

You have presented a hypothetical situation in which A has a contract to purchase a parcel of land from B; however, this contract is contingent on the county's issuance of a building permit to A. When A, through his Attorney C, is unsuccessful in obtaining a permit, B retains Attorney D with Law Firm X and files a mandamus and declaratory judgment against the county. During the litigation, A cooperates with Law Firm X in their preparation for trial. In addition, A has several conversations with Attorney D regarding the status of this litigation as well as the status of A's contract with B.

B prevails at trial against the county and Attorney D notifies A of this development. A then makes demand for settlement; however, B, through his Attorney D, refuses to convey the parcel to A, contending that the contract is no longer valid.

A, now represented by Law Firm Y, files suit against B for specific performance of the contract. In this suit, B is represented once again by Attorney D of Law Firm X.

You have asked whether it is ethically permissible for Attorney D and/or Law Firm X to represent B in the specific performance suit; and should Law Firm Y bring this matter to the attention of Law Firm X.

Given the facts of this situation, the Committee believes that DR:5-102(B) is the appropriate and controlling rule involved. Disciplinary Rule 5-102(B) states that if an attorney, after undertaking employment in contemplated or pending litigation, learns it is obvious that he or a lawyer from 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.

Please see L E Op. No. 836 and L E Op. No. 866. Although they are not directly on point with the matter in question, the Committee opines that they are dispositive of the issue you have raised in your inquiry.

You also wish to know whether Law Firm Y has a duty to inform Law Firm X of a possible conflict of interest existing should Attorney D be called to testify. Since this is not an issue within the purview of the Standing Committee on Legal Ethics, the Committee feels that if you wish you may advise Attorney D as a courtesy, if he is not already aware of the possibility of a conflict.

Committee Opinion
September 1, 1988

Legal Ethics Committee Notes. – See Rule 3.7(c) stating that there is no longer disqualification of the entire firm when a lawyer must testify, unless representation would create a conflict under Rule 1.7 or Rule 1.9. Under Rule 3.7(c), this disqualification is not imputed to the lawyer's firm unless there is an actual conflict of interest.