Committee Opinion
April 1, 1988

LEGAL ETHICS OPINION 1064 ATTORNEY AS WITNESS.

You have furnished the Committee the following facts:

In 1986, I represented a Surety Company which had issued a license bond required by Fairfax County and issued to a home improvement contractor here in Fairfax. The surety and the contractor had been sued as co-defendants in a suit for money damages in the Fairfax County General District Court filed by a homeowner who disputed certain work performed by the contractor.

Although the liability of the surety was questionable in the case, I filed a cross-claim against the contractor for common law exoneration and indemnity under an express agreement executed concurrently with his bond application. Prior to trial, I met with the contractor, explained that I was adverse to him in the case but solicited his cooperation in defending the underlying claim on the merits since he and the surety had a mutual interest in avoiding a judgment for the plaintiff. I enjoyed a good working relationship with the contractor but at all times made it clear to him that I did not represent him.

At trial, my client was dismissed following opening statements and the attorney from our firm who tried the case physically left the courtroom after the dismissal. Prior to doing so, however, the surety's cross-claim against the contractor was dismissed with prejudice upon our motion.

The contractor remained in the courtroom and successfully defended himself. Subsequently, the plaintiff appealed the adverse judgment to the circuit court. Since we understood that no appeal was taken as to the surety, our cross-claim was never appealed. After the case had been pending in the circuit court for several months, I received a Term Day Praecipe asking that the case be set for trial. The Praecipe contained a certificate of service listing me as “counsel for the defendant”. Immediately upon receipt of the Praecipe, I wrote plaintiff's counsel to confirm that I did not represent anyone in the case other than the surety, and to confirm an earlier agreement that no appeal would be pursued as to the surety. I enclosed with this letter a final order dismissing the surety with prejudice. This was endorsed and returned to me. The order was submitted to the court and entered.

The plaintiff admits that no notice that the case was being set for trial was ever given to the contractor. In fact, plaintiff's counsel recently has indicated to me that he did not feel any notice was necessary.

The case was set for trial without notice to the contractor and on December 1, 1987, the plaintiff appeared with counsel and obtained a Default Judgment against the contractor. Plaintiff's counsel allowed 30 days to pass so that the judgment would become final and in January of this year, wrote the contractor demanding payment on the judgment and threatening execution against his assets.

Following receipt of this letter, the contractor arranged an appointment with me and requested that I represent him in having the judgment vacated and proceeding to trial on the merits. Prior to meeting with the contractor, however, I reminded him that I had been adverse to him earlier in the case. Nevertheless, he requested that I accept employment since I was familiar with the facts of the case and would be able to prepare for a trial on the merits at less expense than new counsel.

Subsequently, I spoke with the surety, which is a regular client of our firm, and after thoroughly discussing the factual background of the case, obtained their permission to represent the contractor.

I believe it is important to note that the surety's only relationship to the contractor was its liability under the License Bond which had been issued. This type of bond, even if applicable to this case, is not issued for the benefit of the contractor; instead, the assured parties are the county and individual citizens of the county. There is no obligation on the surety's part to defend claims brought against its principal, in this case, the contractor. Similarly, I believe it should also be noted that at the time I was retained to represent the contractor, all potential claims which the surety may have had against the contractor had been dismissed with prejudice in the general district court and not appealed. For all practical purposes the surety's involvement in the case was terminated in the general district court. Certainly, any adverse claim which he had against the contractor was eliminated when the cross-claim was dismissed in the lower court and not appealed.
I filed a Motion to Vacate the Default Judgment on behalf of the contractor and appeared in circuit court for argument. Prior to hearing the case, the judge who had entered the Default expressed his opinion that I could not represent the contractor since I had previously filed a cross-claim against him in the same case in which I now attempted to represent him, notwithstanding the court's own acknowledgment that circuit court proceedings were *de novo*.

You wish to know whether in a *de novo* proceeding, it is proper for an attorney to represent a litigant against whom he had previously filed an adverse claim arising from the same factual circumstances; and secondly, whether it is improper for an attorney to represent a litigant in a case in which he is a potential witness, even though the substance of his testimony is not disputed by the opposing party.

In response to your first question, DR:5-105(D) states that a lawyer who has represented a client in a matter shall not thereafter represent another person in the *same* or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure. You have advised that your former client, the surety, has consented to your representation. Consequently, the Committee opines that it is not improper for you to represent the contractor in this matter.

In response to your second query, DR:5-101(B)(1) states that a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the

employment and he or a lawyer in his firm may testify 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 your letter, you state that opposing counsel admitted receiving the letter disclaiming your representation of the contractor and acknowledged that you had never represented the contractor. Based upon your assertions that your testimony could only relate to an uncontested matter and that you believe no substantial evidence would be offered in opposition, the Committee opines that DR:5-101(B)(1) would not be violated in this situation.

The Committee, however, refers you to DR:5-102(B), which states that if, after undertaking employment in conflict 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 the behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.