Committee Opinion
January 14, 1991

LEGAL ETHICS OPINION 1386

CONFLICT – ATTORNEYAS WITNESS: ATTORNEY REPRESENTING SPOUSE IN ACTION AGAINST LENDER AND LOAN PROCESSOR WHILE TESTIFYING ON BEHALF OF CLIENT/SPOUSE.

You have informed the Committee that your wife ("W") applied for a low interest loan to purchase a home in her own name alone, which loan was denied based on several objections of the lender ("D"), including the indication that credit would not be granted on the terms and conditions requested by W since D refuses to grant loans to a married person unless the person's spouse joins on the application as co-borrower. You further indicate that each reason stated on the denial, except for the reason regarding co-borrowers, was addressed, explained, or corrected. D re-reviewed the application and ultimately approved the loan upon the condition that W's spouse join as co-borrower. Apparently, that condition was satisfied, since you indicate that the loan was granted. You point out that D's handling of the application subjected it, and its loan processor ("D2"), to liability under the (federal) Equal Credit Act and W has filed actions against D and D2 in federal court. You indicate that W's action against D2 has been settled and will be dismissed.

You advise further that you were a party to conversations with an employee of D during which the employee stated that D does not grant loans to one spouse without the other as co-borrower. Thus, you indicate that it appears possible that it would be in W's interest to have you testify or that D may call you as a witness in the case. However, you have informed the Committee that you and W have contacted approximately a dozen lawyers in an attempt to secure representation for W. Each has refused to accept representation for a variety of reasons: some have conflicts because of having worked with or for either D or the loan processor ("D2"); others indicated it was outside their area of practice; and still others indicated that it was not economically viable to accept representation.

You have asked the Committee to opine as to whether the lack of available alternative representation constitutes a substantial hardship so as to permit you to both represent W and testify as to your conversation with D's employee.

The appropriate and controlling disciplinary rule is DR:5-102(B), which mandates, in pertinent part, that a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he ought to be called as a witness, except if, among other circumstances, refusal would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case. The rationale underlying the preclusion of an attorney serving as witness is described in Ethical Consideration 5-9 [EC:5-9] which finds that "the roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." Various procedural safeguards designed to provide a full and fair hearing become threatened when the

attorney also serves as witness: the lawyer-witness may not be excluded from the courtroom as other witnesses; the usual course of direct and cross-examination cannot be carried out; and the lawyer-witness is in the unique position of having to argue his own credibility. (See, e.g. Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P.2d 296, 300 (Ariz. 1981).)

Further guidance is available through EC:5-10 which states that, in making a decision as to whether to continue representation when the lawyer is to be a witness, the lawyer should determine:

> "the personal or financial sacrifice of the client that may result from his refusal of employment ... 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 refusal ... will impose an unreasonable hardship upon the client before the lawyer accepts ... the employment."

The Committee is of the opinion that the plain language of the exception cited in DR:5-101(B)(3), permitting the lawyer to act as both advocate and witness if the lawyer's refusal of representation would "work a substantial hardship on the client", requires that the hardship so created be specifically related to the distinctive value of the lawyer as counsel in the particular case. (See In re Lathen, 654 P.2d 1110, 1114 (Or. 1982); see also Federated Adjustment Company, Inc. v. Sobie, 455 N.Y.S.2d 820, 822 (1982).)

From the facts you have stated, the Committee is without sufficient information regarding the reasons that the attorneys approached declined to accept representation. Therefore, the Committee cannot determine that there is any distinctive value to your serving as both witness and advocate for your wife so as to constitute a substantial hardship. Thus, in these specific circumstances, the apparent lack of available alternative representation is not sufficient to permit you to serve as both attorney and witness.