



The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Last year, I negotiated a complex and lengthy contract for a client. The client has now been sued for breach of the contract. The case will turn on a pivotal issue of contract interpretation and the intent of the parties. The client will likely want me to be a witness as I was part of all the dealings with the other side. Can our firm defend the suit? What if my recollection of the negotiations differs substantially from our client's on a critical issue?

A: Model Rule 3.7 prohibits a lawyer from acting as "an advocate at a trial" in which the lawyer is a "necessary witness," unless the testimony relates to an uncontested issue or the nature and value of legal services, or the disqualification of the lawyer would cause substantial hardship on the client. Courts in various jurisdictions apply differing standards for determining when the lawyer is a "necessary witness," but in general it means something more than "possible" or "potential," especially when the testimony would be cumulative of that of others. See *Macheca Transp. Co. v. Phila. Indem. Ins. Co.*, 463 F.3d 827 (8th Cir. 2006).

Here it appears your testimony may well be "necessary," especially if your client believes you have essential testimony that cannot be duplicated by others. Under Rule 3.7(b), however, other lawyers in your firm may still act as advocates at the trial, even if you cannot, "unless precluded from doing so by Rule 1.7 or Rule 1.9." This last clause addresses your second question—what if your testimony would be adverse to or inconsistent with that of your client, thereby giving rise to a conflict of interest? In that event, although it is doubtful your client would wish to call you as a witness, the conflict of interest would extend to all lawyers in your firm. Rule 3.7(b) & Comment 6. It could be particularly acute if what you know as a witness is not privileged and can be accessed by the adverse party calling you as a witness. This type of conflict may or may not be the subject of waiver with the client's informed consent, depending on the circumstances. Rule 3.7, Comment 6.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction—the result may be completely different.



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