

Utah Ethics Opinions

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28. USB EAOC Opinion No. 28

Utah State Bar

Ethics Advisory Opinion No. 28

Approved October 24, 1976

Summary: A lawyer or law firm should withdraw as counsel in a case in which the lawyer or a member of the law firm may be called as a witness, unless there are exceptional circumstances, requiring representation by a particular lawyer or law firm.

Facts: You have inquired whether you are required to withdraw from representation of your client under the following circumstances:

Your client is, in fact, a family corporation consisting of your father, your brothers and yourself. You are a minority stockholder.

The corporation entered into a contract with another company by written contract prepared by you. Modifications of the original document were made by the parties at a meeting which you attended, and the final contract represented by the document you prepared together with those modifications.

You are cognizant of the dealings between the parties and performance and related matters.

Recently, the other company has notified your corporation that it has terminated the contract and you have filed suit on behalf of your corporation.

Counsel for the defendant has advised you that he proposes to call you as a witness. You have indicated that you feel the matter comes within the purview of DR 5-101(B).

Opinion: DR 5-101(B) sets forth the circumstances in which an attorney may continue to represent his client in the filing of a lawsuit when he knows that he will or ought to be called as a witness. DR 5-101(B)(4) is the applicable rule in this matter:

"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."

Within the framework of DR 5-101(B) there would be a

question whether the distinctive value of you as the lawyer in this particular case justifies your continuation in the case rather than impose substantial hardship on your client, if you knew or it was obvious that you ought to be called as a witness.

Your attention is called to DR 5-102(B) which more precisely fits the circumstances of this matter assuming that there was no initial reason to anticipate that you might be called as witness:

DR 5-102(B) states:

"If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client."

It appears to the Ethics Committee that in most instances, continued appearance in a matter could be disadvantageous to the client, since you as counsel would necessarily be unable to argue the testimony in the matter.

We are of the opinion that it would require a singular set of circumstances to justify counsel continuing in a matter such as you have delineated. We see no such singular circumstances in this case and conclude that you should withdraw as counsel.

Rule Cited:

DR-5-1-1