

ATTORNEY AS WITNESS – FIDUCIARY
RELATIONSHIPS – *PRO SE*
REPRESENTATION: TRUSTEE'S *PRO*
SE REPRESENTATION WHEN IT IS
OBVIOUS THAT TRUSTEE/ATTORNEY
WILL HAVE TO TESTIFY IN
PROCEEDING.

You have asked the Committee for guidance regarding the propriety of a trustee's *pro se* representation when it is obvious that the trustee/attorney will have to testify in that proceeding. You have presented the following facts to the Committee for consideration.

Attorney A is trustee under a first deed of trust but was neither involved in the original transaction of sale nor in the preparation of the deed of trust. After having been named a substitute trustee, A foreclosed on the real estate and entered into a sales contract with B. Under the terms of the contract, the trustee may retain the purchaser's deposit to cover the costs of arranging a second foreclosure sale in the event that closing does not occur within thirty days. Closing did not take place as required and B has now brought suit in the circuit court against A, in his capacity as trustee, to rescind the sales contract and to recover the deposit, claiming that a potential environmental hazard on the property was not disclosed to him at the time of sale or prior to his having entered into the contract. You have further indicated that a second lien holder, a judgment creditor, is involved and you believe that the trustee may have a fiduciary duty to that lien holder to apply to his judgment any excess realized by the sale.

You have indicated that A wishes to represent himself in his capacity as trustee in this law suit; however, it is very likely that A will have to testify in this proceeding. You have asked if A could testify without violating DR:5-101(B) if his representation is construed as *pro se*. You have also asked that, if the Committee finds that it does not constitute *pro se* representation, would the exception in DR:5-101(B)(3) apply, since, as trustee, A will have to retain an attorney to represent him when A is already familiar with the proceeding and can more readily prepare with less expense than any other attorney. Furthermore, you posit that A's engaging counsel would constitute a hardship since A, in his capacity as trustee, has no funds with which to hire an attorney. You have informed the Committee that the first deed of trust noteholder is not a party to the suit filed against the trustee and therefore has not engaged counsel at this time.

The appropriate and controlling rules relative to your inquiry are DR:5-101(A) and DR:5-102(A) and (B). Disciplinary Rule 5-101(A) provides that a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances. Disciplinary Rules 5-102(A) and (B) provide that if a 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, he shall withdraw from the conduct of the trial, and his firm, if any, shall not continue the representation, except that he or a lawyer in his firm may continue the representation and may testify in the circumstances enumerated in DR:5-101(B). Under DR:5-102(B), 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, the lawyer may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The Committee believes that the mandates of the Code of Professional Responsibility are appropriately applicable to situations in which a lawyer is serving in other than an attorney-client relationship, e.g., as a fiduciary. The conduct of trustees with regard to the

sale of trust property has been defined by the Supreme Court of Virginia which articulated that (1) a trustee under a deed of trust is a fiduciary for both debtor and creditor and must act impartially between them; and (2) a trustee must not place himself in a position where his personal interest conflicts with the interests of those for whom he acts as a fiduciary. *Smith v. Credico Indust. Loan Co.*, 234 Va. 514, 516 (1987), cited in *Smith v. U.S.*, No. 5-83-00384, slip op. at 15 (Bankr. W.D. Va., March 30, 1989). The Committee finds it inconsistent, however, to equate a trustee's duty of acting impartially with any attorney-client relationship. Nevertheless, the Committee is of the opinion that the requirement that a trustee not assume positions involving conflicts with his personal interest is instructive in determining the propriety of the trustee/attorney's conduct as articulated under DR:5-101(A) and DR:5-102(A) and (B).

The Committee is of the view that, since the trustee is precluded by *Smith* from assigning his loyalty exclusively to either the debtor or the creditor, he has not therefore been offered "employment" as the term is used in Disciplinary Rules 5-101 and 5-102, and since the trustee has been sued in his (individual) capacity as trustee, he may represent himself *pro se* in the proceeding described. Acting in his *pro se* capacity, therefore, he is not precluded from testifying in the matter. However, to preclude any semblance of impropriety under either DR:5-101(A) or the second condition articulated in *Smith*, the Committee strongly urges that the trustee/attorney make full disclosure to all parties involved of his personal interest as a defendant in the rescission suit and secure the parties' consent for him to proceed *pro se*.

Committee Opinion
January 4, 1990