
E-83-23 Conflict of interest: Attorney calling partner as expert witness in divorce proceedings

Facts

In the trial of a divorce case, the tax aspects of the proposed property division, maintenance and support often are at issue. An accountant's testimony is sometimes needed to ascertain the fair market value of the assets and is usually required to prove the tax effect upon the parties in the financial distribution of the estate.

Question

Is it ethically permissible for an attorney to use the testimony for a client at trial from members of his/her firm as presented in the above instance?

Opinion

It would be improper for an attorney from your firm to testify for your client in the situation described.

ABA Formal Opinion 339 (Jan. 31, 1975) states that Ethical Considerations 5-9 and 5-10 (Wisconsin Supreme Court Rule 20.23(2)(h) and (i)) make clear that the principal ethical objections to a lawyer or a lawyer in his or her firm testifying for his or her client as to contested issues are that the client's case will, to that extent, be presented through testimony of an obviously interested witness. The advocate is, in effect, "put into the unseemly position of arguing his own credibility or that of a lawyer in his firm." ABA Formal Opinion 339 at 2. The weight and credibility of such testimony may be discounted and, in some cases, the effect will be detrimental to the client's cause. Also, in some situations, the practice may handicap opposing counsel in challenging the credibility of the lawyer witness. *See* SCR 20.23(2)(h).

The Wisconsin Supreme Court examined SCR 20.23(2)(h) (formerly EC 5-9) in *Harris v. State*, 78 Wis. 2d 357, 368, 254 N.W.2d 291 (1976), where 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.” In *Peterson v. Warren*, 31 Wis. 2d 547, 568, 143 N.W.2d 560 (1966), the Wisconsin Supreme Court stated that “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.”

Although the cases cited above address the situation of an attorney testifying on behalf of his or her client, the American Bar Association stated in Formal Opinion 339 that another member of the firm is at least financially interested in the outcome of the case and, therefore, his or her testimony is equally suspect and improper.

SCR 20.24(2) states four exceptions to the general rule under which a lawyer representing a client at trial may utilize testimony of a lawyer of the same firm. The four exceptions permit testimony: (1) relating solely to an uncontested matter; (2) relating solely to a matter of formality where there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) relating solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; and (4) relating to any matter, if refusal to continue as trial counsel would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Unless the lawyer’s testimony falls under one of the above four exceptions, it is improper. In State Bar Formal Opinion E-82-3 (August 1982), the committee stated that only under the circumstances stated in SCR 20.24(2) is a lawyer or a lawyer in his or her firm permitted to testify on behalf of his or her client.

As a general rule, the procedure presented for examination is impermissible under SCR 20.23(h) and (i). In light of the fact that this procedure does not appear to fall within any of the exceptions of SCR 20.24(2), it would be improper for an attorney from his/her firm to testify for the attorney’s client.