



Committee on Professional Ethics

Opinion #290 - 4/27/73 (7-73)

Topic: Representation of
defendant and witness in
criminal proceeding

Digest: Lawyer may not represent
a defendant and a witness
in a criminal proceeding
in which a witness might
invoke the Fifth Amendment

Code: Canon 9
EC 5-9; 5-14
DR 5-105(A); 5-105(C)

QUESTION

May an attorney represent a defendant in a criminal proceeding and also represent in the same proceeding a witness who might invoke his privilege under the Fifth Amendment?

OPINION

Where the witness is to testify against the defendant represented by the attorney, the differing and conflicting interests of the party and the witness clearly preclude representation of the witness by the attorney. DR 5-105(A).

In a proceeding in which the witness will be called to testify on behalf of the defendant represented by the attorney, the defendant and the witness may appear to have common interests. However, in undertaking representation of both the party and witness, the attorney might find himself in the position of being obligated to elicit facts from the witness in support of the client-defendant's case that would, if brought forth, be injurious to his client-witness. In such event, the attorney would be required to decide whether to advise the witness to invoke his privilege under the Fifth Amendment. Such advice could not represent the attorney's independent judgment when the decision to be made could adversely affect his client-defendant. In these circumstances, the attorney would be unable to represent the two clients with undiluted loyalty and independent professional judgment as required by EC 5-14 and DR 5-105(A).

The consent of the defendant and the witness would not make the dual representation proper. The witness could not receive objective advice relating to such consent in the first place. DR 5-105(C).

The dual representation of a defendant and a witness in a criminal proceeding also appears to conflict with the traditional rules of our legal system in which the lawyer acts as an advocate for one party, and the witness, and his attorney, perform a different

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function. See, EC 5-9. To confuse the attorney's role by the representation of both a defendant and a witness in the same proceeding would present an appearance of impropriety. This a lawyer should avoid. Canon 9.
