

ADVISORY ETHICS OPINION 79-14

SYNOPSIS:

In order for an attorney to represent a client and at the same time be a witness the attorney must overcome the rule against such representation by meeting one of the exceptions listed in DR 5-101 (B).

FACTS:

Attorney X represented a buyer in the purchase of land. The seller is now suing the buyer for the return of the land alleging that the seller's corporate agent did not have the authority of the corporation to make the sale.

Attorney X feels he may be called as a witness but that his testimony will be restricted to the facts of what happened at the closing. The buyer desires Attorney X to represent him and Attorney X feels that, in regard to fees, it would be more reasonable for Attorney X to represent the buyer because of his familiarity with the case.

QUESTION PRESENTED:

Attorney X inquired as to whether this Committee should recommend his representing the buyer if he enters into an agreement with the buyer, whether the known or potential conflicts are identified and whether the buyer agrees to waive any liability as a result of those conflicts.

ANALYSIS:

Before this question is answered a discussion of the conflict between the lawyer's role as an advocate and potential witness is appropriate.

Canon 5 of the Code of Professional Responsibility addresses the problem of when an attorney may be called upon to be both a witness and advocate. EC 5-9 points out that the roles of an advocate and witness are inconsistent.

EC 5-10 offers the situations or exceptions when a lawyer may act as an advocate and a witness. These are when the testimony relates only to an uncontested issue or when it will be manifestly unfair to a client for the lawyer to withdraw or refuse to accept employment.

In making the decision the lawyer should consider the personal or financial sacrifice of the client that may result, the materiality of his testimony and the effectiveness of his representation in view of his involvement as a witness.

After these factors are considered, an attorney should remain in the case only if it is clear that refusal or withdrawal will impose an unreasonable hardship upon the client.

The facts in the instant case show that the client may benefit financially if Attorney X accepts employment. Nothing in the facts show the client will suffer an unreasonable hardship if the Attorney refuses to accept employment or withdraws. If additional facts are present that show the client would suffer an unreasonable hardship, then Attorney X may accept the employment, but until then, where questions in this area arise, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate. DR 5-101(B) lists the conditions which must be met for a lawyer to accept employment when he knows he may be called to testify.

Canon 6 of the Code offers a solution to the question of whether an attorney should enter into an agreement with a client where the client agrees to waive any liability as a result of the advocate-witness conflict.

EC 6-6 states that "a lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be inappropriate. See also DR 6-102 which states that a lawyer shall not attempt to limit his liability to his client for his personal malpractice.

In summary, Attorney X may represent buyer even if Attorney X is a potential witness in the ensuing litigation if there are additional facts that show that by withdrawing or refusing to accept employment he causes the client an unreasonable hardship, or if the testimony will relate solely to an uncontested matter, or 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 or if the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer. DR 5-101 (B). The facts of this case do not put the situation clearly within an exception; therefore, he should not represent the buyer.