Committee Opinion
February 15, 1991

LEGAL ETHICS OPINION 1394

WITNESSES/ATTORNEY AS: ATTORNEYS REPRESENTING CLIENT IN PENDING CIVIL SUIT IN WHICH ATTORNEYS AND OTHER MEMBERS OF THE FIRM WILL BE CALLED TO TESTIFY.

You have advised the Committee that disputes arose within partnership ABC which was comprised of minority partner A, minority partner B, and general partner C. The disputes in question resulted in separate suits being filed by partners A and B against C, calling for dissolution of the partnership and other relief. General partner C counterclaimed for damages in both suits, and the suits were ultimately settled following several months of negotiations, with general partner C buying out partners A and B at an agreed-upon price.

Sixteen months later, having learned certain information in the interim which led him to conclude that general partner C had withheld pertinent information during the buy-out negotiations, partner A brought a second suit against C to set aside the settlement, alleging fraud-in-the-inducement. Partner A was represented in this second suit by Attorney A, and you indicate that partners A and B acted in concert during the course of this suit, although partner B was not a party to it. You advise that during the course of discovery, Lawyer I, who previously served as Vice President and General Counsel to partner B (a corporation and its subsidiaries), and Lawyer II were deposed by defendant C as to the discovery date and nature of the alleged fraud. The facts you cite indicate that Lawyers I and II were both members of Law Firm B. Furthermore, you indicate that Lawyer I has been served by defendant general partner C with a trial subpoena to be a witness and that the testimony of Lawyers I, II, and other members of their firm is critical and will be required as to the discovery date of the alleged fraud.

Subsequently, sixteen months after the filing of the second suit and during its pendency, partner B filed a third suit against general partner C. Partner B is represented by Lawyers I and II, who have been deposed in the second suit as noted above, and their law firm, with which B has been involved from the early stages of the formation of the ABC partnership.

You have asked that the Committee consider the propriety of Lawyers I and II and their firm accepting and continuing the representation of partner B in the third suit.

The appropriate and controlling disciplinary rules relative to the issue you raise are DR:5-101(B), which dictates that a lawyer 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 in three circumstances; and DR:5-102(B), which permits a lawyer to continue representation of a client in litigation after he 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 until such time as it becomes apparent that his testimony is or may be prejudicial to his client.

The Committee notes that the proscription of DR:5-101(B), as to initial acceptance of employment, is equally applicable to a lawyer who ought to be called as a witness either on behalf of his client or by the opposing party. The question of whether adverse counsel "ought" to call an attorney for the opposing side must be determined on a factual, case-by-case basis. Where there is a dispute as to the necessity for an attorney to testify, the Committee is of the belief that the dispute must be resolved by a finder of fact, utilizing the proper court procedures for challenging a witness subpoena. The Committee cautions that such tactics hold the potential for improper manipulation of the adversary process through the creation of a witness-lawyer who then is subject to the withdrawal or disqualification mandates of DR:5-101(B) and DR:5-102(B), even though the substance of the lawyer's testimony may be cumulative or equally available from other sources. (See, e.g., Kroungold v. Triester, 521 F.2d 763, 766 (3rd Cir. 1975) (citing and quoting footnote to Model Code of Prof. Resp. DR:5-102(B) stating that rule "was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel"); Cottonwood Estates v. Paradise Builders, 624 P.2d 296, 302 (Az. 1981) (although disqualifying attorney-witness from representing corporation of which he was an officer, court set out test indicating that "[w]hen an attorney is to be called other than on behalf of his client, a motion for disqualification must be supported by a showing that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney's client").) Such a factfinding function is beyond the purview of the Committee.

Assuming the validity of the facts as you have provided them, which facts indicate that the testimony of Lawyers I and II is critical and material to the central issue of fraud, the Committee is of the opinion that Lawyers I and II should not have accepted employment to represent Partner B in the third suit, since they knew or should have known that they ought to be called as witnesses in the matter. You have provided no indication of the existence of any of the three circumstances articulated in DR:5-101(B) as exceptions.

Since, under the facts you have provided, the Committee views the acceptance of employment to have been improper *ab initio*, the Committee finds inapplicable the latitude provided under DR:5-102(B) to an attorney who is called as a witness other than on behalf of his client, which would otherwise allow the attorney to continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

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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.