ETHICAL ISSUES IN CHILD ABUSE CASES – REALLY!?!

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State Bar of Texas
35th ANNUAL ADVANCED CRIMINAL LAW COURSE
July 20-23, 2009
Dallas

CHAPTER 17.1

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Preparatory and Legal Education: Southern Methodist University
B.S., Economics - 1981
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Associate and partner with the law firm of Burleson, Pate & Gibson, L.L.P. since 1985; major area of practice since 1985 -- criminal law

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Dallas Criminal Defense Lawyers Association (Treasurer, 1990-1991; President-Elect, 1992; President, 1993)

Texas Criminal Defense Lawyers Association (Board Member 2005-2009)

Practice Information:

- State and Federal Criminal Trial Practice
- Over 200 State Grand Jury Presentations
- Over 100 Child Abuse Jury Trials
- Over 500 DWI Jury and Bench Trials
- Health Care Fraud Investigations
- Insurance Fraud Investigations
- Child Pornography Investigations
- Law Enforcement - Civil Rights Investigations (Police Misconduct)

Tom Pappas has practiced law for 25 years in the area of criminal defense. He is a frequent seminar speaker on criminal law issues including sexual abuse of children, DWI, police officer misconduct, grand jury representation and use of polygraphs. He has tried over 600 cases including over 300 jury trials at the State and Federal level. He has successfully represented numerous clients at the Grand Jury level. Additionally, he has consulted with State and Federal probation and parole officers on the use of polygraphs for sex offenders on parole and probation.

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ETHICAL ISSUES IN CHILD ABUSE CASES - REALLY!?!

By Tom Pappas
Burleson, Pate & Gibson, LLP

INTRODUCTION

Legal actions, legislative enactments and near daily media coverage have pushed wrongful convictions and prosecutorial misconduct to the forefront of the public's perception of a flawed criminal justice system. Regardless of who is in the public eye concerning ethical lapses, all three components of the daily criminal justice system share responsibility. All three have a legal, moral and practical obligation to elevate professionalism above more personal, or temporal, concerns. Any one group's failures hurt us all and undermine the perception and ability of "the system" to approximate "justice." Nowhere is this more obvious than in child-sex cases.

This seemingly simple concept becomes more difficult to implement when we focus on the three groups formal ethical obligations. The defense bar is obliged to "zealously represent their client to the boundaries of the bar." The prosecution must "see that justice is done." (See Appendix "A") Meanwhile the judiciary must do justice and at all times avoid any appearance of impropriety. These obligations do not change because of the sexual nature of the accusations, the tenderness of the complainants' ages, the fuzzy "science" concerning the psychology of the child witness or the customary absence of physical or testimonial corroboration.

Certain ethical issues continue to arise in child-sex cases. This paper is an effort to highlight and address some of those issues. It is not a systematic "cover the water front" effort to delineate all ethical considerations in all child-sex cases. Most of the legal basis for discussing these issues stems from the United States Constitution, the Texas Constitution and various Federal and Texas Codes of Ethics. Effective representation by counsel, the right to confront witnesses and due process of the law all form the foundation for analyzing ethical issues in child-sex cases. Brady v. Maryland, 373 US 83 (1963) and Crawford v. Washington, 541 U.S. 36, 124 S.Ct.1354 (2004) are referred to repeatedly and in different contexts as this paper addresses ethical issues.

THE CHILD WITNESS

Children that are witnesses contain a number of pitfalls for the professionals in the criminal justice system. Is a child competent to testify? Should the Rules of Evidence be modified in regards to examination and cross-examination of child witnesses? What protocols should be followed in interviewing a child witness in the investigative phase of a child-sex case? What protocols should be followed in preparing a child witness to testify? What variances in statements by a child witness are material? Which of those statements should be disclosed? What should a defense lawyer do when he learns of potential *Brady* violations? How does a judge deal with such potential *Brady* violations?

First, let's briefly discuss *Brady*. Although *Brady* is widely known and frequently referred to, a number of very important points continue to be misunderstood:

1. *Brady* is based on United States Constitutional grounds, not Texas state procedural grounds. Therefore, it is very difficult if not impossible for a defense attorney to waive it on behalf of his/her client; California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); Crawford v. State, 892 S.W.2d 1 (Tex.Cr.App.1994), on remand 934 S.W.2d 744 (Tex.App.—Houston [1st Dist.] 1996).

2. *Brady* applies to Texas Rules of Evidence 608 and any potential evidence that could be considered exculpatory. This includes 404(b)-type evidence, character evidence and evidence that may go to the culpability of a State's witness;

3. *Brady* also applies to any potential evidence that could be considered possible mitigation. In fact, *Brady* itself is a mitigation-disclosure case. This is a point that is frequently missed by prosecutors, the defense bar and judges (but not by Federal Appellate Courts); Palmer v. State, 902 S.W.2d 561, (Tex.App.-Houston [1 Dist.],1995); Franks v. State, 90 S.W.3d 771, (Tex.App.-Fort Worth, 2002)

4. The *Brady* obligation is broad and ongoing. A prosecutor has not only a duty of disclosure, but one of inquiry and willful blindness is unacceptable. Further, the duty of disclosure is ongoing and continues all the way through the legal process. It does not end at opening statements. United States v. Mason, 293 F.3d. 826, 829-30 (5th Cir. 2002); *Morris v. Yist*, 447 F.3d. 735, 744 (9th Cir. 2006); United States v. Bagley, 473 U.S. 667, 682 (1985); Stickler v. Greene, 527 U.S. 263, 281-282 (1999); and Kyles v. Whitley, 514 U.S. 419, 433 (1995).

What is the standard for *Brady* disclosure of prior inconsistent statements by a child witness? The only certain safe harbor disclosure by a prosecutor is full disclosure. Even where C.P.S. and C.A.C. laws may dictate the necessity of Trial Court review or Trial Court ordered disclosure, a prosecutor is not excused from their constitutional *Brady* obligations. This includes prior untrue or unfounded allegations by the child complainant of sex abuse by the defendant in an unrelated incident or old allegations of sexual abuse against an unrelated third party. Lopez v. State, 18 S.W.3d 222 (Tex.Crim.App.2000); Billodeau v. State, 277 S.W.3d 34, (Tex.Crim.App.,2009); Polvado v. State, 689 S.W.2d 945, (Tex.App.-Houston [14th Dist.] 1985, pet. ref'd); Thomas v. State, 669 S.W.2d 420, (Tex.App.-Houston [1st Dist.] 1984, pet. ref'd) but also see Lopez v. State, 86 S.W.3d 228 (Tex.Crim.App., 2002)

Although case law does not yet extend to prior true allegations of sexual abuse against unrelated third parties, a strong case can be made that *Brady* necessitates disclosure because it shows knowledge of the consequences, timing and effect of an outcry and subsequent counseling (and attention) for the complainant. Again, the safest course is always "full disclosure on the record."

What is the standard when a prosecutor or defense lawyer finds themselves in the situation of being a potential impeachment witness by virtue of having been the only person present when an unrecorded interview (or trial preparation) was done of a child witness (or any witness for that matter). First, there is never a set of circumstances that would require any prosecutor, or defense lawyer, to conduct an interview of a child witness without some third person (paralegal, investigator or other lawyer) there to witness and memorialize the child's statements. "That's the way we've

always done it" should be considered a particularly hollow and inadequate response.

1. Lawyers should not be witnesses.

2. If a defense lawyer believes it has happened they should file a motion and make a record with the good faith basis for the motion included in the motion.

3. There must be a compelling need to call an attorney as a witness and all ameliorative measures must first be attempted.

See Appendix "B" form motion and Appendix "C" authority 48 Tex. Prac., Tex. Lawyer & Jud. Ethics § 8:8 (2008-2009 ed.).

What is the basis for a mistrial or continuance of a case where a *Brady* violation is discovered mid-trial?

The basis for a surprise *Brady* disclosure mid-trial continuance is based on a defendant's United States Constitutional rights of effective representation and due process of the law. The procedure for obtaining a continuance or mistrial is found in Texas Code of Criminal Procedure Article 29.03 and 29.13.

> **Art. 29.03. For Sufficient Cause Shown**
>
> A criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown; which cause shall be fully set forth in the motion. A continuance may be only for as long as necessary.
>
> **Art. 29.13. Continuance After Trial is Begun**
>
> A continuance or postponement may be granted on the motion of the State or defendant after the trial has begun, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had.

Please note that all Motions for Continuance must be sworn to.

Finally, what constitutes improperly influencing a witness? One teddy bear or five. A one hour pizza party or a five hour birthday party.

The Texas Penal Code § 36.05 Tampering with a Witness states:

CHAPTER 36. BRIBERY AND CORRUPT INFLUENCE

§ 36.05. TAMPERING WITH WITNESS.

(a) A person commits an offense if, with intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding or coerces a witness or prospective witness in an official proceeding:

(1) to testify falsely;

(2) to withhold any testimony, information, document, or thing;

(3) to elude legal process summoning him to testify or supply evidence;

(4) to absent himself from an official proceeding to which he has been legally summoned; or

(5) to abstain from, discontinue, or delay the prosecution of another.

(b) A witness or prospective witness in an official proceeding commits an offense if he knowingly solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will do any of the things specified in Subsection (a).

(c) It is a defense to prosecution under Subsection (a)(5) that the benefit received was:

(1) reasonable restitution for damages suffered by the complaining witness as a result of the offense; and

(2) a result of an agreement negotiated with the assistance or acquiescence of an attorney for the state who represented the state in the case.

(d) An offense under this section is a state jail felony.

CONCLUSION

In this age of cell phone snapshots and I Phone videos, all lawyers' actions, prosecution and defense, should be viewed from the practical standard of would the average juror think this is appropriate if they knew about it?

Texas Disciplinary Rules of Professional Conduct

(Tex. Disciplinary R. Prof. Conduct, (1989) reprinted in Tex. Govt Code Ann., tit. 2, subtit. G, app. (Vernon Supp. 1995)(State Bar Rules art X [[section]]9))

III ADVOCATE

3.09 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

Comment:

Source and Scope of Obligations

1. A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific obligations. Among these is to see that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause. See paragraph (a). In addition a prosecutor should not initiate or exploit any violation of a suspects right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pre-trial, trial, or post-trial rights from unrepresented persons. See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendants guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a prosecutor is obliged by this rule to take reasonable measures to see that persons employed or controlled by him refrain from making extrajudicial statements that are prejudicial to the accused. See paragraph (e) and Rule 3.07. See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04.

2. Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutors obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.

3. Paragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel. See also Rule 4.03.

4. Paragraph (c) does not apply to any person who has knowingly, intelligently and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

5. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

6. Sub-paragraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law enforcement personnel or other persons assisting or associated with the prosecutor, but not in his employ or under his control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind.

NO.

STATE OF TEXAS	§	IN THE JUDICIAL
V.	§	DISTRICT COURT OF
	§	COUNTY, TEXAS

MOTION TO EXAMINE WITNESSES FOR POSSIBLE CONFLICTS OF INTEREST

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Defendant, , by and through undersigned counsel, and files this his Motion to Examine Witnesses for Possible Conflicts of Interest. In support of such motion, the Defendant would show unto this Honorable Court as follows:

I.

's uncorroborated testimony is the only evidence of any misconduct on the part of the Defendant. The incident allegedly took place on or about , 2005.

II.

It has come to the attention of Defense Counsel that at least five (5) different Assistant District Attorneys representing the State in the above cases have interviewed the child complainant while the child complainant was unaccompanied by anyone else, including a parent. See Exhibit "A." These five (5) Assistant District Attorneys in question are potential witnesses of statements discoverable under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) regarding their various conversations with the child complainant.

III.

The State has a duty to disclose contradictory statements of the complainant. Contradictory statements made by the complainant about the incident was favorable information that was material to the defense, and thus, the State's failure to disclose it violated due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Keeter v. State*, 105 S.W.3d 137

APPENDIX "B"

(Tex. App. Waco 2003). U.S. Const. Amend. XIV. Favorable evidence is any evidence that, if disclosed and used effectively, may make the difference between conviction and acquittal. *Brady* extends to evidence which impeaches the credibility of a witness. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) In *Flores v. State*, 940 S.W.2d 189, (Tex.App.-San Antonio,1996), an eyewitness gave a written statement which was in the prosecutor's file. The day before trial, the witness made oral statements to the prosecutor which added to her written statement and the new evidence was favorable to the defense. The court held that the prosecutor erred in not disclosing the oral statements to defense counsel.

By interviewing the witness alone, the prosecutors have made themselves witnesses to the contradictory statements and exculpatory evidence discoverable under *Brady*. This leads to the most serious consequence of the prosecutors' conduct. A lawyer, even a prosecutor from the same office, cannot be a witness in a matter they are an advocate. See Texas Disciplinary Rule for Professional Conduct Rule 3.08.[1] See also a relevant ethics opinion from the Texas Commission on Professional Ethics attached as Exhibit "B" to this motion.

---

[1] 3.08 Lawyer as Witness

(a) 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 lawyers client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyers client, unless the client consents after full disclosure.

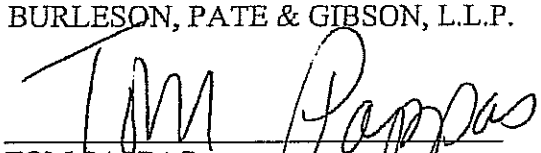
(c) Without the clients informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyers firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.(Tex. Disciplinary R. Prof. Conduct, (1989) reprinted in Tex. Govt Code Ann., tit. 2, subtit. G, app. (Vernon Supp. 1995)(State Bar Rules art X [[section]]9))

IV.

To allow the potential conflict of interest in representing both the State and being a witness in trial would allow for the possibility of a mistrial of these cases. The Defendant requests that examinations of the child complainant and the five (5) Assistant District Attorneys in question be conducted prior to voir dire to determine the likelihood of the existence of such conflicts.

Respectfully submitted,

BURLESON, PATE & GIBSON, L.L.P.



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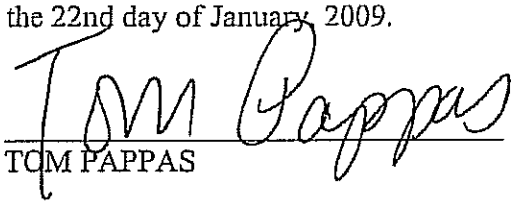
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion was delivered to , Assistant District Attorney, on this the 22nd day of January, 2009.



TOM PAPPAS

ORDER

ON THIS DAY came on to be heard, the foregoing motion of Defendant, upon consideration of same the Court is of the opinion that said motion should be and the same is hereby:

GRANTED DENIED, to which action the Defendant timely noted an objection.

SIGNED this _____ day of _____, 2009.

_____
JUDGE PRESIDING

MS : And Your Honor, please forgive me. I am not sure exactly if I remember what I told them, but after speaking with , I believe I am clear as to what happened. It's my understanding that she either did -- I know she denied at least at one point that the defendant touched her breast. However, when she shows you, it's -- she moves her hand up and down and says it's probably about to here which is right underneath the breast. But she has, like I said, told the SANE nurse as well as the forensic interviewer that he did touch those parts. She was six years old at that time and it was closer in time to obviously today.

She also indicated that she did not remember seeing the defendant walk around naked or without any clothes or just in his underwear. She remembers wearing a shirt and pants and not just underwear. She does not remember looking in a magazine or looking at a magazine, and by magazine, I'm talking about an adult magazine. I apologize. I believe she told one of my other colleagues at one time when she was first interviewed back in 2007 that she -- she says it was only underwear when the defendant was there, tickled from the neck and all down, and says not inside and I am assuming she's talking about the finger not before there. She indicated that he did not touch the chest

EXHIBIT "A"

with his hand. She indicated that she told -- I don't know that she really remembers who exactly she told first, whether it was mom or dad, but she seems to remember it being dad although I believe in the forensic interview she indicated she told mom first.

MR. : Told what, Your Honor? I'm not understanding.

THE COURT: Told mom first.

MR. : Told mom what?

MS. : I don't know. It doesn't get into anything to exactly what she told mom, that's what we have. So out of an abundance of caution, obviously, I am just giving what I believe could be potentially be Brady. As of right now, I don't recall anything else. However, if defense counsel remembers something that I said yesterday that, you know, I have not mentioned, by all means, I would like to hear it, I guess, to make sure that's what we went over yesterday.

MR. : A couple of things, Your Honor. I don't dispute what she told us so far as what she told us yesterday, but there's two things that I want to add. We were informed yesterday that there's never been any claim by the child that there was any penetration which goes to the agg sex count. That's the first and foremost, obviously.

MS. : She indicated that -- she indicated to the SANE nurse that she did not know. She indicated that I believe it was to the SANE nurse. She also indicated to the forensic interviewer that she didn't know or couldn't remember and so, you know, she indicated to me that, again, she doesn't think -- she didn't think so but she doesn't remember. She doesn't remember it being underneath her underwear, so that's the information that I have.

MR. : Well, if there is no penetration, then that's clearly what the evidence is or is going to be that -- you know, we move for a dismissal of that count before we get started.

MS. : Your Honor, I believe the SANE nurse will testify that regardless of whether it's over or under the clothes, if there's any breaking or any, you know, slight break of the plane, which could happen over the clothes if someone is moving their fingers there, then I believe that does constitute penetration and I believe that the SANE nurse will testify to that.

MR. : I don't doubt that the SANE nurse will testify that there's no way -- anywhere where it says that there was penetration. That's what we were told yesterday afternoon and I'm hearing the same thing today.

THE COURT: Well, I mean, at the proper time, I mean, after we hear the evidence, then we may have to take that up.

MS. : Well, Your Honor, and again, obviously if she doesn't remember, you know, that happening and the fact that it's now two years later, she was obviously more -- it was fresher in her mind back then. You know, we have a right to refresh her memory and/or, you know, ask her about inconsistent statements and then I believe at that time it's up to the jury and/or if there is enough there for them to believe one way or the other.

MR. : The next thing, Your Honor, is we were told that the previous prosecutor that she referenced was who did an interview in 2007 that said there was no touching inside and no touching of the chest. That came about -- Mr. has asked and believes and I agree with him the law shows that if there is evidence of exculpatory material in the prosecutor's notes, we would ask that they be provided to us. That clearly shows that there is. It clearly shows that it wasn't provided to us but for us asking in those terms. So we would ask the prosecutor to provide us those notes.

MS. : Your Honor, I don't believe

that they're entitled to the notes. I gave them what I, again, believe to be, you know, Brady. If Your Honor wants to see those notes and gather if there's anything else from them, I believe that's something that is appropriate. But I don't believe that I need to give over my work product and all of my work product for the defense counsel to pick and choose what they want to use.

THE COURT: I don't want to see the notes. I think all the law requires is you turn over any Brady or exculpatory material. If that's the basis of what her notes show, then --

MR. : Well, we would ask that copies of the notes be provided for purposes of the record, and if the Court is unwilling to give them to us, which I take it from the ruling that the Court is, that they at least be provided under seal. It's an important enough issue that they need to be preserved for --

THE COURT: Well, I'll -- you can give them to me and I will review them.

MS. : Yes, sir.

MR. : Okay. And in light of the disclosures, we would re-urge the motions that Mr. urged yesterday, that is the motion for continuance as well as the motion for dismissal as well

Texas Professional Ethics Opinions

OPINION 399

December 1980

Tex. Comm. on Professional Ethics, Op. 399, V. 44 Tex. B.J. 201 (1981)

PROSECUTOR AS WITNESS

DR 5-102; DR 9-101

QUESTION

Is it permissible for a prosecutor in a criminal case to call another prosecutor out of the same office to testify as a witness?

OPINION

DR 5-102(A) provides that after an attorney undertakes employment in a case, and it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial, and his firm, if any, shall not continue representation in the trial, except in certain instances set forth in DR 5-101(B). These exceptions are: 1. If the testimony will relate solely to an uncontested matter. 2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony. 3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client. 4. As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

We hold that DR 5-102 applies to the district attorney's office and to all of those who practice in the same office. The rule would not apply to district attorneys and assistants practicing in another district, in another office. Although each assistant district attorney is not formally a law partner, the same principle would apply because their interest would be in common, just as would be the interest of law partners. Further, under DR 9-101, a lawyer should avoid even the appearance of impropriety. Insofar as Opinion 226 (March, 1959) is in conflict with this opinion, Opinion 226 is hereby overruled.

EXHIBIT "B"

Westlaw.
48 TXPRAC § 8:8
48 Tex. Prac., Tex. Lawyer & Jud. Ethics § 8:8 (2008-2009 ed.)

Texas Practice Series TM
Handbook Of Texas Lawyer And Judicial Ethics: Attorney Tort Standards, Attorney Ethics Standards, Judicial Ethics Standards, Recusal and Disqualification of Judges
Current through the 2008-2009 Update

Robert P. Schuwerk[FNa0], Lillian B. Hardwick[FNa1]

Part II. The Texas Disciplinary Rules Of Professional Conduct
Chapter 8. Article III. Advocate

§ 8:8. Rule 3.08 Lawyer as witness

West's Key Number Digest

West's Key Number Digest, Attorney and Client ⚿22, 37.1

Legal Encyclopedias

C.J.S., Attorney and Client §§ 61, 67, 135 to 137

(a) A lawyer shall not accept or continue employment before a tribunal[FN1] 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, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as an advocate. If the lawyer to be called as a witness

could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

ABA Comparison

This Rule is derived from ABA Model Rule 3.7, but contains modifications designed more closely to reflect prior Texas practice.

Paragraph (a), subparagraph (1), is identical to ABA Model Rule 3.7(a)(1); subparagraph (2) has no counterpart in the Model Rules;[FN2] subparagraph (3) is identical to ABA Model Rule 3.7(a)(2); subparagraph (4) has no counterpart in the Model Rules; and subparagraph (5) is based on, but is substantially narrower than, ABA Model Rule 3.7(a)(3).

Paragraph (b) has no counterpart in the Model Rules.

Paragraph (c) derives from, but is somewhat narrower than, Model Rule 3.7(b).

Texas Code Comparison

With respect to paragraph (a), subparagraphs (1), (2), and (3) are identical to former Texas Code DR 5-101(B)(1), (2), and (3), respectively. Subparagraph (4) has no counterpart in the former Texas Code. With respect to subparagraph (5), former Texas Code DR 5-101(B)(4) provided that a lawyer who knew or should have known that the lawyer or some other lawyer in his firm ought to be called as a witness on behalf of a client nonetheless could continue to represent the client "if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case." This Rule somewhat narrows that exception.

With respect to paragraph (b), former Texas Code DR 5-102(B) provided that "[i]f, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client."

Paragraph (c) is directly contrary to the rules embodied in former Texas Code DRs 5-101(B) and 5-102.

Commentary to Rule 3.08

The rule prohibiting a lawyer from acting both as an advocate and as a witness on behalf of a client in the same matter is a longstanding ethical proscription.[FN3] This rule apparently originated in the law of evidence as a corollary to the general principle that neither a party nor one aligned in interest with a party is competent as a witness on the party's behalf.[FN4] Modern cases, however, largely ignore that approach and analyze the prohibition as a matter of professional ethics rather than evidentiary law.[FN5]

Various justifications have been offered for the ethical proscription against advocates testifying, but most do not withstand analysis. One rationale is that the dual role may be detri-

48 TXPRAC § 8:8
48 Tex. Prac., Tex. Lawyer & Jud. Ethics § 8:8 (2008-2009 ed.)

mental to the client's interests because the lawyer may be more impeachable on grounds of bias.[FN6] That sort of conflict-of-interest rationale, however, supports only a limited prohibition waivable by the client, not the broad, traditional rule that recognizes no exception for client consent.[FN7]

Another rationale asserts that the prohibition is necessary to avoid the appearance of impropriety because a fact finder may believe that a lawyer might alter his testimony to serve the client's interests.[FN8] Commentators generally have rejected this rationale, reasoning that the appearance of bias would exist even if the lawyer-witness were disqualified as an advocate, either because of the lawyer's ongoing loyalty to the client or his expectation of representing the client in the future.[FN9] In any event, this rationale also supports only a limited proscription waivable by the client, rather than the broader traditional approach. Significantly, the ABA Model Code did not offer the appearance of impropriety as a rationale for its DR 5-101(B), [FN10] nor does that justification seem to have taken hold in Texas. [FN11]

A third rationale advanced in support of the prohibition against a lawyer acting as both advocate and witness is that a lawyer's appearance in those dual roles prejudices the opposing party by inhibiting cross-examination of the lawyer-witness.[FN12] At least one commentator has rejected this rationale, reasoning that the opposing counsel's reluctance to zealously cross-examine or attack the credibility of the lawyer-witness based on an assumed desire to preserve professional collegiality "pose[s] an ethical dilemma for opposing counsel rather than for the attorney who testifies."[FN13] Also, for better or worse, such restraint has become increasingly improbable in our contentious contemporary legal culture.

The most cogent rationale for the advocate-witness rule rests on protection of the fact-finding process. "[The] adversary system works best when the roles of the judge, of the attorneys, and of the witnesses are clearly defined. Any mixing of those roles inevitably diminishes the effectiveness of the entire system."[FN14] The principal concern in this area is that a lawyer should not be able to inject personal beliefs into the lawyer's presentation of the case to the jury;[FN15] allowing a particular lawyer to appear as both advocate and witness creates a risk of mixing argument and testimony in that way.[FN16] The rule reflects the concern that an opposing party may be handicapped in challenging such a witness since it may not be clear whether a statement by an attorney-witness should be taken as proof or as an analysis of the proof.[FN17] These rationales do not apply, however, to an attorney's out-of-court functions, such as drafting pleadings or assisting with pretrial strategy.[FN18] Although the Rule prohibits a lawyer who could not serve as an advocate from taking an active role before the tribunal, it does not prevent a lawyer who may or will be a witness from participating in the preparation of the matter.[FN19]

Because this rationale for the prohibition is based on protecting the truth-seeking process, it follows that client consent to the lawyer's dual role should not negate its impropriety.[FN20] Nonetheless, the impact of a lawyer's dual involvement in many instances is marginal at most. Moreover, the lawyer-witness provisions of the former Texas Code were frequently employed as tactical measures to disrupt an opposing party's preparation for litigation. [FN21] That potential for mischief was magnified by the ambiguity of the Code's test for disqualification: whether a lawyer "ought to be called as a witness."[FN22] One court went so far as to indicate

that a lawyer would be disqualified if it appeared that his testimony "could conceivably be used at trial."[FN23] This unfocused approach, which ignored the legitimate concerns underlying the rule and encouraged its abuse, unfortunately became quite widespread.[FN24]

With these concerns in mind, the drafting committee limited application of the Rule to those situations where there is a real danger to the fact-finding process from the lawyer's appearance in the dual role of lawyer and witness.[FN25] In doing so, one important variable was whether the testifying lawyer's information would be favorable or unfavorable to the client's case.[FN26] If that testimony were favorable, the principal issue would be possible prejudice to an opposing party due to confusion concerning the lawyer's dual role in the proceedings. In such circumstances, an affected party should be able to object to the lawyer's participation as an advocate whenever the danger to its interests is substantial.[FN27] If, on the other hand, the lawyer's testimony would be adverse to his own client, an opposing party has no real interest in whether or not the lawyer participates as both advocate and witness. Rather, the principal problem would appear to be possible conflicts of interest between the lawyer and his client--issues which should be settled in accordance with the principles set out in Texas Rule 1.06.[FN28]

The drafting committee recognized that basic dichotomy in this Rule. Paragraph (a) addresses the circumstances in which a lawyer-witness having favorable testimony concerning a matter may participate as an advocate in that proceeding.[FN29] It generally limits that participation to situations where the risk of harm to the opposing party is minimal,[FN30] or where it is necessitated either by the fact that the lawyer would be the only likely source of the information[FN31] or because the lawyer's right to participate in a dual role is constitutionally guaranteed.[FN32]

The exception granted in subparagraph (a)(5), is based on the fact that disqualification of a lawyer defeats a client's right to counsel of its choice and can impose substantial costs and other burdens on that litigant. While those detriments may be the price of justice, they should not be imposed lightly. Consequently, Rule 3.08(a)(5) of this Rule permits a lawyer to remain as both lawyer and advocate in certain circumstances if disqualification would work a "substantial hardship" on the lawyer's client.[FN33] This exception derives from former Texas Code DR 5-101(B)(4) but is narrower, in that under this Rule a lawyer must have "promptly notified opposing counsel that the lawyer expects to testify in the matter" despite the unavailability of any other paragraph (a) exceptions.[FN34] The drafting committee added this prompt notice requirement to prevent the testifying lawyer from creating a "substantial hardship," where none existed initially, merely by representing the client for an extended period of time without notifying opposing counsel of an intention to testify.[FN35] On the other hand, the comments to the Rule specifically discourage delaying valid motions to disqualify opposing counsel in order to maximize their disruptive effect.[FN36] Should a court elect to use this disciplinary standard as a test for disqualification of counsel, it could justifiably deny an otherwise valid motion on that ground.[FN37]

As these approaches reflect, paragraph (a) generally frowns on the tactical use of this Rule for purposes of disqualifying opposing counsel at critical stages of litigation. Among the other ways it curbs that abuse is by replacing the ambiguous "ought to be a witness" test with the

more stringent "necessary to establish an essential fact" standard. Under this new approach, a lawyer would not be subject to discipline for undertaking or continuing representation of a client unless the testimony the lawyer could furnish on behalf of the client were both essential to the client's case and unavailable from any other credible source.[FN38] Paragraph (a) thus minimizes resort to the lawyer-witness rule for tactical litigation purposes where a lawyer's testimony would benefit his client.

The case of *Anderson Producing, Inc. v. Koch Oil Company*,[FN39] presented the first important test of how Rule 3.08 should operate in a nondisciplinary context. In that case, a lawyer who had represented the plaintiff later testified as both a fact witness and an expert witness at the trial of the matter.[FN40] The lawyer's intention to do so, however, was not disclosed until three weeks prior to trial in a timely response to defendant's outstanding discovery requests.[FN41] Defendant's motion to disqualify plaintiff's counsel based on that intention or, in the alternative, to prohibit the lawyer from serving as a witness in the matter, both based on an alleged violation of Texas Rule 3.08 was overruled and the matter proceeded to trial. [FN42] The testifying lawyer, who had participated extensively in the pretrial phase of the matter, sat with other members of his firm at counsel's table during the trial but did not participate in the proceeding except as a witness.[FN43] Plaintiff prevailed, with the testifying lawyer's testimony comprising by far the majority of plaintiff's entire case.[FN44]

Plaintiff prevailed and defendant appealed, raising the participation of plaintiff's counsel as one of its grounds for reversal.[FN45] The court of appeals sustained that contention, concluding that the belated notification of defendant of the lawyer's participation as a witness meant that his appearance in that capacity was inconsistent with the "substantial hardship" exception of Texas Rule 3.08(a)(5) and thus should not have been allowed.[FN46] It also concluded that given the critical importance of the testimony, the error likely caused the rendition of an improper judgment.[FN47] However, the court of appeals did not conclude either that the testifying lawyer could not testify at a new trial or that that lawyer's firm should have been disqualified, apparently believing that one or the other had to occur, but not both.[FN48] This time plaintiff appealed.

On further review, by a vote of 5-4, the supreme court concluded that the court of appeals had erred.[FN49] After concluding that the Texas Rule 3.08 provided the governing standard for disqualification,[FN50] the majority, it went on to conclude that the testifying lawyer's involvement as a lawyer with the matter prior to trial did not mandate disqualification under that standard. [FN51] The majority also excused the timing of the notice by counsel of his intended role as a witness on behalf of his client by concluding that since his testimony did not violate Texas Rule 3.08, he did not have to meet the early notification requirements of the "substantial hardship" exception in order to be free to offer it.[FN52] Finally, the majority concluded that Texas Rule 3.08(c) did not provide a basis for disqualifying *other* lawyers in the testifying lawyer's firm from representing the client at trial but rather, to the contrary, specifically endorsed that approach.[FN53] Because the aggrieved party had waived all other grounds it might have had for challenging the testifying lawyer's testimony or seeking disqualification of counsel, the majority concluded that that the ruling below must be reversed.[FN54]

The dissent authored by Chief Justice Phillips and Justice Spector focused on the fact that the testifying lawyer, through his firm, retained a substantial stake in the outcome of the litigation.[FN55] While agreeing with the majority that the lawyer's involvement with the matter prior to trial was not sufficient to disqualify him as a witness,[FN56] they would have affirmed the court of appeals decision disqualifying the testifying attorney "with specific instructions that [he] not be allowed to testify on remand as long as retains any continuing fee interest in the case, either by contingency or post-withdrawal hourly billings."[FN57] In the dissenters' view, Texas Rule 3.08 would not permit that lawyer, "either in theory or practice," to fail to "sever his role as de facto attorney for [his client] when the trial commenced." [FN58] By failing to require him to give up his fee interest, they concluded, that severance had not been effectuated and his testimony was accordingly improper.[FN59] Moreover, the testifying lawyer could not rely on Texas Rule 3.08(a)(5)'s "substantial hardship" exception to justify the allowance of his testimony, because he had known for many months that he intended to testify and had failed to notify opposing counsel of that fact promptly as required in order to invoke it.[FN60]

The other dissent, authored by Justices Owen and Hecht, took a different view of the allowable circumstances of lawyer testimony, stating that it "would hold that an attorney may not appear as a witness to establish an essential fact on behalf of the client, other than ... one of the ... exceptions set out in [subparagraphs (a)(1) to (4) of] Rule 3.08, if the attorney or the attorney's firm retains a contingent fee interest in the case,"[FN61] and would further hold that "an attorney who is also an advocate in the case may not testify to matters other than those enumerated in Rule 3.08(a)(1) through (4) if opposing counsel was not promptly notified that the attorney expected to testify or where there was no showing that the testifying lawyer's client would suffer a substantial hardship [if the testimony were not permitted]."[FN62] Expressing the view that "[w]e should not allow attorneys to do what [was done] here: to sign on as counsel, prepare the entire case for trial, and then present the case to the jury through their own testimony."[FN63] That approach was objectionable, the dissent reasoned, because it presented the jury with an expert witness (the testifying lawyer) who was supposed to be objective but who was in fact, and was compensated as if he were, an advocate for the client.[FN64] Moreover, the dissent observed, the court had upheld the disqualification of a lawyer based on Rule 3.08 in an earlier decision involving an attorney who proffered an affidavit on behalf of a client, a circumstance far less egregious than the one presented in the case at hand. [FN65] The effect of the majority decision, the dissent continued, would be a continued erosion of public confidence in the legal system, as the citizens saw lawyers cynically manipulating the rules to their own advantage.[FN66]

Obviously the conduct involved in *Anderson Producing* is on the borderline and, in light of the closeness of that decision, the weakness of the majority's key argument that the conduct it approved did not violate subparagraph (a)(5) of Texas Rule 3.08, and the existence of older, contrary authority, its continued viability is open to question. In addition, the argument that a majority of the court found to have been waived but appeared receptive to--namely that permitting a lawyer to testify in a matter in which the lawyer's firm is representing the client without having that lawyer renounce both his direct and indirect fee interest in the matter would violate Texas Rule 3.04(b)--seems unassailable. Thus, at the very least, lawyers faced

by such behavior by an opposing party's attorney should be sure to advance that argument along with those based solely on Texas Rule 3.08. Finally, they should use an interrogatory at an early stage of the case to "flush out" any plans by opposing counsel to surprise them with a belated announcement of such behavior. [FN67]

The recent case of *Gonzalez v. State*[FN68] presents an interesting application of these principles in a criminal law. The case involved a defendant, a licensed physician, accused of organized criminal activity-namely, insurance fraud. It was undisputed that after the defendant had been indicted, he had a series of meetings with a key witness against him, at least two of which were attended by his attorney. As a result of these meetings, the defendant agreed to pay the witness $10,000 and later actually did pay him $3,000. The purposes of these actions were disputed, with the state claiming that they were an effort to buy the witness' silence and the defendant asserting that the payments were designed to allow the witness to obtain his own counsel.[FN69]

The state moved to disqualify defendant's counsel on the theory that he would be a necessary witness to establish an essential fact on the defendant's behalf-namely, the reason why the payments in question were sought and made. Defendant's counsel argued that he was not disqualified because, although his testimony on those issues would be favorable to his client, he would offer what information he had through tape recordings of some of his conversations with the witness involved. At a hearing held on the matter, the lawyer cross-examined the witness against his client and, in the course of doing so, intimated that he had personal knowledge that the witness' assertions were either true or false.[FN70]

The trial court granted the state's motion to disqualify defense counsel and the court of appeals affirmed. It found that there had been a very real probability that the disqualified attorney would have been called to testify on a hotly contested issue of critical importance to the defense, and that his presence in the case as counsel would cause actual prejudice to the prosecution.[FN71] On further review the Texas Court of Criminal Appeals affirmed the lower courts on this issue. That court found that the state had carried its burden of showing that it would be actually prejudiced by counsel's continued representation of the defendant, whether or not he took the stand as a witness on his client's behalf.[FN72] Had he testified, the court continued, the state "would have been prejudiced not only by the undue weight jurors might have attached to counsel's testimony, but also by the confusion that would most likely have resulted during argument regarding whether counsel was summarizing evidence or further testifying as to [his own] personal knowledge."[FN73] On the other hand, even if the lawyer has chosen not to testify, his cross-examination of the state's key witness would have prejudiced the state because it would have carried "the implication to the jury that his questions represented the truth based on his personal knowledge of what occurred," a prejudice heightened by the state's "inability to clarify counsel's testimony and impeach counsel's credibility."[FN74] By likely "affect[ing] the jury's perspective, not only on the witness tampering issue, but also on the credibility of the State's key witness against [defendant] regarding the facts of the charged crime," the court concluded that "counsel's dual roles would most likely have substantially affected the jury's verdict." [FN75] Consequently, the decision to disqualify counsel was proper.[FN76]

The key feature of *Gonzales* appears to have been that the defendant's lawyer would be participating in the trial in two roles--both as attorney and as witness--and his doing so was shown to be prejudicial to the prosecution. But what if an attorney only filled one of those roles, namely that of witness, but the opposing party was prejudiced anyhow? Should such a showing matter? That was the situation confronting the court of appeals in *Powers v. State*.[FN77] The unusual facts of *Powers* were these. The defendant had been arrested by Officer Samuel Williams for DUI. Apparently Officer Williams was also attending law school at the time, because by the time defendant's case came to trial, Officer Williams had passed the Texas bar examination and taken a position as an attorney with the prosecutor's office that was handling that case.[FN78] In defendant's trial, Williams, while he disclosed his present employment, appeared solely as a witness. Apparently defense counsel only found out about Officer Williams current employment by the prosecutor's office through this testimony to that effect and, upon learning of it, moved to disqualify the prosecutor's office and for a mistrial. The trial judge denied such relief, and defendant was convicted.[FN79]

The court of appeals reversed defendant's conviction, concluding that defendant had suffered the same sorts of prejudice as the state has been exposed to in *Gonzales*.[FN80] It found that the witness' credibility was at issue, that the jury would likely attach undue weight to his testimony due to his present affiliation with the prosecutor's office, and that there was a substantial risk of jury confusion stemming from difficulty in determining what portions of Officer Williams' testimony were due to his first-hand observations in connection with defendant's arrest and booking, and what ones were learned from his work with the prosecutor's office.[FN81] The court of appeals also identified another factor that in its judgment merited disqualification of the prosecutor's office that had not been present in *Gonzales*, namely "an appearance of a lack of objectivity concerning his testimony" that "could potentially undermine public confidence in the integrity of the judicial process."[FN82] These factors, the court of appeals concluded, showed that the defendant had suffered actual prejudice and was entitled to a new trial. [FN83]

Upon further review, however, the Texas Court of Criminal Appeals reversed the judgment of the court of appeals.[FN84] The Court of Criminal Appeals concluded that the court of appeals "had not addressed whether Williams served 'dual roles,' " in the underlying matter--namely those of both lawyer and witness.[FN85] Because it found that Williams clearly had not served in both capacities and Rule 3.08 did not apply unless he had done so, it reversed the judgment of the court of appeals, without "reach[ing] the question of whether appellant was harmed."[FN86]

The Texas Court of Criminal Appeal's most thorough and thoughtful exploration of Rule 3.08 in the context of criminal trials is it recent opinion in *Flores v. State*.[FN87] In *Flores*, the court addressed the practice of calling defense counsel to the stand as a fact witness, over objection, during the trial of that lawyer's client.[FN88] In discussing that issue, the court first noted that federal and state courts have always "been very reluctant to permit such an action."[FN89] The court explained that "[p]ermitting a prosecutor to call the defendant's attorney as a witness 'inevitably confuses the distinctions between advocate and witness, argument and testimony, [and] is acceptable only if required by compelling and legitimate need.' "[FN90] Consequently, the court adopted a "compelling need" test to limit when such an ac-

tion would be upheld:

> [In order to call defense counsel as a witness, over objection, during the trial of the defendant's client,] the State must show that: (1) there is no feasible alternative for obtaining and presenting the information to the jury except through defense counsel's testimony; and (2) the testimony is essential, not merely relevant, to the State's case.[FN91]

The court concluded that the State had failed to make that showing in the present case.[FN92] Moreover, the court went on to hold that even when extraordinary circumstances justified putting defense counsel on the stand involuntarily, "the trial court must take all appropriate ameliorative measures to prevent harm." Amplifying on that injunction, the court continued:

> Appropriate ameliorative measures include, but are not limited to: (1) substitution of another attorney to replace defense counsel once it becomes apparent that the testimony is required; and (2) appointment of an additional attorney to represent the defendant during the questioning of defense counsel if there is a compelling need for counsel to testify. * * * The trial court must also be confident that defense counsel's credibility before the jury will not be impugned, tarnished, or discredited in any way; the jury will not be confused by the testimony, the subsequent argument related to the testimony, or the break in the proceedings; and the testimony will not involve, relate to or touch upon any privileged communication.

What is most noteworthy about the *Flores* opinion, however, is not the substance of the rules it enunciates, but rather its penetrating understanding of the nature of the harms created by calling defense counsel as a witness in a criminal case. In that regard, the court of appeals had focused on the substance and apparent significance of defense counsel's testimony in relation to other evidence offered in the case, and concluded that any error in compelling that testimony was harmless.[FN93] The Court of Criminal Appeals, however, rejected that reasoning as "beside the point"[FN94] because it concluded that the harm to a defendant in such circumstances flows not just from the substance of his lawyer's testimony, but rather from the very "placing [of] the lawyer in a dual role and the impressions created thereby." [FN95]

Initially, the court examined the practical difficulties created by forcing defense to take the stand in the midst of his client's trial:

> A lawyer acting as a witness against his client cannot properly perform his duties to his client. With the lawyer on the stand and the client at the counsel table, "it is impossible for the defendant to consult with his attorney." And a lawyer who is testifying for the State cannot adequately protect the record. With our preservation rules, it would be a super-human accomplishment to lodge proper and specific objections to the questions while testifying for the State. Additionally, one would have to avoid divulging any privileged information and inadvertent admissions and anticipate the effect of one's answers, while keeping in mind the issues upon which cross-examination of oneself would be required. And, after being burdened with this impossible task, the lawyer

> would then be faced with cross-examining himself and arguing the client's case to the jury. Putting a defense attorney in the position of arguing his own credibility to the jury is akin to striking [at] the defendant over the shoulder of his attorney.[FN96]

But these practical difficulties were not the only reasons the court gave for condemning the practice. Rather, the court went on to discuss the ways in which such conduct directly undermines the adversary system in ways not readily captured by existing modes of error analysis. Thus, the court continued:

> We believe that a standard harm analysis would be inadequate to address the error which is brought to bear on the proceeding itself. Framing the harm in this fashion demonstrates why a *Strickland* [*v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] analysis, as adopted by the court of appeals is inadequate to address this type of error. *If the focus is on the substance of the testimony, it obscures the greater consideration of the continuing credibility of defense counsel as an advocate after testifying as a witness.* These policy considerations, at the very heart of the lawyer-witness rule, should be the focus of the harm analysis--not whether, upon the entire record, the substance of the testimony elicited prejudiced appellant's case. [FN97]
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> The adversary system of justice is predicated upon the proposition that justice will most surely prevail when adversaries are pitted one against the other. Under that system, it is the sworn duty of defense counsel to use all honorable and legal means to defend a client charged with a crime. It is inconceivable that a lawyer, seeking to convince a jury of the innocence of his client, or that the accused has not been proven guilty, can perform that high duty when he assumes the dual role of defense counsel and witness for the prosecution. Such a procedure sullies the entire legal profession. More particularly, it is manifestly unfair to the honorable trial counsel in this case, who was forced, against his will, to testify against the very client he was sworn to defend; his credibility as a lawyer immediately becomes suspect in the eyes of the jury. Above all, it was unfair to the defendant, who is convicted with the help of his own lawyer's testimony.[FN98]

It is noteworthy that no justice of the Court of Criminal Appeals dissented from this stinging condemnation of the practice of calling defense counsel to the stand as part of the prosecution's case and the sharp limitations placed on it by the court. Indeed, two justices would have gone farther and absolutely barred both prosecution and defense counsel from placing their adversaries on the stand involuntarily during the trial of the case at bar.[FN99] Given those sentiments, prosecutors would be well advised of the closing admonition of the majority's opinion, namely that the State pursues such a course "at its peril."[FN100]

Paragraph (b) addresses the situation where a lawyer's testimony, if offered, would be unfavorable to the client. Its structure precludes its possible use as a tactical litigation device. Since a lawyer normally would not have to volunteer such adverse testimony,[FN101] the Rule does not require any action on the lawyer's part until it appears that the lawyer will be

compelled to furnish it.[FN102] Even then the lawyer need not do anything unless that testimony would be "substantially adverse to the lawyer's client."[FN103] If the lawyer believes that he will be compelled to furnish substantially adverse testimony, paragraph (b) requires the lawyer to treat that situation in accordance with the general conflict of interest principles set out in Rule 1.06, which provide that a client may consent to the representation after disclosure of potential adverse effects.[FN104] Opposing counsel has no right to seek disqualification in those circumstances.[FN105]

Paragraph (c) of the Rule discusses the effect of a lawyer appearing as a witness on the ability of other attorneys in that lawyer's firm to represent the client. Under former law, the general rule required vicarious disqualification of the firm of the testifying lawyer,[FN106] although a number of courts looked at the totality of the circumstances involved to determine whether disqualification was appropriate.[FN107] Following the lead of numerous commentators, both the ABA Model Rules and this Rule take the position that the firm of a testifying lawyer normally should not be required to withdraw from the representation, because the interests protected by the Rule usually are not threatened in that situation.[FN108]

Paragraph (c) recognizes, however, that conflicts of interest may arise when a member of a law firm is a necessary witness and another member of the firm acts as advocate.[FN109] For example, under paragraph (a) there is a risk that the credibility of the lawyer-witness will be impaired if his relationship with the client and the client's advocate is brought out by opposing counsel. Likewise, under paragraph (b), if the testimony of the lawyer-witness adversely affects the client's cause, an ongoing professional relationship with his colleagues might inhibit cross-examination of that lawyer. Paragraph (c) takes the position, however, that these are matters to be determined solely between lawyer and client after full disclosure and that as long as the testifying lawyer does not participate in the presentation of the matter before the finder of fact, the opposing party has no cause to complain.[FN110]

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[FN1] The phrase "before a tribunal" was added to paragraph (a) as part of Referendum '94, in order to bring the text of the paragraph in line with the comments to the Rule and the original intent of those drafting it. *See Referendum '94*, 57 TEX. B.J. 265, 278 (1994) (Item D.1).

[FN2] *But see* ABA MODEL CODE DR 5-101(B)(2) (containing this same provision). Further, the ABA's "Model Code Comparison" commentary to Rule 3.7 indicates that the provision had been deleted from that Rule solely because it appeared redundant in light of the provisions of ABA Model Rule 3.7(a)(1). *See* ABA MODEL RULE 3.7 comment (Model Code Comparison para. 2).

[FN3] *See* TEX. CODE DRs 5-101(B), 5-102; TEX. CANON 16.

[FN4] *See* 6 WIGMORE, EVIDENCE § 597 (Chadbourn rev. ed. 1976).

[FN5] *See* Cottonwood Estates v. Paradise Builders, 128 Ariz. 99, 624 P.2d 296, 299 (1981);

Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C.App. 539, 261 S.E.2d 520, 522-23 (1980); ABA Formal Op. 50 (1931).

[FN6] *See, e.g.*, United Pac. Ins. Co. v. Zardenetta, 661 S.W.2d 244, 247 (Tex.App.--San Antonio 1983, no writ) (attorney shall withdraw from a case upon learning that he may be called as a material witness); General Mill Supply Co. v. SCA Serv., 697 F.2d 704, 716 (6th Cir.1982) (affirming disqualification of attorney for providing an affidavit on behalf of client); *see also* TEX. CODE EC 5-9 (noting that by acting as both counsel and witness a lawyer becomes vulnerable to impeachment as an interested witness and thus may not fulfill that role effectively); Sutton, *The Testifying Advocate*, 41 TEX. L. REV. 477, 482-83 (1963) (lawyer who will be a witness should not be advocate as well).

[FN7] *See* Comment, *The Rule Prohibiting an Attorney from Testifying at a Client's Trial: An Ethical Paradox*, 45 U. CIN. L. REV. 268, 272 (1976). *But see* Crossword Systems (Texas), Inc. v. Dot Hill Systems Corp., 2006 WL 1544621 (W.D. Tex. 2006) (disqualifying both testifying counsel and that attorney's entire firm, based in large part on such considerations, but relying on both former ABA Model Code and current ABA Model Rules, as well as Texas Rules in doing so).

[FN8] *See, e.g.*, Aghili v. Banks, 63 S.W.3d 812, 818 (Tex.App.--Houston [14th Dist.] 2001, mand. denied)("The practice of attorneys furnishing from their own lips and on their own oaths the controlling testimony for their client is one not to be condoned by judicial silence. ... [N]othing short of actual corruption can more surely discredit the profession.")(quoting Warrilow v. Norrell, 791 S.W.2d 515, 523 (Tex.App.--Corpus Christi 1989, writ denied)); TEX. CODE EC 5-9 (noting that a lawyer who is both counsel and a witness is more easily impeachable for interest); EC 5-10 (relying on the reasoning that the lawyer becomes a less effective witness); Ford v. State, 4 Ark.App. 135, 628 S.W.2d 340, 342 (1982) ("because of interest or the appearance of interest in the outcome of the trial, the advocate who testifies at trial may be subject to impeachment and the evidentiary effect of his testimony will be weakened. . . ."); Crossword Systems (Texas), Inc. v. Dot Hill Systems Corp., 2006 WL 1544621 (W.D. Tex. 2006) (disqualifying both testifying counsel and that attorney's entire firm, based in part on such considerations, but relying on both former ABA Model Code and current ABA Model Rules, as well as Texas Rules in doing so); Comden v. Superior Court, 20 Cal.3d 906, 912, 145 Cal.Rptr. 9, 11, 576 P.2d 971, 973 (1978) ("[a]n attorney who attempts to be both advocate and witness impairs his credibility as witness and diminishes his effectiveness as advocate"), cert. denied, 439 U.S. 981, 99 S.Ct. 568, 58 L.Ed.2d 652 (1978); ABA Formal Op. 50 (1931) ("[a]lthough his zeal as a lawyer might not influence his testimony as a witness, an ever critical public is only too apt to place such a construction upon it.").

[FN9] *See* Brown & Brown, *Disqualification of the Testifying Advocate--A Firm Rule?*, 57 N.C.L. REV. 597, 611-13 (1979).

[FN10] *See* ABA Formal Op. 339 (1975); *see also* TEX. CODE EC 5-9, EC 5-10 (relying on the reasoning that the lawyer becomes a less effective witness). *But see* Crossword Systems (Texas), Inc. v. Dot Hill Systems Corp., 2006 WL 1544621 (W.D. Tex. 2006) (disqualifying both testifying counsel and that attorney's entire firm, based in part on perceived appearance

of impropriety in allowing some members of firm to serve as advocate when other members of firm would be key witnesses, but relying on both former ABA Model Code and current ABA Model Rules, as well as Texas Rules in doing so).

[FN11] *See* Gilbert McClure Enterprises v. Burnett, 735 S.W.2d 309, 311 (Tex.App.--Dallas 1987, no writ). *But cf.* Aghili v. Banks, 63 S.W.3d 812, 817-19 (Tex.App.--Houston [14th Dist.] 2001, mand. denied) (holding that an attorney may not be a witness by affidavit offering key facts in support of clients while also serving as their attorney in the matter; and trial court abused its discretion in not striking affidavit). *But see* Crossword Systems (Texas), Inc. v. Dot Hill Systems Corp., 2006 WL 1544621 (W.D. Tex. 2006) (disqualifying both testifying counsel and that attorney's entire firm, based in part on perceived appearance of impropriety in allowing some members of firm to serve as advocate when other members of firm would be key witnesses, but relying on both former ABA Model Code and current ABA Model Rules, as well as Texas Rules in doing so).

[FN12] *See, e.g.*, TEX. CODE EC 5-9 ("opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case"); *Ford*, 628 S.W.2d at 342 ("opposing counsel may be handicapped in cross-examining and in arguing the credibility of trial counsel who also acts as a witness"); ABA Formal Op. 339 (1975) (noting the practice of testifying for the client may handicap opposing counsel in challenging the credibility of the lawyer-witness).

[FN13] *See* Enker, *The Rationale of the Rule that Forbids a Lawyer to Be Advocate and Witness in the Same Case*, 1977 AM. B. FOUND. RES. J. 455, 457-58.

[FN14] Cottonwood Estates v. Paradise Builders, 128 Ariz. 99, 102, 624 P.2d 296, 300 (1981). *See also* Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416, 422 (Tex.1996)("Rule 3.08 is grounded principally on the belief that the finder of fact may become confused when one person acts as both advocate and witness"); Aghili v. Banks, 63 S.W.3d 812, 817-19 (Tex.App.-- Houston [14th Dist.] 2001, mand. denied) (attorneys, like judges, should not be "permitted to blur their roles by appearing as witnesses," and, when they do, they "tend [ ] to cast doubt on the ethics and propriety of our judicial system"). PEC Op. 468, 54 ("The purposes of Rule 3.08 are to insure (1) that a client's case is not compromised by being represented by a lawyer TEX. B.J. 731 (1991)who could be a more effective witness for the client by not also serving as an advocate (2) that the client not be burdened by counsel who may have to offer testimony that is substantially adverse to the client's cause (3) to avoid confusion of the finder of fact and (4) to avoid prejudice to the opposing party that can arise from a single person playing dual roles of advocate and witness.").

[FN15] *See* TEX. CODE DR 7-106(C)(4); Tex. Rule 3.04(c)(3).

[FN16] *See, e.g.*, Weil v. Weil, 238 A.D. 33, 35, 125 N.Y.S.2d 368, 370 (1953) (new trial granted where trial lawyer testified after having participated in raid to gather evidence of client's wife's adultery); *see also* Levy & Levy, *Persuading the Jury With Facts Not in Evidence: The Fiction-Science Spectrum*, 105 U. PA. L. REV. 139, 155 (1956) (recognizing that lawyers have ability, through argument, to create unverifiable facts in the minds of jurors).

[FN17] *See Anderson Producing*, 929 S.W. at 421-22; *see also* Aghili v. Banks, 63 S.W.3d 812 (Tex.App.--Houston [14th Dist.] 2001, mand. denied) (defendant attorney who conducted foreclosure sale of condominium units was disqualified from appearing as both counsel for himself and defendant condominium owners' association and as affiant supporting motion for summary judgment); Warrilow v. Norrell, 791 S.W.2d 515 (Tex.App.--Corpus Christi 1989, writ denied) (attorney who testified as both a fact and expert witness on behalf of his client and actively participated as an advocate by questioning witnesses, addressing the court, and arguing to the jury was properly disqualified based on DR 5-101(B) and 5-102(A), the forerunners to Rule 3.08).

[FN18] *See Anderson Producing*, 929 S.W. at 422-23.

[FN19] *See Anderson Producing*, 929 S.W. at 423 (holding that company's attorney did not violate Rule 3.08 by continuing to draft pleadings, engaging in settlement negotiations, or assisting with trial strategy, after learning that he would probably be called as a witness at trial for the company). *Cf.* Spain v. Montalvo, 921 S.W.2d 852 (Tex.App.--San Antonio 1996, mand. overruled) (attorney properly disqualified under this Rule could assist successor counsel with trial preparation activities).

[FN20] *See, e.g.*, Banks v. Boone, 691 S.W.2d 783, 783-84 (Tex.App.-- Amarillo 1985, no writ); United Pac. Ins. Co. v. Zardenetta, 661 S.W.2d 244, 248 (Tex.App.--San Antonio 1983, no writ) (counsel may become a witness, but the client cannot waive the bar rule that disqualifies that counsel); Supreme Beef Processors v. American Consumers Indus., 441 F.Supp. 1064, 1068 (N.D.Tex.1977) (held that attorney must notify the court of the conflict, even with the client's consent to future representation with the conflict).

[FN21] *See, e.g.*, White v. Culver, 695 S.W.2d 763, 765 (Tex.App.--El Paso 1985, no writ) (attorney raised a fictitious claim, which would require testimony of opposing counsel, in an attempt to disqualify opposing counsel); *Zardenetta*, 661 S.W.2d at 248 (court disqualified opposing counsel because the attorney could be called as a witness); Bottaro v. Hatton Assocs., 680 F.2d 895, 897 (2d Cir.1982) (court held that no disqualification of counsel was necessary as the trial was not affected); *see also* Brown & Brown, *supra* note 9, at 619-20; Note, *The Advocate-Witness Rule: If Z, Then X. But Y?*, 52 N.Y.U. L. REV. 1365, 1380 n.88 (1977) [hereinafter *The Advocate Witness Rule*]; Note, *Disqualification of Law Firms Under the Attorney-Witness Rule*, 54 TUL. L. REV. 521, 532 nn. 55-58 (1980) [hereinafter *Disqualification of Firms*].

[FN22] *See* TEX. CODE DRs 5-101(B), 5-102(A).

[FN23] *Supreme Beef*, 441 F.Supp. at 1069.

[FN24] *See e.g.*, Bert Wheeler's Inc. v. Ruffino, 666 S.W.2d 510, 514 (Tex.App.--Houston [1st Dist.] 1983, no writ) (tactical use by opposing counsel to disqualify skillful adversary); Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Corp., 546 F.2d 530, 538-39 n. 21 (3d Cir.1976) (ethical rules govern attorney conduct and do not constitute rules of evidence), cert. denied, 430 U.S. 984, 97 S.Ct. 1681, 52 L.Ed.2d 378 (1977); Comden v. Superior Court, 20 Cal.3d 906, 145 Cal.Rptr. 9, 11, 576 P.2d 971, 973 (1978) (court disquali-

fied counsel because it could not say with any degree of security or in good conscience that the lawyer would not be called as a witness), *cert. denied*, 439 U.S. 981, 99 S.Ct. 568, 58 L.Ed.2d 652 (1978).

Unfortunately, this tendency was reflected in the first Texas case decided under Rule 3.08. *See* Industrial Accident Bd. of the State of Texas v. Spears, 790 S.W.2d 55 (Tex.App.--San Antonio 1990) (trial court reversed and law firm disqualified, in part on rationale that members of firm might be witness as to critical fact, without showing that lawyers had any actual knowledge of matter and, if so, what the lawyer's testimony would be). Subsequently, however the Texas Supreme Court vacated the court of appeals decision in *Spears* and held that the trial court had not abused its discretion in refusing to disqualify counsel. *See* Spears v. Fourth Court of Appeals, 797 S.W.2d 654 (Tex. 1990).

The supreme court's earlier decision in Ayres v. Canales, 790 S.W.2d 554 (Tex.1990), put Texas firmly on the right track in this area and presaged its decision in *Spears*. In *Ayres*, the court observed, "Comment ten to Rule 3.08 ... states that the rule should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice because reducing the rule to such a use would subvert its purpose. . . . In order to prevent such misuse of the rule, the trial court should require the party seeking disqualification to demonstrate actual prejudice to itself resulting from the opposing lawyer's service in the dual roles." The court held that the right to counsel of one's choosing can be restricted only if the opposing party can show actual prejudice or other compelling reasons for disqualification. *See Ayres*, 790 S.W.2d. at 658. *See also* Tex. Rules, Preamble ¶; 15; PEC Op. 468, 54 TEX. B.J. 731 (1991); PEC Op. 475, 55 TEX. B.J. 882 (1992) (lawyer whose testimony was not necessary to establish essential facts on behalf of his client and was not adverse to his client, but who learned he might be called as a witness by opposing party, was not required to withdraw from the case).

[FN25] *Accord*, Powers v. State, 165 S.W.3d 357 (Tex.Crim.App. 2005), rev'g 140 S.W.3d 851 (Tex.App.--Fort Worth 2004) (Rule 3.08 was not implicated by having investigating police officer in DUI case who, by the time the case came to trial, had passed bar and joined prosecutor's office as an attorney, testify against defendant, when he did not also participate in trial as an attorney; thus any prejudice suffered by defendant as a result of that circumstance was of no legal consequence).

[FN26] This factor played an important role under the former Texas Code, which authorized a lawyer to serve as both advocate and witness in certain circumstances if the lawyer's testimony would be offered on behalf of the client, but absolutely forbade such conduct otherwise. *See* TEX. CODE DR 5- 102(A), (B).

[FN27] Such a danger may arise even prior to trial. *See* Mauze v. Curry, 861 S.W.2d 869 (Tex.1993) (attorney who filed affidavit on behalf of client as expert witness to defeat opposing party's motion for summary judgment had "testified" for his client within the meaning of paragraph (a), and so should have been disqualified from representing the client at trial). While the conclusion that a lawyer providing an affidavit on behalf of his client thereby becomes a witness for that client is a reasonable one, the remedy of disqualification seems to be

a rather extreme penalty for a pretrial involvement that has no reasonable likelihood of confusing the trier of fact (who would be the trial judge) or prejudicing the opposing party. A preferable approach to policing such conduct by a lawyer that is fully consistent with the Rule would be to use the fact of a violation of Rule 3.08 by such a "testifying" lawyer as a basis for striking the affidavit offered by counsel rather than as a basis for disqualification of counsel altogether. *See* Southtex 66 Pipeline Co., Ltd. v. Spoor, 238 S.W.3d 538, 543 (Tex.App.--Houston [14th Dist.], rev. denied) (adopting this approach and holding that trial court erred in not striking attorney affidavit based on such an objection).

[FN28] Refer to commentary to Rule 1.06 (§ 6.6), at notes 64-81, 86-106 *supra* and accompanying text.

[FN29] Paragraph (b) regulates a lawyer whose testimony would be adverse to the client. Refer to notes 72-76 *infra* and accompanying text.

[FN30] *See* Tex. Rule 3.08(a)(1) (testimony related to uncontested matter); TEX. RULE 3.08(a)(2) (testimony related solely to matter of formality, not likely to be opposed by substantial evidence).

[FN31] *See* Tex. Rule 3.08(a)(3) (testimony related to value of lawyer's services).

[FN32] *See* Tex. Rule 3.08(a)(4) (testimony by lawyer who is a named party and appearing *pro se*). PEC Opinion 368 gave this exception tacit recognition. That opinion concluded that a lawyer who defended himself, as a named party, against a suit by other members of his firm, did not violate former Texas Code DR 5-101(B). *See* Tex. Rule 3.08(a)(4). The Professional Ethics Committee refused to extend that exception, however, to allow a party defendant lawyer's firm to represent both that lawyer *and* other defendants. *See* Tex. Rule 3.08(a)(4). These Rules would permit a firm to undertake both of those representations as long as no other disabling conflicts of interest existed and the lawyers involved complied with provisions of 3.08(c). Both of these positions were recognized by the Supreme Court of Texas in *Ayres*, 790 S.W.2d at 556-58 (mandamus will lie to vacate orders prohibiting testifying lawyer from representing himself and prohibiting nontestifying colleagues of that lawyer from representing their common law firm).

[FN33] *See* PEC Op. 468, 54 TEX. B.J. 731 (1991) (a husband who is an attorney may represent his wife and testify in a matter in which he is not a named party and in which he shares no common liability with his wife and may accept attorneys' fees awarded by the court, if he is otherwise legally entitled to them, provided the attorney's wife would experience substantial hardship if the attorney did not represent her and provided that required notification is given to opposing counsel).

[FN34] *See* Tex. Rule 3.08(a)(5).

[FN35] *See* Tex. Rule 3.08 comment 7. By the same token, for the purposes of this Rule, a court should determine whether an opposing counsel received prompt notification by focusing on when the need to testify became apparent rather than when the proceeding commenced. This way an opposing party cannot create a need for a lawyer's testimony late in the proceed-

ings and then claim that undue delay in notification bars the attorney from testifying.

[FN36] Tex. Rule. 3.08 comments 7, 10. Although one Texas appellate court decision may have ignored the disfavoring of tactical motions to disqualify counsel (*see Spears*, 790 S.W.2d at 55 (disqualification motion filed three days before trial despite fact that grounds of motion were known to opposing counsel for many months)), such tactics were firmly disapproved by the Supreme Court of Texas in *Ayres*, 790 S.W.2d at 557-58. Subsequently, *Spears* itself was vacated by the Supreme Court of Texas, without reaching the questions of whether the motion to disqualify was dilatory, or, if so, whether that fact alone would have justified denying it. *See* Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 n. 1 (Tex.1990).

[FN37] This is the intended thrust of the observation in comment 7 that one reason why counsel wishing to serve as both advocate and witness must promptly notify opposing counsel of that fact is to "enabl[e] them to make any desired response at the earliest opportunity." Any other interpretation of the Rule would "subvert its true purpose by converting it into a mere tactical weapon in litigation." Tex. Rule 3.08 comment 10. *Cf. Ayres*, 790 S.W.2d at 558 (overturning orders disqualifying colleagues of testifying lawyers where movant "failed to show that he had any interest other than tactical maneuvering in obtaining disqualification of nontestifying members of the firm").

[FN38] *See* In re Bivins, 162 S.W.3d 415, 420-21 (Tex.App.--Waco 2005, no pet.) (movant motion to disqualify opposing counsel under this rule would be denied when, although movant showed that opposing counsel might possess information relevant to pending matter, movant did not demonstrate either that lawyer was unique source of such information--so that lawyer's testimony would be "necessary" to establish fact at issue--or that lawyer's testimony would be unfavorable to movant); In re Sanders, 153 S.W.3d 54 (Tex. 2004), rev'g 151 S.W.3d 211 (Tex.App.--Dallas 2004) (where testimony that movant claimed would be offered by attorney sought to be disqualified was either available from other witnesses or from attorney's records and, in any event, was collateral to principal issues in case, court of appeals erred in upholding attorney's disqualification); In re Chu, 134 S.W.3d 459 (Tex.App.--Waco 2004, no pet.) (attorney ad litem should not be disqualified under this rule merely because opposing counsel wished to call him as witness, when movant could not point to any testimony which that attorney could offer that was not available from other sources). *Accord*, Macheca Transport Co. v. Philadelphia Indemnity Ins. Co., 463 F.3d 827, 833 (8th Cir. 2006) (observing that testimony "may be relevant and even highly useful, but still not be strictly necessary," and that disqualification under the 'necessary' test is warranted only if "there are things to which he will be the only one available to testify"). For cases applying a similar test for purposes of disqualification under the prior disciplinary rules, *see* J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1358-59 (2d Cir.1975); Freeman v. Kulicke & Soffa Indus., 449 F.Supp. 974, 977-78 (E.D.Pa.1978); Miller Elec. Constr. v. Devine Lighting Co., 421 F.Supp. 1020 (W.D.Pa.1976); Cottonwood Estates v. Paradise Builders, 128 Ariz. 99, 105, 624 P.2d 296, 302 (1981). *Cf.* In re Works, 118 S.W.3d 906 (Tex.App.--Texarkana 2003, no pet.) (refusing to disqualify lawyer under this rule when movant could not show that lawyer had personal knowledge of allegedly critical facts).

[FN39] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416 (Tex. 1996).

[FN40] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 418 (Tex. 1996).

[FN41] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 419 (Tex. 1996).

[FN42] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 419 (Tex. 1996).

[FN43] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 419 (Tex. 1996).

[FN44] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 428-29 (Tex. 1996) (Owen and Hecht, JJ., dissenting).

[FN45] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416,420 (Tex. 1996). The court of appeals opinion may be found at Koch Oil Co., a Div. of Koch Industries, Inc. v. Anderson Producing, Inc., 883 S.W.2d 784, 133 O.G.R. 162 (Tex. App.--Beaumont 1994).

[FN46] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 420 (Tex. 1996).

[FN47] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 420 (Tex. 1996).

[FN48] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 420 (Tex. 1996).

[FN49] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 418-25 (majority opinion), 425-27 (Phillips, C.J. and Spector, J. dissenting), 427-35 (Owen and Hecht, JJ., dissenting) (Tex. 1996).

[FN50] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 420-22 (Tex. 1996).

[FN51] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 422-23 (Tex. 1996).

[FN52] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 424 (Tex. 1996).

[FN53] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 424 (Tex. 1996).

[FN54] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 423,424 (Tex. 1996). One of these grounds was that the testifying lawyer assumed the dual role of lawyer for the client by sitting with plaintiff's counsel at the lawyer's table. However, defendant had not

objected to that arrangement at trial. *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 423 (Tex. 1996). The second ground, and arguably a far more substantial one on which the dissenting judge focused, was that "despite offering expert testimony at trial, [the testifying lawyer] was being compensated as an attorney, through his firm, on a contingency basis, dependent on [his client's] success in the litigation." *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 424 (Tex. 1996). While the majority stated that "it certainly could be argued" that such compensation violated Texas Rule 3.04(b)'s limitations on the compensation of witnesses, that issue also was not raised in the trial court or in the court of appeals, and so was held to be waived. *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 424 (Tex. 1996).

[FN55] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 425 (Tex. 1996).

[FN56] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 426 (Tex. 1996).

[FN57] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 426, 427 (Tex. 1996).

[FN58] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 426 (Tex. 1996).

[FN59] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 426 (Tex. 1996).

[FN60] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 427 (Tex. 1996). The dissent's view of how the "substantial hardship" exception should work--namely that it bars *all* testimony by a lawyer who also is representing the client on whose behalf the testimony would be offered except that specified in subparagraphs (a)(1) to (a)(4)--is the better reading of that provision. Contrary to the majority's interpretation, the notion is that, apart from those four exceptions, a lawyer's testimony on behalf of the lawyer's client is apt to be both tainted by the lawyer's fee interest in the case and apt to sow confusion with the trier of fact, and so should be rejected except in cases of manifest necessity. As the comments to the Rule point out, however, a testifying lawyer should not be permitted to "creat[e] a 'substantial hardship' where none once *existed*, by virtue of a lengthy representation of the client in the matter at hand." Tex. Rule 3.08, cmt. 7.

[FN61] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 427 (Tex. 1996).

[FN62] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 427 (Tex. 1996).

[FN63] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 429 (Tex. 1996).

[FN64] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 430 (Tex. 1996).

[FN65] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 430 (Tex. 1996). The dissent was referring to Mauze v. Curry, 861 S.W.2d 869 (Tex. 1993).

[FN66] *See* Anderson Producing, Inc. v. Koch Oil Company, 929 S.W.2d 416, 431-32 (Tex. 1996).

[FN67] For an interesting discussion of *Anderson Producing* and both prior and subsequent related decisions addressing Rule 3.08, *see* Linda Jegermanis, Danger at the Crossroads: Ethical Considerations for the Lawyer Seeking to Testify on Behalf of a Contingency Client After Anderson Producing, Inc. v. Koch Oil Co., 59 Baylor L. Rev. 857 (2007) (suggesting that broad remedy of disqualification might be too extreme for situation).

[FN68] Gonzalez v. State, 117 S.W.3d 831 (Tex.Crim.App. 2003).

[FN69] *See* 117 S.W.3d at 835.

[FN70] *See* 117 S.W.3d at 836.

[FN71] *See* Gonzalez v. State, 117 S.W.3d 831 (Tex.Crim.App. 2003).

[FN72] *See* 117 S.W.3d at 837-38, 840-44.

[FN73] 117 S.W.3d at 840.

[FN74] Gonzalez v. State, 117 S.W.3d 831 (Tex.Crim.App. 2003).

[FN75] Gonzalez v. State, 117 S.W.3d 831 (Tex.Crim.App. 2003).

[FN76] A dissenting opinion (*see* 117 S.W.3d at 846-48) found that there was no real likelihood of prejudice to the state in the event that disqualification had been disallowed and that, to the contrary, any prejudice was more likely to fall on the lawyer's client. *See* 117 S.W.3d at 847-48. Because the client had waived any such harm, the dissent argued, Texas Rule 3.08 provided no basis for the state to seek disqualification (*see* 117 S.W.3d at 848), and the disqualification of counsel violated the client's Sixth Amendment right to counsel of his choice. *See* Gonzalez v. State, 117 S.W.3d 831 (Tex.Crim.App. 2003).

[FN77] Powers v. State, 140 S.W.3d 851 (Tex.App.--Fort Worth 2004), rev'd, 165 S.W.3d 357 (Tex.Crim.App. 2005).

[FN78] *See Powers*, 140 S.W.3d at 852-53.

[FN79] *See Powers*, 140 S.W.3d at 853-54.

[FN80] The court of appeals consistently refers to the "*Gonzales*" case as the "*Gonzalez*" case, but it is clear from its citation to and discussion of the earlier opinion that it is referring to the same matter discussed immediately above.

[FN81] *See Powers*, 140 S.W.3d at 854-56.

[FN82] *See Powers*, 140 S.W.3d at 857.

[FN83] *See* Powers v. State, 140 S.W.3d 851 (Tex.App.--Fort Worth 2004), rev'd, 165 S.W.3d 357 (Tex.Crim.App. 2005).

[FN84] 165 S.W.3d 357 (Tex.Crim.App. 2005).

[FN85] *See* 165 S.W.3d at 358.

[FN86] *See* 165 S.W.3d 357 (Tex.Crim.App. 2005)..

[FN87] Flores v. State, 155 S.W.3d 144 (Tex.Crim.App. 2004).

[FN88] *See Flores*, 155 S.W.3d at 146.

[FN89] *Flores*, 155 S.W.3d at 148.

[FN90] Flores v. State, 155 S.W.3d 144 (Tex.Crim.App. 2004) (quoting United States v. Schwartzbaum, 527 F.2d 249, 253 (2nd Cir. 1975).

[FN91] Flores v. State, 155 S.W.3d 144 (Tex.Crim.App. 2004) (footnote omitted).

[FN92] *See Flores*, 155 S.W.3d at 149.

[FN93] *See* Flores v. State, 155 S.W.3d 144 (Tex.Crim.App. 2004).

[FN94] Flores v. State, 155 S.W.3d 144 (Tex.Crim.App. 2004).

[FN95] *Flores*, 155 S.W.3d at 150.

[FN96] *Flores*, 155 S.W.3d at 150-51 (footnotes omitted). It was these concerns that led the court to fashion the "ameliorative measures' to be used in those rare instances where calling defense counsel as a witness would be proper.

[FN97] Flores v. State, 155 S.W.3d 144 (Tex.Crim.App. 2004) (footnotes omitted; emphasis in original).

[FN98] *Flores*, 155 S.W.3d at 151 (quoting State v. Livingston, 30 Ohio App.2d 232, 285 N.E.2d 75, 77 (1972).

[FN99] *See Flores*, 155 S.W.3d at 152-53 (Johnson & Price, JJ., concurring).

[FN100] *Flores*, 155 S.W.3d at 151.

[FN101] The only possible exceptions would involve information that a lawyer must disclose pursuant to Texas Rules 1.05(e) and (f) and the other rules that they incorporate by reference, or where Texas Rule 1.02(c) mandates disclosure in order to avoid assisting a client's commission of a criminal or fraudulent act.

[FN102] *See* Tex. Rule 3.08(b).

[FN103] Tex. Rule 3.08(b).

[FN104] *See* Tex. Rule 1.06. Refer to commentary to Rule 1.06 (§ 6.6), at notes 64-81, 86-106, *supra.* Authorities criticizing prior law in this area also supported this approach. *See* Brown & Brown, *supra* note 9, at 622-23; Enker, *supra* note 13, at 457; *The Advocate-Witness Rule, supra* note 21, at 1367-68.

The Fifth Circuit has taken the position that under ABA Model Rule 3.7, the counterpart to this Rule, "[i]f a lawyer must testify adversely to a client's interest, the client cannot waive the conflict." Horaist v. Doctor's Hospital of Opelousas, 255 F.3d 261, 266 (5th Cir. 2001) (citing Federal Deposit Insurance Corp. v. United States Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir.1995)). That is not the position taken under this Rule, which requires that the propriety of seeking a waiver be evaluated on a case-by-case basis under the standards applicable to lawyer-client conflicts in general and, in any event, precludes an opposing party from basing a disqualification motion under this Rule solely on the existence of such conflicts.

[FN105] *See* In re Bivins, 162 S.W.3d 415, 421 (Tex.App.--Waco 2005, no pet.). *But see* Crossword Systems (Texas), Inc. v. Dot Hill Systems Corp., 2006 WL 1544621 (W.D. Tex. 2006) (disqualifying both testifying counsel and that attorney's entire firm, based in part on perceived likelihood that client would be prejudiced by allowing some members of firm to serve as advocate when other members of firm would be key witnesses, but relying on both former ABA Model Code and current ABA Model Rules, as well as Texas Rules in doing so).

[FN106] *See* Boling v. Gibson, 266 Ark. 310, 321-22, 584 S.W.2d 14, 20-21 (1979); Ford v. State, 4 Ark.App. 135, 628 S.W.2d 340, 342 (1982). *See generally The Advocate-Witness Rule, supra* note 21, at 1372-73 (attorney disqualified when testifying on client's behalf). *Cf.* TEX. CODE DR 5-105(D) that mandated firm-wide disqualification only if a tainted lawyer was disqualified by other provisions of DR 5-105. ABA Model Code DR 5-105, on the other hand, called for firm-wide disqualification when a lawyer in such a firm was disqualified by *any* disciplinary rule.

[FN107] *See* Audish v. Clajon Gas Co., 731 S.W.2d 665, 673 (Tex.App.-- Houston [14th Dist.] 1987, writ ref'd n.r.e.); Stocking v. Biery, 677 S.W.2d 792, 794 (Tex.App.--San Antonio 1984, no writ) (trial court not required to disqualify firm unless testimony to be elicited from firm's attorney is material to movant's defense and prejudicial to attorney's client); Bottaro v. Hatton Assocs., 680 F.2d 895, 897 (2d Cir.1982) (court refused to disqualify law firm representing plaintiff when one of its members was called as a witness absent a finding that presence of testifying lawyer would taint trial by affecting the firm's presentation of the case); People v. Baldi, 54 N.Y.2d 137, 148-49, 444 N.Y.S.2d 893, 429 N.E.2d 400, 406 (1981) (defense lawyer's testimony on behalf of client not improper where all other witnesses hostile and client trusted lawyer).

[FN108] *See* Brown & Brown, *supra* note 9, at 610; *Disqualification of Firms, supra* note 21, at 530-34. *Accord* Ayres v. Canales, 790 S.W.2d 554, 556-57 (Tex.1990); Stanley v. State, 880 S.W.2d 219 (Tex.App.--Fort Worth 1994, no writ) (one member of district attorney's of-

fice can serve as witness while another member prosecutes case); PEC Op. 471, 55 TEX. B.J. 520 (1992) ("Under Rule 3.08, unlike the provisions of the Texas Code of Professional Responsibility (Disciplinary Rules 5-101 and 5-102) ... [,] any prohibition of an attorney's acting as both advocate and witness applies only to the attorney-witness and not to another lawyer in the law firm provided the client gives informed consent to the representation by the other lawyer"). *But see* Crossword Systems (Texas), Inc. v. Dot Hill Systems Corp., 2006 WL 1544621 (W.D. Tex. 2006) (disqualifying both testifying counsel and that attorney's entire firm, based in part on perceived likelihood that client would be prejudiced by allowing some members of firm to serve as advocate when other members of firm would be key witnesses and in part on perceived impropriety of allowing that situation to occur, but relying on both former ABA Model Code and current ABA Model Rules, as well as Texas Rules in doing so).

[FN109] *See* PEC Op. 513 (1996) (certified public accountant employed as internal controller by a law firm may not ethically testify as an expert in a case in which the law firm is employed "unless the accountant's testimony is the same nature as would permit an attorney to testify as an expert on a case in which he or she is representing a party").

[FN110] *See* Tex. Rule 3.08(c); Anderson Producing, Inc. v. Koch Oil Co., 929 S.W.2d 416, 421-23 (Tex.1996).

A strong argument against a lawyer serving as a witness while other members of the lawyer's firm continue to represent the firm's client was raised but not resolved in *Anderson Producing*. There, the lawyer / witness' firm was being compensated on a contingent fee basis. The opposing party argued that, since the testifying lawyer was a partner in the firm, he necessarily would receive a portion of that fee. That form of compensation, however, would result in the lawyer receiving a contingent fee for his testimony, at least indirectly, in violation of Tex. Rule 3.04(b). *See Anderson*, 929 S.W.2d at 424-25. Although the supreme court did not reach this argument (*see Anderson*, 929 S.W.2d at 425), it appears to have a good deal of force. Consequently, a prudent law firm should provide for that eventuality by executing an agreement with the testifying lawyer by which he surrenders any interest in that fee.

48 TXPRAC § 8:8
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