

Opinion 471
June 1991
Tex. Comm. on Professional Ethics, Op. 471, V. 55 Tex. B.J. 520 (1992)

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a law firm represent a client in an appeal from a judgment following a trial if a lawyer in the law firm, who is not the lawyer arguing the case on appeal, testified as a fact witness at the trial?

STATEMENT OF FACTS

While he was a partner in a law firm that subsequently dissolved, attorney A represented a corporation in transactions that later became the subject of litigation. In the trial of this litigation, attorney A testified as a fact witness for the corporation and attorney B and his law firm represented the corporation. At the time of the trial, attorney A was not a partner or associate in attorney B's law firm and there was no understanding that attorney A would become associated with any of the lawyers who represented the corporation at the trial. Several months after the trial, attorney A and attorney B became partners in a new law firm.

The corporation has requested attorney B and the law firm in which attorney A and attorney B are currently partners to represent the corporation in the appeal from the trial at which attorney A testified as a fact witness. In the appeal, attorney A will assist in the briefing and preparation of the case but attorney A will not participate in the argument before the appellate tribunal.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct (the "Disciplinary Rules") should not be interpreted to deny a client the right to choose his attorney unless such a result is clearly required by the language and purposes of the applicable Rules. See Texas Professional Ethics Committee Opinion No. 468 (*Texas Bar Journal*, July, 1991).

Limitations on a lawyer's acting as both witness and advocate in a matter are set out in Rule 3.08 of the Disciplinary Rules. Rule 3.08(a) provides that a lawyer may not accept or continue employment in an adjudicatory proceeding if he knows or believes that he may be a witness necessary to establish an essential fact on behalf of his client unless one of five specified exceptions applies. For purposes of this opinion, it is assumed that none of the five exceptions is applicable. Rule 3.08(c) provides that, "[w]ithout the client's informed consent," a lawyer who is not personally prohibited from representation under Rule 3.08(a) may not act as advocate for the client if another lawyer in the law firm is personally prohibited by Rule 3.08(a) from such a role. However, as noted in Comment 8 to Rule 3.08, with the client's informed consent, a lawyer who is not personally prohibited from acting as an advocate before the tribunal may represent the client before the tribunal and the lawyer who is personally prohibited may participate in the preparation of the matter for presentation to the tribunal. The only prohibition applicable if the client's informed consent is obtained is the prohibition of Rule 3.08(c) that the personally prohibited lawyer may not "take an active role before the tribunal in the presentation of the matter."

As noted in Texas Professional Ethics Opinion No. 468, *supra*, the principal purposes of the limitations on a lawyer's acting as both witness and advocate in the same proceeding are (1) to ensure that a client's case is not compromised by being represented by a lawyer who could be a more effective witness for the client by not also serving as an advocate, (2) to ensure that the client is not burdened by counsel who may have to offer testimony that is substantially adverse to

the client's cause, (3) to avoid confusion for the finder of fact, and (4) to avoid possible prejudice to the opposing party that can arise when one person plays the dual roles of advocate and witness. These purposes all relate principally to testimony and advocacy before the same tribunal. Once an attorney has testified in a trial without violation of Rule 3.08, the participation of the attorney or another lawyer in his firm in appellate proceedings following the trial would not be contrary to any of the primary purposes of the Rule except possibly in the event that an attorney- advocate presented oral argument to an appellate tribunal regarding disputed factual matters as to which the attorney gave essential testimony at trial. In the circumstances that are the subject of this opinion, attorney A will not be arguing before the appellate tribunal and hence there is no possible contravention of any of the primary purposes of Rule 3.08.

Under Rule 3.08, unlike the provisions of the Texas Code of Professional Responsibility (Disciplinary Rules 5-101 and 5-102) that previously governed with respect to attorneys acting as witnesses, any prohibition on an attorney's acting as both advocate and witness applies only to the attorney-witness and not to another lawyer in the law firm provided the client gives informed consent to the representation by the other lawyer. Accordingly, if the client gives informed consent, Rule 3.08 does not operate to make any restrictions applicable to attorney B merely because limitations of Rule 3.08 may apply to attorney A.

CONCLUSION

With the informed consent of the client, a law firm may represent a client in an appeal from a trial at which an attorney in the law firm, other than the attorney who will argue the appeal before the appellate tribunal, testified as a fact witness on behalf of the client at the trial.