

Final

ETHICS ADVISORY PANEL
OPINION, #95-40, REQUEST #606
ISSUED - SEPTEMBER 14, 1995

The inquiring attorney was retained by a client to revise his/her estate plan and various related matters. The inquiring attorney prepared a revocation of a power of attorney, a durable power of attorney, will, and durable power of attorney for healthcare. The inquiring attorney witnessed the will and healthcare power of attorney. The client died and the executor retained the inquiring attorney for purposes of probating the will and settling the estate. A friend of the decedent contested the will and filed a petition with the court. The inquiring attorney withdrew as legal counsel to the executor/estate because he/she would be testifying at trial and the subsequent attorney entered his/her appearance.

The subsequent attorney has invited the inquiring attorney to participate in discovery and pre-trial motions. The inquiring attorney asks whether he/she may represent the executor/estate in discovery and pre-trial motions.

Rule 3.7 "Lawyers as Witness" states:

(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

(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 and Rule 1.9.

Rules 3.7(a) prohibits a lawyer who is to be a necessary witness from "acting as an advocate at trial," however, the Rule does not bar the lawyer from playing a role in the representation short of trial advocacy.

A lawyer who is expected to testify on contested issues at trial may represent the party in pre-trial proceedings. In State Bar of Minnesota, Committee on Professional and Judicial Ethics, Op CI-1118 (1985), the committee stated that an "advocate" in the context of Rule 3.7 is defined as a person who "participates as a spokesperson for the client in open court." Case law allows an attorney to perform pre-trial work on a matter where he/she will be called to testify at trial because the attorney did not intend to play the advocate at trial role. The Panel opines that in accordance with Rule 3.7, case law and ethics opinions that the inquiring attorney may play a role in the representation of the executor/estate short of trial advocacy.