

LEGAL ETHICS OPINION 1539

ATTORNEY AS WITNESS: ATTORNEY
AS WITNESS TESTIFYING TO
IMPEACH ARRESTING OFFICER'S
TESTIMONY.

You have presented a hypothetical situation in which an attorney was contacted by a client for possible representation on a boating under the influence of alcohol charge, as well as companion charges of assault on a police officer and cross-warrants against the police officer in question. The attorney advised the client that he would probably be available to represent him on the charges, however, the attorney was not retained at that time.

You indicate that, shortly after the above conversation, the attorney was present in one of the circuit court rooms of the relevant jurisdiction, with approximately 25 to 30 other persons, and overheard the arresting officer in the client's case explain loudly to a Virginia state trooper the events of the boating incident. You advise that the attorney did not intend to overhear the conversation. Furthermore, you indicate that the arresting officer's statements led the attorney to believe that he might become a necessary witness in the client's case, depending on the arresting officer's testimony at trial.

You indicate that, several days later, the attorney encountered a police officer/personal friend/former client who had previously arrested the client for alcohol-related offenses. The police officer/friend began to tell the attorney that he had seen the client on the night of his arrest and that he had appeared "messed up". You indicate that previously, the client had advised the attorney that he had seen the police officer/friend that evening across the room (10 to 15 feet away) when he was in the precinct lock-up. Furthermore, the client had also told the attorney that he had not ingested any alcohol for at least 24 hours prior to his arrest. When the attorney informed the police officer/friend that the client's story was that the officer was no closer than 10 or 15 feet away, the police officer indicated that he "was not close enough to smell any odor or alcohol", but knew that the client "had a real glassy-eyed stare".

When, subsequently, the police officer appeared as a potential witness for the Commonwealth at the first trial date, the attorney withdrew from representation of the client and referred him to another attorney for trial at the General District Court level.

The client has since indicated to the attorney that he is dissatisfied with the services of the attorney to whom he was referred and now wants the attorney to represent him in the matter.

You have asked the committee to opine whether, under the facts of the inquiry, the attorney may accept representation of the client.

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

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called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify under certain limited, enumerated circumstances. Further guidance may be found in Ethical Consideration 5-9, [EC:5-9] which provides 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 Ethical Consideration 5-10 [EC:5-10], which exhorts that "[w]here the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate."

The committee is of the opinion that, under DR:5-101(B), it would be improper for the attorney to accept representation of the client under the circumstances where the attorney knows or it is obvious that he or a lawyer in his firm ought to be called as a witness. From the facts presented, it appears to the committee that the attorney has been privy to his client's, the arresting officer's, and the police officer/friend's versions of the events and that the client's and police officer/friend's stories are clearly in conflict. In addition, the committee finds that none of the exceptions enumerated in DR:5-101(B) (1)-(3) are applicable in the circumstances described. See LE Op. 462, LE Op. 723.