

LEGAL ETHICS OPINION 1359

ATTORNEY AS WITNESS – IN-HOUSE  
COUNSEL – HEARING OFFICER: IN-  
HOUSE COUNSEL REPRESENTING  
EMPLOYER WHEN THE IN-HOUSE  
COUNSEL WILL BE A WITNESS;  
PROPRIETY OF APPEALS EXAMINER  
IGNORING OPPOSING COUNSEL'S  
OBJECTION TO SUCH  
REPRESENTATION.

You have asked the Committee to consider the propriety of in-house counsel representing his employer at a Virginia Employment Commission (VEC) hearing when the in-house counsel will be the only witness for the employer. In addition, you wish to know whether it is improper for the lawyer/appeals examiner for the VEC to ignore an objection to such testimony.

For the purposes of this opinion, the Committee will assume that in-house counsel is a Virginia attorney, since a non-lawyer or a foreign attorney may represent a party before the VEC, and, as such, neither the non-lawyer or foreign attorney can be required to adhere to the Disciplinary Rules.

The appropriate and controlling Disciplinary Rules relevant to your inquiry are DR:5-101(B) and DR:5-102(A). Disciplinary Rule 5-102(A) provides that if, after undertaking employment, an attorney learns, or it becomes 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 the representation, unless one of the conditions enumerated in DR:5-101(B) exists. Disciplinary Rule 5-101(B) provides that it is permissible for an attorney to accept employment even if he knows or it is obvious that he or another attorney in his firm ought to be called as a witness if (1) the testimony will relate solely to an uncontested matter or to a matter of formality and no substantial evidence will be offered in opposition to the testimony; (2) the testimony will relate solely to the nature and value of the legal services rendered in the case by the lawyer or his firm to the client; or (3) as to any matter, if refusal 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.

As indicated in the Committee's prior LE Op. 329, for the purposes of ethical conduct, administrative hearings constitute litigation as contemplated by DR:5-102. The Committee further directs your attention to LE Op. 976 which in the Committee's view is dispositive of your inquiry. In that earlier opinion, the Committee found that, where trial counsel ought to be called as a witness on behalf of his client, DR:5-102(A) would mandate that trial counsel withdraw from the proceeding unless one of the circumstances enumerated in DR:5-101(B) existed. The only possible exception which could have applied under the facts of that inquiry was an analysis of whether the withdrawal would "work a substantial hardship on the client because of the distinctive value of the

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lawyer or his firm as counsel in the particular case." ( DR:5-101(B)(3)) The Committee concluded by stating 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." (See also ABA Formal Opinion No. 339 and LE Op. 1136)

Therefore, if the Virginia in-house counsel's testimony will be relevant to the central issue of the cause of action, it would be improper for the in-house counsel simultaneously to engage or continue the representation of his client/employer in the VEC proceeding. Only if the testimony will be related solely to the nature and value of the legal services rendered, or in the instance where withdrawal would result in substantial hardship to the client, may an attorney represent a client and be called as a witness to testify on his/her behalf. (See LE Op. 723, LE Op. 879, LE Op. 907, LE Op. 1162) The Committee has consistently been of the view that the role of an advocate and of a witness are inconsistent; an advocate advances or argues the cause of another, while a witness states facts objectively. EC:5-9. Where there is doubt as to whether an attorney should testify on behalf of his client, the attorney should consider the interests of the client and if the client's interests would be better served by his attorney's testimony than by his representation, the attorney should withdraw and should side on the issue of testifying.

As for the matter of the attorney/hearing examiner's conduct, the Committee believes that decisions of trial procedures in response to a motion for disqualification of opposing counsel are in the discretion of the court. Therefore, regardless of whether a conflict may have existed, it is beyond the purview of the Committee to opine as to the propriety of the finder of fact or the court's denial of a motion for disqualification, the basis of which raised an ethical violation.

While you have not inquired about your duty to report, please be advised that all lawyers having knowledge that another attorney has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects have an obligation under DR:1-103(A) to report such knowledge to the appropriate authority. Whether an attorney's conduct is such that it raises a "substantial question as to that lawyer's fitness to practice law in other respects" is a case-by-case decision which should be made after consideration of the facts and analysis of the impact on the offending lawyer's fitness to practice law. (See LE Op. 1308 and *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (1988))

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**Legal Ethics Committee Notes.** – Editor's Note: Rule 3.7(a) uses the term "adversarial proceeding" rather than the old Code's "trial".

**Editor's Note.** – Overruled in part by L E Op. No. 1528. See footnote 1 of the opinion for scope.