

You have presented a hypothetical situation in which the husband of an attorney's client died as a result of gunshot wounds inflicted upon him in July 1988 during an altercation between the victim, the client and the client's mother. The client's mother confessed to shooting the victim, was charged with murder and convicted of involuntary manslaughter. The client was neither charged nor convicted of any criminal conduct as a result of these events.

You advise that the victim was a wealthy individual who directed in his will that his estate be divided equally between the client, the child of the client's marriage with the victim, and each of the two children of the victim by a former marriage (the stepchildren). Shortly after the victim's death, his business was sold and the proceeds of that sale were placed in an escrow fund pending the resolution of certain litigation filed against the victim's business prior to its sale. Pursuant to the terms of the will, the client was entitled to twenty-five percent of that escrow fund upon its release.

In the spring of 1990, a wrongful death action was filed against the client and her mother by the estate of the victim, claiming that they had conspired and caused the victim's death. The attorney was retained by the client to defend her in that litigation and agreed to do so on an hourly rate plus costs.

You indicate that the litigation was extremely complex and involved the deposition and trial testimony of scores of witnesses. The trial itself took approximately three weeks and resulted in a verdict against the client and her mother in the amount of three million dollars.

Furthermore, you indicate that, several months prior to the commencement of the trial, the client advised the attorney that she was no longer able to pay his fees as incurred. In return for the attorney's agreement to continue the representation, the client signed several credit line notes and assigned to the firm a security interest in that portion of the escrow fund to which she was entitled pursuant to the terms of the victim's will.

Following the jury verdict, a judgment was entered against the client in the amount of three million dollars and has since become final. When the escrow fund was released, the attorney representing the estate was advised by the executor that the attorney representing the client claimed a security interest in the client's portion of the escrow fund to the extent of the fees incurred by the attorney in her representation. The security interest was pursuant to the credit line notes and assignment referred to above.

Upon learning of the security interest, the other three beneficiaries of the victim's estate filed a Chancery action against the attorney, the firm and the client seeking the following relief: (1) the imposition of a constructive trust upon the proceeds of the escrow fund otherwise due and payable to the client; (2) the setting aside of the assignment to the attorney as a fraudulent conveyance; and (3) the setting aside of the assignment to the attorney as a voluntary conveyance in return for consideration not deemed valuable at law.

You state that both the attorney and the client vehemently contest the litigation. You also state that the attorney is defending himself and his firm pro se and that he has filed the initial responsive pleadings on behalf of his client. The attorney representing the other beneficiaries of the estate has filed a motion to disqualify this attorney as counsel for his

client on the grounds that the attorney will be called as a witness to testify at trial. You indicate that this motion has not yet been ruled upon by the trial judge.

You have asked the Committee to opine whether, under the facts of the inquiry, it would be proper for the attorney to continue as counsel for himself, the firm, and the client when the attorney will be called to testify at trial.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-101(B) and DR:5-102(A) and (B) which provide, respectively, that if prior to or after undertaking employment in contemplated or pending litigation, 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 representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR:5-101(B)(1) through (3); and if, after undertaking employment in contemplated or pending litigation, 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. The exceptional circumstances of DR:5-101(B)(1) through (3) which permit continuation of representation include testimony which relates solely to an uncontested matter or a matter of formality, testimony which relates solely to the nature and value of legal services rendered in the case by the lawyer, and, as to any matter, if failure to continue representation would result in a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

It is axiomatic that an individual may try his own case and testify on his own behalf. An individual's professional status as an attorney does not deprive the litigant of that right. Thus, when an attorney is a party to a lawsuit, particularly when called upon to defend himself, the conflict between advocate and witness do not apply and the lawyer may conduct the trial of the case although he may be a witness for himself. However, if the lawyer provides testimony which involves confidential communications between him and his co-defendants/clients and if such testimony is adverse to his clients, the lawyer may not continue to represent his co-defendants. See Alabama State Bar Legal Ethics Opinion 82-634, ABA/BNA Law. Man. on Prof. Conduct, 801:1036.

Thus, the Committee opines that it is not improper for the attorney to continue to represent himself, his firm, and the client when he will be called to testify, unless and until it is apparent that such testimony will be prejudicial and adverse to his client. In that case, attorney would have to withdraw from representing his client.

The Committee is aware that, in certain circumstances, however, it would be improper for an attorney to represent his firm or other attorneys in his firm. See, e.g., LE Op. 958, LE Op. 1051, LE Op. 1315.

Committee Opinion  
December 14, 1992