

ADVISORY OPINION

Issue:

Is it a violation of Rule 5-102 of the Code of Professional Responsibility for an associate in a law firm to sue a former client of the firm for unpaid legal fees if the associate will act as both counsel and witness on behalf of the law firm?

Discussion:

The attorney who requested this opinion stated as a fact that her testimony would not relate to any of the four items enumerated under Rule 5-101(B). Since this is a suit against a former client for fees, it appears that her assumption is incorrect, since her testimony would fall under the exception of Rule 5-101(B)(3) which states that an attorney may also act as a witness "if the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his law firm to the client." While it is not clear from the attorney's request whether the "client" that she is worried about is her law firm or the Defendant-former client, any concerns about the latter should be dispensed with because (a) the Defendant is a former client, (b) the subject of the testimony is within the exception, and (c) there is full disclosure between the Plaintiff law firm and its lawyer representative.

The rationale in requiring a lawyer to withdraw when he or she will have to be a witness is to protect the client. For example, if the finder of fact determines that the lawyer, as a

witness, is being untruthful, then his untruthful testimony will taint his entire representation of the client in that case.

The above considerations are not present when a lawyer sues a former client for fees. Moreover, the lawyer has a constitutional right to represent himself in court. Though there appears to be no New Mexico case law on the subject, in various unreported decisions, defendants' motions seeking to disqualify a law firm for representing itself in a fee dispute were quickly denied.

In conclusion, a lawyer or law firm may appear pro se in a suit against a former client for fees, and there is no obligation for the lawyer to withdraw (i.e., to hire an outside lawyer to represent him or his firm), even if he knows that he will have to testify in the case.