

Committee Opinion  
November 23, 1988

LEGAL ETHICS OPINION 1184

ATTORNEY/CLIENT RELATIONSHIP –  
CONFLICT OF INTEREST – WITNESS:  
ATTORNEY AS EXPERT WITNESS FOR  
PLAINTIFF AND DEFENDANT IN A  
RELATED MATTER.

You have advised that, prior to your admission to the Virginia State Bar, you were an active member of the Sudanese Bar. During that time, in June, 1985, you executed an affidavit as an expert witness for plaintiffs in an action which arose out of a contract and subcontract between parties located in Sudan, Switzerland, Great Britain and the United States. The subject of the affidavit was whether Sudan would be a convenient forum for the action and you opined that it would not. Subsequently, following your admission to the Virginia Bar in 1986, you executed an affidavit for defendants on the issue of Sudan's statute of limitations in a different but related action. Defendants have now requested that you execute an affidavit on Sudan's statute of limitations in the case in which you previously opined for plaintiffs on the issue of convenient forum.

You wish to know whether executing the affidavit presently requested by defendants would result in any conflict of interest or other ethical impropriety.

The key principle involved in the facts and question you have presented is whether or not an attorney-client relationship existed between you and either the plaintiffs or defendants. The existence of such a relationship is determined by the definition found in Part Six, Subsection A of Section I of the Virginia Rules of Court. A copy of that definition is attached for your review. The determination of whether you enjoyed an attorney-client relationship or were merely an expert witness is beyond the purview of the Committee. You will need to review the extent of your contact and the surrounding circumstances in light of the definitions contained in the Rules of Court in order to determine the relationship.

Should you find that an attorney-client relationship exists, DR:5-105 would govern any future activity you may have with the parties. Furthermore, it would also raise concerns over your affidavit executed in 1988 for the defendants since it was for a substantially related case. Under DR:5-105, a lawyer may accept or continue employment for multiple clients only where each client consents to the representation after full disclosure and where it is obvious that the lawyer can adequately represent the interests of each. In addition, the requirement, under Canon 9, that a lawyer avoid even the appearance of professional impropriety should be a consideration, although the Committee believes that, in this situation, compliance with the provisions of DR:5-105 would have mollified any inherent appearance of impropriety. Finally, the Committee would also direct your attention to the requirements of preservation of a client's confidences and secrets under DR:4-101(A) and (B).

Should you find that no attorney-client relationship existed between you and the plaintiffs at the time of the execution of your affidavit, and that you served purely as an expert witness, the Committee opines that the Code of Professional Responsibility is

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inapplicable to the situation. The Code does not in any way preclude an individual from serving as an expert witness for both parties in an action, although there may be certain evidentiary concerns regarding appropriate discovery procedures. Those concerns, however, are beyond the purview of the Committee.

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