

Tip of the Month

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Lawyer as a Witness: Guidance on the Application of [Rule 3.7](#)

Everyone is familiar, in principle, with the prohibition on lawyers acting as advocates in proceedings in which the lawyer is a necessary witness. While the issue doesn't arise often, application of the rule can implicate high stakes, including disqualification and the right of a party to be represented by the party's desired lawyer. Recently-published [Wisconsin Formal Ethics Opinion EF-25-01](#) addresses this important topic, and provides guidance on its application.

A knowledge of the rule and its possible applications is important, because the loss of counsel can be costly and disruptive. Avoiding the issue altogether or addressing it as early as possible in the representation is strongly preferred. If the lawyer might possibly be a witness, best practice is to thoroughly discuss the issue with the client at the earliest possible opportunity.

In summary, the rule clearly applies to jury trials. "Less clear is whether it also applies to bench trials or administrative proceedings. In either situation the lawyer generally may participate in pretrial or appellate matters. Given the ambiguity over the rule's reach, the committee recommends that lawyers proactively seek guidance from the presiding tribunal in a matter not tried to a jury on whether the rule applies."

According to the opinion:

[If the lawyer's testimony is favorable to the client, the rule permits the lawyer to participate in pretrial matters and transfer advocacy responsibilities at trial to another lawyer in the firm if the lawyer's testimony becomes necessary. SCR 20:3.7\(b\). This option requires the client's informed consent.](#)

[If the lawyer's testimony would be adverse to the client or a former client, a conflict of interest exists and is governed by \[Rules 1.7, 1.9\(c\), and 1.10, as well as 3.7\]. This must also be discussed with the client. In most cases the conflict would require the lawyer and their firm to withdraw from the representation.](#)

Rule language varies in different jurisdictions, so be sure to consult your jurisdictions rules, ethics opinions, and case law.

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See, e.g., Ill. [Op. 11-06](#); Ill. [Op. 11-05](#); [Michigan RI-264](#); [Connecticut Informal Op. 24-1](#); [DC Ethics Op. 228](#); Garner, [Ethics Spotlight: When a Lawyer Takes the Witness Stand](#) (California Lawyers Association July 2023); [MS Ethics Op. 195](#); [MA Ethics Op. 99-1](#); [NYSB Ethics Op. 1045](#).

Should you need advice on this or any other risk management topic, contact our senior risk management counsel at Attorneys Risk Management, and click on the “Request a Risk Management Consultation” button.



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