

LEGAL ETHICS OPINION 1513

ATTORNEY AS WITNESS: ATTORNEY
REPRESENTING CLIENT ON APPEAL
TO THE SUPREME COURT OF
VIRGINIA AFTER ATTORNEY'S
PARTNER TESTIFIED ON BEHALF OF
CLIENT AT TRIAL.

You have presented a hypothetical situation in which Partner A and Law Firm Alpha represented a client in negotiations with her father and two sisters concerning the disposition of a family business and the distribution of the father's estate during his remaining lifetime and upon his death. As a result of these negotiations, a plan was put in place whereby the two sisters' stock would be redeemed immediately; part of the father's stock would be transferred to the client; a redemption agreement (personally guaranteed by the client) would be executed for the eventual acquisition of the father's shares; and a will and trust would be made by the father, providing for the allocation of his estate among the three daughters in agreed proportions. The father's stock was ultimately redeemed several years later, prior to his death. At the time of this redemption, the father amended his will and trust to eliminate the client's share of his estate as had been included in the earlier agreed plan, with the exception of her one-third share of the father's residence. Neither the father nor the sisters notified the client of this change. The amended will contained a "no-contest" or in terrorem clause providing that anyone who challenged the will would forfeit her share of the father's estate.

You have further indicated that the client first learned of the change after the death of her father several years later. She then contacted Partner A, who advised her that the change in her father's will and trust violated a contract to make a will between her father and herself (as well as the other sisters) made a number of years earlier. Based on this advice, Partner B of Law Firm Alpha brought suit on behalf of the client against the estate of her late father.

Shortly after pretrial discovery began in the case, when it was first learned that there would be a factual (as opposed to a purely legal) dispute, it became obvious that Partner A would need to be called as a witness at the trial of this matter. The law firm, therefore, withdrew from the representation of the client for the remainder of pretrial discovery and the trial of the case. Partner A was called as a witness on behalf of the client at the trial and testified concerning the negotiations, communications, and actions that Partner A relied upon in advising the client that a contract to make a will had been made and subsequently breached. Witnesses who were called by the estate and the sisters testified that no contract had been made (or breached).

You indicate that the trial judge ultimately ruled that the evidence failed to establish the existence of a contract, finding for the defendants on the contract claim. The trial judge, however, found that the plaintiff had brought her suit "in good faith upon the advice of counsel," and held that a "no-contest" provision in the amended will of the client's father would not be "effective" under such circumstances to deprive plaintiff of her one-third share of the father's residence.

Committee Opinion
May 11, 1993

You advise that the client, through her substitute trial counsel, has filed a notice of appeal to the trial court's denial of her breach of contract claim on the merits. The defendants have noticed an appeal to the trial court's ruling that the "no-contest" clause in the will would not be effective as to the client in these circumstances. It is anticipated that the client will fully pursue her appeal to the Supreme Court of Virginia. For purposes of this appeal, the client has requested that Law Firm Alpha represent her as counsel of record before the Virginia Supreme Court, with the understanding that if the ultimate decision of the Supreme Court is to remand the case for a new trial, Law Firm Alpha will not be able to represent her at trial if Partner A is likely to testify. Having a long-standing relationship with the client, the law firm would like to serve as counsel of record for the client on appeal with Partner B (but not Partner A) appearing before the Supreme Court as counsel on behalf of the client on appeal.

You have asked the committee to opine whether, under the facts of the inquiry, Partner B in Law Firm Alpha may represent the client as counsel of record in connection with the appeal to the Supreme Court of Virginia, given the fact that Partner A's testimony is now concluded and that credibility of witnesses is not an issue to be decided by the Supreme Court.

The appropriate and controlling Disciplinary Rules related to your inquiry is DR:5-101(B) which states, in pertinent part, 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 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, or if, as to any matter, 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.

The committee is of the opinion that employment on the appeal does not constitute a separate representation from that of the trial since argument on appeal may require an attack on the credibility of the partner's testimony at trial.

Therefore, the committee is of the opinion that the prohibitions of DR: 5-101(A) against a lawyer serving simultaneously as a witness and an advocate are equally applicable at the appellate level of a case. Thus, the committee opines that it would not be proper for Partner B to represent the client as counsel of record on appeal to the Supreme Court of Virginia.

Legal Ethics Committee Notes. – See Rule 3.7(c) stating that there is no longer disqualification of the entire firm when a lawyer must testify, unless representation would create a conflict under Rule 1.7 or Rule 1.9. Under Rule 3.7(c), this disqualification is not imputed to the lawyer's firm unless there is an actual conflict of interest.