Committee Opinion
February 28, 1996

LEGAL ETHICS OPINION 1668 — REPRESENTATION OF BENEFICIARIES OF A WILL BY A FIRM WHEN THE WILL WAS DRAFTED BY THE SAME FIRM.

You have presented a hypothetical situation in which Attorney G was a partner in Firm D when he interviewed J and drew her will, which was subsequently signed by J, with Firm D employees, W and S, witnessing the signing and attesting to the sound mind and disposing memory of J. B, also an employee of Firm D, notarized the will. Attorney G has since left Firm D.

Several years later, J died. Suit has been filed challenging the validity of J's will, and the beneficiaries have been named as defendants. Plaintiff claims undue influence by the defendants and lack of testamentary capacity on the part of J. The defendants have retained Firm D to represent them in this action. It is likely that Attorney G will be called as a witness for the defense to testify concerning his interview with J. W and S, who are currently employed by Firm D, will also be called to testify concerning J's mental competency at the time of the execution of the will.

Under the facts you have presented, you have asked the committee to opine as to whether a conflict of interest exists in Firm D's representation of the beneficiaries of the will in a will contest suit when the will was drawn by a former partner of Firm D.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-101(B) and DR:5-102(A) which require an attorney and his law firm to decline employment or withdraw as counsel in pending litigation if he knows that he or another attorney in his firm ought to be called as a witness on behalf of a client. These rules, sometimes called the "witness-advocate" rule, are based on the premise that the lawyer must decide whether his client's interests are better served if the attorney is a witness or an advocate. The attorney cannot do both as he would be placed in the unseemly and ineffective position of advocating his own credibility. The two roles are inconsistent. EC:5-9.

DR:5-101(B) and DR:5-102(A) are applicable only when a lawyer currently associated with the law office ought to be called as a witness. In LE Op. 1507 the Committee held that a public defender's office was not required to withdraw because of the need to call a former assistant public defender to impeach a witness for the Commonwealth. Where the attorney-witness is no longer with the law firm serving as trial counsel, the "witness-advocate" rule stated in DR:5-102(A) does not apply.

In the facts you present, the committee believes that Firm D may continue to represent the defendants in the suit challenging the will prepared by Attorney G, who is no longer with the firm, even though Attorney G is expected to be called as a witness on behalf of the defendants. In regard to the current employees of Firm D (W and S) who witnessed the will, the fact that they are also expected to testify does not disqualify Firm D under DR:5-102(A). This rule addresses the ethical concerns created when a trial attorney or a

member of his firm is expected to testify on behalf of a client. The rule does not apply when a non-lawyer employee is called by the firm. See, e.g., LE Op. 1500 (lawyer can call his legal assistant to testify in order to impeach at trial a witness whom the legal assistant had interviewed).