FORMAL OPINION NO. 15

DUTY OF LAWYER AS PROSPECTIVE WITNESS

The following question and comment has been submitted to this Committee for its opinion:

> "When two or more lawyers are practicing as partners and where the partnership represents a client in a trial, is it improper for a partner or an associate employed by the partnership to testify other than on formal matters if the partner or associate who testified does not thereafter question any witness or participate in any argument and the client's case as far as the trial is concerned, is handled by another member or associate of the partnership?"
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> "It seems that the question could arise in two ways: First, it could be apparent that the testimony of a partner or an associate would be necessary or likely in the event of trial at the time the action was commenced; or, second, the necessity of testimony by such partner or associate would arise during the course of a trial in which such partner or associate had been taking an active part. In the first situation the answer to the question posed above would determine whether employment in the case should or should not be accepted. In the second situation the answer to the question would determine whether counsel outside of the partnership would need to be called into the case."

Canon 19 is involved and provides that:

> "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."

The words "other counsel" give rise to the questions presented here as well as related problems.

Generally, it may be said that a law firm is an entity, the partners or associates of which are in such close relationship that

if one member of the firm is barred from accepting employment, then all the members thereof are barred. Thus, if a lawyer knows he is to be a witness for a client then he should refuse employment and neither he nor the members of his firm should conduct the trial.

Exceptions to this generalization are where the lawyer is to testify as to merely formal matters, or, in the rare case, where the lawyer acting as a witness has a long and detailed familiarity with the details of the matter in litigation, so that his withdrawal may necessarily deprive his client of knowledge and experience of irreplaceable value. See ABA Opinion No. 220.

If it develops during the course of a trial that a lawyer must appear as a witness he should withdraw as counsel and leave the conduct of the trial to outside counsel or to a member of his firm, unless the latter is placed in a position of conflict or of having to attack the lawyer-witness' testimony.

As was said in the above-cited Opinion No. 220:

> "Like many other problems arising in the course of professional employment, this involves questions of good taste as well as of ethics, its solution depending largely on the surrounding circumstances, in the light of which each case must be resolved, within the limits above outlined, by the lawyer, with, of course, full disclosure to opposing counsel and to the tribunal."

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*This is an undated opinion. It was decided prior to the adoption of the Idaho Code of Professional Responsibility. DR 5-101 and DR 5-102 of the present Code governs the subject matter of this opinion.