

Final

**RHODE ISLAND SUPREME COURT
ETHICS ADVISORY PANEL
Opinion No. 97-11, Request No. 713
Issued May 8, 1997**

Facts:

The inquiring attorney filed a petition for probate of a client's will. Another lawyer in the inquiring attorney's law firm had drafted the will and was a subscribing witness. An objection to the petition has been filed on the grounds that the testator lacked testamentary capacity. The inquiring attorney anticipates that the other lawyer in his/her law firm will testify in the matter.

Issues Presented:

The inquiring attorney asks whether the Rules of Professional Conduct permit an attorney whose partner or associate is expected to testify in a contested probate matter to represent the executor or the estate in the probate proceedings.

Opinion:

Yes. Pursuant to Rule 3.7(b) of the Rules of Professional Conduct, the inquiring attorney may represent the executor or the estate in probate proceedings in which another lawyer in his/her law firm is likely to be called as a witness, provided that the inquiring attorney is not otherwise precluded from the representation by reason of a conflict of interest under Rule 1.7 or Rule 1.9.

Reasoning:

Rule 3.7 of the Rules of Professional Conduct prohibits an attorney from acting in the dual capacities of advocate and witness in a proceeding, except in limited circumstances. Unlike the predecessor Code of Professional Responsibility, Rule 3.7 does not extend the prohibition to the partners or associates of an attorney who will testify. See Annotated Model Rules of Professional Conduct, at 362 (3rd ed. 1996). The rule states:

Rule 3.7. Lawyer as Witness. -

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;

- (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) 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.

Rule 3.7(b) makes clear that the disability imposed by subsection (a) is personal and is not to be imputed to other attorneys in the law firm. Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering, §3.7: 301, at 684, (2nd ed. Supp.1997). The rule is consistent with Rule 1.10(a) in that the latter does not contain any reference to Rule 3.7 in the list of situations requiring imputed disqualification. Id.; see Rule 1.10(a) (requiring disqualification of attorney's firm only when attorney is disqualified under Rule 1.7, Rule 1.8(c), Rule 1.9 or Rule 2.2). At the same time, Rule 3.7(b) protects a client from conflicts of interest by cross-referencing Rule 1.7 (Conflicts of Interest: General Rule) and Rule 1.9 Conflict of Interest: Former Client). For example, if there will be a conflict between the testimony of a client and that of his/her attorney or a member of the attorney's firm, the representation would be precluded under the conflict of interest provisions. See Annotated Model Rules of Professional Conduct at 356.

Accordingly, the Panel concludes that the Rules of Professional Conduct permit the inquiring attorney to represent the estate or the executor in the probate proceeding in which another member of his/her firm is likely to be called as a witness, unless the inquiring attorney is precluded from doing so by Rule 1.7 or Rule 1.9. The inquiring attorney has represented to the Panel that there are no conflicts of interest under Rule 1.7 or Rule 1.9. The Panel is without sufficient factual information to make an independent determination of whether any such conflicts of interest exist.

The Panel's advice is protective in nature. It is provided for the benefit of the inquiring attorney for the purpose of avoiding disciplinary action. It is not binding upon any other persons including a court which has unfettered authority to render an independent decision. See O'Rourke v. Power, No. 95-458 M.P. (R.I. Feb. 26, 1997).