

FORMAL OPINION NO. 83*

The Ethics Committee has been asked to render an opinion on the following question:

Where an attorney discovers that his testimony will be required in an action to be filed in behalf of his client, may he thereafter cooperate with the substituted attorneys who bring the action for the former client in the preparation of pleadings, etc.?

DR 5-101(B) states in part as follows:

"A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, . . ."

"The great weight of authority in this country holds that the attorney who acts as counsel and witness, in behalf of his client, in the same cause on a material matter, not of a merely formal character, and not in an emergency, but having knowledge that he would be required to be a witness in ample time to have secured other counsel and given up his service in the case, violates a highly important provision of the Code of Ethics. . ." Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 499, 141 A. 866, 869 (1928).

It would appear from the foregoing language that the attorney is required to "give up his service in the case," and we construe this to mean all service, including preparatory work in the case.

DATED this 20th day of December, 1974.

*DR 5-102(A) is the current Code section applicable to this question if it arises subsequent to undertaking the representation. DR 5-101(B) applies prior to undertaking the representation. See also, I.S.B. Opinions No. 61 (March 15, 1973); and 15 (undated).