

A Flurry of Decisions Under The Advocate-Witness Rule (Rule 3.7)

BY ROY SIMON

The advocate-witness rule has always been a powerful rule. Unlike other conflict of interest rules, client consent cannot cure a disqualification that arises when a lawyer who will be a witness also wants to serve as an advocate before the tribunal. The advocate-witness rule is also one of the most confusing rules – both lawyers and courts often misconstrue it. Given the power of the rule and its confusing language, many lawyers move to disqualify their adversaries based on a real or imagined advocate-witness conflict. Even so, March 2010 was a surprise. Between March 15th and March 29th, four different courts in New York (two state, two federal) issued decisions on the advocate-witness rule. Two decisions granted disqualification of the conflicted lawyer; two denied disqualification as “premature.” This article will discuss these four recent decisions.

Background: The Advocate-Witness Rule

Let’s start by setting out the rule itself in full:

*Rule 3.7:
Lawyer As Witness*

(a) a lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

- (1) the testimony relates solely to an uncontested issue;
- (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
- (3) disqualification of the lawyer would work substantial hardship on the client;
- (4) 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; or
- (5) the testimony is authorized by the tribunal.

(b) a lawyer may not act as advocate before a tribunal in a matter if:

- (1) another lawyer in the lawyer’s firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by rule 1.7 or rule 1.9.

Thus, Rule 3.7(a) governs personal disqualification of a lawyer who will be a witness, whereas Rule 3.7(b) governs disqualification of the partners and associates of a lawyer who will be a witness. (The disqualification of partners and associates pursuant to Rule 3.7(b) is sometimes called “imputed disqualification,” but it really isn’t, because the personal disqualification of a lawyer as an advocate under Rule 3.7(a) is not automatically imputed to other lawyers in the firm under Rule 3.7(b). Rather, Rule 3.7(b) sets out its own criteria for disqualification.)

The leading case construing Rule 3.7 in New York is *Murray v. Metropolitan Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009). (The case was known in the district court as *In Re MetLife Demutualization Litigation*. I wrote about it in NYPRR’s November 2009 issue as part of my discussion of Rule 3.7 – see *Roy Simon on the New Rules – Part VIII: Rule 3.7(a) through Rule 3.9.*) In *Murray* the second Circuit explained the policies underlying the rule that forbids the same lawyer from serving simultaneously as both advocate and witness:

We have identified four risks that rule 3.7(a) is designed to alleviate: (1) the lawyer might appear to vouch for his own credibility; (2) the lawyer’s testimony might place opposing counsel in a difficult position when she has to cross-examine her lawyer-adversary and attempt to impeach his credibility; (3) some may fear that the testifying attorney is distorting the truth as a result of bias in favor of his client; and (4) when an individual assumes the role of advocate and witness both, the line between argument and evidence may be blurred, and the jury confused. These concerns matter because, if they materialize, they could undermine the integrity of the judicial process.

But the *Murray* court also explained that these policies are much weaker in cases of “imputed” disqualification under Rule 3.7(b). (In *Murray*, the movant sought to disqualify an entire firm, not the particular lawyer who would be a witness.) The court said:

In imputation cases (Rule 3.7(b)), the witness is not acting as trial counsel; these concerns are therefore “absent or, at least, greatly reduced.” Accordingly, disqualification by imputation should be ordered sparingly, and only when the concerns motivating the rule are at their most acute.

Therefore, the second Circuit reformulated the test for imputed disqualification under the advocate-witness rule:

[W]e now hold that a law firm can be disqualified by imputation *only* if the movant proves by *clear and convincing evidence* that [a] the witness will provide testimony prejudicial to the client, and [B] the integrity of the judicial system will suffer as a result. This *new formulation* is consistent with our prior efforts to limit the tactical misuse of the witness-advocate rule. [Emphasis added; citations omitted.]

With that brief background in place, I will now turn to the four recent cases, which I will address in the order they were decided.

Uribe Bros. Corp. v. 1840 Washington Avenue Corp.

In *Uribe Bros. Corp. v. 1840 Washington Avenue Corp.*, 26 misc.3d 1235(a), 2010 WL 918432 (Bronx County sup. Ct. 2010) (Dominic R. Massaro, J.), a commercial tenant (Uribe) sued a landlord (1840 Washington Avenue) for breach of contract and other alleged wrongs. Apparently, the land-lord had failed to obtain a certificate of occupancy, so Uribe didn't pay rent. The landlord had sued (in another case) for nonpayment of rent and for eviction, and Uribe brought this suit to settle the score. By order to show cause, the landlord sought to disqualify both Uribe's attorney (Bernard Weintraub) and the law firm at which Weintraub was "of counsel." The basis for the motion was that Weintraub, representing Uribe, had prepared and witnessed the original lease, and a later lease amendment now at issue.

The landlord argued that Weintraub was likely to be called as a "necessary witness" to testify about the "circumstances surrounding the lease agreement and the parties' intentions involved in agreeing to the amendment." More specifically, the landlord said that Weintraub's "credibility" was in issue concerning the parties' intent when they negotiated the lease and the amendment to the lease, and that Weintraub was needed to testify concerning other aspects of the negotiations, including whether the terms were translated so that defendant Pedro Hernandez could understand the agreement. Finally, mistakenly believing that the advocate-witness rule would disqualify Weintraub as a witness if he remained as an advocate, the landlord argued that allowing Weintraub to remain as Uribe's counsel and to be unavailable to testify would cause significant prejudice to the landlord's case.

Uribe countered that the landlord had made no showing as to why Weintraub's testimony would be necessary. Uribe also said he would be severely prejudiced if the landlord could "dictate who is their attorney in this litigation." Uribe pointed out that "when a lawyer invokes the need to call an opposing attorney as witness and then acts to disqualify the witness as counsel, such motions are subject to strict scrutiny because of the likelihood for abuse and use as a tactical device."

Judge Massaro, in a well reasoned opinion, had little difficulty denying the motion to disqualify. In determining whether to disqualify an attorney on advocate-witness grounds, the court said, it would be "guided, but not bound in discretion," by Rule 3.7. Then Judge Massaro recognized (as other federal and state courts have recognized) that the advocate-witness rule lends itself to "opportunistic abuse." Because of that potential abuse, a court "must guard against the advocate/witness rule's tactical use to disqualify counsel, and must subject disqualification motions to strict scrutiny." The moving party bears the burden of demonstrating specifically both (a) how and as to what issues prejudice may occur, and (b) that the likelihood that "prejudice" will occur is substantial. Finally, Judge Massaro set a standard:

Disqualification is appropriate only if proven by clear and convincing evidence that (1) the witness will provide testimony prejudicial to the client and (2) the integrity of the judicial system will suffer as a result.

The landlord in Uribe did not meet this burden. The essence of the question was "whether Weintraub simultaneously can function as witness and attorney, and whether the need to obtain counsel's testimony will place defendants at a disadvantage if Weintraub continues as Plaintiffs' counsel." The court understood that the parties disagreed about the proper interpretation of the lease, but "the factual dispute is insufficient by itself to deprive Plaintiffs of Weintraub's legal services," and the factual dispute provided no grounds for disqualifying the firm.

The landlord's apparent concern that Weintraub's role as counsel would prohibit the landlord from calling Weintraub as a witness was also misplaced. Citing several cases, the court said: "There is no universal prohibition against compelling a party's counsel to testify." The court believed that the landlord's motion to disqualify was centered upon the issue of translation (because the landlord's representative did not speak English), and that the landlord would be at a disadvantage if it could not question the drafter of the lease amendment, Weintraub. But "case law allows counsel's testimony in precisely this situation," so the court denied the landlord's motion to disqualify Uribe's counsel.

Moreover, "Defendants failed in their burden to show that disqualification of the lawyer would not work substantial hardship upon his clients." Thus, the court assumed that Weintraub would qualify for the "substantial hardship" exception in Rule 3.7(a)(3) even if the landlord could demonstrate that Weintraub ought to be called as a witness.

In any event, trial was still a long way off. The court therefore stated:

[C]ourts often permit attorneys who are potential witnesses to represent clients throughout pretrial proceedings including discovery and dispositive proceeding before considering disqualification. At this stage of the litigation, where the pleadings are incomplete, doubt remains that Attorney Weintraub in fact needs to be called as a witness. As a result, this motion can be viewed as premature

The landlord likewise failed to show adequate grounds for disqualifying Weintraub's law firm. In fact, the landlord did not raise any separate grounds for disqualifying Weintraub's firm, and the court saw no reason to analyze the impact of Rule 3.7(b).

One more point about the Uribe case is interesting. The court expressed concern that defendants had raised issues under DR 5-102(a) of the New York Code of Professional Responsibility but had not discussed Rule 3.7 of the current New York Rules of Professional Conduct, which replaced the disciplinary rules effective April 1, 2009. Is it really possible, after all of the articles and CLE programs and recent ethics opinions, that lawyers still do not know that our old Code of Professional Responsibility is history? Yes, unfortunately, it's possible. In fact, as we will see below, at least one judge is also oblivious to the new rules.

Decker v. Nagel Rice LLC

In *Decker v. Nagel Rice LLC*, 2010 WL 1050355 (S.D.N.Y., March 22, 2010) (Shira A. Scheindlin, J.), a legal malpractice case, the court was faced with a new twist. Rather than filing a run-of-the-mill motion to disqualify, defendants raised the advocate-witness rule as an objection to plaintiffs' motion seeking *pro hac vice* admission for a lawyer named James Lowy. The facts of this long-simmering litigation are complex. In brief, a November 2000 ski train fire in Austria killed 155 people.

Nagel Rice and several other lawyers and law firms filed a class action on behalf of American and foreign victims, but various things went wrong in the representation. (For example, after the court dismissed plaintiffs' claim against Siemens AG, Nagel Rice and its co-counsel failed to seek relief under rule 60(b) – and in 2004, after the second Circuit decertified the class and held that the foreign plaintiffs could pursue their claims as an opt-out class, Nagel Rice and its co-counsel never refiled on behalf of the foreign

plaintiffs.) In 2005, after the decertification, Nagel Rice and its co-counsel withdrew from representing the foreign plaintiffs.

At that point, James Lowy and some other lawyers took over the representation. Lowy continued representing the foreign plaintiffs in the District Court and on appeal, but the foreign plaintiffs never won anything.

In December of 2009, the foreign plaintiffs filed this legal malpractice action against Nagel Rice and its co-counsel (but not against James Lowy). Plaintiffs sought Lowy's admission *pro hac vice* in the Southern District of New York, but defendants objected on multiple grounds, including the advocate-witness rule. Judge Scheindlin agreed with the defendants and denied Lowy's request for *pro hac vice* admission.

Judge Scheindlin, always intelligent and illuminating, began her legal analysis by citing the second Circuit's decision in *Murray v. Metropolitan Life Ins. Co.* (*supra*) for the proposition that the advocate-witness rule is intended to address four concerns:

(1) the lawyer might appear to vouch for his own credibility; (2) the lawyer's testimony might place opposing counsel in a difficult position when she has to cross-examine her lawyer-adversary and attempt to impeach his credibility; (3) some may fear that the testifying attorney is distorting the truth as a result of bias in favor of his client; and (4) when an individual assumes the role of advocate and witness both, the line between argument and evidence may be blurred, and the jury confused.

Judge Scheindlin found all four concerns present here. She explained:

Lowy declares that he will testify that defendants engaged in malpractice while he and his co-counsel attempted to rectify those mistakes. Given Lowy's involvement with the underlying lawsuit ... this testimony may cause jurors and this Court to fear that he is distorting the truth as a result of bias in favor of plaintiffs or to protect his own interests. Defendants' counsel will vigorously cross-examine Lowy regarding the actions he took or failed to take as the foreign plaintiffs' counsel in the *In re Ski Train Litigation*. Defendants' counsel will seek to impeach Lowy's credibility with regard to whether it was defendants or Lowy that caused the foreign plaintiffs' alleged harm. Such cross-examination places opposing counsel in a difficult situation and will require Lowy to vouch for his own credibility. Lowy's simultaneous representation of plaintiffs and his need to defend his own conduct will "blur the line between argument and evidence [such] that the jury's ability to find facts [will be] undermined."

Furthermore, the court found Lowy's testimony to be "both necessary and prejudicial." Lowy did not merely play a passive role in the underlying *Ski Train* litigation. Instead, Lowy was one of only three attorneys that represented the foreign plaintiffs during the precise time when the alleged malpractice was ongoing. Lowy would need to explain why he did not take steps to minimize plaintiffs' alleged harm (such as by seeking certification of the foreign plaintiffs as an opt-out class in the wake of the second Circuit opinion or pursuing a judgment on appeal with regard to the dismissal of the claims against Siemens AG.) Such testimony "will necessarily be adverse to plaintiffs' position and undermine their claim that defendants' malpractice caused their harm," the court said. Because Lowy's testimony was

both “necessary and prejudicial,” the court found that Lowy “must be disqualified under the advocate-witness rule.” That led to this conclusion:

Although mindful of plaintiffs’ right to choose their own counsel, Lowy’s involvement in the litigation underlying this malpractice action presents one of the rare instances where an attorney’s presence poses a significant risk of trial taint. Therefore, Lowy is disqualified from representing plaintiffs in this action and plaintiffs’ motion to admit Lowy *pro hac vice* is denied.

Interpharm Inc. v. Wells Fargo, N.A.

Interpharm Inc. v. Wells Fargo, N.A., 2010 WL 1141201 (S.D.N.Y., March 25, 2010) (Henry Pitman, Magistrate Judge), arose after the 2008 collapse of a pharmaceutical company called Interpharm (the plaintiff here) that manufactured generic drugs. Interpharm alleged that its principal secured creditor, Wells Fargo, was responsible for its collapse because Wells Fargo, in violation of its lending agreements, “progressively imposed more draconian conditions on Interpharm as a condition to forbearing from foreclosing on its collateral.” Interpharm claimed that these forbearance conditions “became so restrictive that they prevented Interpharm from doing business and left it with no alternative to going out of business.”

Early in the litigation, based on the advocate-witness rule, Interpharm moved to disqualify a lawyer named Jeffrey Wurst and his former firm, Ruskin, Moscou, Faltischek, P.C. (“Ruskin, Moscou”), from representing Wells Fargo. The motion to disqualify cited Wurst’s alleged involvement in the various forbearance agreements. For example, Interpharm claimed that:

- Wurst attended a meeting between Interpharm and Wells Fargo on January 28, 2008 and made a 20-minute presentation concerning the conditions under which Wells Fargo would be willing to enter into a new forbearance agreement
- Wurst “took the lead” in negotiations between Interpharm and Wells Fargo with respect to at least three forbearance agreements
- Wurst refused to sign certain documents concerning the sale of Interpharm’s real property, which resulted in the buyer’s having to pay additional transfer taxes and a reduction in the net proceeds received by Interpharm
- Wurst had unspecified communications with one of Interpharm’s Directors, and with Interpharm’s Chief Recovery Officer, in which no other Wells Fargo representative participated

Based on all of this, Interpharm argued that Wurst and ruskin, moscou should be disqualified because (a) Wurst “ought to be called” as a witness on behalf of Wells Fargo, and (b) “may be called” as a witness on behalf of Interpharm to give testimony that “might be prejudicial” to Wells Fargo.

Magistrate Judge Pitman began his thorough and thoughtful analysis with two maxims found in many New York cases. First, because courts must guard against the tactical use of motions to disqualify counsel, such motions are “subject to fairly strict scrutiny,” particularly motions under the witness-advocate rule. Second, the movant therefore bears the burden of demonstrating “specifically how and as

to what issues in the case the prejudice may occur” and that the “likelihood of prejudice to the witness-advocate’s client is substantial.”

After quoting New York rule 3.7 in full, Magistrate Judge Pitman drew on the Second Circuit’s wisdom in *Murray v. Metropolitan Life Insurance Co.* and earlier cases. He first listed three principal concerns underlying the qualified prohibition against a lawyer serving as an advocate and a witness in the same proceeding: “(1) the lawyer will appear to vouch for his own credibility, (2) the lawyer’s testimony will put opposing counsel in a difficult position when he has to vigorously cross-examine his lawyer-adversary and seek to impeach his credibility, and (3) there may be an implication that the testifying attorney may be distorting the truth as a result of bias in favor of his client.”

Next, Magistrate Judge Pitman addressed both subparagraphs of Rule 3.7. To warrant disqualification of an individual lawyer under Rule 3.7(a), “it is not enough that the lawyer-witness is a member of the trial team. Rather, disqualification under subdivision (a) is warranted only where the lawyer-witness will actually advocate before the jury.” To warrant imputed disqualification of a lawyer’s firm under rule 3.7(b), the testimony must be “sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer’s independence in discrediting that testimony.”

However, because the concerns animating Rule 3.7(a) and (b) arise “only when an attorney appears as both witness and advocate before the fact finder,” numerous courts in the southern district of New York have held that the advocate-witness rule addresses only counsel’s participation at trial – it “does not bar counsel’s participation in pre-trial proceedings.”

Magistrate Judge Pitman then bluntly applied these principles to the situation at hand.

First, Interpharm had offered “no evidence whatsoever” that Attorney Wurst would offer any testimony or had any information that would warrant either his personal disqualification under Rule 3.7(a) or his firm’s disqualification under Rule 3.7(b). Interpharm confidently stated that Wurst, if not Interpharm’s “star witness,” would be “among the most prominent” – but Interpharm offered no evidence to support this “bombast.” At this stage, the court observed, there was no evidence even to suggest that Wurst has “unique, non-privileged testimony that would be favorable or unfavorable to either side.” Moreover, undeniable facts strongly suggested that plaintiff’s contentions about Wurst’s significance as a witness were “either baseless or little more than wishful thinking.” In practical terms, a release and a merger clause in the final forbearance agreement created “formidable barriers to the admission of oral testimony concerning the negotiations and the events that lead up to the final forbearance agreement,” so it was “far from clear at this stage that any testimony concerning what occurred during the parties’ multiple negotiating sessions will be admissible.” In addition, “the mere fact that a law firm assists in preparing an agreement that is later the subject of litigation does not automatically mean that the firm must be disqualified.”

Second, Magistrate Judge Pitman stated that disqualification would be “entirely premature” at this stage. The concerns that justify disqualification of an attorney who will be a witness “are not implicated at the pretrial stage,” and the matter was “still a long way from trial.”

In sum, since plaintiff had not demonstrated either that Wurst has “admissible, non-privileged and non-cumulative testimony that would even be of use to either side” or that “the concerns underlying the disfavor of advocate-witnesses are implicated at this early pre-trial stage,” he denied plaintiff’s motion to disqualify Wurst and Ruskin, Moscou, without prejudice to renewal at a later time.

Catalanotto v. Abraham

Catalanotto v. Abraham, 2010 WL 1340772 (Suffolk County Sup. Ct., March 29, 2010) (Peter H. Mayer, J.), is a vivid illustration of unacceptable conduct by lawyers and judges. The plaintiffs had purchased land and two new homes on Muffins Meadow Road from defendant Little Neck Development Corp (“Little Neck”). Unfortunately, the homes flooded when it rained and snowed. In this suit, plaintiffs alleged that the defendants carelessly, negligently and improperly constructed both homes, causing significant flood damage to the interior and exterior of the homes due to rain storms and snow melt. The three defendants were the President of Little Neck (Tom Abraham), Little Neck itself, and a lawyer named Kenneth Kirschenbaum who was the owner of record of the land on which the homes were built and who allegedly was personally involved in supervising the construction.

Despite Kirschenbaum’s status as a defendant, Kirschen-Baum and his law firm appeared on behalf of all three defendants. (Do you see any conflict here?) As if to demonstrate the dangers of multiple representation by a lawyer who has a personal stake in the case, Kirschenbaum proceeded to file a motion for summary judgment solely on behalf of himself, not his two co-defendants.

Defendants did not raise Kirschenbaum’s conflict, but Plaintiffs moved to disqualify Kirschenbaum and his firm on the grounds that Kirschenbaum was a “material witness” and had “competing interests” with his co-defendant clients. The court granted the motion.

The court began its analysis by focusing on Kirschenbaum’s glaring personal conflict of interest, quoting DR 5-101(a) and ECs 5-1, 5-2, and 5-3 in its analysis. (The court never suggested that ECs were merely “aspirational,” not binding. Nor did the court cite New York Rule 3.7.) In opposition to plaintiffs’ motion to disqualify, Kirschenbaum submitted an affidavit from his client saying, “I do not acknowledge a conflict and if there is any conflict I waive it.” One does not get the impression that Kirschenbaum burned the midnight oil studying informed consent. But this article is about the advocate-witness rule, so I will not linger on the personal conflict of interest (and I will just wonder in passing whether Kirschenbaum complied with the stringent requirements of DR 5-104 when he went into business with his clients in the deals underlying the litigation).

Turning to the advocate-witness rule, the court did not cite Rule 3.7. Rather, Justice Mayer quoted DR 5-102(B) (“[n]either a lawyer nor the lawyer’s firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer ... may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client”) (Emphasis added) and ECs 5-9 (“[a]n advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility”). The court then squeezed its entire analysis of the advocate-witness rule into two sentences:

Mr. Kirschenbaum's status as the property owner and his undisputed business relationship with builders Tom Abraham and Little Neck, coupled with the plaintiffs' claims that Mr. Kirschenbaum played an active role in the construction, render him a witness on material claims against him in this case. In addition, acting as attorney for himself and all other potentially liable defendants places him in the potential position of arguing his own credibility....

Oddly, the court made no finding that Kirschenbaum might be called as a witness "other than on behalf of the client" or that his testimony would or might be "prejudicial" to Kirschenbaum's clients. Absent these findings, the appropriate disciplinary rule was DR 5-102(a), not DR 5-102(B). Nevertheless, the court granted the motion to disqualify partly on the basis of DR 5-102(B), which was the only section of the advocate-witness rule it cited.

Is there something missing from Justice Mayer's analysis in Catalanotto? Yes, there is: he shows no awareness at all that the appellate divisions replaced the old Code of Professional responsibility with the New York rules of Professional Conduct on April 1, 2009, nearly a year before the opinion was issued. He does not even cite rule 3.7. Is it possible that a New York Supreme Court Justice is still totally unaware that the old disciplinary rules no longer govern the conduct of New York lawyers?

Ignorance of the new rules of Professional Conduct falls below the standards that we expect and deserve from judges. How can a judge be a role model for lawyers and a minister of justice for litigants if the judge does not even know the rules of ethics? I understand that judges occasionally miss important cases or overlook relevant rules. Every-body makes mistakes. But how can a judge miss the entire New York Rules of Professional Conduct? How can a judge explain that? (and what other changes in the law has Justice Mayer missed?)

I wondered whether Justice Mayer's opinion in Catalanotto was just an aberration, so I checked out his judicial profile in the New York Law Journal. I went through all twenty of the appellate cases arising from appeals of Justice Mayer's rulings since he was elected to the Supreme Court in 2006. I found that the second department had reversed Justice Mayer in whole or in part in 50% the cases listed (10 out of 20 times). That is an extraordinarily high reversal rate. Maybe it is time to repeal the judicial exemption to mandatory CLE found in 22 NYCRR § 1500.5(b)(1) (attorneys who do not practice law are exempt, and the "practice of law does not include the performance of judicial ... functions"). At least the courts should amend the CLE rules to require judges to take the minimum amount of legal ethics CLE credits mandated for all New York lawyers.

Conclusion: Expect Many More Rule 3.7 Decisions

Lawyers love to file motions to disqualify under the advocate-witness rule because conflicts are based on vague elastic terms such as "likely" and "significant" and "prejudice," and because the advocate-witness rules does not include any provision enabling a disqualified lawyer to cure an advocate-witness conflict by obtaining a client's informed consent. As the four cases in this article illustrate, courts sometimes ward off motions to disqualify on advocate-witness grounds as "premature," but courts also grant these motions with reasonable frequency. Given that New York Rule 3.7 differs significantly both from former DR 5-102 and from the ABA Model Rule, the proper interpretation of Rule 3.7 will likely take years to evolve. We can expect many more motions and many more decisions under Rule 3.7 as lawyers and courts hammer out the meaning of New York's unique version of the advocate-witness rule.

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