

Committee Opinion
October 19, 1992

LEGAL ETHICS OPINION 1474

ATTORNEY AS WITNESS:
ATTORNEY/MECHANICS' LIEN AGENT
REPRESENTING CONTRACTOR AND
TESTIFYING AS TO CLAIMS AND
DISBURSEMENTS.

You have presented a hypothetical situation in which law firm A acts as mechanics' lien agent, pursuant to recently enacted Va. Code § 43-4.01, for its long-time builder/developer client B. In some instances, A disburses funds pursuant to Va. Code § 43-4.01(F). In other instances, A simply receives notice pursuant to Va. Code § 43-4.01(D).

You indicate that a mechanics' lien is filed against a construction project for which A has been designated as mechanics' lien agent for B. The bill of complaint is timely filed and B asks A to undertake representation on its behalf in defense of the bill of complaint.

You have asked the Committee to opine whether, under the facts of the inquiry, it is proper for the firm to represent the client in defense of the bill of complaint where it is possible or probable that the law firm will be called to testify as the mechanics' lien agent. You also inquire whether the testimony qualifies for the exception under DR:5-101(B)(1).

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:5-101(B), which states 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 undertake the employment and he or a lawyer in his firm may testify under certain enumerated circumstances, the most pertinent of which circumstances includes that in which 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. Further guidance is available through Ethical Consideration 5-9 [EC:5-9] which exhorts that "[a]n advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent "; and EC:5-10 which indicates that, when the question arises as to the lawyer's accepting or retaining employment while also needing to be called as a witness, "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate".

The Committee recognizes that the attorney, as mechanics' lien agent, may be in the best position to acknowledge receipt of notice of claims and testify as to the disbursement of funds in satisfaction of such claims. Thus, the Committee believes that it is obvious that the attorney ought to be called as a witness in the matter.

The Committee has previously opined that an attorney may act as a witness for his client if the testimony relates solely to an uncontested matter or to a matter of formality. See, e.g., LE Op. 1064, LE Op. 1424. The Committee takes notice that the referenced mechanics' lien statute requires perfection of a lien through proper notice and an itemized

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statement which includes payments made and balance due. Based upon those statutory requirements, therefore, the Committee is of the opinion that the attorney's testimony as mechanics' lien agent would relate to central issues in the case rather than to matters of formality. The Committee recognizes that the attorney does not contest that the bill of complaint has been timely filed; however, the Committee is of the view that, although the timeliness of the bill may be uncontested, the sufficiency of notice, the itemized statements, and the record of payments made may still be contested issues. Thus, since there is no information at the outset of the representation as to whether those issues will be contested, the Committee opines that it would be improper and violative of DR:5-101(B) for A to undertake representation of B in defense of the bill of complaint. Furthermore, the Committee notes that the mandates of DR:5-101(B), precluding an attorney from serving as both advocate and witness, do not include any provision for a cure by consent of the parties. Finally, the Committee reiterates the posture of EC:5-10 which encourages the lawyer to resolve any doubts as to the advocate-witness dilemma in favor of the lawyer testifying and against his continuing as an advocate.