Committee Opinion
February 24, 1998

LEGAL ETHICS OPINION 1709

ATTORNEY FOR PLAINTIFF TESTIFYING AT VENUE HEARING RE: STATEMENTS BY DEFENDANT MADE PRIOR TO SUIT BEING FILED.

You have presented a hypothetical situation in which a plaintiff's lawyer has testified in a venue hearing about a defendant's pre-trial statements to the lawyer regarding where the defendant conducted his business or other affairs. Under the facts you have presented, you have asked the committee to opine as to the propriety of this same lawyer continuing to represent the plaintiff. You indicate that the venue issue, having been resolved by the court, will not come up again during the trial on the merits. The appropriate and controlling disciplinary rule relative to your inquiry is DR 5-102(A), which is part of the "witness-advocate rule" and which states:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (3).

A lawyer may continue to conduct a trial on behalf of a client where he or a member of his firm testifies: (1) 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; (2) solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; or (3) where refusal to testify 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. DR 5-101(B)(1)-(3).

In the facts you present, it appears that none of the three exceptions applies. The issue of venue is neither uncontested nor a mere formality, if plaintiff's counsel would have to testify as to defendant's statements as they relate to that issue. The "substantial hardship" exception under DR 5-101(B)(3) is to be construed narrowly. *Estate Of Andrews v. United States*, 804 F. Supp. 820, 829 (E.D. Va. 1992) *citing United States v. Johnston*, 690 F.2d 638, 642 n. 9 (7th Cir. 1982); *Wickes v. Ward*, 706 F. Supp. 290, 293 (S.D.N.Y. 1989). Nothing presented in your hypothetical demonstrates that the plaintiff's counsel or his firm has a distinctive value to the client as a result of any long-standing relationship with the client and familiarity with the client's affairs such that changing lawyers would pose a "substantial hardship" to the plaintiff. *Cf., Estate of Andrews v. United States, supra.*

Presumably, the question of venue would be taken up at a pre-trial hearing and therefore any testimony of plaintiff's counsel on that matter would be outside the presence of any jury that would hear the case on its merits. However, the policies and

considerations which support the "witness advocate" rule do not permit the committee to restrict its application solely to matters before a jury. *See, e.g., United States v. Johnston*, 690 F.2d 638, 644 (7th Cir. 1982) (policy considerations supporting witness advocate rule apply to proceedings tried to a judge). The rule is designed to protect the client's interests in not having testimony produced on contested issues from a witness who is obviously interested in the outcome and is thus subject to impeachment for that reason. EC 5-9. Impeachment can occur before a judge or jury. Further, the rule is also based on a sense of fairness to the adverse party to obviate any concern that the trier of fact might attach undue weight to the advocate-witness's testimony. *Estate of Andrews v. United States, supra*, 804 F. Supp. at 824. Finally, the rule serves to preserve the integrity of the judicial system by, among other things, avoiding any public perception that a testifying advocate has distorted the testimony to further his or her client's cause and prevail in the litigation. *Id*.

The committee concludes that it would be improper for the plaintiff's counsel to continue to conduct the litigation on behalf of the plaintiff having testified for the plaintiff at the pre-trial venue hearing. Subsequent to your original request, you have asked if the disqualification of plaintiff's counsel as trial counsel could be avoided if: (1) plaintiff hires another lawyer, not affiliated with the witness-advocate, to file the suit initially and to handle the pre-trial venue hearing, including the examination of the witness-advocate; and (2) the witness-advocate enters his appearance as counsel of record after the pre-trial hearing on venue is concluded.

There is a division of authority on whether an attorney who testifies in a pre-trial proceeding is automatically disqualified from participating as counsel at trial. Applying ABA Code of Professional Responsibility, DRs 5-101(B) and 5-102, one court has ruled that these rules do not mandate a *per se* disqualification of a prosecutor who testified at a pretrial suppression hearing. *United States v. Johnston, supra*, 690 F.2d at 645 (however the trial courts are encouraged to substitute a new prosecutor to try the case). Under ABA Model Rule 3.7(a), a lawyer who testifies in a pretrial proceeding is not disqualified from representing the client at a trial. The rule states "a lawyer shall not act as an advocate *at trial* in which the lawyer is likely to be a necessary witness except where. . . ." MR 3.7(a) (emphasis added). *See also*, Colorado Ethics Op. 78 (1994) (MR 3.7 applies only to a lawyer acting as an advocate at trial, and not to pre-trial matters, unless the lawyer's testimony, if admitted at trial would reveal the lawyer's dual role). Unlike Model Rule 3.7, the language of DR 5-102(A) does not, in the committee's opinion, allow it to treat the pretrial venue hearing and the actual trial as two separate proceedings for purposes of the witness-advocate rule. Rather, the committee must interpret and apply DR 5-102(A) giving effect to the plain and ordinary meaning of its terms. Also, the committee must be mindful that the witness advocate rule is a broad prophylactic rule designed to prevent even the appearance of impropriety. Where an attorney testifies as a witness as to some contested pretrial issue, then later appears as an advocate for the same party on whose behalf he testified, the court, litigants and observing public could have a distorted view of the judicial process that would undermine confidence in the legal system.

Committee Opinion
February 24, 1998

The use of another attorney only to file suit and examine the attorney-witness, so that the attorney-witness can then take over the case as an advocate and be substituted as counsel, violates DR 1-102(A)(2) (a lawyer may not circumvent a disciplinary rule through the actions of another). In addition, such a situation, if considered acceptable under the Code of Professional Responsibility, would enable the unscrupulous lawyer to manipulate and fashion his testimony to advance his own self-interest in prevailing as an advocate for the client. Therefore, in the committee's opinion, the disqualification of the witness-advocate cannot be avoided by the limited employment of outside counsel with an understanding that the witness-advocate will appear later as counsel of record in the same case.

You have also presented a second question regarding whether it is permissible for a lawyer to contact an opposing party, directly and *ex parte* when that party was represented by counsel in litigation after the litigation has ended in a non-suit. The appropriate and controlling disciplinary rule relative to your inquiry is DR 7-103(A)(1) which prohibits an attorney from communicating directly with a party that he knows to be represented by counsel, unless he has the prior consent of opposing counsel or is authorized by law to do so.

The committee has previously opined that the entry of a non-suit does not terminate the representation of a party or certain duties owed to a client under an attorney-client relationship. [LEOs 1432, 1088, 872, 841 and DR 2-108(D)]. In two prior opinions, the committee has concluded that it is improper for an attorney to communicate with an adverse party that was represented by counsel during the course of a proceeding which has been concluded and there was no suit pending. In Legal Ethics Opinion 963 the committee opined that it is improper for an attorney to send a letter to the opposing party concerning judgment matters during the appeal period from the general district court when the opposing party was represented by counsel at trial. The committee applied DR 7-103(A)'s "anti-contact" rule even though no appeal had yet been filed nor had opposing counsel indicated an appeal would be filed.

Similarly, in Legal Ethics Opinion 1389 the committee found it improper for an attorney to communicate with an opposing party about a visitation problem after the conclusion of litigation involving custody, support and visitation even though a final order had been entered and there was no communication from the opposing party's counsel that they continued to represent their client. The committee concluded that the entry of a final order in the custody did not terminate the opposing counsel's relationship with their client and that the presumption should be that the attorney continues to represent the client.

The committee is of the opinion that the taking of a nonsuit pursuant to Virginia Code § 8.01-380 does not automatically terminate the attorney-client relationship because of the ability of the party and their counsel to refile suit within the time periods prescribed in Virginia Code § 8.01-229. Thus, when a nonsuit has been taken, before communicating with the opposing party an attorney must contact opposing counsel and inquire as to

whether the opposing party remains represented by counsel and govern his or her conduct accordingly.