

## **ETHICS OPINION**

**RO-91-19**

### **LAWYER AS A WITNESS PROHIBITION DOES NOT APPLY TO PRE-TRIAL PHASE OF LITIGATION**

#### **QUESTION:**

**"In June of 1988 Ms. S came to me for advice in regard to her work-related injury while in the employ of Company One on or about February 4, 1988. During the course of my representation of Ms. S facts came to my attention which would indicate that she was harassed by the employer and more particularly, its plant nurse. I had a number of conversations with the attorney for Company One, the personnel manager for Company One, a rehabilitation nurse hired by the workmen's compensation carrier, and two employees of the workmen's compensation carrier concerning my client's medical condition and the fact that I thought she was being harassed by the plant nurse. On two or three occasions I was contacted by the personnel manager of the company who desired to know when my client would be returning to work. He was quite insistent upon obtaining this knowledge because he said he needed to make provisions for replacing her if she would not be back and needed to take care of other administrative matters. Based on information that I obtained I wrote the personnel manager a letter stating that my client would not be returning to work because of the recommendations of her doctors concerning her medical and mental condition resulting from her injury.**

**Upon receiving my letter the personnel manager mailed to me a letter stating that he considered that my client had quit. To my knowledge I had no further contact with the personnel manager after this point. On August 28, 1989 I along with co-counsel brought a suit against Company One on behalf of Ms. S in the Circuit Court of ABC County. The suit alleged injuries compensable under the workmen's compensation law of the state of Alabama and also stated a claim for wrongful discharge or termination under the same workmen's compensation act. These two causes of action were later severed for separate trial. A jury trial was requested by the plaintiff for the cause of action based upon wrongful termination.**

**During the course of discovery the deposition of the personnel manager, Mr. G was taken by the plaintiffs. At the deposition Mr. G made the following statement when asked about a conversation that he had with me:**

**Page 132, Lines 13 & 14: Q. 'Okay. Do you recall anything else that was said in those discussions?'**

**Page 132, Lines 15 & 16:**

**A. 'The only thing that I remember specially that Lawyer X told me was when she quit.'**

**Page 132, Lines 17, 18 & 19: Q. 'And what was that?' A. 'That, in essence, Ms. S has quit and she will not be returning to work.'**

**Subsequently the defendant Company One noticed my deposition and it was taken in part but not concluded on the 6th of March, 1991.**

**At my deposition counsel for the defendant raised questions about the propriety of me continuing to represent my client and testifying at the trial of the case and cited Disciplinary Rule 5-101(B) of the Code of Professional Responsibility of the Alabama State Bar. I have consistently maintained to the attorneys for the defendants and the court that based upon the discovery that we have had to date that it would not be necessary for me to testify in the case unless the personnel manager for the defendant or the workmen's compensation nurse or the employees of the insurance carrier testified as to matters that were discussed between us prior to the instigation of the lawsuit and that such testimony was contrary to my understanding of our conversation. I have not heard anything to date that would lead me to believe that I would be called as a witness for the plaintiff in the case in chief or for impeachment purposes against Defendants' witnesses. My feeling is that the only testimony I might give would be for impeachment of one of the defense witnesses previously mentioned if they were to change their testimony or testify to facts that were contrary to my memory of said communications.**

**Because the defendants have made various remarks concerning the propriety of me representing my client and testifying as a witness at the trial I would appreciate it very much if you could answer the following questions:**

- 1. First, can I continue to represent Ms. S throughout the remaining discovery procedures in this case?**

- 2. Can I represent Ms. S at the trial of the wrongful discharge action and/or workmen's compensation action?**
- 3. If I am called upon to give testimony to impeach defendants' witnesses concerning my communications with them would I be required to withdraw?**
- 4. If it becomes apparent that I may be called upon for the sole purpose of impeaching testimony given by the defendants' witnesses concerning whether or not the plaintiff voluntarily terminated her employment, may I continue as her attorney and give' such testimony or am I required to withdraw at that point?**
- 5. If the defendants call me as a witness, would I be required to withdraw?**

**ANSWER QUESTION ONE:**

**Yes, the lawyer witness rule is not applicable to the pre-trial phase of litigation.**

**ANSWER QUESTION TWO:**

**You may represent Ms. S at the trial of the workmen's compensation action since it is "unlikely" that you would be a "necessary witness". The answer to your question concerning the representation of Ms. S at the trial of the wrongful discharge action is contained in 3, 4 and 5 below.**

**ANSWER TO QUESTIONS THREE, FOUR & FIVE:**

**You must withdraw from the representation of Ms. S in the wrongful discharge action, if, at trial, you are called upon to testify concerning whether or not the plaintiff voluntarily terminated her employment, unless withdrawal at that**

**point would work a substantial hardship on your client. Your withdrawal in this instance would be mandated without regard to which party called you as a witness. Your disqualification in this matter, however, would not extend to co-counsel or other members of your firm.**

**DISCUSSION:**

**Rule 3.7 of the Rules of Professional Conduct of the Alabama State Bar, effective January 1, 1991, continues the traditional and well established proposition that a lawyer who represents a client in a litigated matter may not also appear in that matter as a witness. Rule 3.7 provides as follows:**

**"3.7 Lawyer As Witness**

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where:
  - (1) the testimony relates to an uncontested issue;**
  - (2) the testimony relates to the nature and value of legal services rendered in the case; or**
  - (3) disqualification of the lawyer would work substantial hardship on the client.****
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9."**

**The prior lawyer witness rules DR 5-101(B) and DR 5-102, contained the somewhat vague language regarding the conditions that would lead to disqualifica-**

tion, i.e., when a lawyer "knows or it is obvious that he or a lawyer in his firm ought to be called as a witness." The effect of this language in some instances caused counsel to be disqualified on mere speculation. The language in new Rule 3.7 is more carefully drawn requiring withdrawal only when the lawyer is "likely" to be a "necessary" witness. Consequently, the decision to withdraw can, in good faith, be delayed to a time closer to the date of the trial. At that point, the lawyer would then determine whether his continued representation at trial would be permitted under any of the three exceptions in 3.7(a).

The third exception [3.7(a)(3)] to the lawyer witness rule is the most important because it permits an equitable balancing of the interests of the parties. Consequently, a lawyer may continue as an advocate at trial even though he is a witness if the harm to his client caused by his withdrawal is not outweighed by the harm to the opposing party. This exception is similar to the exception found in DR 5-101 (B)(4) but less restrictive. The language in DR 5-101(B)(4) permitted a lawyer to continue as an advocate at trial if his disqualification would "work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in a particular case." The new language permits a balancing of the equities without tying substantial hardship to the distinctive value of the lawyer.

Finally, Rule 3.7(b) makes it clear that the disqualification is personal and is not imputed to other members of the lawyer's firm. Thus, a solution, and a factor,

**in balancing the equities involved in disqualification, is to permit another lawyer in the firm to continue the trial should that become necessary.**

**In the fact situation that you pose you state, "I have consistently maintained to the attorneys for the defendants and the court that based upon the discovery that we have had to date that it would not be necessary for me to testify in the case unless the personnel manager for the defendant or the workmen's compensation nurse or the employees of the insurance carrier testified as matters that were discussed between us prior to the instigation of the lawsuit and that such testimony was contrary to my understanding of our conversation." In view of your uncertainty concerning whether it will be necessary that you be a witness, you may delay a withdrawal decision to such time that any uncertainty is resolved. It should be noted that it does not become "necessary" that a lawyer be a witness simply because the opposing party asserts that the lawyer has knowledge that might be relevant. If, in fact, it does become "necessary" that you be called as a witness, whether before trial or during trial, then you must withdraw as counsel at the trial unless your testimony relates to an uncontested issue or withdrawal would cause a substantial hardship on your client. In this regard, if possible, you should prepare co-counsel to proceed with the trial should it become necessary for you to be a witness.**

**RWN/vf**

**4/17/91**

