E-82-3 City attorney called as adverse witness

Question

May a city attorney (or an assistant) continue to represent the city in an action brought by a former employee against said city wherein said city attorney (or assistant) is called by adverse party, or is notified that he or she will be called as a witness on behalf of said adverse party?

Opinion

Yes, subject to certain limitations.

SCR 20.25(1) requires that when a lawyer learns or it is obvious that said lawyer or a lawyer in his or her firm ought to be called as a witness on behalf of his or her client, the lawyer shall withdraw from the conduct of the trial and the firm, if any, may not continue representation at the trial except as permitted by SCR 20.24(2)(a) to (d).

SCR 20.25(2), however, states:

> If, *after undertaking employment* in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the firm may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that his or her testimony is or may be prejudicial to the client. (Emphasis supplied.)

Thus, the prohibition of SCR 20.25(1) is directed to a lawyer voluntarily offering to testify on behalf of the lawyer's own client, whereas SCR 20.25(2) is directed to calling the lawyer as a witness other than on behalf of the lawyer's client.

Your attention is also invited to SCR 20.23(2)(h), which is former EC 5-9. This ethical consideration was quoted by the Wisconsin Supreme Court in *Harris v. State*, 78 Wis. 2d 357, 369 (1976) wherein the Court stated, among other things, ''As a general matter, the roles of witness and advocate are inconsistent and a practice this court has discouraged'' (p. 368), and further stated that:

> Whether a lawyer should testify in a trial in which he is an advocate is a matter for the trial court's discretion; in light of the strong and sensible policies against

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> mixing these roles, however, the answer should usually be no, especially where the value of the testimony is small, or collateral to the ultimate issues (p. 369).

In one of the earlier cases cited by the court in *Harris v. State*, *Peterson v. Warren*, 31 Wis. 2d 547, 568 the court stated:

> The practice of permitting an attorney involved in the case to testify *on behalf of his client* is generally frowned on by the Canons of Ethics of the American Bar Association and by this Court. However, the attorney is competent and the policy against his testifying, while remaining in the case as an attorney for one of the parties is not absolute and the trial court may, within its discretion, permit the attorney to testify to prevent an injustice or redress a wrong. (Emphasis supplied.)

In your question, two matters are readily apparent: (1) that the action had already been commenced prior to notification by adverse counsel, and (2) the city attorney would not be testifying on behalf of his or her client. Thus, under the rules and cases cited, it is discretionary with the trial court as to whether or not the city attorney (or assistant) would be permitted to testify.

With respect to the city attorney (or assistant) withdrawing from the pending action, it is our opinion that this might work a substantial hardship on the client (the city involved), since withdrawal of the city attorney or any assistant would disqualify the entire city attorney's staff and would be covered by SCR 20.24(2)(d).

In any event, if the lawyer is called as an adverse witness, and is permitted by the court to testify, he or she would still be bound by SCR 20.21 and SCR 20.22 requiring the lawyer to preserve the confidences and secrets of his or her client.

The committee also believes it proper to call to your attention a statement made by the Supreme Court in *Rude v. Algiers*, 11 Wis. 2d 471, 482 (1960):

''The practice of attempting to call opposing counsel as a witness during the course of trial to establish some fact that can be readily proved in a different manner should be discouraged.''

In conclusion, the committee is of the opinion that the city attorney (or assistant) need not withdraw from representation of the city under the facts presented in your question, conditioned upon his or her compliance with the Supreme Court Rules and the Supreme Court decisions hereinabove cited, and

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in any event, obtains the consent of his or her client to continue such representation.

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