

You have advised that Lawyer A represented the plaintiff in a personal injury action in which, prior to the scheduled trial, Lawyer A accepted, on behalf of his client/plaintiff, a settlement offer made by counsel for the defendants. The settlement agreement was confirmed in writing between Lawyer A and counsel for the defendants; however, several days later, counsel for the defendants advised that they would not perform the settlement agreement because of newly discovered information which allegedly showed that in depositions and responses to interrogatories, plaintiff made misrepresentations constituting fraud in the inducement of the settlement agreement. Lawyer A then filed breach of contract action against the defendant and his insurance carrier. The issues in the breach of contract action include (1) failure to perform the settlement agreement; (2) whether or not there were certain misrepresentations made by the plaintiff in the depositions and responses to interrogatories; and (3) whether or not counsel for defendants justifiably relied upon these representations. The suit prays for damages in the amount of the earlier agreed-upon settlement.

The fact that there was a settlement agreement has been established by the letters between Lawyer A and counsel for the defendants. The representations of plaintiff which counsel for the defendant alleges were relied upon in making their offer to settle are contained in the deposition transcript and in plaintiff's written responses to interrogatories. Counsel for the defendants have withdrawn from the representation of the defendants in the breach of contract action since they will testify as to their reliance upon representations made by the plaintiff. In addition, counsel for the defendants have recommended to the defendants' new counsel that Lawyer A be summoned to testify at trial and that the plaintiff's case file be subpoenaed. Lawyer A does not anticipate any issue arising that would necessitate testimony from him or any member of his firm and he intends to resist any request that he testify in this case.

You have asked the Committee to consider whether Lawyer A may ethically continue to represent plaintiff in the breach of contract action and in the original tort claim.

The appropriate and controlling disciplinary rule relative to whether Lawyer A may continue to represent the plaintiff in the breach of contract action is DR:5-102(B) which provides that, if 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.

Likewise, the Committee believes that it is ethically permissible for Lawyer A to continue to represent plaintiff in the original tort claim. There is no prohibition under DR:5-102 relative to withdrawal as counsel when a lawyer becomes a witness that would require the lawyer to withdraw as well from any substantially related matter pending litigation. However, the Committee opines that if it becomes apparent that the testimony given by Lawyer A tends to or will prejudice or damage his client, Lawyer A should move to withdraw from the original tort claim since the continued representation could therefore result in a course of conduct by the lawyer that would be inconsistent with zealous representation. (See DR:7-101(A)(3) and DR:2-108(A)(1))

Committee Opinion

May 2, 1989