

### **Ethics Opinion No. 85-3**

#### **Propriety of Firm Continuing as Trial Counsel when it is Necessary to Call a Former Associate as a Witness.**

The Committee has been asked to determine whether a firm may represent a client at trial when it is necessary to call a former associate of the firm as a witness on behalf of the client.

Law Firm A was Mr. X's personal attorney. When Mr. X became president of Corporation Z, Law Firm A became counsel to the Corporation. Associate B did work for the Corporation as corporate counsel. A disgruntled customer sued the Corporation, Mr. X, Associate B, and other corporate officers alleging that they had fraudulently induced him to purchase the Corporation's product. All defendants except Mr. X have now been dismissed (by reason of settlement or bankruptcy). Law Firm A has been retained to represent Mr. X at trial and has determined that it should call its former Associate B to give testimony helpful to Mr. X's defense. It is not expected the Associate's testimony will be disputed.

DR 5-101(B) prohibits a lawyer from acting as trial counsel when the attorney also will be called to testify at trial, except in certain limited circumstances. None of the exceptions are applicable to the facts.

DR 5-105(D) states if a lawyer is required to decline employment, then "no partner, or associate, or affiliate with him or his firm" may accept or continue employment. *See also, Aleut Corp. v. McGarvey*, 573 P.2d 473 (Alaska 1978).

DR 5-101(B) would prohibit Associate B from representing Mr. X as trial counsel. The question, therefore, is whether DR 5-105(D) should be read to mean that Law Firm A, as Associate B's former employer, also is disqualified from representing Mr. X. The Committee concludes this question should be answered in the negative.

Ethical Considerations 5-9 and 5-10 and ABA Form Opinion 339 explain that the primary concerns behind DR 5-101(B) are that a lawyer's ability to act as advocate for his client is, or may be, impaired by his interest (financial or otherwise) in the outcome of the case and that a lawyer should avoid the "unseemliness" of arguing his own credibility.

The Committee believes that the purposes behind DR 5-101(B) are appropriate when applied to an individual lawyer or team of lawyers acting as trial counsel. Although DR 5-105(D) requires disqualification of the firm when any lawyer of the firm is disqualified, the Committee notes that ABA Model

Rules of Professional Conduct Rule 3.7(b) expressly states that a lawyer may act as advocate even though another lawyer in his firm (not acting as a trial counsel) will be called as a witness (provided doing so does not cause a conflict of interest).

The Committee believes that no legitimate ethical consideration is served by extending the prohibition of DR 5-101(B) to instances where a former associate will be called as a witness.

Adopted by the Alaska Bar Association Ethics Committee on August 8, 1985.

Approved by the Board of Governors on August 23, 1985.