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Opinion No. 27 of the Ethics Committee of the Colorado Bar Association Adopted March 16, 1963

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BAR BRIEFS

OPINION NO. 27 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED MARCH 16, 1963

SYLLABUS

It is improper for a lawyer to conduct the trial of a lawsuit on behalf of a client when the lawyer knows in advance of trial that it is probable that his partner will be a witness in the lawsuit and will be required to testify to other than merely formal matters.

FACTS

Law firm F defended its client C in a lawsuit brought by A. B is obligated to hold C harmless from claims of A, including litigation costs and attorneys' fees but has refused to do so.

After the termination of the lawsuit by A, C wishes to sue B under the indemnity agreement. A partner in law firm F is expected to be a witness for the plaintiff in this action. He would testify concerning certain aspects relating to the first action other than merely formal matters.

May another partner in law firm F properly conduct the lawsuit on behalf of C against B?

OPINION

Canon 19 reads as follows:

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

We consider the only question to be whether, on these facts, another member of the law firm of the attorney-witness may be considered "other counsel" within the intent of this Canon. We believe that this question must be answered in the negative.

On two previous occasions this Committee has considered the propriety of a partner of a lawyer engaging in some activity in which the lawyer himself could not properly engage. Opinion No. 18, 38 Dicta 263 and Opinion No. 21, first published in 38 Dicta 369, amended and republished in 39 Dicta 265. Both opinions quote with approval from Opinions No. 49 and 72 of the American Bar Association Committee on Professional Ethics as follows:

The relation of partners in a law firm are such that neither the firm nor any member or associate thereof may accept any professional employment which any member of the firm may not properly accept.

We believe that this statement is also applicable to the facts stated above.

Although the question is not raised by the facts presented, the Committee feels that an exception might properly exist where the possible need for the lawyer to testify at the trial cannot reasonably be foreseen in advance of the trial. Under such circumstances, upon advising the judge and opposing counsel, and with the sanction of the trial court, it might be appropriate for another member of the firm of the lawyer-witness to conduct the remainder of the litigation. This would be true only if the client's interests would be adversely affected because outside counsel could not become sufficiently familiar with the case in the middle of the lawsuit to fully represent the client. This problem would not arise where the need to testify can be anticipated in advance of the trial.

The Committee is aware that the ABA Committee on Professional Ethics has concluded that a partner of the lawyer-witness may be considered "other counsel" within the meaning of Canon 19, ABA Opinion No. 220. This Committee feels that the views expressed by Committee Members Houghton and Brand in dissenting to ABA Opinion No. 220 are more compelling than the views expressed in the majority opinion.

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