

(0634)
(FINAL)

ETHICS ADVISORY PANEL
Opinion #93-40, Request #353
Issued July 28, 1993

An attorney is the co-executor and attorney for an estate. The attorney hired counsel to represent the estate in a litigation matter. Prior to trial, counsel withdrew from the litigation. The attorney filed a motion in Probate Court to hire successor counsel. The Probate Court denied the motion. The estate has been unable to find another attorney to represent the estate. The attorney asks whether he may represent the estate in the pending litigation given that he/she will "definitely be called as a witness."

Rule 3.7 entitled "Lawyers as Witness" states that:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

The comments to the rule point out that "Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client."

The inquiring attorney informs the Panel that the exceptions contained in Rule 3.7(a)(1) and 3.7(a)(2) do not apply, as his testimony will relate to a contested issue and does not involve the nature or value of legal services rendered. The Panel is unable to determine whether the circumstances described by the inquiring attorney fall within exception 3.7(a)(3), "substantial hardship." The Panel is unable to render an opinion as to whether the attorney may act as an advocate and a witness at trial, but suggests that a motion before the court in which the matter is pending, with notice to all parties, may be the appropriate method to determine whether a "substantial hardship" exists.