

The Legal Ethics Committee was asked whether an attorney should withdraw from employment as trial counsel when he or a lawyer ought to be a witness in the case. The committee opined that DR:5-102(A) would mandate that the lawyer withdraw as counsel unless one of the circumstances enumerated in DR:5-101(B)(1), (2) or (3) existed. Under the facts of the inquiry the only possible exception which might apply is DR:5-101(B)(3) which allows an attorney to testify if withdrawal would "work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case." The committee referred to ABA Formal Opinion No. 339 for clarification of the term "substantial hardship."

Three instances where a "substantial hardship" might exist are (1) when a complex suit had been in preparation over a long period of time and a development which could not be anticipated makes the lawyer's testimony essential; (2) when it would be manifestly unfair to the client to be compelled to seek new trial at substantial additional expense and perhaps to seek delay of the trial; or (3) when a long or extensive professional relationship with a client may have afforded a lawyer or firm such extraordinary familiarity with the client's affairs that the value to the client of representation by that lawyer or firm in a trial involving those matters would clearly outweigh the disadvantages of having a lawyer, or a lawyer in the firm, testify to some disputed and significant issue.

The committee opined that the client's desire to have the attorney continue representation even though the attorney might be called as a witness was not sufficient to warrant a "substantial hardship." [DR:5-101(B)(1), (2) and (3); ABA Formal Opinion No. 339]

Committee Opinion
September 1, 1987