DELAWARE STATE BAR ASSOCIATION

COMMITTEE ON PROFESSIONAL ETHICS OPINION 1983-3

The Committee has been asked by two Delaware Assistant Public Defenders for its opinion on whether they are obligated to withdraw from representation of a criminal defendant. The Assistant Public Defenders represent a defendant ("Defendant A") who is currently awaiting trial on a serious felony. A short while ago, the Attorney General's Office informed the Public Defender's Office that it would call as a prosecution witness another client of the Public Defender's Office ("Defendant B")*. The Public Defender's Office has since withdrawn representation of Defendant B.

The Public Defender's Office anticipates that Defendant B's testimony will be hotly disputed in several respects, including whether he has received or expects to receive consideration of any kind from the State in exchange for his testimony. Consequently, the prosecution has advised the Public Defender's Office that it may also call as a witness the Assistant Public Defender who represented Defendant B. The Public Defender's Office believes that the purpose of calling Defendant B's former attorney would be to corroborate B's testimony that he did not seek through his attorney to obtain any consideration from the State in exchange for his cooperation.

* Defendant A and Defendant B, although both represented by the Public Defender's Office are not co-defendants.

The Public Defender's Office does not know the exact details of the testimony which the Assistant Public Defender who represented Defendant B may be called upon to give at trial nor does it know the extent to which the Assistant Public Defender's testimony will or may be prejudicial to Defendant A.

QUESTIONS

1. Does the Public Defender's Office have an ethical obligation under DR 5-102(B) to withdraw from representation of Defendant A at the present time because of the possibility that the Assistant Public Defender who represented Defendant B may be called as a prosecution witness at trial and may give testimony prejudicial to Defendant A?

2. If the Public Defender's Office does not have an obligation to withdraw representation at the present time, must it withdraw if the Assistant Public Defender is called as a prosecution witness at trial and does give testimony prejudicial to the defendant?

3. May Defendant A waive the ethical prescriptions contained in DR-102(B)?

OPINION

Since the State has announced that it may call as prosecution witness the Assistant Public Defender who represented Defendant B and since the Assistant's testimony may be prejudicial to Defendant A, the Public Defender's Office must

under DR 5-102(B) withdraw from representation of Defendant A. The ethical obligations of the Public Defender's Office to withdraw representation cannot be waived by the client.

DISCUSSION

DR 5-102(B) governs situations in which a lawyer must withdraw from representation of a client upon learning that he or she will or may be called to testify other than on behalf of the client.* It provides:

> DR 5-102(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 5-102(B) mandates withdrawal whenever an attorney or a member of his firm will or may give testimony prejudicial to the client. United States v. Reeder, 614 F.2d 1179, 1186 (8th Cir. 1980); Freeman v. Kulicke & Soffa Industries, Inc., 449 F.Supp. 974, 977-78 (E.D. Pa. 1978), aff'd, 591 F.2d 1334 (3rd Cir. 1979); See: Pennwell v. Clairol, Inc., 440 F.Supp. 17, (N.D. Ga. 1977).**

* The Discipliniary Rules are mandatory in nature; they state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Order of the Supreme Court of the State of Delaware, dated March 22, 1971, adopting the Delware Lawyers Code of Professional Responsibility. See: Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 268 n.5 (D.Del 1979).

** See also, United States v. Cortellesso, 663 F.2d 361, 363 (1st Cir. 1981); United States v. Crockett, 506 F.2d 759, 761 (5th Cir.), cert. denied, 423 U.S. 824, 96 S.Ct. 37 (1975).

However, a lawyer faced with the possibility of testifying against his or her client need not withdraw until it becomes apparent that the testimony he or she will give is or may be prejudicial to the client. Kroungold v. Triester, 521 F.2d 763, 766 (3rd Cir. 1975); Davis v. Stamler, 494 F.Supp. 339, 342-43 (D.N.J. 1980), aff'd, 650 F.2d 477 (1981).* Moreover, once a lawyer learns that he or she is to be called as a witness for the prosecution, he or she should withdraw from representing the criminal defendant. United States v. Crockett, 506 F.2d at 761.

The test of prejudice in the context of DR 5-102(B) is whether the "projected testimony ...[is] ...sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony." Freeman v. Kulicke, 449 F.Supp. at 977. In other words, testimony is prejudicial when it is substantial enough that an independent lawyer might seek to cross-examine the witness and/or to question his credibility. Id.; accord Rice v. Baron, 456 F.Supp. 1361, 1370 (S.D.N.Y. 1978); Smith v. New Orleans Federal Savings and Loan Association, 474 F.Supp. 742,

* This limitation serves to discourage opposing counsel from calling an attorney as a witness as a ploy to disqualify the attorney. Since disqualification is a "drastic step", courts and counsel should examine the claimed violation and "attempt to shape a remedy which will assure fairness to the parties and integrity to the judicial process." Ross v. Great Atlantic & Pacific Tea Co., 447 F.Supp. 406, 409 (S.D.N.Y. 1978). For example, in Great Atlantic the substance of the lawyer's testimony could be introduced through other evidence short of calling the attorney.

749-50 (E.D. La. 1979). The question is not whether the testimony adversly effects the trial in general, but whether it has an adverse affect on "any material and disputed aspect of a client's case." Freeman v. Kulicke, 449 F.Supp. at 977.

Thus, DR 5-102(B) is concerned with situations in which trial counsel, because of his connection with the lawyer-witness, might be inhibited from vigorously attacking the credibility of the witness' testimony. Smith v. New Orleans, 474 F.Supp. at 749-50; see also: United States v. Cortellesso, 663 F.2d at 363; American Bar Association Formal Opinion 185 (July 24, 1938).

The Public Defender's Office presently knows that the Assistant Public Defender who represented Defendant B may be called as a witness other than on behalf of Defendant A and that his testimony may be prejudicial to A since the lawyer's testimony will corroborate B's testimony that B has not accepted consideration in exchange for his testimony. The Public Defender's strategy of showing that Defendant B has "cut a deal" in exchange for his testimony against Defendant A may require the Assistant Public Defender trying the case to cross-examine, impeach and argue the credibility of his fellow attorney. Since this is the very situation DR 5-102(B) seeks to avoid, withdrawal at the present time is appropriate.

The question further arises whether withdrawal is excused if it would work a hardship to Defendant A.* Unlike DR 5-101(B) and DR 5-102(A), DR 5-102(B) does not contain a "hardship" exception. In Cornwell v. Clairol, 440 F.Supp. at 19 n.6, the court stated

that DR 5-102(B), read literally, recognized no exception for hardship.** Ethical Consideration 5-10***, on the other hand, speaks of a balancing test:

> 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, doubtes should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

* The Public Defender's Office has done substantial work on Defendant A's case and Defendant A has stated that he does not want the Public Defender's Office to withdraw from the case.

** But see: Ross v. Great Atlantic & Pacific Tea Co., 447 F.Supp. at 409 (Hardship exception in DR 5-101 applicable to DR 5-102(B)).

*** Ethical Considerations, unlike Disciplinary Rules, are not mandatory. Rather, they are aspirational in character and represent the objectives toward which every lawyer should strive. See Footnote at p. 3, supra.

Thus, Ethical Consideration 5-10 permits continued representation in "exceptional" cases where withdrawal will work a clear hardship to the client. Courts have set a high threshold for showing that withdrawal will work an undue hardship to the client. See e.g., Davis v. Stamler, 494 F.Supp. at 340 (more than one person usually competent to represent rights of criminal defendant); Supreme Beef Processors v. American Consumer Industries, 441 F. Supp. 1064, 1068-69 (N.D. Tex. 1977) (hardship exception in DR 5-101(B)(4) generally contemplates only an attorney who has some expertise in specialized area of law such as patents.) In view of this high threshold showing and in view of the fact that the situation at hand directly implicates the fundamental ethical precepts of impeaching a colleague's testimony, withdrawal is appropriate. As stated in Ethical Consideration 5-10, all doubts should be resolved in favor of withdrawal.*

Finally, Defendant A may not waive or consent to continued representation which violates DR 5-102(B). The ethical standards embodied in DR 5-102(B) are for the protection of the bar and the court and the rule cannot be waived by a client. See: United States v. Cortellesso, 663 F.2d at 363; Supreme Beef Processors v. American Consumer Industries, 441 F.Supp. at 1068; cf. Freeman v. Kulicke, 449 F.Supp. at 981 (because disciplinary rules concerned directly with standard of conduct of bar and only

* Because Delaware has not adopted the Model Rules of Professional Conduct, this Committee has not considered what effect, if any, the Model Rules might have on the issues raised in this opinion.

indirectly with interests of litigants, client cannot consent to violation of a disciplinary rule.) Hence, even if Defendant A consents to continuing representation, the Public Defender's Office must still withdraw.