FORMAL OPINION NO. 61*

The following fact situation was presented to the Committee for its opinion:

> Client Y went to Attorney A's office in 1969 with Mr. X. Y indicated that he wanted Attorney A to draw an escrow contract and documents for the sale of his farm. Both Y and X were informed that A could only act as an attorney for one individual and that since he had over the years represented Mr. Y that he would draw the contract for him and bill him for the said contract.
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> Both men entered into a discussion in the Attorney's office regarding the terms of the agreement. Basically the written terms of the agreement were to sell all of Mr. Y's farm less ten (10) acres where Y's house was located.
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> Attorney A drafted the contract, excluding and reserving from the sale ten acres in the southeast corner of an eighty-acre parcel. An agreement was prepared, and Mr. Y and Mr. X went to Attorney A's office to sign said agreement. X was again informed that if there were any questions on his part that he should consult with his own attorney.
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> Several years later in 1972 a suit was instituted by Mr. X. seeking to reform the written agreement claiming an ambiguity involved or that the contract was void and in need of modification.
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> Attorney A had acted in the assumption throughout, and had inquired of Mr. Y if he felt that there would be any need for A to be a witness on Y's behalf in the lawsuit. He informed A that he would not call him as a witness on his behalf and

would not expect him to testify. A then undertook to defend Y.

The suit progressed to the pleading stages and was set for trial. Prior to trial, Mr. X's attorney, Attorney B, and Attorney A deposed the two opposing parties. At that time, towards the close of the session, Mr. X in answer to a question regarding what witnesses he intended to call stated that among others he intended to call Attorney A as a witness. Attorney B then implied that he had given notice that A was a witness in the case and was improperly appearing in the case.

In view of the fact that the defendants and the plaintiffs had fully executed the agreement for the sale of real property and there appeared in issue no fraud or claim of misrepresentation, but one rather of ambiguity as to the excluded land and an allegation of breaches of the contract, it had been Attorney A's conclusion up to the moment of Attorney B and Mr. X's demand that he be a witness, that this matter would not involve matters likely to require his testimony.

The question is whether or not Attorney A should immediately withdraw in view of the circumstances.

It would appear that Canon 5 of the Code of Professional Responsibility is a clear answer to this query. Subsection B seems to indicate that under the circumstances outlined, it is not necessary for him to withdraw from the case until it is apparent that his testimony would be prejudicial to his client.

DATED this 15th day of March, 1973.

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*DR 5-102 now provides that a lawyer must withdraw if it is obvious that he will be called as a witness on behalf of his client, but need not withdraw if he is to be called as a witness other than on behalf of his client, unless his testimony is or may be prejudicial to his client.