

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-48
Issued: October 1971

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May an attorney represent an accident victim in a tort claim where an associate of his firm witnessed the accident along with other persons, and persons other than the associate will be called as witnesses?

Answer: Yes.

OPINION

A member of our Association has been asked by out of-state counsel to associate himself in a tort claim arising out of an automobile accident which is said to have been witnessed by numerous persons, including incidentally, the Circuit Judge of the court which will have jurisdiction of the litigation, the Chief of Police, a police sergeant, and several attorneys. One of the attorneys happens to be the son of the member of our Association who questions whether or not he can ethically become involved in the litigation. According to the attorney making the inquiry, his son is a practicing attorney in the same office, but is not a partner in the firm and is employed upon a straight salary basis, so that his income is not dependent upon the results of this or any other particular piece of litigation. Apparently the son's testimony will be cumulative, and might not be used in evidence at all during the trial.

Much has been written in the Canons of Professional Ethics, the newer Code of Professional Responsibility, and in the opinions of Ethics Committees and Courts concerning the appearance of an attorney as a material witness in a case. For example, it has been held that an attorney or his partner should not testify in a will contest case concerning the competency of the testator, when one side or the other is represented by the attorney or his partner. See Formal Opinion 50, American Bar Association Opinions on Professional Ethics.

On the other hand, Courts have generally held that, in the absence of any statute to the contrary, the testimony of an attorney for his client is competent, and the fact that he is or has been an attorney in the case affects only his credibility.

Under the circumstance as outlined to the Committee, the Committee cannot state that it is per se unethical for an attorney to accept employment in a situation such as

presented. In the first place, the attorney-witness involved is not an actual partner of the attorney accepting the employment, and, probably more importantly, the testimony of the witness does not appear to be absolutely essential to the prospective client's case.

In coming to this conclusion, the Committee is proceeding upon the assumption that the testimony of the attorney-son is, in fact, merely cumulative, and is not necessary to the proper prosecution of the claim. In the event that his testimony is necessary, there is some doubt in the minds of the members of the Committee that the employment should be accepted. There also appears to be a duty to the client in this situation, in that the client should be fully aware that the attorney-son would not be called as a witness.

Again, if the testimony of the attorney-son would be unfavorable to his father's version of the case, perhaps the employment should be refused, as the son could obviously be called as a witness by the opposition, which would have the effect of materially altering the course of the case.

At the time of trial of the case, it would appear to the Committee to be in the best interest of justice that both plaintiff's and defendant's attorneys refrain from mentioning in any way that the son of the plaintiff's attorney was a witness in the case, and, although the Committee certainly has no authority to tell the presiding judge how this situation should be handled, we would suggest that this matter should be disposed of in pretrial conference.

While the circumstances of the inquiry present a very delicate situation, we would not go so far as to say that the attorney should not accept employment in the incident case, but should adhere to the usual admonition that he should not only avoid improper relationships, but also should avoid, as far as possible, giving the appearance of any improper relationship.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.