

ETHICS ADVISORY PANEL  
OPINION #94-61 REQUEST #532  
Issued August 25, 1994

The inquiring attorney represents an administrator of an estate who seeks to bring an action to recover for the benefit of the estate funds held by the decedent and certain heirs at law in joint accounts. One of the heirs informed the attorney that she was not aware that her name was on one of the decedent's accounts. After filing a complaint in court, the attorney deposed the same heir who contradicted her previous statements and testified under oath that she knew her name was on one of the joint accounts. The heir was given an opportunity to retract her statements which she did not. The attorney believes that he/she may be required to testify in court regarding these inconsistent statements. The attorney asks whether he/she may continue as counsel or must he/she withdraw, or can he/she continue to represent the client in pending litigation until he/she learns whether the testimony will be required.

Rule 3.7 entitled "Lawyer as Witness" states the following:

(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.

(b) 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 or Rule 1.9.

Rule 3.7(a) prohibits a lawyer who is likely to be a necessary witness from acting as an advocate at trial. However, Rule 3.7 does not bar the attorney from accepting the employment at all. Pursuant to case law, an attorney can actually play a role in the representation of a client short of trial advocacy. See, e.g., Culebras Enterprises Corp. v. Rivera-Rios, 844F 2d 94 (1st Cir. 1988) wherein lawyers who performed substantial pre-trial work in case in which, had it gone to trial, lawyers would have been called as witnesses but would not have served as trial counsel. The first circuit held that in performing the pre-trial work the buyers did not violate Rule 3.7 because they did not act and did not plan to act as the trial attorney. American Bar Association Committee on Ethics and Professional Responsibility, Informal Opinion 89-1529 (1989) state that lawyers who expect to testify on contested issues at trial may represent the party in pre-trial proceedings, provided that the client consents after consultation and the lawyer reasonably believes the representation will not be adversely affected by the client's interest in the expected testimony. State Bar of Michigan, Committee on Professional and Judicial Ethics, Opinion CI-1118 (1985) states that "advocate" in the context of Rule 3.7 is best defined as a person who "participates as a spokesperson for the client in open court." The opinion (citing Annotated Model Rules of Professional Conduct, 2nd ed., 1992 p.391) states that a lawyer who in his capacity as certified public accountant will be providing expert testimony in a divorce case may also serve as co-counsel to a lawyer from another firm.

The Panel opines that the attorney may continue to represent the client in negotiations and in an advisory capacity prior to any court appearances. At that time, any attorney in the inquiring attorney's law firm may represent the client at trial.