at 9.

167. *Id.* at 3.

168. *Id.* at 4-6.

169. Stephen D. Easton, "Red Rover, Red Rover, Send That Expert Right Over": Clearing the Way for Parties to Introduce the Testimony of Their Opponents' Expert Witnesses, 55 SMUL. REV. 1427, 1431-32 (2002) [hereinafter *Red Rover*]; see also Gregory P. Joseph, *Engaging Experts*, NAT'L L.J., Apr. 18, 2005, at 12 ("All experts should be retained, at the outset, as consulting experts.")

170. *Red Rover*, *supra* note 169, at 1432.

171. RESTATEMENT, *supra* note 82, § 31.

172. No experienced trial lawyer will ever state that the expert and the retaining party share an attorney-client relationship, nor will a savvy lawyer-expert include such language in an engagement letter or agreement. This is because the existence of an attorney-client relationship is not privileged, and the opposing party is sure to discover the engagement letter or agreement. See EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 64 (4th ed. 2001) ("The mere fact that the attorney-client relationship exists is not privileged."); *Red Rover*, *supra* note 169, at 1434-36 (discussing trial lawyers' extensive discovery into opposing experts). The opposing lawyer will then impeach the expert based on the expression or existence of an attorney-client relationship by pointing out to the jury that attorneys owe a duty of loyalty to their clients and that attorneys are fiduciaries to their clients. Lawyers who want to keep certain communications with experts confidential will express the need for confidentiality in a letter that says nothing about an attorney-client relationship. See *Expert Witness Conflicts*, *supra* note 125, at 927 (instructing lawyers on protecting the confidentiality of expert witness communications).

termination of the attorney-client relationship on the theory that a consulting expert has completed the contemplated services when the attorney becomes a testifying expert. In most cases lawyers ask testifying experts to help formulate strategy, suggest discovery, identify information that will support the expert's opinion and conjunctively hurt the opponent's case, assist in identifying additional experts, and script deposition questions to be asked of opposing experts—all things that consulting experts do and that, in the Committee's eyes, make consulting experts lawyers for the parties retaining them.¹⁷³ In sum, if you accept the Committee's position that a lawyer-expert who functions as a consulting expert shares an attorney-client relationship with the party retaining her, and further accept the litigation reality that testifying experts typically serve a consulting function too, then you must conclude that, except in rare cases, a testifying lawyer-expert shares an attorney-client relationship with the party for whom the expert testifies.

There is no retreating from this conclusion. It cannot be avoided by reasoning that "[a] duty to advance a client's objectives diligently through all lawful measures, which is inherent in a lawyer-client relationship, is inconsistent with the duty of a testifying expert,"¹⁷⁴ because that simply is not true. Experts cannot lie, but lawyers may suggest opinions to testifying experts, and experts may phrase their opinions in ways calculated to favorably influence jurors and judges.¹⁷⁵

Similarly, there is no retreat on the basis that a "testifying expert provides evidence that lies within his special knowledge...and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information."¹⁷⁶ That statement is only partially correct. Again, it is true that an expert cannot lie, but a "retained expert's function is not only to assist the court or fact-finder in understanding complicated matters, but also to render competent assistance in supporting his client's action against the client's opponent."¹⁷⁷ A party who expects its expert to offer testimony favorable to the opponent usually can withdraw the expert and, in so doing, prevent the opponent from calling the expert as a witness.¹⁷⁸ Any duty a testifying expert owes to the court is tempered by the expert's duty of loyalty as an agent for the lawyer or client who hired the expert.

Assume, for example, that you as a lawyer hire me as a lawyer-expert and that you identify me as your testifying expert. I prepare a favorable report. In meeting with you before my deposition, however, I offer several new opinions detrimental to your client's case and you therefore cancel the deposition and withdraw me as a witness. Because the opponent has its own expert, the court will not allow the opponent to call me as a witness to elicit the unfavorable opinions.¹⁷⁹ I cannot thereafter say to you: "I know you don't like my opinions that hurt your case, but having been disclosed as a testifying expert I am an independent servant of the

173. See Formal Op. 97-407, *supra* note 7, at 4.

174. *Id.*

175. Lubet, *supra* note 154, at 470-71.

176. Formal Op. 97-407, *supra* note 7, at 4.

177. Marrogi v. Howard, 805 So. 2d 1118, 1132 (La. 2002).

178. *Expert Witness Conflicts*, *supra* note 125, at 932.

179. *Id.* For an unusual example of when an opponent was entitled to read an expert's deposition testimony at trial, see *White v. Vanderbilt University*, 21 S.W.3d 215 (Tenn. Ct. App. 1999), a case in which counsel failed to withdraw an expert who rendered unfavorable opinions when deposed.

court, and I therefore intend to testify at trial regardless of your desires because I have a duty to the court, on behalf of the other law firm and its client, to provide truthful and accurate information.” My duty of loyalty as your agent and your client’s agent or subagent prevents me from doing that. In other words, my independence as a testifying expert witness has limits, and those limits are sufficiently confining so that invoking my “independence” as a basis for denying the existence of an attorney-client relationship is not persuasive.

Nor does it help to reason that a testifying lawyer-expert must not share an attorney-client relationship with the party because attorney-client communications normally are confidential, while communications between a testifying expert and a party are not.¹⁸⁰ First, this is backwards reasoning. It is also flawed reasoning because attorneys and clients may have communications that are not confidential. Second, it is not necessarily true that all communications with a testifying expert are discoverable.¹⁸¹ Third, clients may waive the attorney-client privilege both expressly and by implication¹⁸² and may similarly waive work product immunity.¹⁸³ Thus, it is just as likely that the discovery of a testifying lawyer-expert’s communications is attributable to the party’s express or implied waiver of the attorney-client privilege or work product immunity, as it is that the party and the testifying expert never shared a confidential relationship in the first place.¹⁸⁴

C. *The Path Not Taken*

Here is a correct statement of the law and, thus, what the Committee should have said. The existence of an attorney-client relationship is a question of fact.¹⁸⁵ In any given case, a testifying lawyer-expert may share an attorney-client relationship with the retaining party. For the same reason, a consulting expert may share an attorney-client relationship with the retaining party. And, again depending on the facts, both testifying lawyer-experts and consulting lawyer-experts may *not* share attorney-client relationships with parties that retain them. The existence of an attorney-client relationship depends not upon the label given the expert, but instead upon whether (1) the party manifests to the lawyer-expert the intent that the lawyer-expert provide legal services for it, and the lawyer-expert consents to do so, or (2) the lawyer-expert knows or reasonably should know that the party is relying on the expert to

180. See Formal Op. 97-407, *supra* note 7, at 9 (stating that a testifying expert owes the client a duty of confidentiality).

181. Some courts hold that a lawyer does not waive work product immunity by sharing opinion work product with a testifying expert. Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. 485, 548 n.431 (1997).

182. See EPSTEIN, *supra* note 172, at 292-391.

183. RESTATEMENT, *supra* note 82, § 91.

184. See *Herrick Co. v. Vetta Sports, Inc.*, No. 94 CIV. 0905(RPP), 1998 WL 637468, at *1 (S.D.N.Y. Sept. 17, 1998) (noting that designation of attorney as expert witness waives the attorney-client privilege and work product immunity).

185. *Stender v. Vincent*, 992 P.2d 50, 58 (Haw. 2000); *Bd. of Overseers of the Bar v. Mangan*, 763 A.2d 1189, 1192-93 (Me. 2001); *Attorney Grievance Comm’n v. Shaw*, 732 A.2d 876, 883 (Md. 1999); *Gramling v. Mem’l Blood Ctrs. of Minn.*, 601 N.W.2d 457, 459 (Minn. Ct. App. 1999); *In re Disciplinary Action Against Giese*, 662 N.W.2d 250, 255 (N.D. 2003); *DiLuglio v. Providence Auto Body, Inc.*, 755 A.2d 757, 766 (R.I. 2000).

provide legal services, and the lawyer-expert does not indicate an unwillingness to do so.¹⁸⁶

That being the law, a lawyer-expert who does not want an attorney-client relationship with the party for whom the expert serves should disavow the relationship, preferably in writing.¹⁸⁷ This is important because the mere fact that a lawyer-expert is engaged for the purpose of serving as an expert witness does not negate the possibility that she may also function as a lawyer for the party. It is in the lawyer-expert's interest to expressly disclaim an attorney-client relationship because by doing so she avoids some ethical duties.¹⁸⁸ In contrast, the retaining party has no incentive to expressly disavow an attorney-client relationship. In the event that the lawyer-expert is laboring under the mistaken impression that she is the party's counsel, the party benefits from the lawyer's belief that she owes the party duties of confidentiality and loyalty. If the party becomes concerned that the lawyer-expert's misperception may pose a problem, such as when the opponent might impeach the lawyer-expert based on bias, the party can then disclaim an attorney-client relationship.

If the lawyer-expert and the retaining party share an attorney-client relationship, then the lawyer-expert must be concerned about Rule 1.7 (current client conflicts), Rule 1.9 (former client conflicts), and Rule 1.10 (imputed disqualification) vis-à-vis expert service. Returning to our earlier hypothetical situations, if Smith had an attorney-client relationship with your client, Jones would be disqualified from representing the codefendant. Smith could not represent the codefendant under either Model Rule 1.7(a)(1) or (a)(2),¹⁸⁹ and his disqualification would be imputed to other lawyers in his firm.¹⁹⁰ Nor can Smith enable the firm to accept the more lucrative representation of your codefendant by "firing" your client as his client because that triggers Rule 1.9(a), and Smith's former client conflict will be imputed to the firm.¹⁹¹

If Adams has an attorney-client relationship with your client as its lawyer-expert, he cannot sue the client in another case. That is a conflict under Model Rule 1.7(a)(1), which provides that a concurrent conflict of interest exists if "the representation of [one] client will be directly adverse to another client."¹⁹² And, like Smith, Adams cannot cure the concurrent conflict by quickly dropping your client,

186. RESTATEMENT, *supra* note 82, § 14.

187. See 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.12 (5th ed. 2005) (discussing use of "non-engagement letters" to avoid attorney-client relationships).

188. A lawyer-expert may not be able to avoid liability for negligently performing expert services, however, even if the lack of an attorney-client relationship precludes a legal malpractice claim. Some jurisdictions recognize a cause of action against expert witnesses for failing to provide competent litigation support services. See, e.g., Marrogi v. Howard, 805 So. 2d 1118, 1131-33 (La. 2002); see also *id.* at 1128 n.16 (collecting cases).

189. See MODEL RULES, *supra* note 9, R. 1.7(a)(1) (prohibiting representation where representation of one client will be directly adverse to another client); *id.* R. 1.7(a)(2) (involving material limitation on lawyer's responsibilities to another client).

190. *Id.* R. 1.10(a) (imputing disqualification under Rules 1.7 and 1.9).

191. *Id.* R. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client..."); *id.* R. 1.10(a) (imputing conflicts under Rule 1.9).

192. *Id.* R. 1.7(a)(1).

for then again Rule 1.9 comes into play, as does Rule 1.10 if Adams tries to laterally transfer the plaintiff's case to another lawyer in his firm.¹⁹³

It is also possible that a lawyer-expert might have an attorney-client relationship with the hiring lawyer even if the lawyer-expert has no such relationship with the party that is the lawyer's client.¹⁹⁴ If that is the case, then Smith and Adams still have conflicts under Model Rule 1.7 that are imputed to other lawyers in their firms.

Of course, a wise lawyer-expert will disclaim any attorney-client relationship. If that is the case, a court still may exercise its inherent power to disqualify the lawyer-expert in a matter adverse to that party if the party shared a confidential relationship with the expert and received confidential or privileged information.¹⁹⁵ A court may thereafter exercise its inherent power to disqualify the retaining lawyer's law firm.¹⁹⁶ The tougher question, however, is what to do about the disloyal testifying lawyer-expert who is not counsel to the party for whom the lawyer-expert will testify and who thus claims to be uninhibited by Rules 1.7 and 1.9, or the lawyer-expert who is not only not counsel to a party, but who also claims the right to abandon the party in any event because the lawyer-expert has received no confidential information. Should such lawyer-experts be allowed to assume roles adverse to the parties they serve strictly as experts? Is their disloyalty beyond the reach of ethics rules? The answer to both questions is no.

Lawyer-expert conflicts of interest in litigation may be addressed under Model Rule 8.4(d), which broadly provides that it is "professional misconduct" for a lawyer to "engage in conduct that is prejudicial to the administration of justice."¹⁹⁷ The "prejudicial to the administration of justice" standard is broad. It encompasses conduct considered reprehensible in the practice of law, conduct unbecoming a lawyer, and conduct tending to undermine the integrity and competence of the legal profession.¹⁹⁸ A lawyer may violate Rule 8.4(d) through conduct that merely has the potential to adversely affect the judicial process; actual impairment or harm is not required.¹⁹⁹ Similarly, the rule does not require harm to the client for a violation.²⁰⁰

Rule 8.4(d) comes into play in the lawyer-expert context because a lawyer-expert who does not share an attorney-client relationship with the party is either (1) an agent for the lawyer who hires the expert and thus a subagent for the client, who is

193. For a discussion of "hot potato" cases, see William Freivogel, "Hot Potato" Doctrine, http://www.freibogelconflicts.com/new_page_25.htm (last visited Jan. 22, 2006).

194. The hypothetical case involving "Smith" and "Jones" is based on a case I defended while a partner with Armstrong Teasdale LLP in Kansas City, Missouri. I hired Smith as an expert witness. Smith insisted on structuring the engagement such that he had an attorney-client relationship with my firm, with him as the lawyer and my firm as his client. He then wrote me an engagement letter that began: "Thank you very much for having retained me to ask us [sic] to represent Armstrong Teasdale in connection with the...matter." Letter from [Smith] to author (Dec. 3, 2003) (on file with author) (withholding lawyer-witness's identity).

195. *Expert Witness Conflicts*, *supra* note 125, at 913-14.

196. *See, e.g.*, *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 584 (D.N.J. 1994) (disqualifying defense counsel who retained expert engineer who possessed confidential information from plaintiff's counsel).

197. MODEL RULES, *supra* note 9, R. 8.4(d).

198. *See In re Mason*, 736 A.2d 1019, 1022-23 (D.C. 1999) (discussing cases and predecessor Model Code provision).

199. *See In re Uchendu*, 812 A.2d 933, 941 (D.C. 2002).

200. *See In re Shaughnessy*, 811 N.E.2d 990, 991 (Mass. 2004) ("An ethical violation may exist even where there is no evidence that the client has been harmed.").

the ultimate principal,²⁰¹ or (2) an agent for the retaining party.²⁰² The lawyer-expert is the client's agent regardless and, as an agent, owes the client fiduciary duties of confidentiality and loyalty.²⁰³ Those who would dispute a testifying lawyer-expert's agency ought not. An agent's fiduciary duties to the principal can vary depending on the parties' agreement and the scope of their relationship. Thus, a lawyer-expert's retention to testify rather than to merely consult does not mean that the lawyer-expert is not an agent or that the expert does not owe the retaining party fiduciary duties; it means that in the agency the expert is permitted to view facts and data dispassionately and, if asked, to state opinions that do not support the client's position. Because the party (the principal) agrees to the testifying expert (the agent) rendering truthful opinions, an expert who testifies truthfully but unfavorably on cross-examination does not breach the duty of loyalty. Likewise, a testifying expert who turns over the case file to the other side in discovery does not breach the duties of confidentiality or loyalty because the party agreed (expressly or impliedly) at the outset that the expert could do this in accordance with the Rules of Civil Procedure.

Except as generally described above, a lawyer-expert who acts adversely to the party that retains him as an expert breaches his duty of loyalty as that party's agent. Regardless of whether the lawyer-expert gave the party legal advice, his representation of an adversary presents a conflict between his fiduciary duties owed to the party as its agent and his fiduciary duties owed to the client as a lawyer.²⁰⁴ In a profession that prizes loyalty above almost all else, a lawyer-expert's disloyalty to a retaining party in litigation is reprehensible and unbecoming, undermines the integrity of the legal profession, and therefore violates Rule 8.4(d). Whatever the criticisms of this analysis, it is not sufficient to condemn it as unfair or unduly harsh because it seeks to impose a stricter standard on lawyer-experts than that which is imposed on non-lawyer experts facing disqualification for allegedly switching sides in litigation. The duties of lawyer-experts simply are greater than the duties of ordinary experts.²⁰⁵ Such is the price of professional self-regulation.

Granted, some courts hold that lawyers cannot engage in conduct prejudicial to the administration of justice without violating other ethics rules.²⁰⁶ Those same courts, however, seem to recognize an exception where an attorney's conduct, without violating another ethics rule, "violate[s] accepted ethical norms of the profession."²⁰⁷ Clearly, loyalty is an accepted ethical norm of the legal profession. Thus, the fact that a lawyer-expert may breach the duty of loyalty as a party's agent without violating other ethics rules does not foreclose a finding that the lawyer-expert has violated Rule 8.4(d).

201. See WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 6 (3d ed. 2001).

202. See Lubet, *supra* note 154, at 472.

203. See GREGORY, *supra* note 201, at 13–14, 140–44.

204. See *Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 117 Cal. Rptr. 2d 685, 698 (Ct. App. 2002).

205. *W.R. Grace & Co. v. Gracecare, Inc.*, 152 F.R.D. 61, 65 (D. Md. 1993).

206. See, e.g., *In re Discipline of an Attorney*, 815 N.E.2d 1072, 1074 (Mass. 2004) (holding attorney's conduct not "prejudicial to the administration of justice" when the conduct neither violated professional norms nor undermined the legitimacy of the judicial process, and violated no other disciplinary rule).

207. *Id.* at 1080.

Returning yet again to the earlier hypothetical examples, both Smith and Adams breached their duties of loyalty as agents for the parties they served as experts. Accordingly, they violated Rule 8.4(d). The question then becomes what to do about it.

If Smith or Adams shared confidential relationships with the parties for which they served as experts, and the parties passed confidential information to them, the courts in the pending cases can exercise their inherent authority and disqualify them if asked to do so.²⁰⁸ The courts' inherent authority to disqualify Smith and Adams "derives from the necessity to protect privileges which may be breached when an expert switches sides, and from the necessity to preserve public confidence in the fairness and integrity of judicial proceedings."²⁰⁹ But that is a separate issue from the probable professional discipline flowing from Smith's and Adams' violation of Rule 8.4(d), as it should be. Ethics rules are not intended to be a foundation for attorney disqualification disputes; they are intended for "professional regulation in a separate forum."²¹⁰ As for any punishment in the disciplinary process, the severity of the discipline will depend on the facts of the particular cases and a host of other circumstances.

IV. CONCLUSION

Lawyers may serve as fact and expert witnesses. Lawyers and courts alike are uncomfortable with the dual roles of lawyer and fact witness, though this discomfort is probably exaggerated. A lawyer's disqualification as a trial advocate does not prevent the lawyer from representing a client in many other aspects of the same case. Furthermore, disqualification cannot be ordered upon an opponent's mere representation that the lawyer is a necessary witness or will be called as a witness. Rather, a party seeking to disqualify a lawyer under Model Rule 3.7(a) must establish that the lawyer's proposed testimony is relevant, material, not merely cumulative, and unobtainable elsewhere. This is a difficult standard to satisfy, principally because the facts that are the subject of lawyers' intended testimony are so often obtainable from other sources.

To the extent that courts have misapplied the lawyer-witness rule, they have done so in the summary judgment context. Despite the fact that Model Rule 3.7(a) is clearly limited to trials, courts occasionally hold that the rule precludes lawyers from offering affidavits supporting or opposing summary judgment. In addition to the clear language of Rule 3.7(a), there is no policy reason commending its application to lawyers' affidavit testimony at summary judgment proceedings. Because it is the judge who reads motions, there is no chance that the lawyer's dual roles will be confusing. It is equally unlikely that a judge, as compared to a jury, will be unfairly influenced by the lawyer's dual roles.

When it comes to lawyers serving as expert witnesses, conflicts of interest and breaches of confidentiality are real concerns. The ABA's respected Standing Committee on Professional Responsibility attempted to address these concerns in

208. *Turner v. Thiel*, 553 S.E.2d 765, 768 (Va. 2001).

209. *W.R. Grace & Co.*, 152 F.R.D. at 64.

210. *Rude Question*, *supra* note 16, at 33.

a formal opinion concluding that consulting lawyer-experts share an attorney-client relationship with the party retaining them but that testifying lawyer-experts do not. Unfortunately, the opinion insufficiently analyzed the roles of lawyer-experts. A good argument can be made that lawyer-experts provide law-related services within the meaning of Model Rule 5.7(a) and thus are subject to all of the other ethics rules. In any event, lawyer-experts may be disciplined for conflicts of interest under Model Rule 8.4(d), which prohibits lawyers from engaging in conduct prejudicial to the administration of justice. This is true even if they do not share an attorney-client relationship with the party for whom they testify. Lawyer-experts still owe duties of loyalty to the parties that retain them under agency law principles, which are duties that disciplinary authorities and courts ought to enforce. After all, loyalty is a core value of the legal profession, and disloyalty by a lawyer surely prejudices the administration of justice even if it is manifested in service as an expert witness.