Committee Opinion
September 29, 2010

LEGAL ETHICS OPINION 1849 — THE ETHICAL ISSUES OF LAWYERS TESTIFYING UNDER OATH IN COURT TO DEBTS OWED TO THE CLIENT.

In this hypothetical, on the general return docket for civil cases in General District Court, a lawyer appears on behalf of his client, who is the plaintiff in the case. The lawyer or his firm is retained and the lawyer is not employed by the client as in-house counsel. The lawyer's knowledge of the case is typically based solely on what the client has relayed to the lawyer and what the lawyer has determined by his pre-filing investigation of the case. The plaintiff is not personally present, and the initial pleading in the case (warrant in debt, unlawful detainer, etc.) is signed either by the plaintiff personally or by the lawyer as attorney for the client. The defendant fails to appear. The lawyer raises his hand to be sworn in and subsequently testifies under oath as to the amount of the debt and that the debt is still owed.

In the alternative, the lawyer submits an affidavit pursuant to Code of Virginia §8.01-28 that is notarized as required and signed by the lawyer himself or by a member of his firm, attesting to the debt owed by the defendant. The defendant either fails to appear and is in default, or appears but is unsure what the alleged debt is for or of the amount owed, and is, therefore, unable to deny under oath that he owes the debt. The lawyer will ask for judgment based on the affidavit. In cases where the defendant does not appear, the judge cannot determine whether the debt is uncontested based solely on that fact.[1]

QUESTIONS REGARDING ETHICAL CONDUCT

1. Is it permissible for the lawyer to raise his hand to be sworn in by the Court and swear or affirm under oath that the debt is owed to his client and obtain a judgment in favor of his client?

2. In the alternative, may the lawyer obtain a judgment in favor of his client on an affidavit to which he or a member of his firm has sworn on the client's behalf?

APPLICABLE RULES

The appropriate and controlling rule relative to this hypothetical is Rule 3.7(a)(1). [2]

[1] The Committee notes that when this draft opinion was published for comment, some of the commentators criticized the factual predicate set out in the hypothetical that the judge cannot determine whether the debt is uncontested solely on the basis that the debtor-defendant fails to appear. First, this is not a statement or conclusion of the Committee. It is the requesting party's statement or observation based upon her experience with debtors in collection cases. Second, the requestor draws a distinction between (i) the debtor's failure to appear, which places the debtor in *default* and (ii) the court reaching the conclusion that the underlying debt is "uncontested" for purposes of Rule 3.7(a) simply because the debtor—for whatever reason (i.e., lack of notice, illness, inability to obtain leave from work, etc)—fails to appear in court. These, of course, are factual and legal issues the Committee cannot decide. However, the Committee's opinion is based, as it must be, upon the facts and reasonable inferences drawn therefrom as presented by the requestor.

[2] Rule 3.7 Lawyer As Witness

ANALYSIS OF THE QUESTIONS PRESENTED

The initial analysis of the questions rests upon the inevitability of whether the defendant appears in court to defend or deny the debt. Clearly, if the defendant makes an appearance in the case and either denies or contests the debt as stated in the warrant or detainer, the lawyer cannot personally affirm the debt or personally testify as to the debt owed. The underlying analysis of the questions revolves around the legal analysis of admissible evidence, testimonial evidence, and hearsay, which this Committee cannot address because these are legal issues that are beyond its purview.

A threshold inquiry is whether an attorney who submits an affidavit in a matter thereby becomes a necessary witness for purposes of Rule 3.7. Jurisdictions vary on this issue.[3] In the facts presented, the plaintiff's attorney submits an affidavit on the only substantive issue in the case—the indebtedness of the defendant—and without any other witness in the court to testify asks the court to enter judgment for the plaintiff on his affidavit. In this capacity, the lawyer is acting both as witness and advocate. The Committee opines that by submitting the affidavit under these circumstances the attorney has become a necessary witness within the meaning of Rule 3.7(a).

Given that the ethics issue is inextricably linked to a legal issue, this Committee sought an Attorney General's opinion as to whether a plaintiff's lawyer in a debt collection case, is authorized, pursuant to Code of Va. §8.01-28, to serve as agent for the plaintiff and sign and file an affidavit stating the amount of the plaintiff's claim even though that lawyer does not have first hand knowledge of the amount owed. The Attorney General's office opined that a plaintiff's lawyer in a debt collection case is an "agent," as that term is used in §8.01-28, and may sign and file an affidavit stating the plaintiff's claim.[4] While this Committee does not give legal advice or analysis, the Committee relies upon the Attorney General's opinion that legally a plaintiff's lawyer may sign as agent for the client when filing a warrant in debt or affidavit in a debt collection matter.

(a) A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

* * *

[3] *Compare Int'l Res, Ventures v. Diamond Mining*, 934 S.W.2d 218 (Ark. 1996)("Rule 3.7 is applicable to a lawyer giving evidence by affidavit as well as by testimony in open court."); *and Mauze v. Curry*, 861 S.W.2d 869 (Tex. 1993)(lawyer in medical malpractice case became necessary fact witness by submitting affidavit opining that defendant was negligent), *with Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555 (Ky. 2001)(lawyer who files personal affidavit in opposition to motion for summary judgment does not automatically become necessary witness subject to disqualification) *and Bank One Lima N.A. v. Altenburger*, 616 N.E.2d 954 (Ohio Ct. App. 1992)(disqualification reversed; lawyer did not become necessary witness regarding substantive matters by submitting affidavit stating only that documents attached to it from him were received by opposing counsel).

[4] Letter from William C. Mims, Acting Att'y Gen. of Virginia, to Karen A. Gould, Executive Director, Virginia State Bar (February 25, 2009) (on file with the Virginia State Bar).

As Code of Virginia §8.01-28 allows an agent of the plaintiff to sign and file an affidavit affirming the debt and the Attorney General of Virginia has opined that the attorney for the plaintiff may sign the affidavit as agent of the plaintiff, the next question is whether the statute, as interpreted by the Attorney General of Virginia, precludes the application of Rule 3.7(a) or any other Rule of Professional Conduct to the facts presented. Conduct may be lawful but nevertheless unethical under rules regulating the legal profession. *Gunter v. Virginia State Bar*, 238 Va. 617, 621, 385 S.E.2d 597 (1989) ("The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility, many parts of which proscribe conduct which would be lawful if done by laymen.")

Under the facts of the hypothetical, the judge in these cases decides not to treat these matters as uncontested because the defendant does not appear. Rule 3.7(a)(1) would not allow the lawyer to become a witness either by testimony or affidavit because the lawyer would be testifying as to an essential element of the case, that a debt exists and the amount of the debt. While the lawyer can act as agent and can advocate the client's case, the lawyer cannot become a witness to a material fact, unless the court finds the matter to be uncontested based upon factors other than the defendant's failure to appear.

This opinion is advisory only and not binding on any court or tribunal.