



Committee on Professional Ethics

Opinion #353 - 7/24/74 (25-74)

Topic: Lawyer as witness

Digest: A lawyer may not act as trial counsel for another in an action in which he will be called as a witness to matters beyond mere formality but may appear pro se.

Code: DR 5-101(B); EC 5-9, 5-10

QUESTION

May a lawyer act as trial counsel for another in the litigation of a matter where it is known that he will be a witness where the lawyer is a party united in interest with another party.

OPINION

It is improper for a lawyer to act as trial counsel for another in an action where he knows he will be a witness called by one of the parties, except in the narrow circumstances set forth in DR 5-101(B) which provides:

"DR 5-101(B) - A lawyer shall 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 that he may undertake the employment and he or a lawyer in his firm may testify:

- "(1) If the testimony will relate solely to an uncontested matter.
- "(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.
- "(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.
- "(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."

The reason for the prohibition rests to a large extent on the fact that the dual role of witness and advocate gives the appearance that the attorney's zeal as an advocate will influence his testimony as a witness. ABA 50 (1931). See also ABA 220 (1941); ABA Inf. 396 (1961); N.Y. City 654 (1944); N.Y. City 126 (1929); N.Y. County 362 (1941); EC 5-9; EC 5-10.

**NEW YORK STATE BAR ASSOCIATION
Professional Ethics Committee Opinion**

Opinion #353

- 2 -

The rule, of course, has no application to the situation where a lawyer is a party, for any party may appear pro se, be a witness and represent himself. He does not lose this right because he is a lawyer.
