

LEGAL ETHICS OPINION 1616

ATTORNEY AS WITNESS;  
ATTORNEY/CLIENT RELATIONSHIP  
WHEN ATTORNEY PERFORMED TITLE  
EXAMINATION.

You have presented a hypothetical situation in which an attorney represents plaintiffs in a boundary line dispute. You indicate that the attorney formerly represented the defendant by performing a title examination, i.e., drafting a title opinion letter, on a tract of land which is part of the boundary dispute. The attorney is to be called, by the defendant, to testify regarding the findings of the title examination as it relates to the elements of proof in a boundary line dispute. The former client does not consent to the attorney's representation of the plaintiff.

You have asked the committee to opine, under the facts of the inquiry, (1) whether the plaintiff's attorney has a conflict of interest; and (2) whether the attorney can continue his representation, knowing that he is to be called as a witness.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-102(B) which states that, if, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client; and DR:5-105(D), which states that a lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

Since an attorney-client relationship was established, the defendant is a former client of the attorney and thus the provisions of DR:5-105(D), dealing with former client conflicts of interest, are applicable to the facts presented. Thus, it would be improper for the attorney to represent the plaintiff against the defendant in the boundary line dispute without the consent, after full disclosure, of the former client/defendant.

Given that the attorney may not represent the plaintiff in the matter, your inquiry concerning the attorney as a witness on behalf of the defendant is no longer relevant. The committee notes, however, that under the plain language of Disciplinary Rule 5-102(B) [DR:5-102], an attorney may continue representation of a party, even if called to testify by the opponent, until it is apparent that his testimony is or may be prejudicial to his client. See LE Op. 866, LE Op. 1226, LE Op. 1240, LE Op. 1455, LE Op. 1517, LE Op. 1528.