

Committee Opinion  
March 2, 1988

LEGAL ETHICS OPINION 1048

ATTORNEY AS WITNESS.

You advise that you prepared a will on behalf of a client who died in 1987. You believe that the original will was left in your custody, but are unable to locate it. It appears that the will have to be proven and that you will have to testify regarding the signing of the will and the fact that you are unable to locate it. You also advise that your firm represents the beneficiaries of the will of your former client without charge in the suit to prove the will.

You believe that your testimony would not be adverse to the interests of the beneficiaries and therefore constitutes an exception as provided in DR:5-102(B). You believe that your testimony would be helpful and essential to their case. You also believe that your case is similar to that addressed in LE Op. 836, which provided that it was not unethical for an attorney to continue representing a defendant when the attorney's law partner prepared the defendant's deed, which was the subject matter of the suit, and when the attorney's partner would be called as a witness, providing that the testimony of the attorney/partner as a witness was not prejudicial.

You wish to know whether or not you must withdraw from representing the beneficiaries of the will, due to the fact that you will probably be called as a witness regarding the signing of the will and your inability to locate the original will.

Disciplinary Rule 5-102(A) [ DR:5-102] states "If, 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). "Disciplinary Rule 5-101(B)(1) states that "a lawyer may continue representation when he will be called as a witness if the testimony will relate solely to an uncontested matter or to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony."

In this instance, however, the attorney will be testifying as to the validity of the will. From the facts provided in your letter, it appears that this is a contested matter. Therefore, the Committee opines that you should withdraw from representing the beneficiaries of the will. The facts which you provide in your letter differ from those of LE Op. 836. In LE Op. 836, the attorney was called as a witness for someone other than his client. In that situation, DR:5-102(B) was applicable. Disciplinary Rule 5-102(B) states that "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."

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