

AFFIDAVIT TESTIMONY IN DISSOLUTION CASES

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Several recent advisory opinion requests have raised the issue of attorney testifying through affidavits about substantive matters in dissolution cases.

The Code of Professional Responsibility addresses this question in EC 5-9 which provides:

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Disciplinary Rule 5-102(A) states:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

The above provisions apply equally to trial testimony and affidavit testimony. By filing an affidavit, an attorney states under oath the facts as he or she knows them.

The ethical objection to a lawyer testifying as to contested issues is that the client's case will be presented through the testimony of an obviously interested witness who is subject to impeachment on that account. Because a trial advocate clearly possesses such an interest, the testimony of a lawyer and his or her firm is properly subject to inquiry. The danger is that the weight and credibility of the lawyer's testimony may be discounted and the effect will be detrimental to the client's case. A client's cause is best served by having testimony from a witness not subject to impeachment for interest in the outcome of the trials.

Our experience, as well as that of many other members of the bar, is that lawyers frequently file affidavits in dissolution actions addressing substantive issues such as visitation practices, the conduct of an abusive spouse, the nature and amount of marital assets, and failure by one party or the other to comply with court orders. This appears to be a growing problem. Such conduct requires a lawyer to make a difficult choice. The lawyer may be required to depose opposing counsel. If not, the lawyer is subject to

criticism for ignoring his or her client's interest in cross-examining opposing counsel, who has testified against his or her client in the affidavit. It is, therefore, unfair as well as ethically objectionable for lawyers to act as both advocate and witness.

The exceptions provided in DR 5-101(B), however, permit a lawyer to testify: (1) if the testimony will relate solely to an uncontested matter; (2) if the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) if the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his or her firm to the client; and (4) as to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his or her firm as counsel in the particular case.

American Bar Association Formal Opinion No. 339 (January 31, 1975) illuminates DR 5-101(B). In determining whether the particular circumstances justify continued representation, Formal Opinion 339 states:

Under the Code the critical question is whether the distinctive and particular value to the client of that lawyer or that law firm as trial counsel in that particular case is so great that withdrawal would work a substantial personal or financial hardship upon the client. The most serious and extensive consideration should be given, with the client's informed participation, of the possibility and practicality of engaging other counsel to try the case so that the client may have the lawyer's necessary testimony without the risk of less effective representation resulting from his own counsel being both witness and advocate. If withdrawal, under the circumstances, would clearly work a hardship on the client, the lawyer or firm should continue as counsel despite the necessity for such testimony.

In determining whether continued representation is justified, EC 5-10 points to such factors as the personal or financial sacrifice of the client, materiality of the testimony, and the continued effectiveness of the lawyer as advocate. However, lawyers may prevent the necessity of choosing between continuing as counsel or withdrawing to be a witness by obtaining affidavits on substantive matters from the real witnesses in the case. If the lawyer is the only witness who can testify to a given set of facts, then EC 5-10 requires that doubts about continued representation be resolved in favor of the lawyer testifying and against becoming or continuing as an advocate.