

Final

ETHICS ADVISORY PANEL  
OPINION # 95-44, REQUEST # 620  
ISSUED - SEPTEMBER 14, 1995

The inquiring attorney is an attorney for an executor in a will contest. The attorney for the deceased may be called as a witness. The inquiring attorney seeks to employ the attorney for the deceased to prepare discovery material on issues that he/she will not be required to testify as a witness. The inquiring attorney asks whether he/she may refer the preparation of discovery to the attorney for the deceased.

The Rule pertinent to this inquiry is as follows:

Rule 3.7 "Lawyer 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
- (3) disqualification of the lawyer would work substantial hardship on the client.

Rule 3.7(a) prohibits a lawyer who will be 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 Judicial Ethics, Op CI-1118 (1985), this committee stated that an "advocate" in the context on Rule 3.7 is defined as a person who "participates as a spokesperson for the client in open court." The 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 the attorney for the deceased may play a role in the representation of the executor/estate short of trial advocacy.