The Advocate as Witness: Understanding Context, Culture and Client

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UNDERSTANDING CONTEXT, CULTURE AND
CLIENT

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"How come they have to swear in the witness but not the Lawyer?"1

INTRODUCTION

Lawyers and clients have relationships. Courts and regulators emphasize the fiduciary aspect of this bond: it is more than a joint business venture or a contract.2 It is not so clear, however, that the actual relationship that lawyers and clients forge receives heightened protection by courts and regulators. Other important values bump up against relationships. The need for evidence justifies impairing the attorney-client relationship through expansive interpretations of exceptions to the attorney-client privilege.3 Courts use high standards of professionalism and loyalty obligations to justify severing long-standing attorney-client relationships under the conflicts of interest rules.4 And the need for clear roles justifies interfering with long-

1. This quote appeared as a caption to a cartoon, Laugh Parade, by Bunny Hoest, in the September 16, 2001 issue of Parade Magazine.
standing relationships when a lawyer-advocate is needed as a witness in a matter: the advocate-witness rule.

The advocate-witness concern arises because lawyers become involved in the client's affairs in their status as lawyer. Lawyers may know facts because they have been involved in the planning of a deal or arrangement or the negotiation of a contract. They may know facts because of investigations undertaken as part of the representation. Lawyers may know process facts, such as what documents are ascertainable from discovery. Lawyers routinely make assertions of procedural and process facts and provide background information to judges without running afoul of the advocate-witness rule. Lawyers do not need to be sworn when asserting these process and background facts because they have an ethical obligation not to make false statements of fact or law to the judge. In these situations lawyers are making representations of fact that will likely affect the procedural presentation of the case, but do not go to the underlying merits. When lawyers have become intertwined with the merits, however, they begin to look more like a traditional fact witness. In these circumstances, any factual statements that a lawyer makes should be subject to the same vetting that all witnesses receive, including the requirement that the witness be sworn and subject to cross-examination. Once the lawyer moves into the realm of functioning as both advocate and fact witness, distinct professional responsibility issues arise.

The advocate-witness rule is an ethics rule of relatively recent origin, but with deeper roots. Despite its recent vintage as a rule, it has come to be the third most litigated ethics issue in federal court practice, running behind only conflicts of interest and communication with represented parties in importance. Commentators tend to be quite skeptical of the rationale behind, and need for, the advocate-witness rule. But court opinions give more credence to the concept.

5. See generally Jeffrey A. Van Detta, Lawyers as Investigators: How Ellerth and Faragher Reveal a Crisis of Ethics and Professionalism Through Trial Counsel Disqualification and Waivers of Privilege in Workplace Harassment Cases, 24 J. Legal Prof. 261 (2000).
7. See Model Rules of Prof'l Conduct R. 3.3(a) (1983); The Federal Law of Attorney Conduct, supra note 3, ch. 811. In answer to the query posed in the introductory quote, see text accompanying note 1, the conventional view is that lawyers are to present arguments, not facts. Consequently, lawyers generally do not need to be sworn in as witnesses.
8. The Federal Law of Attorney Conduct, supra note 3, § 802.20[1] (reporting that from 1990-95 reported federal cases raising ethics issues most commonly dealt with conflicts of interest (46%), communication with represented parties (10.6%) and lawyer as witness (10.1%), according to a study by the Standing Committee on the Rules of Practice and Procedure of the Federal Judicial Conference).
The use of the advocate-witness rule raises many questions. How does the rule operate in practice? Does a seemingly neutral rule of professional responsibility—that the lawyer should not also serve as a witness—have a disproportionate impact on lawyers and clients who have developed a long-standing relationship, often the lawyer for a family, small business or union? In other words, does this professional responsibility rule have a larger impact on middle-income clients? Are the concerns of the advocate-witness rule primarily ethical concerns?

Like so many professional responsibility issues, the answer to these queries is not ascertainable from reported court decisions or published disciplinary actions. This rule is largely self-executing: lawyers appear to recognize, whether because of rules or common sense, that merging the role of advocate and witness is not typically a wise idea.10 The issue rarely serves as the basis of professional discipline from the applicable state licensing body.11 Many lawyers appear unfamiliar with the advocate-witness rule embodied in Model Rule of Professional Conduct 3.7 (and state versions of this rule) and Model Code of Professional Responsibility DR 5-102(A) and DR 5-101(B).12 More importantly, certain practice settings appear to have adapted local practice to adjust to the reality that within their practice setting a lawyer occasionally may need to serve as witness.13 Labor arbitration,14 patent practice,15 child advocacy16 and criminal practice17 appear to be areas in which lawyers are more frequently needed as

Consistency is Cloaked in Confusion, 50 Ark. L. Rev. 59, 63 (1997) (noting the “time-honored principle that an attorney may not act as counsel in litigation in which the attorney will be a material witness”). But see Van Detta, supra note 5, at 284.

10. United States v. Prantil, 764 F.2d 548, 553 (9th Cir. 1985) (“The rule envisions that as soon as the dilemma is anticipated the attorney will promptly discharge his ethical obligations by electing one of the two mutually exclusive paths that lie before him.”); Borman v. Borman, 393 N.E.2d 847, 856 (Mass. 1979) (“We therefore take this opportunity to state that first and foremost, the code is self-executing.”); see also infra Part I.D.

11. See generally Wolfram, supra note 9, § 7.5.1 (noting that professional discipline is “infrequently imposed and rarely severe”).

12. See, e.g., United States ex rel. Hanrhan v. Thieret, 695 F. Supp. 372, 394 (N.D. Ill. 1988) (“[L]awyer-disqualification motions before this Court and in the reported cases reveal that all too many lawyers are unaware of the demands of the Disciplinary Rules that incorporate and implement the advocate-witness rule.” (emphasis in original)).

13. For example, litigators are encouraged to conduct witness interviews in the presence of a third party, who can be called if necessary to impeach the witness. See Wolfram, supra note 9, § 12.4.1.

14. See infra Part II.

15. See infra note 46 and accompanying text.


17. In criminal matters, the practice of serving a subpoena on defense counsel has risen dramatically in recent years. The Federal Law of Attorney Conduct, supra note 3, § 813.04[1][b].
witnesses. When the issue comes to the attention of adjudicatory bodies, the ultimate treatment appears to differ based on how the issue is framed, the practice setting in which it arises, and the forum in which the issue is litigated.

To better understand how the rule operates, I chose three bodies of information to examine: published federal court opinions interpreting the advocate-witness rule, the approach of one state (Massachusetts) and labor arbitration. Because of a dearth of formal references to advocate-witness issues in labor arbitration, I conducted interviews with a selection of labor arbitrators or advocates (both union and management) to obtain a picture of the practice options that this legal community has used to deal with the advocate-witness phenomenon.18

What emerged from this review is a fascinating picture of the advocate-witness rule as a chameleon rule. Like a handful of other ethics rules, the advocate-witness rule operates like an ethics rule in some contexts, seeking to guide a lawyer toward right behavior. In other contexts, it operates like a rule of procedure to help determine how to proceed with the case and present evidence in a manner fair to both sides. In yet other circumstances, the rule more closely resembles an evidentiary principle, in which it helps inform whether the evidence will be allowed. Ethics-procedure-evidence are a familiar triumvirate in legal ethics, and the values behind them intersect in other areas, including the attorney-client privilege, duties to present issues well grounded in fact or law, and discovery obligations. What determines whether the rule operates (or ought to operate) like an ethics rule, a procedure rule or an evidentiary concern appears to turn on several broad variables: the context (formal or informal, public or private) in which the issue arises, the legal culture in which it appears (levels of trust, etc.), and the nature of the client.19

The adaptability of the advocate-witness rule to the particular context, culture and client also demonstrates that some legal contexts give greater protection to the attorney-client relationship. As the review below indicates, labor arbitration is significantly more tolerant of dual functioning as both advocate and witness, treating the issue as largely a procedural concern, so that fewer clients are separated from their counsel of choice. Labor arbitration is also a significant source of access to justice for many middle-class, and aspiring middle-class, workers. At least in the context of labor arbitration, the advocate-witness rule bends to give greater protection to middle-income clients.

18. See infra Part II.B.
It is true that this chameleon rule is untidy and sometimes appears to lack coherence. The advocate-witness rule is grounded in multiple policy concerns that appear inconsistent because different contexts raise different policy concerns. The application of the rule is subject to some criticism. Bad decisions can flow from an unduly wooden application of the rule. From this review it appears that federal courts could be more respectful of—give more weight to—the reality of a strong attorney-client relationship, without going as far as labor arbitration. But perhaps chameleon rules have, like their namesakes, found the correct technique for adapting to the surrounding situation.

I. ORIGINS OF THE ADVOCATE-WITNESS RULE AND JUDICIAL IMPLEMENTATION

A. Early and Modern Judicial Articulations: Evidentiary and Procedural Concerns

The 1535 trial of Sir Thomas More provided one of the earliest examples of the troublesome practice of serving as both advocate and witness. The Solicitor-General Richard Rich, who was assisting Attorney General Sir Christopher Hale in the prosecution, unexpectedly took the stand to help bolster the prosecution's case by testifying that Thomas More had made traitorous comments to him in a conversation that took place in the Tower of London. Later nineteenth-century historical accounts were highly critical of this act. "[T]he judges were in dismay—the Attorney-General stood aghast—when Mr. Solicitor, to his eternal disgrace, and to the eternal disgrace of the Court who permitted such an outrage on decency, left the bar, and presented himself as a witness for the Crown." Mr. Rich

20. Cf. Christopher Slobogin & Amy Mashburn, The Criminal Defense Lawyer's Fiduciary Duty to Clients With Mental Disability, 68 Fordham L. Rev. 1581, 1618 (2000) (suggesting use of arguably inconsistent theories of advocacy versus best interests approaches when dealing with mentally disabled clients "accommodates the reality that a combination of inconsistent theories may produce the most workable conceptualization of the lawyer's role and may be more descriptively accurate of the approach used by most lawyers").

21. Wolfram, supra note 9, § 7.5.2 (1986) (discussing effect of rule in "clumsy judicial hands").


returned from the stand to the counsel table and called two additional witnesses to attempt, unsuccessfully, to corroborate his own testimony. The accounts of Sir Thomas More's withering response brought the assistant prosecutor's credibility directly into question. "In good faith, Mr. Rich, I am more sorry for your perjury than for mine own peril." Long acquainted with Mr. Rich, Sir Thomas More reportedly stated he was "sorry you compel me to speak it," that Mr. Rich was "always esteemed very light of [his] tongue, a great dicer and gamester." Why would Sir Thomas More confide the secrets of his conscience to "a man always reputed of me for one of so little truth and honesty." Obviously, this was a trial that has historically been treated as a sham, so the act of the prosecutor serving as a witness against the defendant was one of only many outrages to a modern mind. But by the nineteenth century, the dual role of prosecutor and witness was condemned for putting the advocate's credibility directly at issue.

Seeds of the advocate-witness concern also began appearing in American court decisions in the nineteenth century as courts expressed their discomfort with lawyers serving as both advocate and witness. This "highly indecent practice" subjects the lawyer to "just reprehension." Even in cases in which the lawyer has a duty to testify, "they necessarily cause great pain to counsel of the right spirit." Courts seemed uncomfortable with relying on counsel's testimony.

Whatever rhetorical condemnation courts gave the practice, the early judicial references to advocates serving as witnesses framed the issue in evidentiary terms, addressing whether counsel was a competent witness. In 1886, the U.S. Supreme Court addressed the

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24. The witnesses, Sir Richard Southwell and Mr. Palmer, reported that "they were so busy in trussing up the books in a sack, they gave no ear to the conversation" that supposedly incriminated Sir Thomas More. Lives of the Lord Chancellors, supra note 23, at 62.
25. Id. at 61.
26. Id. at 62.
27. Frear v. Drinker, 8 Pa. 520, 521 (1848).
29. Id.
30. Richardson v. Eldridge, 20 F. Cas. 708, 708-09 (S.D.N.Y. 1851) ("[The court] would strongly discountenance proctors being used as witnesses to prove the case of their clients, and is always reluctant to decree upon their testimony alone.").
issue in *French v. Hall*, in which it strongly stated that “[t]here is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client.” The Court uses policy in a narrow sense, functionally distinguishing policy from propriety, noting that “[i]n some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the practice, therefore, may very properly be discouraged.” Yet, it may also “be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong.”

*French v. Hall* represents a classic example of an advocate-witness situation. The defendant testified that he had told no one that he had promised to pay plaintiff $5,000. Plaintiff wished to offer his counsel as a rebuttal witness to testify that the defendant had told counsel of the promise. The trial court *sua sponte* refused to allow the evidence because the proposed witness was acting as counsel for plaintiff. The trial court would later deny a motion for a new trial on a new theory: plaintiff’s counsel knew that his testimony would be needed and erred in failing to give the evidence in the case in chief. The Supreme Court reversed and remanded for a new trial because of the “illegal” ground of denying admission of the testimony because the witness was also an advocate in the case. By refusing to treat the advocate-witness concern as a bar to testimony—an evidentiary ruling—the Court acknowledged the balancing of values inherent in the inquiry, particularly where the evidence is offered by the party whose lawyer is to testify. The balance weighed strongly in favor of admitting the testimony.

The Court’s use of language is also interesting. It states that “plaintiff” wished to call the witness, but we can infer that it was plaintiff’s counsel who wished to call himself. Yet by using “role” language, the Court could transform a seemingly direct request (“Let me testify.”) into a person speaking at the behest of another (“My client asks that I testify.”). While evidence and etiquette appear to be the dominant concerns in *French v. Hall*, the role concerns would continue to lurk in the background.

The idea that the advocate-witness concern is more often present when a lawyer seeks to appear as a witness “for his client” resonates

31. *French v. Hall*, 119 U.S. 152, 154 (1886). As Professor Jeffrey Van Detta notes, this emphasis on the absence of a positive enactment could be read as an invitation for professional regulation. See Van Detta, *supra* note 5, at 275.
33. *Id.* at 154-55.
34. *Id.* at 153-54.
35. *Id.* at 154.
36. *Id.*
37. *Id.* at 154-55.
38. *Id.* at 155.
in the 1908 Canons of Ethics, which in turn drew its language from the
1887 Alabama State Bar Association
Code.39 ABA Canon of Ethics 19 states that:

When a lawyer is a witness for his client, except as to merely formal
matters, such as the attestation or custody of an instrument and the
like, he should leave the trial of the case to other counsel. Except
when essential to the ends of justice, a lawyer should avoid testifying
in court in behalf of his client.40

The Canon 19 approach attempts to codify instances in which
testimony would be allowed: merely formal matters and the huge
catchall of “ends of justice.” The Canons did not address the
circumstances in which a lawyer might be required to testify against
the client, presumably because such circumstances would also likely
involve conflict of interest concerns.

Prior to the 1970s, the federal and Massachusetts court treatment of
the advocate-witness issue paralleled the concerns of French v. Hall
and Canon 19. The few courts that addressed advocate-witness issues
focused not on whether to disqualify counsel, a remedy designed to
correct presumably unethical conduct, but on whether to allow
counsel to serve as a witness, an evidentiary concern.41 Out of
eighteen federal court cases prior to 1970, nine courts allowed the
testimony,42 eight rejected the testimony,43 and one found the issue to
be unripe (but would have allowed the testimony).44 While the
numbers suggest that courts were equally balanced between allowing
and prohibiting the testimony, it appears that courts generally allowed
the testimony as long as the apparent motive was to provide testimony

39. See H. Drinker, Legal Ethics app. F (1953). The 1887 Alabama Code, which is
contained in Appendix F of Drinker’s book, has some small differences in language.
Of most interest, the Alabama Code stated that an attorney “should scrupulously
avoid” testifying on behalf of his client. The “scrupulous” emphasis was dropped in
the ABA Canons.

40. Canons of Prof’l Ethics Canon 19 (1908).

41. See also ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 50 (Dec.
14, 1931).

42. Bank of America v. Saville, 416 F.2d 265, 272 (7th Cir. 1969); United States v.
Fiorillo, 376 F.2d 180, 185 (2d Cir. 1967); Laughner v. United States, 373 F.2d 326, 327
(5th Cir. 1967); United Parts Mfg. Co. v. Lee Motor Prod., Inc., 266 F.2d 20, 24 (6th
Cir. 1959); Walker v. Bailey, 245 F.2d 486, 490 (C.C.P.A. 1957); Davis v. Aznar, 37
F.R.D. 223, 225 (D. Md. 1965); Irvin v. Dowd, 153 F. Supp. 531, 539 (N.D. Ind. 1957),
rev’d on other grounds, 359 U.S. 394 (1959); Am. Securit Co. v. Shatterproof Glass
Corp., 154 F. Supp. 890, 893 (D. Del. 1957); Sears, Roebuck & Co. v. Am. Plumbing

43. Loeb v. Hammond, 407 F.2d 779, 781 (7th Cir. 1969); Travelers Ins. Co. v.
Dykes, 395 F.2d 747, 748-49 (5th Cir. 1968); Gajewski v. United States, 321 F.2d 261,
269 (8th Cir. 1963); United States v. Clancy, 276 F.2d 617, 636 (7th Cir. 1960), rev’d on
other grounds, 365 U.S. 312 (1961); Lau Ah Yew v. Dulles, 257 F.2d 744, 746-47 (9th
Cir. 1958); United States v. Alu, 246 F.2d 29, 34 (2d Cir. 1957); United States v.
Chiarella, 184 F.2d 903, 911 (2d Cir. 1950), vacated on other grounds, 341 U.S. 946
(1951); Welcher v. United States, 14 F.R.D. 235, 238 (E.D. Ark. 1953).

that could not be easily obtained elsewhere. Courts noted that the practice of serving as both counsel and witness is of "doubtful propriety" and the ordinary practice is to withdraw as counsel before testifying.\(^45\) The issue of advocate testimony appeared to be particularly common in patent cases, with the courts demonstrating considerable leniency in allowing the testimony.\(^46\) Courts disallowed testimony for a variety of traditional evidentiary or procedural reasons: because it incorporated secondary statements;\(^47\) because counsel was not listed on the pretrial list of witnesses;\(^48\) or because the attorney was attempting to testify as an expert witness on an issue to be decided by the judge and jury.\(^49\) The early Massachusetts cases followed a similar pattern, treating advocate-witness inquiries primarily as an evidentiary concern.\(^50\)

In the occasional case in which the advocate's testimony was sought by opposing counsel, a frequent starting point for the analysis was whether the testimony is covered by the attorney-client privilege, again an evidentiary question.\(^51\) If the evidence is not privileged, then the propriety of testifying was typically addressed as an issue of ethics, to be left to the conscience of the attorney.\(^52\)

The early judicial treatment of advocate-witness concerns demonstrates a common understanding of ethics as a private concern. As the Supreme Court suggested in 1887, ethics is not "the policy of

\(^{45}\) Sears, Roebuck & Co., 19 F.R.D. at 332; Welcher, 14 F.R.D. at 238 (finding practice of counsel offering themselves as witness "too easily proceeds towards the perversion of the attorney's office and ought steadfastly to be frowned upon," and attorney affidavit that incorporated secondary statements not sufficient to satisfy summary judgment standard).

\(^{46}\) See, e.g., United Parts Mfg. Co., 266 F.2d at 24 (admitting counsel's unsworn explanation as to prior art after expert witness disallowed and waiving failure to administer oath because opposing counsel failed to object); Walker, 245 F.2d at 490 (allowing testimony and explaining that "[t]he testimony of the patent attorney who prepared an application is ordinarily accepted as to the circumstances surrounding its preparation, and in many cases it would be difficult or impossible to make a satisfactory showing of diligence in preparing and filing an application by any other means"); Am. Securit Co., 154 F. Supp. at 893 (finding attorney competent to testify).

\(^{47}\) Welcher, 14 F.R.D. at 238 (holding attorney affidavit that incorporated secondary statements not sufficient to satisfy summary judgment standard).

\(^{48}\) Travelers Ins. Co., 395 F.2d at 748.

\(^{49}\) Loeb v. Hammond, 407 F.2d 779, 781 (7th Cir. 1969).

\(^{50}\) We found only two Massachusetts cases on the advocate-witness concern prior to 1970, and both treated the issue as an evidentiary and etiquette concern. Holbrook v. Seagrave, 116 N.E. 889, 890 (Mass. 1917) ("While such a practice by an attorney is not to be commended, it was within the discretion of the court to permit the [attorney] to testify."); Potter v. Ware, 55 Mass. 519, 524 (1848) (stating that while it is rare that counsel can testify for a client without dishonor, until the rules of evidence are changed, a witness will not be excluded merely because he is testifying on behalf of his client).


\(^{52}\) Id. at 332 (quoting 70 C.J. 175-78).
the law" but a private matter, not properly the sphere of the courts.\textsuperscript{53} Whether to testify is a question of legal ethics, which is left to the lawyer's "own conscience."\textsuperscript{54} This is not to suggest that courts did not act upon ethical violations prior to the movement toward codes and rules of ethics. Even under the Canons courts would occasionally disqualify counsel for conflicts of interest.\textsuperscript{55} Advocate-witness issues, at least, were seen as subject to limited oversight by the courts.

During the period before the Model Code, federal courts also began to see procedural dimensions to the advocate-witness issue. Concern about a lawyer being required to testify was a significant focus of the appellate court's decision in \textit{Hickman v. Taylor} to protect attorney work product.\textsuperscript{56} The Supreme Court's majority opinion in \textit{Hickman} viewed the advocate-witness as a practice to be discouraged.\textsuperscript{57} Justice Jackson's concurring opinion also expressed concern that the attorney's credibility might be placed in issue if the attorney's notes were subject to production.\textsuperscript{58} The values behind the advocate-witness concern were helping to shape the Court's creation of a work product privilege.

\section*{B. The Model Code and Model Rules Articulation Through a Judicial Lens}

\subsection*{1. The Model Code Approach}

The 1973 Model Code of Professional Responsibility articulated a much more detailed advocate-witness rule and marked the change of

\textsuperscript{53} French \textit{v. Hall}, 119 U.S. 152, 154 (1886); see also Cox \textit{v. Kee}, 186 N.W. 974, 975 (Neb. 1922) (quoting 4 Jones, Commentaries on Evidence § 754, which states that an attorney testifying at the call of the client "is a matter which should appeal to the professional pride of an attorney and his sense of his true position and duty"); State \textit{v. Lee}, 28 S.E.2d 402, 404 (S.C. 1943) ("In the final analysis, the rule seems to be that the question of whether an attorney should testify in a case with which he is professionally connected is one of legal ethics, resting largely with his own conscience.").

\textsuperscript{54} \textit{Lee}, 28 S.E.2d at 404.


\textsuperscript{57} Hickman \textit{v. Taylor}, 329 U.S. 495, 513 (1947). The Court reasoned that requiring the attorney to disclose what witnesses have said forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

\textit{Id.}

\textsuperscript{58} \textit{Id.} at 516-17 (Jackson, J., concurring).
judicial treatment of this practice. The movement toward rule enactments gave federal courts new tools with which to think about attorney conduct issues. Rules also gave opposing counsel new vehicles to consider in implementing a litigation strategy. The advocate-witness rule is a classic example of this process. The Model Code drafters elected to put in two distinct provisions to govern advocate-witnesses. DR 5-101(B) provides that a lawyer shall not accept employment "if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness," with four exceptions:

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.

The Model Code was trying to legislate when justice may require the attorney's testimony. But the drafters obviously concluded that they needed a flexible catch-all category of "substantial hardship." As noted below, the power of this exception is diminished by the narrow interpretation given to this phrase.

DR 5-102(A) governs withdrawal from ongoing litigation and distinguishes between situations in which the lawyer seeks to testify on behalf of the client and when the lawyer's testimony is sought by opposing counsel. DR 5-102(A) provides that a lawyer should withdraw when the lawyer "learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client" unless the exceptions above apply. DR 5-102(B) provides that when 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." Presumably, the lawyer would not

59. Consequently, pre-Code federal cases that allowed the attorney to serve as both advocate and witness may be subject to question. See, e.g., United States v. Peng, 602 F. Supp. 298, 302 (S.D.N.Y. 1985) (suggesting that pre-Code cases that allowed attorney to serve as both advocate and witness had been overruled); see also Jeffrey A. Stonerock, The Advocate-Witness Rule: Anachronism or Necessary Restraint?, 94 Dick. L. Rev. 821, 821 (1990) ("The rule is over 150 years old, but most of the cases and commentary discussing it originate within the past 30 years.").

60. Model Code of Prof'l Responsibility DR 5-101(B) (1980).

61. Id. DR 5-101(A).

62. Id.

63. DR 5-101(B).
voluntarily testify for one's own client if the testimony were prejudicial. Because prejudice is the only factor considered when the opposing counsel seeks the testimony, the rule indirectly makes conflict of interest concerns the only variable in these circumstances.  

Writing with broad strokes, the Ethical Considerations accompanying the Model Code also gave more detailed policy justifications for the advocate-witness rule. Unfortunately, the Model Code simply listed the concerns, failing to make clear that different factual settings may raise different concerns. Serving as both counsel and witness, it said, makes the lawyer "more easily impeachable for interest and thus be a less effective witness"—reflecting the evidentiary dimension of the advocate-witness rule. By testifying, a lawyer handicaps opposing counsel who attempts to challenge the credibility of the advocate-witness, raising a question of possible prejudice to opposing counsel. This appears to be primarily a procedural concern. The advocate who is also a witness "is in the unseemly and ineffective position of arguing his own credibility"—raising a question both of etiquette and possible impairment of the obligation of competence that a lawyer owes a client. In sum, the role of advocate and witness "are inconsistent: the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." This cluster of policy justifications comes across as a jumble of concerns, but they reflect four distinct themes: (1) role confusion that occurs both to the fact-finder and individual attorney; (2) institutional concerns that flow from role confusion, including possible impaired confidence in the outcome of a trial in which roles have been blurred; (3) conflict concerns that the lawyer's judgment or performance will be impaired to the detriment of the client; and (4) possible prejudice to the opposing party.

This multi-pronged approach of the Model Code gave significantly more detailed guidance to courts, and courts in turn took up the invitation to reconceptualize advocate-witness issues as primarily an ethics concern rather than an evidentiary matter. A Judicial Conference study of published federal court cases from 1990 to 1995 found that while conflicts of interest represented the most frequently litigated issue (204 cases, or 46% of all ethics-related cases), two other issues received significant attention in federal court: communication with represented parties was raised in 47 cases (10.6%) and advocate-witness issues were raised in 45 cases (10.1%).

64. For this reason, some commentators categorize the advocate-witness rule as a subset of conflicts of interest. See, e.g., Green, supra note 4, at 71 n.4.
66. Id.
67. Id.
68. Id.
69. Id.
While the Model Code's advocate-witness rules disfavor serving as both an advocate and witness, the rules do provide exceptions. The first three exceptions have received relatively little attention. The substantial hardship exception has been more frequently litigated and has generally been narrowly construed by the courts. Mere expense and delay are not sufficient to demonstrate substantial hardship. Some courts allow substantial hardship to be applied only when the potential for disqualification was not known to the parties in advance. Most importantly for this discussion, severing a long-standing relationship is typically not sufficient to demonstrate a substantial hardship.

Reconceptualizing the advocate-witness concern as an ethical issue also opened the door to a powerful derivative consequence: imputed disqualification. The Model Code expressly extends the bar to representation under the advocate-witness rule to both a lawyer and "a lawyer in his firm." The Model Code had no provision for client waiver, so a client could find his or her lawyer and the law firm disqualified, with the accompanying cost, delay and psychological and tactical disruption, even though the client wished to retain that relationship.

Although federal courts often stated that they were influenced by or following the Model Code, some federal courts elected not to


71. DR 5-101(B).

72. See The Federal Law of Attorney Conduct, supra note 3, § 812.03[3]; see also Maier v. Maier, 439 N.E.2d 811, 814 & n.7 (Mass. 1982) (allowing attorney to testify where the credibility of the attorney was not at issue and the testimony would not bear on any disputed issue); Borman v. Borman, 393 N.E.2d 847, 856 (Mass. 1979); Bernier v. DuPont, 715 N.E.2d 442, 448 (Mass. App. Ct. 1999) (finding counsel to the executrix of an estate should have been allowed to testify about his fees in a probate proceeding and remanding on that issue).


76. See infra Part I.E.3.


follow the imputed disqualification provisions. Other courts did impute disqualification, typically in cases in which the lawyer was integrally involved in the underlying factual setting and likely to be not just a necessary witness, but an essential one whose credibility was directly on the line. These were often circumstances in which courts found substantial prejudice if the firm continued to represent the client, which typically were circumstances in which a conflict was also likely to be found.

2. The Model Rules: Loosening the Grip

The 1983 Model Rules of Professional Conduct loosened the grip of the advocate-witness rule. Model Rule 3.7(a) states that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness" except where three exceptions, which paralleled the exceptions above, are met. Incorporating a standard of "necessary witness" brought the evidentiary roots more clearly into focus again. This standard also brought the ethics rule more closely in line with the work product protection of Hickman v. Taylor, which protects attorney work product absent a showing of necessity or justification by the opposing counsel. The Model Rules continued the exceptions of the Model Code, collapsing the first two exceptions into a single category that "the testimony relates to an uncontested issue." The substantial hardship prong was also changed in one important respect. It simply became that "disqualification of the lawyer would work substantial hardship on the client" and did not expressly link hardship to the distinctive value of the lawyer or his


80. See, e.g., Lamborn v. Dittmer, 873 F.2d 522, 531 (2d Cir. 1989); Tisby, 157 F.R.D. at 166; Gen. Mill Supply Co., 505 F. Supp. at 1096 (holding disqualification of firm appropriate where "the credibility of the entire law firm would be at issue through every twist and turn of the trial"); Freeman v. Kulicke & Soffa Indus., Inc., 449 F. Supp. 974, 978 (E.D. Pa. 1978) (denying imputed disqualification where movant could demonstrate only a "vague and incidental" showing of prejudice).


82. Hickman v. Taylor, 329 U.S. 495 (1947); see also infra Part I.A.

83. R. 3.7(a)(1).

84. Id.
firms to the particular case.\footnote{85} In theory, the change in words should have increased the number of substantial hardship exceptions. It appears, however, that cases citing the Model Rules are strongly influenced by decisions under the Model Code.\footnote{86} The substantial hardship exception continues to be narrowly construed.\footnote{87}

Of greater practical significance, the Model Rules expressly eliminated imputed disqualification unless it was otherwise required by the conflicts rules.\footnote{88} In this respect the Model Rules picked up and echoed the trend in federal courts to limit the impact of imputed disqualification.

While the Model Rules do not expressly distinguish between calling a witness on behalf of a client and being called as a witness for the opposition, these distinctions continue to carry weight in court decisions.\footnote{89} Litigants may seek testimony as a strategic matter because the advocate-witness rule may lead to disqualification of opposing counsel. As a result, there is a healthy and appropriate skepticism when the attorney is called by opposing counsel. The Northern District of Illinois, which has chosen to draft its own rules of attorney conduct for lawyers who appear before it, has also retained this distinction.\footnote{90}

\footnote{85} There appears to be little legislative history on why the distinctive value prong was dropped. See Center for Prof'l Responsibility, ABA, The Legislative History of the Model Rules of Prof'l Conduct: Their Development in the ABA House of Delegates 139 (1987). This ABA history does mention that, unlike the Model Code provision, which limited the exception to cases in which the lawyer is of "distinctive value... as counsel in the particular case," \textit{id.} at 138, Rule 3.7 requires "a balancing... between the interests of the client and those of the opposing party." \textit{Id.} at 140. It states that because a "balancing of interests" is required, a finding of substantial hardship will depend on the facts of the particular case. \textit{Id.}


\footnote{87} \textit{See infra} note 152 and accompanying text.

\footnote{88} R. 3.7(b).

\footnote{89} When a lawyer's testimony may be needed on behalf of the lawyer's own client, a very practical cost-benefit analysis occurs. The lawyer considers whether the benefits of his or her testimony (as opposed to testimony by other persons or not presenting the evidence) outweighs the consequences to the client of changing lawyers. But a cost-benefit analysis seldom weighs in favor of testimony when it is sought by opposing counsel. United States v. Prantil, 764 F.2d 548, 554 (9th Cir. 1985) ("When, however, the proposed testimony is germane to his adversary's case, the balance of hardships is no longer in equilibrium.").

\footnote{90} Bogosian v. Bd. of Educ., 95 F. Supp. 2d 874, 876 (N.D. Ill. 2000). This skepticism explains a related issue of the brief effort to use ethics rules to attempt to limit the ability of prosecutors to subpoena defense counsel. \textit{See The Federal Law of Attorney Conduct, supra} note 3, § 813.04.
C. Comparing Federal Court and Massachusetts Court Treatment

Evaluating the impact of the advocate-witness rule in federal court practice is conceptually tricky because there is no uniform advocate-witness rule in federal courts. In a majority of jurisdictions, the federal courts apply the rules of the state in which they sit. But the remaining courts may refer directly to the Model Code, the Model Rules, their own rules of conduct, or to multiple rules to evaluate attorney conduct. The picture is further complicated because the advocate-witness rule was subject to significant modification by states, with eleven of the forty-five states moving to a Model Rules approach that modified Rule 3.7 in some respect. Some states continued to use imputed disqualification, others retained the distinction between being called as a witness for or against one's client. Surprisingly, Georgia retained the 1908 Canons' version of the advocate-witness rule until 2001. This variety of state approaches, along with no consistent standard for federal court practice, means that in theory a lawyer may be subject to different rules whether the lawyer is litigating in state court or across the street in federal court. This, in theory, should reflect a conceptual morass. But the federal courts seem to ignore the differences in most circumstances, relying instead on the general common law case decisions that have gone before. For example, in FDIC v. United States Fire Insurance Company, the Fifth Circuit looked to four different advocate-witness rules to determine whether to disqualify counsel. When analyzing whether disqualification was appropriate, the court reverted to the very common policy concern of whether a conflict was present. In determining that imputed disqualification was not warranted, the court appeared to be influenced by the fact that the advocate's client had consented to the theoretical conflict.

A tortured justification for disqualification such as that offered by U.S. Fire, premised on a purported possible conflict of interest sometime in the future, suggests not so much a conscientious

92. See generally Lawyer as Witness, ABA/BNA Lawyers Man. On Prof'l Conduct, L MPC 61:501 (1998); see also Van Detta, supra note 5, at 285-86.
94. Roy M. Sobelson, Legal Ethics, 51 Mercer L. Rev. 353, 358 (1999) ("[A]doption of Proposed Rule 3.7 would also end one of Georgia's disciplinary rules' enduring mysteries—why Georgia has retained Canon 19 of the 1908 ABA Canons of Professional Ethics as the model for its advocate-witness rule."). Georgia has now adopted the Model Rules version of the advocate-witness rule, with a modification that "+[t]he maximum penalty for a violation for this Rule is a public reprimand." Georgia Rules of Prof'l Conduct R. 3.7 (2001), available at http://www.gabar.org/grpc37.htm.
95. See generally Lyon & Phillips, supra note 9 (discussing possible forum-shopping to avoid imputed disqualification under advocate-witness rule).
professional concern for the profession and the client of the opposing counsel as a tactic designed to delay and harass.\textsuperscript{97}

Once a court believes that a motion is presented for strategic purposes, it is likely that the court will be able to interpret around any differences between the Model Code, Model Rules and state variations. This is particularly true in federal courts, which increasingly distinguish between whether an ethical violation is present and whether disqualification is the appropriate remedy.\textsuperscript{98}

The impact in state court practice may be more significant. For example, on January 1, 1998, Massachusetts moved from using the Model Code to Model Rule 3.7 for evaluating advocate-witness situations. Imputed disqualification under the Massachusetts Model Code approach had been interpreted by the Boston Bar Association as an immovable obstacle.\textsuperscript{99} The new rule, which eliminates imputed disqualification, will presumably give litigants more flexibility to use other lawyers within a firm should the advocate need to testify.

The comments to the Restatement of the Law Governing Lawyers aptly note that the Model Code treats advocate-witnesses primarily through the lens of conflict of interest, while the Model Rules appears to be "managing advocacy."\textsuperscript{100} When the dust settles, it appears that, except for the significant issue of imputed disqualification, there is likely to be little significant difference in outcomes from application of the Model Code or the Model Rules within the federal courts.\textsuperscript{101} The Model Rules more clearly add an evidentiary perspective, focusing on whether the lawyer is a "necessary witness."\textsuperscript{102} Both focus on trial, which suggests that the ethical dimensions are bound up in the context—the procedure—of the trial environment. Yet advocate-witness concerns are not addressed merely as matters of trial practice and procedure presumably because the bar—and the courts, who have

\textsuperscript{97} Id. at 1315.


\textsuperscript{99} See BBA Ethics Opinion 93-5, available at www.bostonbar.org/ethics/op93_5.htm (noting under Massachusetts DR 5-101, "[a] lawyer and his firm ordinarily must withdraw from pending litigation when the lawyer learns that he ought to be called as a witness on behalf of his client even though he has a longstanding relationship with his client" and criticizing this rule and recommending that the Massachusetts Supreme Judicial Court adopt a more flexible rule).


\textsuperscript{102} Model Rules of Prof'l Conduct R. 3.7(2) (1983).
a strong interest in the professional responsibility rules—wish lawyers to exercise discretion to avoid the procedural and evidentiary problems that flow from serving as both advocate and witness. By casting the issue as an ethical or professional responsibility concern, lawyers are asked to internalize and avoid the issue.

D. Practical Reasons to Avoid Serving as Both Advocate and Witness

Before exploring in greater detail the policy concerns behind the advocate-witness rule and the courts' treatment of relationships, it is important to note that too much emphasis on rules may neglect other pressures that affect behavior. Very practical concerns discourage lawyers from serving as a witness in a proceeding in which they are also advocates. Significantly, testifying opens up claims of work-product or attorney-client privilege waiver for subjects related to the attorney's testimony. Courts have compelled production of work product when lawyers express their opinions as witness. Certainly a lawyer should recognize a substantial risk that attorney-client and work-product privileges will be abrogated if the lawyer is named as a witness.

More subtle forces may discourage lawyers from serving as advocates as well. Clients might become angry because the lawyer was not a stronger or clearer witness. Some attorneys who have also served as witnesses in cases in which they were not an advocate report that switching to the role of witness was more stressful than serving as an advocate. In addition, neutral witnesses are likely to be more effective. Lawyers can emphasize that the witness has no self interest or other reason to intentionally or unintentionally slant

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105. Leybold-Heraeus Tech., Inc. v. Midwest Instrument Co., 118 F.R.D. 609, 614 (E.D. Wis. 1987) (finding client assumed the risk of waiver by naming two of the attorneys as witnesses and noting that failure to disclose documents would disadvantage opposing party's ability to cross examine witness).

106. Garvey, supra note 6, at 226.

107. Advocate-witness interview (summaries on file with author). This was not the uniform assessment, however. Several attorneys in labor arbitration, both management and union, expressed no greater anxiety about serving as a witness. Some relished the experience because it often created a jovial atmosphere in the proceeding.

108. See Hickman v. Taylor, 329 U.S. 495, 517 (1947) (Jackson, J., concurring) ("Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it.")
testimony. All of these pressures gives practical reasons why serving as advocate and witness is not an optimum tactical decision absent a pressing need or, as discussed below, a substantial hardship to the client should the lawyer be forced to withdraw.

E. Institutional Concern & Role Confusion

1. The Emphasis on Roles

The body of federal and Massachusetts court opinions on advocate-witnesses give a rich rhetorical place to role differentiation and institutional concerns.\textsuperscript{109} The court's explanation in \textit{United States v. Prantil} is illustrative:

The advocate-witness rule prohibits an attorney from appearing as both a witness and an advocate in the same litigation. This venerable rule is a necessary corollary to the more fundamental tenet of our adversarial system that juries are to ground their decisions on the facts of a case and not on the integrity or credibility of the advocates. Accordingly, adherence to this time-honored rule is more than just an ethical obligation of individual counsel; enforcement of the rule is a matter of institutional concern implicating the basic foundations of our system of justice.\textsuperscript{110}

"Venerable," "fundamental tenet," "time-honored rule" and "basic foundations of our system of justice" are words designed to have the reader tie the role distinction to the very fabric of fair advocacy. The advocate-witness rule in some circumstances is driven primarily by institutional concerns about trial integrity and legitimacy.\textsuperscript{111} This interest intersects with procedural concerns. For example, in \textit{Serody v. Serody} the Massachusetts Court of Appeals upheld the disqualification of counsel, expressing concern that the outcome of the trial will turn on the lawyer's credibility.\textsuperscript{112} Even if the lawyer testified truthfully, the testimony would appear less credible because it came from the mouth of the opponent's advocate.\textsuperscript{113} A procedural concern

\textsuperscript{109} See, \textit{e.g.}, \textit{Estate of Andrews v. United States}, 804 F. Supp. 820, 827 n.2 (E.D. Va. 1992) (stating "concerns of institutional integrity[] apply equally to jury and non-jury trials").

\textsuperscript{110} \textit{United States v. Prantil}, 764 F.2d 548, 552-53 (9th Cir. 1985).


\textsuperscript{112} \textit{Serody v. Serody}, 474 N.E.2d 1171, 1172 (Mass. App. Ct. 1985) (finding no abuse of discretion to disqualify \textit{sua sponte} wife's counsel after husband's attorney gave notice of intent to call wife's attorney in modification of divorce decree; testimony was relevant and likely to be prejudicial to wife; "[i]t was of no consequence" that two other judges refused to disqualify attorney).

\textsuperscript{113} \textit{Id.} at 1173.
was also woven into the analysis: even if the advocate did appear credible, how would testifying lawyers cross-examine themselves? Because the lawyer would not be able to impeach himself if the testimony was harmful to his client, an independent lawyer was needed. In other words, the pressures presented in this case could rise to the level of a conflict of interest, and that conflict was more than just a personal concern between lawyer and client. If a conflict existed that called into question the ability to have the underlying facts presented and analyzed, then the process of adjudication was threatened—an institutional concern. That institutional concern can be captured using the language of procedure (such as due process) or the language of ethics.

The institutional concern has become more pronounced in recent years as both federal and Massachusetts courts increasingly distinguish between whether a rule has been violated and the appropriate remedy. Increasingly, both federal and Massachusetts opinions state that even if there is a violation, disqualification will be appropriate only if the lawyer's conduct will "taint" the trial or the legal system. Taint to the trial involves situations in which the dual functioning will call into question whether the facts can be fully explored in a manner fair to both sides.

Taint to the legal system, as the term suggests, can be more amorphous. But courts know it when they see it, and increasingly courts have a discerning eye. Courts wish to avoid motions to disqualify brought for tactical reasons. But courts also will act when the dual functioning so permeates the proceeding that the court becomes distracted by the lawyer's advocacy. FDIC v. Isham is illustrative. Defense counsel had represented two banks in multiple loans and in negotiation with the FDIC when the banks were placed

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114. See supra note 98 and accompanying text.

116. See supra note 98 and accompanying text.
117. Isham, 782 F. Supp. at 528 ("The critical question is whether the litigation can be conducted in fairness to all parties.").
118. The Federal Law of Attorney Conduct, supra note 3, § 808.01[5].
Defense counsel then represented several former directors and officers of the bank in a subsequent suit by the FDIC. Because the officers and directors were asserting an advice of counsel defense, the FDIC moved to disqualify plaintiff's counsel under the advocate-witness rule. The court found that the dual functioning would taint the trial because of jury confusion and the possibility that the jury will give either too much or too little weight to counsel's testimony because of the dual role, giving an unfair advantage to one side or the other. The court also described the impact on the legal system:

In addition, Colantuno's dual role taints the legal system. Colantuno will be in the awkward position of testifying either that he gave proper legal advice to the defendants, which would undercut their defense, or that he gave them improper legal advice, which would harm his professional reputation. This Hobson's choice impermissibly taints the legal system generally.

The court's description raises an obvious conflict of interest concern. The court also asserted the somewhat discredited standard of "appearance of impropriety," but relied on this standard as well because of the legal profession's intimate involvement in the savings and loan crisis. The institutional concerns noted above are inextricably intertwined with concerns about role confusion. The strains of etiquette that run through advocate-witness decisions bring out concerns of role confusion. Arguing one's own credibility is both "unseemly" and "ineffective." Commentators sometimes ridicule the language of etiquette because of an understandable worry that it may reflect mere convenience or practice preference rather than an important concern. But behind this etiquette language lies the apprehension that all the players in the adversarial theatre are thrown off balance when one player moves between roles.

Role confusion is of greater concern when a case is tried to a jury rather than a judge. Presumably a sophisticated judge will not be unduly swayed by the lawyer's role. But the advocate-witness rule does not limit its application to jury trials. Courts have applied the advocate-witness rule in trials before judges and in certain pre-trial

120. Id. at 527.
121. Id. at 524, 529.
122. Id. at 528.
123. Id.
125. Isham, 782 F. Supp. at 529 ("The savings and loan crisis is pervasive. It has severely undercut public faith in the banking system. Unfortunately, the legal profession is intimately involved and, as a result, it has suffered a corresponding loss of public confidence.").
hearings before a judge.\textsuperscript{127} If lawyers were given significantly more leeway in bench trials, there is some concern that a lawyer might waive a jury trial to avoid the impact of the advocate-witness rule.\textsuperscript{128} But fewer negative consequences inhere in dual functioning before a judge.\textsuperscript{129} While lawyers can avoid the issue by electing not to participate, courts generally will not require withdrawal from trial on the merits because a lawyer has testified in a pre-trial proceeding.\textsuperscript{130} If the lawyer’s pre-trial testimony is highly disputed, courts leave open whether subsequent disqualification might be appropriate.\textsuperscript{131} Courts have also disqualified lawyers from participating in certain pre-trial activity, such as depositions, if the activity includes evidence that, if admitted, would reveal the attorney’s dual role as both advocate and witness.\textsuperscript{132} Not surprisingly, the district courts have very broad discretion to determine whether a lawyer who testifies in a pre-trial proceeding should be allowed to continue representation at the trial.\textsuperscript{133}

2. Evaluating the Role Emphasis

Maintaining pristine roles within a trial setting is an enduring legal fiction. One’s role as adjudicator, advocate or witness blur in some contexts. Just as the advocate-witness rule allows a lawyer to testify as

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\item \textsuperscript{127} See, e.g., Freight Drivers Local No. 375 v. Kingsway Transp., Inc., No. CIV.90-593E, 1991 U.S. Dist. LEXIS 15801, at *12-13 (W.D.N.Y. Oct. 22, 1991) (disqualifying lawyer from serving as advocate in evidentiary hearing in which he would also testify, though counsel was not disqualified from representing client at full trial).
\item \textsuperscript{129} See United States v. Morris, 714 F.2d 669 (7th Cir. 1983) (holding advocate-witness rule did not prevent attorney testimony in pre-trial suppression hearing because judge is unlikely to be confused by the dual appearance); United States v. Johnston, 690 F.2d 638, 643-45 (7th Cir. 1982); Johnson, 131 F. Supp. 2d at 1105.
\item \textsuperscript{130} Morris, 714 F.2d 669. Attorneys routinely present affidavits in certain pre-trial settings, such as applications for interlocutory relief. See Garvey, supra note 6, at 192-94. Lawyers also frequently submit affidavits in support of, or opposition to, motions for discovery sanctions. Id. These affidavits, however, typically go to the discovery process rather than the merits of the case. Id. at 192-93. The practice is usually confined to preliminary matters that will usually be tested in a full trial on the merits. Even this fairly routine pre-trial practice can raise advocate-witness concerns when the credibility of an attorney-advocate is directly called into question. See, e.g., Permian Corp. v. United States, 665 F.2d 1214, 1218 & n.8 (D.C. Cir. 1981) (expressing concern “as to the professional propriety of Mr. Juceam’s performance in the district court in the dual role of affiant and advocate” in appeal from preliminary injunction prohibiting SEC from turning over documents to Dept. of Energy where record included affidavit of counsel concerning oral understanding and same counsel presented oral argument to court of appeals).
\item \textsuperscript{131} Johnson, 131 F. Supp. 2d at 1108.
\item \textsuperscript{132} World Youth Day, Inc. v. Famous Artists Merch. Exch., 866 F. Supp. 1297, 1303 (D. Colo. 1994) (disqualifying lawyer from both participating in trial and taking depositions, but allowing lawyer to participate in other pre-trial activity).
\item \textsuperscript{133} Johnson, 131 F. Supp. 2d 1088 (finding court should consider possible prejudice to defendant or unfairness if prosecutor who testified at pre-trial proceeding continued participation at trial).
\end{itemize}
to uncontested matters, judges take "judicial notice" of facts that are common knowledge.\textsuperscript{134} Lawyers frequently provide factual information about the litigation process, such as information about discovery.\textsuperscript{135} When prosecutors make discretionary charging and disposition decisions, they engage in a process that "looks a lot like adjudication."\textsuperscript{136} Presumably each of these tasks require a level of detachment, of measured judgment.\textsuperscript{137} Nonetheless, each of these examples nibbles at the edge of the traditional role, but does not undermine the core functioning. The judge risks reversal by taking judicial notice of disputed facts.\textsuperscript{138} And the evidentiary, ethical and procedural issues inherent in the advocate-witness rule attempt to protect the core function of advocate.

When courts talk about role confusion, they are referring to circumstances in which the traditional functions might become impaired by multiple roles. The fact-finder may give undue weight to the testimony of the attorney. Alternatively, opposing counsel may be hampered in cross-examination. If the lawyer chooses not to testify and presents evidence through an alternative witness, the lawyer's participation might be so obvious to all observers that the lawyer becomes, in effect, an unsworn witness.\textsuperscript{139} The testifying lawyer's own judgment may be impaired by the desire to be a credible witness. The testifying advocate's performance as an advocate may be impaired because of the lawyer's inability to argue persuasively her own credibility. Except for the possibility of conflicts of interest, each of these claims taken alone may appear to be a slender reed on which to place the weight of a rather strong ethics rule. However skeptical commentators are, there is a "there, there." Seemingly simple, prophylactic rules help capture a concern that is amorphous.

In some cases the lawyer's testimony emerges because the lawyer has become inextricably intertwined with the merits. For example, one district court found disqualification was appropriate because of the attorney's "inability to separate himself from the dual roles of attorney and witness," even though the DR 5-102(A) threshold requirement of "ought to be called as a witness" had not been met.\textsuperscript{140} The court observed that "[h]e became so involved with the

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\item \textsuperscript{134} Fed. R. Evid. 201(b), (c).
\item \textsuperscript{135} \textit{See} Garvey, \textit{supra} note 6, at 192-94 (identifying process/substance distinction).
\item \textsuperscript{137} \textit{Id}. at 1715-16.
\item \textsuperscript{138} \textit{See}, e.g., Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001).
\item \textsuperscript{139} United States v. McKeon, 738 F.2d 26, 35 (2d Cir. 1984) (finding presence of counsel would taint trial where counsel would serve as unsworn witness); United States v. Cunningham, 672 F.2d 1064, 1074-75 (2d Cir. 1982) (disqualifying counsel where he would effectively be an unsworn witness if permitted to act as trial counsel); Malaspina, \textit{supra} note 111.
\end{itemize}
presentation of his client's case that he testified to facts not in evidence and stated his personal opinion regarding witnesses' testimony and the justness of his client's cause.\footnote{141}{Id.} These are the very cases in which the lawyers become so passionate about the case that tensions between the parties and credibility attacks can make the goal of a measured trial difficult.\footnote{142}{Gen. Mill Supply Co. v. SCA Serv., Inc., 505 F. Supp. 1093, 1098 (E.D. Mich. 1981) (stating that disqualification of firm is appropriate where "the entire proceeding would be tainted by the harsh recriminations hurled by the parties and witnesses").} These are also likely circumstances in which the very passion at question has resulted in a strong attorney-client bond.\footnote{143}{See, e.g., United States v. Orgad, 132 F. Supp. 2d 107, 123 (E.D.N.Y. 2001) (finding attorney's "incredible bond" did not constitute a relationship that created a substantial hardship for client).}

3. "Trusted Counsel": Judicial Protection of Relationships with Clients

Some courts expressly state that they do not wish to separate clients from "trusted counsel without giving rise to any countervailing benefit to either those clients themselves or to the judicial system."\footnote{144}{Rice v. Baron, 456 F. Supp. 1361, 1372 (S.D.N.Y. 1978) (citing Int'l Elec. Corp. v. Flanzer, 527 F.2d 1288, 1293 (2d Cir. 1975)) (denying motion to disqualify under the advocate-witness rule, but disqualifying under conflicts rules).} Counsel become "trusted" because the lawyer and client have developed an attorney-client relationship grounded in understanding and respect. While courts might note the value of trusted counsel, as Professor Bruce Green has observed, many courts give relatively little weight to the burden clients suffer when their chosen counsel has been disqualified.\footnote{145}{Green, supra note 4, at 90.}

This lack of significant respect for a real, as opposed to abstract, relationship is reflected in the federal courts' narrow and even stingy interpretation of what constitutes a substantial hardship under the advocate-witness rule.\footnote{146}{Stonerock, supra note 59, at 837-40.} Federal courts have found that a "long-standing relationship with a client, involvement with the litigation from its inception or financial hardship" are not substantial hardships sufficient to trigger an exception to the advocate-witness rule.\footnote{147}{Jones v. City of Chicago, 610 F. Supp. 350, 361 (N.D. Ill. 1984), rev'd on other grounds, 856 F.2d 985 (7th Cir. 1988); accord Orgad, 132 F. Supp. 2d at 123 (finding attorney's "incredible bond" did not constitute a relationship that created a substantial hardship for client). A few courts have suggested that long involvement in the litigation would constitute distinctive value. See, e.g., Miller Elec. Constr., Inc. v. Devine Lighting Co., 421 F. Supp. 1020, 1023 (W.D. Pa. 1976); Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1353 (D. Colo. 1976).} Long familiarity with the client and the ability to communicate in the
client's native language of Romanian was not sufficient. A ten-year relationship and expending over 450 hours of work on the case did not constitute "distinctive value" to the client. As long as the client can find replacement counsel, courts generally find no substantial hardship. Some courts have concluded that even difficulty in obtaining substitute counsel is not substantial hardship. Even the more recent substantial hardship cases decided under Model Rule 3.7, which urges in the comments a balancing test, have continued to give a narrow interpretation to substantial hardship. Under a balancing test, substantial hardship would be evaluated in light of a host of factors, including the nature of the attorney's testimony, the impact on the other litigants in the case, the ability of the attorney to continue to work behind the scene, and other concerns. But the lack of even rhetorical respect for a long-standing attorney-client relationship in many of the cases is quite striking.

Some commentators have been very critical of the courts' narrow interpretation of the substantial hardship exception, calling it "harsh, narrow" and "almost abusive." The derivative expense and delay that accompanies disqualification, which is closely akin to relationship issues, does not rise to the level of substantial hardship. Occasionally a federal court will acknowledge the real-life consequences of disqualifying devoted counsel, such as the District Court in Kansas, which found substantial hardship where the client would have great difficulty finding experienced lead counsel who would be willing to undertake the litigation on a contingency fee basis. But this broader interpretation is the exception.

150. See, e.g., SuperGuide Corp. v. Directv Enter., Inc., 141 F. Supp. 2d 616, 624 (W.D.N.C. 2001) (acknowledging extensive experience and expertise of attorney and "many hours devoted to the litigation" but disqualifying counsel because it was not "likely that SuperGuide will have difficulty finding replacement counsel of equal stature").
153. R. 3.7, cmt. 4.
154. Stonerock, supra note 59, at 838.
156. Chapman Eng'rs, Inc. v. Natural Gas Sales Co., 766 F. Supp. 949, 959 (D. Kan. 1991) (finding facts to suggest that efforts to call opposing counsel as necessary witness were for tactical reasons). But see Norman Norell, Inc. v. Federated Dep't Stores, 450 F. Supp. 127, 131 (S.D.N.Y. 1978) (refusing to accept claimed difficulty in
The Model Code requires not just substantial hardship, but also that the substantial hardship be due to "the distinctive value of the lawyer [or his firm] as counsel in the particular case." But this simply moves the interpretive possibilities to the phrase "distinctive value." Courts do not consider the interpersonal relationship between lawyer and client—the trust built up due to a long relationship—as a distinctive value. Some courts have concluded that the distinctive value component of DR 5-101(B)(4) is met only when the attorney has a specialized legal expertise. These cases suggest a rather distressing conclusion: lawyers are deemed fungible unless they have a particular legal expertise. Under this approach, the human dimension of trust that develops—the heart of a fiduciary relationship—receives no acknowledgment and consequently no respect in the analysis.

Clients, on the other hand, certainly do not treat lawyers as fungible, particularly knowledgeable clients who seek a particular expertise. Clients who are not repeat actors with significant economic clout, such as middle income clients, must rely even more on the human dimension of trust because they have not developed the expertise to assure that they are receiving good counsel. They typically do not have access to a wide group of lawyers.

The dismissive attitude toward the interpersonal aspects of the attorney-client relationship is somewhat understandable. A court may not want an open-ended value such as "relationship," which requires a judgment call about an interpersonal bond. The cure is not to elevate the attorney-client relationship above other values and concerns. But it certainly is entitled to greater weight and respect than the federal courts give. A more thoughtful balancing that expressly looks for the nature of the attorney-client relationship would give greater protection to clients.

In contrast to the somewhat stingy protection of relationships seen in federal court practice, the Massachusetts opinions contain a somewhat greater rhetorical respect for the value of a long-standing attorney-client relationship. For example, in Gorovitz v. Planning Board of Nantucket the Massachusetts Supreme Judicial Court finding other counsel to take case on contingency as sufficient to demonstrate distinctive value).

160. Lyon & Phillips, supra note 9, at 73-74.
161. See Miller v. Colo. Farms, No. 97-WY-2015-WD, 2001 WL 629463, at *5 (D. Colo. Jan. 16, 2001) (acknowledging that "disqualification is likely to work substantial hardships upon [the client], including financial hardships as well as difficulties in re-starting this case with new counsel" but based on balancing of interests, a trial "free of taint" warranted disqualification).
allowed an attorney who was both general partner and legal counsel to the partnership to testify as a key material witness and continue as advocate. While grounding its decision on the interpretation that the attorney was also a party litigant, the court went on to note the particularly high value that exists when a long or extensive professional relationship between an attorney and a client may have afforded the lawyer or firm with extraordinary familiarity with the client's affairs. The Supreme Judicial Court also expressly reaffirmed its commitment that disqualification is appropriate only when continued participation taints the legal system or the trial itself. The strongest precedential force of Gorovitz appears to be its admonition that courts defer to an attorney's conclusion that his or her conduct does not violate the code. Other Massachusetts decisions, however, have rejected a conclusion that trust in counsel could constitute a substantial hardship, such as where the case involved a manageable breach of contract claim.

F. Understanding Courts' Strident Interpretation of the Advocate-Witness Rule

Courts are, by their nature, public forums, financed by the state to offer public statements of norms. Individual judges have differing views of how actively a court should seek to establish norms for attorney conduct. Most courts envision that lawyers are "officers of the court" and have obligations toward the legal system. Most importantly, the judicial branch has the power to sanction attorneys for misconduct, including imposing significant fines, ordering disqualification of counsel, fee forfeiture and the like. Both state and federal judges can refer lawyer misconduct to the state regulatory
body for review and possible sanction by the bar.\textsuperscript{170} These powers all emerge not just from a desire to control the proceedings before the court—a procedural value—but also for many judges from a time-honored sense that judges should guide the legal profession.\textsuperscript{171}

Although many published federal and Massachusetts court opinions ask whether the dual functioning as advocate and witness will taint the trial process, some courts also make clear that judges have an obligation to help the profession maintain high professional standards.\textsuperscript{172} The Supreme Court has embraced this function, at least in theory.\textsuperscript{173} While courts sometimes state that “courts do not exist to discipline attorneys, but to resolve disputes,” courts nonetheless take an active interest in the state of legal ethics.\textsuperscript{174} This contrasts sharply, as we see below, with the view that some arbitrators take of their role in arbitration.\textsuperscript{175}

II. IMPLEMENTING ADVOCATE-WITNESS CONCERNS IN LABOR ARBITRATION

A. The Culture of Labor Arbitration

The treatment of the advocate-witness is quite different in labor arbitration than the treatment reflected in reported court decisions. The arbitration process is much more tolerant of, and occasionally even embraces, the dual functioning. To understand why this is so, it is necessary to have a brief understanding of labor arbitration.

Arbitration is the process of submitting a dispute to a neutral person selected by the parties to give a binding resolution of the dispute.\textsuperscript{176} Arbitration is very common in collective bargaining agreements negotiated by union and management, with almost all

\textsuperscript{170} The Federal Law of Attorney Conduct, supra note 3, § 807.01.
\textsuperscript{173} See, e.g., Wheat v. United States, 486 U.S. 153, 160 (1988) (“Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.”); Nix v. Whiteside, 475 U.S. 157, 166 (1986).
\textsuperscript{175} See infra Part II.B.
\textsuperscript{176} Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 2 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (“[A] simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.”).
contracts providing for arbitration of certain types of grievances.\footnote{177} Over sixteen million employees are union members, and over eighteen million employees are covered by union contracts, which means that arbitration represents a significant institutional mechanism for accessing justice for a large number of middle-class individuals.\footnote{178}

The formal structure of labor arbitration involves a union representative and management representative making presentations to the neutral person. The representatives need not be lawyers. Figures vary, but somewhere between twenty-five and thirty-five percent of the union advocates are lawyers.\footnote{179} Management appears to be more likely than unions to have attorney-advocates. A grievance is usually initiated by the union on behalf of the employee.\footnote{180} As a formal matter, the union is the client. But unions have a duty of fair representation to the individual employee, which creates at least a minimal level of obligation to the bargaining unit member.\footnote{181} The Supreme Court has analogized this to a fiduciary duty.\footnote{182} This duty of fair representation does not require a union to provide an attorney who satisfies professional standards.\footnote{183} Consequently, legal ethics rules provide an extremely important institutional force to assure a level of competent and fair representation. Although the client technically is the union, as Professor Russell Pearce describes, concepts of the derivative client strongly suggest that the lawyer owes duties of competence and loyalty to the individual union member.\footnote{184}

Although labor arbitration has its roots in the desire to resolve labor-management disputes, it carries many fundamental aspects of

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\footnote{178} Statistical Abstract of the United States 445 (2000). In 1999, 16,476,700 individuals were union members and 18,182,300 were covered by union contracts. According to the 1999 figures, 13.9\% of the labor force are union members and 15.3\% are covered by union contracts.
\footnote{179} Cooper & Nolan, supra note 177, at 20.
\footnote{181} Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991) (stating that union actions are arbitrary only if union's behavior was so far outside a wide range of reasonableness as to be irrational); Vaca v. Sipes, 386 U.S. 171, 190 (1967) (holding union breaches duty of fair representation if its actions are "arbitrary, discriminatory, or in bad faith").
\footnote{182} O'Neill, 499 U.S. at 74.
\footnote{184} Id. at 1108, 1115-17. Prof. Pearce states that "[t]he derivative client doctrine has implications for the lawyer's duties of loyalty, competence, and confidentiality." \textit{Id.} at 1108. Confidentiality is the most problematic of these obligations since the union and the individual union member are akin to joint clients, which in turn raises particular problems of confidentiality. \textit{Id.} at 1114-15.

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An arbitrator "does not sit to dispense his own brand of... justice," but is constrained by the "essence [of] the collective-bargaining agreement." Because labor arbitration is private (except when public employers are involved), the constitutional requirements of due process do not apply. But "notions of 'due process' must be incorporated into grievance and arbitration procedures for the courts to enforce or the National Labor Relations Board to defer to arbitrators' awards."

Labor arbitration produces some rules and precedents, which many other forms of alternative dispute resolution do not provide. The conclusions and opinions of arbitrators are often published with the consent of the parties. Although published opinions are not binding precedent, they provide public statements of the prevailing rules, as well as provide advice to future litigants. This is not just an academic possibility. Fairweather's Practice and Procedure in Labor Arbitration, an 800 page comprehensive treatise, is in its fourth edition and cites extensively to published arbitration opinions. In other words, labor arbitration is much more than settlement, which tends to move the resolution into a completely private venue.

Just as with court opinions, a written opinion helps instill "confidence in the integrity of the process" of labor arbitration. It is justice within the labor-management community, setting public norms and standards. Although every case may not involve the expression of public values, the outcomes hopefully reflect the spirit of the labor-

186. United Steelworkers of Am. v. Enter. Wheel & Car Corp. 363 U.S. 593, 597 (1960). This was the third of what became known as the Trilogy cases interpreting § 301 of the Taft-Hartley Act.
191. See Fairweather's, supra note 188.
management community that entered into the collective-bargaining agreement.\textsuperscript{193}

Labor arbitration is not court-sponsored and generally the cost of the arbitration is absorbed by the parties.\textsuperscript{194} In the majority of labor arbitrations the two sides have chosen the arbitrator (or arbitrators) from a slate.\textsuperscript{195} One significant goal of the arbitration process is to resolve the differences with less time and expense than court litigation would entail.\textsuperscript{196}

In sum, this brief summary reveals a dispute resolution scheme that provides access to justice for a large number of middle-class individuals. While labor arbitration has many attributes of private justice, such as greater control over the forum, this private justice has strong norms driven by custom, practice and—most importantly—by the public policies underlying the federal labor statutes.\textsuperscript{197}


\textsuperscript{194} Alleyne, \textit{supra} note 190, at 409-10.

\textsuperscript{195} See Frank Elkouri & Edna Asper Elkouri, \textit{How Arbitration Works} 135-36 (4th ed. 1985). Certain disputes call for a three arbitrator panel with one management appointed member, one labor appointed member, and the third selected by the two party-appointed individuals. The party-appointed neutral often may not be "neutral" in the tradition sense. See Deseriee A. Kennedy, \textit{Predisposed With Integrity: The Elusive Quest For Justice in Tripartite Arbitrations}, 8 Geo. J. Legal Ethics 749, 774 (1995). In one quite amazing case of role confusion in a Rhode Island arbitration, a party-appointed neutral (the arbitrator) stepped away from the judge's table, took an oath of office and testified about certain factual matters in the very proceeding in which he was adjudicating. While this blending of roles may be common in a European model, it is significantly outside the norm even in the informal arbitration setting. In that circumstance, the American Arbitration Association, which had administered the arbitration, intervened and required the parties to start over with arbitrators who would not serve as witnesses. Interview with Richard M. Reilly, formerly Senior Vice President, American Arbitration Association.

\textsuperscript{196} If trials are like "surgeries: painful last resorts for otherwise incurable ailments, which are likely to place the patient in a weakened condition at least temporarily and almost certain to leave lasting scars," then labor arbitration is a structural equivalent of day surgery. Luban, \textit{supra} note 185, at 2621.

\textsuperscript{197} Fairweather's, \textit{supra} note 188, at 1 (stating that practice and procedure of modern labor arbitration are firmly rooted in "state and federal law seeking to promote uniformity and other public policies underlying the federal labor statutes"). The 1947 Taft-Hartley Act, 29 U.S.C.A. §§ 141-97, authorized federal courts to enforce collective bargaining agreements, which eventually led to a "whole-hearted endorsement of arbitration" by the Supreme Court. See Cooper & Nolan, \textit{supra} note 177, at 12; see also Thomas C. Kohler, \textit{Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues}, in \textit{Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society} 131, 150 (Mary Ann Glendon & David Blankenhorn
B. The Advocate-Witness in Labor Arbitration

Although the rules of ethics would suggest that serving as advocate and witness is strongly discouraged, "[i]n arbitration proceedings, it is entirely proper for the advocate (counsel or presenter) to testify." Even in hearings before the National Labor Relations Board, early published opinions indicated that "it is not our function or responsibility to pass on the ethical propriety of a decision by counsel to testify in one of our proceedings" as long as the testimony "is otherwise proper and competent." This tolerance of dual functioning appears to apply to labor issues litigated in the federal courts, where a simple assertion of substantial hardship has been sufficient to allow the advocate to argue an appeal where the advocate was the crucial witness at the hearing under review. That being said, where the testimony amounts to a significant conflict of interest, an arbitrator can and will disqualify counsel.

In an effort to capture a snapshot of how advocates actually function as witnesses in labor arbitrations, I interviewed twelve labor arbitrators or advocates, and held a group interview with seven hearing examiners (a functional equivalent of labor arbitrators) at a state labor relations agency. These interviews obviously did not attempt to capture an empirical snapshot of the practice of advocates serving as witnesses, but rather sought to identify the range of practice options available and how the individuals treated the issue when it arose. The responses below set out a descriptive summary of the practices reported. The majority of the advocates and arbitrators

199. Local Union No. 9 of the Int'l Union of Operating Eng'rs, 210 N.L.R.B. 129, 129 n.1 (1974) (denying motion to strike testimony of charging counsel) (citing French v. Hall, 119 U.S. 152, 154 (1886)); see also Adolph Coors Co. & Brewery, Bottling, Can & Allied Indus. Union, Local 366, 235 N.L.R.B. 271, 273 n.4 (1978) (rejecting request that testimony of respondent's attorney be stricken as violation of ABA code and noting that attorney was the most credible of the three witnesses who testified on the issue).
200. See NLRB v. G&T Terminal Packaging Co., 246 F.3d 103, 109 n.4 (2d Cir. 2001) (stating that where attorney was going to be the sole witness to a "critical issue" on appeal attorney needed to "either . . . file an appearance by a new attorney who could argue the appeal or to submit an affidavit stating that [the lawyer's] disqualification would work a substantial hardship on the client because of the distinctive value of the lawyer or [her] firm as counsel in this particular appeal"); timely filing of affidavit sufficient to allow lawyer to proceed (second alteration in original) (internal quotations omitted)).
202. I also posed the query in more informal settings to numerous other advocates and arbitrators in the labor-management field as I prepared a six page questionnaire to guide me in the interviews.
practice in the New England region. The group represents a blend of both public and private sector advocates and arbitrators.

When confronted with the possibility of requiring the testimony of an attorney in labor arbitration, arbitrators and advocates report a range of approaches. Only one arbitrator reported requiring the attorney to have substitute counsel for the entire case if the attorney was going to serve as a witness. Only one advocate reported a local culture in which it was customary that the lawyer would step down from the actual arbitration and bring in substitute counsel.

Much more often the arbitrators and advocates reported that the issue became a subject of discussion among the participants in the arbitration as they agreed upon a fair system of proceeding. In these circumstances, presumably, the issue is one in which a stipulation is not appropriate or customary. The attorneys and arbitrators interviewed described an array of approaches designed to have the attorney continue to serve as the advocate in the proceeding while still giving the needed testimony. Several arbitrators expressly leave the issue to the parties to resolve and proceed in the manner the parties negotiate. Occasionally, the issue is presented as a challenge that the advocates and arbitrator will discuss as a pre-hearing issue. The actual resolution falls in a range of approaches. Advocates who know the issue is going to arise and who have access to co-counsel will bring co-counsel in to question the advocate for the needed testimony. The advocate-witness would then resume the advocate role for the remainder of the hearing. One hearing examiner would encourage the parties to agree to a continuance to allow the testifying advocate a chance to bring in co-counsel for that portion of the case. Several advocates and arbitrators reported that occasionally an advocate would be sworn and testify in narrative form. Arbitrators expressed more reservation about this practice than advocates.

Most advocates did not make formal objections to the dual functioning. When pressed on why, a variety of reasons emerged. One arbitrator flatly said that the objection would be frivolous because there is no basis to exclude the testimony if relevant. A more significant factor, however, appears to be the underlying culture. Union and management advocates frequently know each other and come from what one arbitrator described as a “culture of negotiation.” These are both clients and lawyers with ongoing relationships. Accommodating the advocate-witness in the context of arbitration allows the participants to discuss and define the values behind the rule through a process of agreement.

Another factor appears to be the participants’ desire for future flexibility. An advocate who objects today may need to testify next week. When asked whether the need for testimony was more common for union or management, the advocates did not have a consensus. Union lawyers, however, tended to state that the union
side was more likely to need an advocate as witness, and management tended to state that management was more likely to need the advocate's testimony. Most arbitrators reported that they worked with the parties to identify a procedure that allowed the evidence to come in while giving opposing counsel a fair opportunity to cross-examine the advocate-witness.

It would be easy to dismiss this pattern by concluding that the legal ethics rules have less relevance in labor arbitration, but the arbitrators uniformly agreed that lawyers in arbitrations have an obligation to comply with the legal ethics rules. They had process obligations to assure the proceeding met minimal levels of fairness. But the arbitrators did not appear to view themselves as having any special role to assure high standards among members of the bar. Their goal is to assist in the private resolution of this dispute.

The advocates generally recognized that serving as both advocate and witness posed special challenges. Only one advocate spoke with current familiarity of Model Rule 3.7. The advocate had adopted a detailed formal procedure for advising the management client and seeking written informed consent before proceeding as both advocate and witness. In the rare case in which this advocate felt that the advocacy role would be impaired, the lawyer brought in substitute counsel. More often, the lawyers described thinking about the advocate-witness issue and concluding that as long as the lawyer could function effectively as an advocate, the lawyer should proceed to try the case and also serve as a witness. In effect, the lawyers appear to have concluded that the labor or management client would suffer a substantial hardship—delay, increased expense in educating another attorney, loss of a familiar "partner" in the labor-management process, heightened formalism—if the lawyer were to withdraw from the arbitration hearing unnecessarily. The arbitrators, also inextricably intertwined in this web of ongoing relationships, generally deferred to that judgment. The participants appeared content with the result. Several of the advocates and arbitrators talked about the changed atmosphere in the room when the lawyer stepped out from behind the table to testify—mostly of joviality, occasionally of heightened tension.

C. Significance of Informal and Private Context and Shared Culture: Distinguishing Labor Arbitration From Courts

While one can argue that some of the rationales behind the advocate-witness rule should not apply to labor arbitration, the text of Model Rule 3.7 appears to apply. One could argue that labor

203. One prominent treatise on arbitration argues that the underlying rationale of the advocate-witness rule at judicial proceedings does not apply to labor arbitration because there is less chance for role confusion when the case is tried to an
arbitration is not a “trial” within the meaning of Rule 3.7, but this is a rather technical distinction and offers weak explanation. It is true that arbitrations are often referred to as “hearings” and both the rules of evidence and procedural requirements are more informal than a court-based trial. However, while labor arbitration is fairly characterized as an extension of the bargaining process, it nonetheless asks parties to present testimony in the light most favorable to the side represented. The adversarial structure is as vibrant in labor arbitration as in a traditional court trial. The advocates and arbitrators who were questioned for this article characterized their arbitration proceedings as trials or hearings. Advocates for each side take their roles very seriously. They often are “cause” lawyers, particularly the union attorneys, embracing the position of union lawyer not just as a job but as a mission. Almost all of the advocates interviewed knew that there was some rule out there that called into question whether it was appropriate to serve as a witness in a proceeding in which they were an advocate.

Labor arbitrations are also tried to an arbitrator, not a jury, so that the role confusion inherent in serving as advocate and witness is not as severe. But the ethics rules do not limit their reach to jury trials, but refer to trials generally. Even in the arbitration context, the arbitrators were required to make an assessment about the credibility of the advocate. The arbitrators expressed different opinions about whether the advocate is a more or less persuasive witness than the typical witness. One arbitrator noted that one presumes that an advocate is generally truthful, which emphasizes the familiar community in which labor arbitration occurs. Another arbitrator stated that an advocate’s testimony would always have to be viewed with a cautious eye because of the advocate’s self-interest in presenting favorable testimony.

Labor arbitrations are also different from court proceedings in that non-lawyers may serve as advocates. This typically occurs when a union representative “tries” the case on behalf of the union member. But the fact that both lawyers and non-lawyers serve as advocates does not explain away the phenomenon of the advocate-witness. Lawyers and non-lawyers function in advocacy roles in patent actions and in IRS proceedings. In each of these areas lawyers must adhere to the rules of professional responsibility even though non-lawyers experienced and skilled arbitrator. In addition, because labor arbitrations are private, there is less “risk of public skepticism from role changing.” Fairweather’s, supra note 188, at 239.

205. See, e.g., Jack Winter, Inc. v. Koratron Co., 50 F.R.D. 225, 228 (N.D. Cal. 1970) (stating that preparation of a patent application brings into play legal skills even though non-lawyer patent practitioners may also engage in same function).
functioning in the same role are free of many of the obligations. Two union advocates interviewed for this article noted that they jokingly complained to their non-lawyer counterparts about having the extra burden of worrying about advocate-witness rule concerns.

D. Protecting Relationships in Private Dispute Resolution

One could explain the more relaxed approach to the advocate-witness in labor arbitration by noting the differences above. Collectively, they offer a plausible explanation. But an equally descriptive—and less technical—reason for the greater flexibility of dual functioning appears to be the culture of arbitration and the nature of the clients. Labor arbitration works to protect relationships in a more thorough and systemic manner than court litigation. The process assumes an ongoing relationship described in the collective bargaining agreement and a relatively equal bargaining strength. There is some evidence to suggest that union employees who pursue a grievance through arbitration are more likely than their non-union counterparts to intend to stay in the employment relationship. Scholars have also explored whether labor arbitration has a therapeutic dimension.

Labor arbitration often involves repeat actors: the union representative and the corporate attorney presenting their case to an experienced labor arbitrator approved by each side. Because the neutrals typically must be agreed upon by both sides, and depend on this private selection process for their living, the arbitrators have an incentive to act in a credible manner toward both sides. All participants are likely to see each other again. As a practical matter, the attorneys are more likely to be repeat players than an individual arbitrator or any individual union member.

206. Id.
207. Paul H. Haagen, New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration, 40 Ariz. L. Rev. 1039, 1052 (1998) ("The entire process of arbitration in the context of a collective bargaining agreement assumes that the parties are in an ongoing relationship.").
210. See Murray S. Levin, The Role of Substantive Law in Business Arbitration and the Importance of Volition, 35 Am. Bus. L.J. 105, 164 (1997) ("Arbitrators appreciate that continued demand for their services is dependent on their ability to demonstrate to these astute repeat players that they are able to produce credible outcomes.").
E. Protecting Attorney-Client Relationships for Middle-Income Clients

One effect of the more relaxed approach to the advocate-witness in labor arbitrations is to give greater respect to the attorney-client relationship for middle-class clients in labor arbitration. Unions function in part as economic institutions to enhance the economic welfare of their members. They also serve as an opportunity to move groups of workers into middle-class status, or keep them in that status. Perhaps most importantly, unions serve as one of the "mediating bodies"—"the overlooked middle"—that help our society define the relationship between individuals and the larger institutions of governments and corporations. When union and management negotiate and sign a collective bargaining agreement, they are creating a system of private law. Arbitration is not an isolated dispute resolution event among strangers, but one of the procedures agreed upon by the two entities—union and employer—to help the individuals within each group come to shared understanding of the meaning of that law.

The process of arbitration is inextricably bound up with the ongoing relationship. To treat any actor within this relationship, including counsel, as fungible would be to deny an essential attribute of the institution. This is not to suggest that the relationships receive protection above all other interests. Within this labor arbitration world, however, relationships are given high respect because it is the relationship that helps assure the long-term connection between the parties.

Even this language, however, does not capture the place of arbitration and the network of relationships on which it is built. Labor arbitrations often deal "with messy things like personal relationships and seemingly mundane day-to-day issues." But issues surrounding discharge from work—often described as the labor equivalent of capital punishment—have a huge impact on the life of the employee. Seemingly smaller issues—seniority, work conditions, etc.—are issues that touch the daily lives of the employee. Labor arbitration and labor representation is one of the few areas where middle-income clients obtain meaningful access to representation on a subject critically important to their daily lives. The process of negotiating and implementing a collective bargaining agreement, and engaging in arbitration of disputed issues, provides "an unmatched opportunity to involve people in making and

213. See Kohler, supra note 197, at 143.
214. Kohler, supra note 212, at 226.
administering the law that most directly determines the details of their daily lives. 216

CONCLUSION: COMMENTS ON THIS CHAMELEON RULE

The advocate-witness rule is like a chameleon, changing color to accommodate the context in which it is applied. In labor arbitration it functions more like a rule of procedure than an ethics or evidentiary issue. It typically is a process concern that the arbitrator and participants manage in a fair manner. This appears to occur because the culture of arbitration and the web of relationships inherent in the process make the lawyer an important part of the process. A resort to formalism would indeed result in a substantial hardship to the client. Once the practice setting suggests that substantial hardship is, in effect, presumed, then the issue evolves from an ethics concern to a procedural one.

In federal court practice the epicenter of concern over the advocate-witness continues to be an ethics issue, but pushed more closely to an evidentiary concern by the adoption of the Model Rules. Because the advocate-witness concern often, but not always, bumps up against conflict of interest concerns, it makes sense that federal courts have continued to view the advocate-witness as an ethics issue. Within that framework, however, the courts have given too little recognition to the human dimensions of the attorney-client relationship. Acknowledging the real impact on a long-standing attorney-client relationship would enrich the balancing test that is emerging under the Model Rules to determine whether a substantial hardship is present. And the client should also make a difference. Clients without significant resources will bear a disproportionate hardship if their lawyer is disqualified. The very awareness of the real hardship to clients is likely one reason why this rule is self-executing. Attorneys attempt to prevent hardship to clients. The somewhat greater respect for relationships reflected in the Massachusetts decisions, 217 to the extent that one can draw conclusions from a handful of decisions, suggests that state courts might be somewhat closer to the day-to-day lives of lawyers and clients.

The overlap and intertwining of the procedure-evidence-ethics approaches might suggest that an ethics analysis for advocate-witness is no longer needed, if it ever was. Federal courts, at least, do not reflect this cynicism about the ethical dimensions of the advocate-witness rule. 218 More importantly, just because there is significant overlap does not take away from the advantages of a multi-sphere

216. Kohler, supra note 212, at 228.
217. See supra Part I.E.3.
218. See supra Part II.B.
approach to the advocate-witness.\textsuperscript{219} The multiple approaches allow the relevant tribunal and lawyers to apply the approach that best captures the values at stake.\textsuperscript{220} This chameleon rule can assure fairer treatment of all the relevant actors if applied with culture, context and clients in mind.


Notes & Observations