Nebraska Ethics Advisory Opinion for Lawyers
No. 93-6

AN ATTORNEY MUST WITHDRAW AS COUNSEL, PURSUANT TO DR 5-102, ONCE THE ATTORNEY LEARNS THAT HE OR SHE WILL BE CALLED AS A WITNESS, OR IT IS OBVIOUS THAT THE ATTORNEY OUGHT TO BE CALLED AS A WITNESS ON BEHALF OF A CLIENT, UNLESS THE ATTORNEY QUALIFIES UNDER ONE OF THE FOUR EXCEPTIONS SET FORTH IN DR 5-101(B)(l)-(4). HOWEVER, AN ATTORNEY REPRESENTING HIS OR HER LAW FIRM HAS NOT ACCEPTED "EMPLOYMENT," AND IS NOT WORKING FOR A "CLIENT, SO THE PROHIBITIONS OF DR 5-102 DO NOT APPLY.

FACTS

Attorney A is representing his law firm, consisting of two attorneys, in a dispute which is in litigation over terms and conditions of the law firm's lease with their landlord. Attorney B, the second partner in the law firm, performed most of the work in negotiation of the lease, so Attorney A's involvement was limited.

Opposing counsel has objected to Attorney A's representation in the litigation on three separate occasions and each objection has been overruled.

There is a possibility that this matter may go to trial, and that Attorney A may be called as a witness.

QUESTION PRESENTED

Whether a lawyer, who is acting on behalf of his own or her own law firm, can continue as counsel when there is a possibility that he or she will be called as a witness.

DISCUSSION

An attorney must withdraw as counsel pursuant to DR 5-102, if, after accepting employment, he or she learns that they will be called as a witness, or it is obvious that he or she ought to be called as a witness on behalf of a

client, unless the attorney qualifies for any one of the four exceptions set forth DR 5-101(B)(l)-(4). Those exceptions provide that an attorney may continue to represent a client, even after learning he or she may be called as a witness, if the following criteria are met:

> 1 If the testimony will relate solely to an uncontested matter.
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> 2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
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> 3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
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> 4. As to any matter, if refusal 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.

It is not clear whether the situation at hand fits within one of the four exceptions. However, a number of other jurisdictions have refused to apply DR 5-102 when, as here, an attorney seeks to represent himself or his firm in litigation.

The Florida State Bar Association in Formal Advisory Opinion 84-4 opined:

> A lawyer may represent her law firm in an action against a former corporate client . . . where members of the firm will testify regarding the services provided to the former client and how those services benefitted the individual defendants. Based on the facts, the lawyer is not accepting "employment" from a "client" within the meaning of the provision prohibiting a lawyer from accepting a case if he knows that he or a lawyer in his firm ought to be called as a witness on behalf of a client.

In O'Neil v. Bergan, 453 A.2d 337 (1982), the District of Columbia Court of Appeals affirmed a trial court's refusal to disqualify a partner from representing his law firm in a malpractice action. The court found that even assuming that a member of the firm ought to have been called as a witness, DR 5-101(B) did not apply because the partner had not accepted "employment" within the context of the case, for the firm was in effect representing itself.

The Massachusetts Supreme Judicial Court applied the same reasoning in Borman v. Borman, 393 N.E.2d 847 (1979), when it vacated the disqualification of a lawyer's firm from representing him in a divorce action. Upon the plaintiff-wife's argument that at least one other member of the firm would be called to testify concerning the lawyer-husband's compensation, the trial court disqualified the firm. The appellate court determined that to apply DR 5-102 when the testifying advocate is a litigant in the action miscomprehends the thrust of the rule. The court noted that as a party litigant a lawyer could represent himself if he so chose, and that the situation of a lawyer representing his firm was in the same genre and should receive the same benefit of choosing counsel.

Additionally, where, as in the situation at bar, the advocate attorney would likely not be called as a witness or, if called, would provide only cumulative testimony, withdrawal becomes less significant. EC 5-10 provides, in relevant part:

> It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue.

Therefore, an attorney does not have to withdraw as counsel under DR 5-102 even if he or she may be called as a witness if, after carefully weighing all the specific facts of the case, the attorney determines that his or her testimony would be merely cumulative.

CONCLUSION

An attorney must withdraw as counsel, pursuant to DR 5-102, if after undertaking employment the attorney learns that he or she will be called as a witness on behalf of a client, unless the attorney qualifies under one of the four exceptions set forth in DR 5-101(B)(l)-(4). However, when an attorney is representing his or her firm, he has not accepted employment from a client but is in effect representing himself. Accordingly, the prohibitions of DR 5-102 do not apply and the representation may continue.

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