

Opinion 513
June 1995

Tex. Comm. on Professional Ethics, Op. 513, V. 59 Tex. B.J. 84 (1996)

QUESTIONS PRESENTED

Can a Certified Public Accountant employed as an internal controller by a law firm, ethically testify as an expert in a case in which the law firm is employed?

DISCUSSION

Texas Disciplinary Rule 3.08 states that a lawyer shall not act as attorney in a case in which he or she knows or believes that the lawyer is or may be called as a witness, unless the testimony falls within one of the exceptions set out in the rule. Although this rule does not precisely address the service of attorneys as expert witnesses, the rule is applicable here as described in *Warrilow v. Norrell*, 791 S.W.2d 515 (Tex.App.--Corpus Christi 1989, writ denied). In this case, the appeals court found that the trial court abused its discretion by allowing one of the party's attorneys to testify as an expert witness. The court stated that a different expert witness could have and should have been used.

Rule 5.03 of the Texas Disciplinary Rules makes such rules applicable to non-lawyers who are employed by, retained by or associated with a lawyer. Such lawyer shall make reasonable efforts to ensure that the non-lawyer is in compliance with these rules. Therefore, under Rule 5.03, if an attorney may not testify as an expert witness, neither may an employee of that attorney serve as a testifying expert witness.

Furthermore, as a testifying expert witness, the accountant's working papers, reports and any material reviewed by the accountant would be subject to discovery. The use of the law firm's in-house Certified Public Accountant could lead to a waiver of attorney-client privilege once he is designated a testifying expert. According to Texas Disciplinary Rule 1.05, no exceptions exist in this situation for the lawyer to waive that privilege. As discussed above, if the lawyer cannot waive the attorney-client privilege, neither can an employee of that lawyer. Therefore the naming of the employee as an expert witness could constitute a violation of Rule 1.05 because of the waiver of the attorney-client privilege.

CONCLUSION

A lawyer who uses an in-house accountant as a testifying expert witness would be in violation of Texas Disciplinary Rules 5.03, 3.08, and 1.05, unless the accountant's testimony is the same nature as would permit an attorney to testify as an expert on a case in which he is representing a party.