

You have presented a hypothetical situation in which a law firm handles the collection of unpaid accounts for numerous retail, commercial and professional practices. Although the large majority of the firm's cases come through a local collection agency, the firm has a signed agreement with the individual clients concerning its representation of them, as well as the basis upon which its fees are to be paid.

In most of the firm's collection cases, its procedure is to file a civil warrant in the General District Court and to mail a copy of the civil warrant to the debtor/defendant. No affidavit of the account is filed with the warrant or with the Court. On the return date of the warrant, a member of the firm will appear in the General District Court, having reviewed the file and having information, either from the client or through the collection agency, which reflects the balance owing on the account. In most cases, the matter is not contested and the defendant does not appear. In some instances, however, the defendant does appear but does not dispute the amount owing. In the instances where the defendant does appear and disputes the amount owing, a trial date is set.

You further indicate that, in those instances in which the defendant does not appear, the judge of the General District Court places the attorney under oath and the attorney then testifies as to the balance owing on the account. The attorney's knowledge of the account and the balance owing is based upon information provided to the firm, either directly by the client or through the collection agency employed by the client. In the circumstances you describe, based on the attorney's testimony and the fact that the defendant does not appear to dispute the account, judgment then is granted to the plaintiff/creditor.

You have asked the Committee to opine whether, under the facts of the inquiry, it is proper for an attorney to be placed under oath and testify as to the accuracy of a collection client's account, based upon information provided to the attorney by the client, when the matter is not contested by the defendant.

The appropriate and controlling disciplinary rule related to your inquiry is DR:5-101(B)(1), which provides 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 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.

The Committee has previously opined that an attorney/co-executor/witness must discontinue representation of a client unless the finder of fact determines that the attorney/co-executor's testimony will relate solely to an uncontested matter or to a matter of formality to which no substantial opposing evidence will be offered. (See LE Op. 723)

Committee Opinion
September 16, 1991

The Committee believes that the propriety of the representation you describe turns on whether or not the matter before the court is uncontested. Under the facts you have presented, it is the opinion of the Committee that, although the testimony to be offered by the attorney relates to the central issue of the case, it is being offered in an uncontested matter given the defendant's failure to appear. Furthermore, since the testimony is only offered after the defendant fails to appear, there is no reason to believe that substantial evidence will be offered in opposition to the attorney's testimony. Thus, the Committee opines that it is not improper for an attorney to be placed under oath and testify as to the accuracy of a collection client's account, when the matter is considered uncontested as a result of the defendant's failure to appear.