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**E-88-6      Lawyer as witness on behalf of client**

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**Question**

Must an attorney representing a client withdraw from his or her representation of a client in a dispute with a third person involving circumstances that likely would require the attorney, at some stage of litigation, to give testimony from his or her personal knowledge on behalf of the client, which testimony would not be adverse to the client's interest but would be adverse to and challenged by the third person?

**Opinion**

Prior to the effective date of the Rules of Professional Conduct for Attorneys, Jan. 1, 1988, the answer to this question generally would have been: "yes, the lawyer and the lawyer's firm must withdraw." *See* SCR 20.24(2) and SCR 20.25(1).

However, under SCR 20:3.7, a lawyer's testifying on behalf of his or her client on a contested issue does not necessarily disqualify other members of that lawyer's firm from acting as advocates in the proceeding. SCR 20:3.7(b) permits other firm members to replace the testifying lawyer as advocates, provided that the testifying lawyer is not conflicted under SCR 20:1.7 or SCR 20:1.9. If the testifying lawyer is conflicted under one of those rules, all members of the firm would be disqualified from acting as advocates by SCR 20:1.10(a). However, even if a conflict exists for the testifying lawyer under SCR 20:1.7 or SCR 20:1.9, those rules do provide for a client waiver, which would permit another firm member to act as advocate.

Although SCR 20:3.7 affords testifying lawyers and their clients substantial protection from disqualification motions brought by opposing counsel, testifying lawyers and their firms nevertheless may conclude that a client's interests would be better served in some cases by substitution of new counsel. For example, a jury might attach less credibility to the lawyer's testimony because of the obvious self-interest of the lawyer's firm. Although SCR 20:3.7 does not expressly require consultation with and consent of the client to proceed with another member of the firm as advocate, informed client consent to this is not only

prudent but most likely required by other rules. *See, e.g.*, SCR 20:1.2.(1), SCR 20:1.4 and SCR 20:1.7(b).