The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 2320, COLUMBUS, OH 43215-6104
(614) 644-5800 (888) 664-8345 FAX: (614) 644-5804
www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2003-5

Issued October 3, 2003

Withdrawn by Adv. Op. 2020-05 on June 12, 2020

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is improper for a law director or an assistant law director to act as an advocate in a trial in which another attorney in the law director's office will testify as a witness on behalf of the city unless permitted under one of the exceptions in DR 5-101(B)(1) through (4), or under compelling and extraordinary circumstances recognized by a court.

OPINION: This opinion addresses a question regarding the application of the advocate witness rules to government attorneys.

> Is it proper for a law director or an assistant law director to act as an advocate in a trial in which another attorney in the law director's office will testify as a witness on behalf of the city?

The Ohio Code of Professional Responsibility prohibits a lawyer from acting in the dual capacities of advocate and witness in a proceeding, except under limited circumstances. The Ohio Code (unlike the Model Rule 3.7, ABA Model Rules of Professional Conduct) extends the advocate witness prohibitions to lawyers in the firm of the testifying attorney. The advocate witness rules are set forth in DR 5-101(B) and DR 5-102.

DR 5-101 (B) governs *acceptance of employment* when a lawyer ought to be called as a witness. Under DR 5-101(B), a lawyer may accept representation and testify on behalf of a client only under the exceptions enumerated in DR 5-101 (B)(1) through (4).

> DR 5-101. REFUSING EMPLOYMENT WHEN THE INTERESTS OF THE LAWYER MAY IMPAIR THE LAWYER'S INDEPENDENT PROFESSIONAL JUDGMENT.
>
> (B) A lawyer shall not accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or a lawyer in the firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in the firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.

> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or the firm as counsel in the particular case.

DR 5-102(A) governs *continuance of employment* when a lawyer learns that the lawyer or a lawyer in the firm ought to be called as a witness *on behalf of the client*. Under DR 5-102(A), a lawyer may continue representation of the client and he/she or a lawyer in the firm may testify on behalf of the client *only* under the exceptions enumerated in DR 5-101(B)(1) through (4).

> DR 5-102. WITHDRAWAL AS COUNSEL WHEN THE LAWYER BECOMES A WITNESS.
>
> > (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he [she] or a lawyer in his [her] firm ought to be called as a witness on behalf of his [her] client, he [she] shall withdraw from the conduct of the trial and his [her] firm, if any, shall not continue representation in the trial, except that he [she] may continue the representation and he [she] or a lawyer in his [her] firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

DR 5-102(B) governs *continuance of employment* when the lawyer learns he/she or a lawyer in the firm ought to be called as a *witness against the client*. Under DR 5-102(B) a lawyer may continue representation until it is apparent his/her testimony is or may be prejudicial to the client. DR 5-102(B) is not germane to this opinion.

Underlying the question raised, is the issue of whether a law director's office is a "firm" for purposes of DR 5-101(B) and 5-102(A). If a law director's office is a "firm" then the restrictions on representation imposed upon a testifying law director or a testifying assistant law director will extend to all attorney members of a law director's office.

There is a definition of "firm" in the Ohio Code of Professional Responsibility. A "'[l]aw firm' includes a legal professional association, corporation, legal clinic, limited liability company, registered partnership, or any other organization under which a lawyer may engage in the practice of law pursuant to the Supreme Court Rules for the Government of the Bar of Ohio." Section 2, Definitions, Ohio Code of Professional Responsibility.

There is also a definition of "firm" in the ABA Model Rules of Professional Conduct. "'Firm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." Rule 1.0(c), ABA Model Rules of Professional Conduct.

Commentary to the ABA Model Rules indicates that a government office is a firm. "With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct." ABA Model Rule 3.7, Comment 3. Unlike Ohio's disciplinary rules, under the model rules, a "firm" is not automatically disqualified from representing a client when a firm member testifies. ABA Model Rule 3.7 (b) states: "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 [Conflicts of Interest: Current Clients] or Rule 1.9 [Duties to Former Clients]."

In the Ohio Code of Professional Responsibility there is no explicit language regarding whether a government office constitutes a "firm," for purposes of the advocate witness rules. It is instructive to look at ABA, Informal Opinion 1405 (1977) because that opinion interprets DR 5-101 of the ABA Model Code of Professional Responsibility, upon which Ohio's DR 5-101 is modeled. In Informal Opinion 1405, the ABA Standing Committee on Ethics and Professional Responsibility responded to an inquiry regarding whether it was ethical for an Assistant Attorney General in the civil division of the Attorney General's office to represent an agency at an appeal hearing when another Assistant Attorney General in the civil division was a witness for the agency. The committee stated that DR 5-101(B) governed the inquiry. ABA committee advised that the representation was ethical. Under the facts presented the proposed testimony related solely to formal procedural steps taken and the exception in DR 5-101(B)(2) applied. ABA, Informal Op. 1405 (1977). Thus, the advocate witness rule, DR 5-101, applied to the testifying government attorney as well as to attorneys in the office.

Most states have now adopted the ABA Model Rules, but past opinions interpreting the ABA Model Code of Professional Responsibility took different approaches to the application of the advocate witness rule to attorneys in government offices. Government offices are not treated as firms for purposes of DR 5-101(B) and or DR 5-102. See e.g. West Virginia State Bar, Op. 85-2 (1985) (prosecuting attorney's office). Government attorney offices are treated as firms for purposes of DR 5-101(B) and or 5-102. See e.g., Kansas Bar Assn, Op. 82-37 (1982) (city attorney's staff); State Bar of Texas, Op. 399 (1980) (district attorney's office). The substantial hardship exception of DR 5-101(B)(4) applies to government offices. See e.g., Vermont Bar Assn, Op. 92-05 (1992) (deputy state attorney's office).

No Ohio case law squarely addresses whether a government attorney office constitutes a "firm" for purposes of the DR 5-101(B) and 5-102(A). Nevertheless, three Supreme Court of Ohio cases provide instruction to Ohio attorneys as to the proper application of the advocate witness rule. *State v. Coleman* (1989), 45 Ohio St.3d 298; *Mentor Lagoons*,

Inc. v. Rubin (1987), 31 Ohio St.3d 256; *155 North High, Limited v. Cincinnati Insurance Company* (1995), 72 Ohio St.3d 423.

In *State v. Coleman* (1989), 45 Ohio St. 3d 298, 301-02, the Supreme Court of Ohio found without merit an appellant's assertion that he was denied a fair trial because the prosecuting attorney was permitted to testify during the guilt phase of the trial. The testifying prosecuting attorney took no part in the trial of the case, but testified as a witness to identify handwritten motions prepared by the appellant. *Id*. at 301. The court found that the trial court did not err in admitting the testimony and that it was not a violation of DR 5-102 because "this testimony was necessary to lay a foundation for the expert's testimony, and the prosecuting attorney was the only person available to testify as to the identity of the author of the motions." Id. at 302.

The *Coleman* court stated that a prosecutor's testimony should be avoided, but cited *United States v. Johnston* 690 F.2d 638, 644 (7th Cir. 1982) for the proposition that a prosecutor's testimony may be "permitted in extraordinary circumstances and for compelling reasons, usually where the evidence is not otherwise available." *Coleman*, 45 Ohio St.3d at 302.

The *Coleman* court stated:

> We recognize that a prosecuting attorney should avoid being a witness in a criminal prosecution, but where it is a complex proceeding where substitution of counsel is impractical, and where the attorney so testifying is not engaged in the active trial of the cause and it is the only testimony available, such testimony is admissible and not a violation of DR 5-102.

Id. at 302.

In *Mentor Lagoons, Inc. v. Rubin* (1987), 31 Ohio St.3d 256, the Supreme Court of Ohio addressed the issue of whether a trial court may summarily refuse to allow an attorney to testify in a case in which he is representing a litigant on the grounds that such testimony may be in violation of the Code of Professional Responsibility. The court concluded:

> [W]hen an attorney representing a litigant in a pending case requests permission or is called to testify in that case, the court shall first determine the admissibility of the attorney's testimony without reference to DR 5-102(A). If that court finds that the testimony is admissible, then that attorney, opposing counsel, or the court sua sponte, may make a motion requesting the attorney to withdraw voluntarily or be disqualified by the court from further representation in the case. The court must then consider whether any of the exceptions to DR 5-102 are applicable and, thus, whether the attorney may testify and continue to provide representation. In making these determinations, the court is not deciding whether a Disciplinary Rule will be violated, but rather preventing a potential violation of the Code of Professional Responsibility.

Id. at 260.

In *155 North High, Limited v. Cincinnati Insurance Company*, (1995) 72 Ohio St.3d 423 the Supreme Court of Ohio addressed the issue of whether a trial court abused its discretion by allowing a party's attorney to serve as both an advocate and witness at trial. The court held:

> DR 5-104(B)(4) is an exception to the general rule of DR 5-102(A) that an attorney cannot serve as both an advocate and witness. The attorney who intends to invoke this exception has the burden to prove that his or her services provide a distinctive value and that his or her disqualification would work a substantial hardship on his or her client. Neither familiarity with the case nor mere added expenses are sufficient to prove this exception.

Id. at 429-30.

The following observations arise from these cases. First, while testimony by a prosecutor should be avoided, it may be necessary in extraordinary circumstances and for compelling reasons, such as in a criminal matter where it is a complex proceeding, where substitution of counsel is impractical, and where the attorney so testifying is not engaged in the active trial of the cause and it is the only testimony available (the *Coleman* exception). Second, testimony by a prosecutor or members of the prosecuting attorney's office is appropriate if it meets one of the exceptions in DR 5-101(B) (1) through (4). Third, during proceedings, courts will determine whether the DR 5-101(B) exceptions allow an attorney or members of the attorney's firm, including government offices, to testify and to continue representing the client.

The well-stated reasons for limiting the dual role of advocate and witness are in EC 5-9.

> **EC 5-9** Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

The ethical reasons for restrictions on serving as an advocate and a witness apply with equal force to attorneys in government offices and to attorneys in private practice. In addition, with government attorneys there are special concerns. On one hand, the prestige of the government may enhance the credibility of the government attorney as a witness, but on the other hand, the risk of impeachment or otherwise being found not credible may disgrace the government office. See *U.S. v. Johnston* 690 F2d 638, 643 (7th Cir. 1982) (en banc). As described in *United States v. Birdman*, 602 F.2d 547, 553-555 (3rd Cir. 1979), there is the risk that a prosecutor may not be a fully objective witness; the risk that the prestige of a government attorney's office will artificially enhance his credibility, the risk of confusing the jury as to whether the prosecutor is speaking in the

capacity of a prosecutor or a witness; and the need to preserve the public confidence in the process of justice. "The chief fear which underlies the ethical rule, it is commonly acknowledged, is not that the testifying prosecutor actually will overreach a hapless defendant but that he will Appear to a skeptical public to have done so." *Birdman*, 602 F.2d at 554 (footnote omitted).

As explained in EC 5-10, decisions regarding whether a lawyer represents and/or testifies in a matter arise at different times—before accepting representation and during representation-but are guided by the same considerations.

> **EC 5-10** Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. **In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.** (Emphasis added.)

The Board finds no basis for distinguishing attorneys in a government office, from attorneys in a private law firm for purposes of the advocate witness rule. Thus, it is the Board's view that a government office constitutes a "firm" for purposes of the advocate witness rule. Ohio's advocate witness rule restricts representation by a testifying attorney and his firm; therefore, representation by an attorney in a law director's office in a matter in which there is testimony by another attorney in the law director's office is not proper unless permitted under one of the DR 1-101(B)(1) through (4) exceptions or under compelling and extraordinary circumstances as recognized by a court.

In conclusion, the Board advises as follows. It is improper for a law director or an assistant law director to act as an advocate in a trial in which another attorney in the law director's office will testify as a witness on behalf of the city unless permitted under one of the exceptions in DR 5-101(B)(1) through (4), or under compelling and extraordinary circumstances as recognized by a court.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions

regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.