

Committee Opinion  
September 9, 1988

LEGAL ETHICS OPINION 1136

ATTORNEY AS WITNESS:  
WITHDRAWAL IF IT WILL CAUSE  
SUBSTANTIAL HARDSHIP ON THE  
CLIENT.

Your inquiry, which has apparently been reviewed and approved by all interested parties, presents the following set of facts. Attorneys X and Y, not members of the Virginia State Bar, respectively represent two separate defendants before a United States District Court in Virginia in a criminal action for the same activities. Attorneys X and Y have apparently represented the defendants on the issues involved for more than four years. Attorneys X and Y claim that they, on behalf of their clients, reached agreements with Internal Revenue Service agents in another state to provide their respective clients with transactional immunity from criminal prosecution for tax violations. The IRS agents dispute the position. Among the issues under the pending indictments is the issue of whether or not such immunity was granted. The issue is a material and partially dispositive matter. A pre-trial hearing has been set to resolve the dispute over transactional immunity.

Attorneys X and Y have stated that they are the best, and in some cases, the only witnesses to the conversations with the IRS agents, making them necessary witnesses to the disputed issue. Attorneys X and Y take the position that the immunity matter in issue is pre-trial, and is not governed by DR:5-102. Alternatively, they assert that the exceptions in DR:5-102, found in DR:5-101(B)(3), apply under the facts. The issues require no particular subject matter expertise, and any capable, experienced trial attorney could provide competent representation on behalf of the two criminal defendants. This issue is apparently not a new issue in the case.

As to the first position taken by defense attorneys that the immunity matter in issue is a pre-trial one, and is not governed by DR:5-102, the opinion of the Committee is that the Code of Professional Responsibility does not provide a distinction between testifying in pre-trial issues and testifying at trial.

As to whether or not attorneys X and Y fall within the exceptions offered by DR:5-101(B)(3) to DR:5-102, the Committee is without sufficient information, other than conclusory statements apparently not agreed to by all parties, to say that a substantial hardship would be worked on the clients should attorneys X and Y withdraw from representation.

The strictures of DR:5-102 and DR:5-101 are directed against the assumption or continuance of representation if an attorney needs to testify on behalf of his client. The roles of adversary and witness are inconsistent. Withdrawal must be effected unless it 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." DR:5-101(B)(3). Ethical Consideration 5-10 [ EC:5-10] provides language to determine what constitutes a substantial hardship:

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Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. ... In the exceptional situation where it will be manifestly unfair to the client for the lawyer ... to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his ... withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that ... withdrawal will impose an unreasonable hardship upon the client before the lawyer ... continues the employment. Where the question arises, doubts should be resolved in favor of a lawyer testifying and against his ... continuing as an advocate.

The emphasis added by the last sentence provides a necessary guide for the facts as presented by your inquiry. The Committee therefore opines that, under the limited facts presented, it would be inappropriate for attorneys X and Y to continue as counsel to their respective clients and testifying on the issues.

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**Legal Ethics Committee Notes.** – See Rule 3.7(c) stating that there is no longer disqualification of the entire firm when a lawyer must testify, unless representation would create a conflict under Rule 1.7 or Rule 1.9. Under Rule 3.7(c), this disqualification is not imputed to the lawyer's firm unless there is an actual conflict of interest.