E-80-3 Special prosecutor as witness

Question

May a former district attorney accept an appointment as special prosecutor in view of the fact that there is a distinct possibility that he may be called as a witness in the matter wherein he would be acting as special prosecutor?

Facts

The former district attorney, who had successfully prosecuted and convicted a defendant in a jury trial for first degree murder, was appointed by the court as special prosecutor on defendant's petition for post-conviction relief. However, the former district attorney, appointed special prosecutor, was of the opinion that it was a distinct possibility that he might be called as a witness by either the defendant or the state because of his personal knowledge of facts pertaining to some of the grounds on which the defendant was basing his relief on the petition. These facts do not appear of record and are evidentiary facts relating to the merits of the petition. There are other parties who were also witness to the same facts, such as other courtroom personnel.

Opinion

Since the former district attorney, subsequently appointed special prosecutor, would be representing the same party, the state of Wisconsin, in both matters, there is no reason that because of a conflict of interests he could not properly act as special prosecutor.

The situation of the attorney acting as a witness has occurred on numerous occasions in Wisconsin trials, and the law is, in general, well established.

In 1926 it was decided that a lawyer, actively engaged on the part of the prosecution, may not properly become a witness, and, if he determines that he should be a witness, he should immediately retire from conducting the prosecution. *Zeidler v. State*, 189 Wis. 44.

If a lawyer, proposing to act as trial attorney, discovers before trial that he is a material witness and that it will probably be necessary that he testify as to

contested facts, he should immediately withdraw as attorney. *Interior Woodwork Co. v. Buhler*, 207 Wis. 1; *Estate of Weinert*, 18 Wis. 2d 33; *Southard v. Occidental Life Ins. Co.*, 31 Wis. 2d 351. It may be helpful to read *Lorenz v. Wolff*, 45 Wis. 2d 407 as assistance in understanding the philosophy of the court in this respect.

The general rule has been modified by the court in allowing the attorney to testify as to noncontroversial facts within his personal knowledge and as to mere formal matters such as custody of an article to be offered in evidence or formal matters such as attestation of instruments. *State v. Ketchum*, 263 Wis. 82; *Southard v. Occidental*, *supra*.

In certain restricted situations the court has indicated that there is some slight discretion in the trial judge, when it appears that an exceptional case is presented for the attorney's testimony in the interest of justice. *Peterson v. Warren*, 31 Wis. 2d 547; *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559; *Harris v. State*, 78 Wis. 2d 357.

In *Ennis v. Ennis*, 88 Wis. 2d 82, pages 96 through 100, the court primarily was concerned with a conflict of interest, but on page 98 the court alludes to the fact that in that instance it became necessary for plaintiff's counsel to testify with respect to his own involvement in the original action. The court stated that the attorney's conduct constituted a serious breach of the Code of Professional Responsibility in several respects, referring to Disciplinary Rule 4-101 and Disciplinary Rule 5-101(B).

It is the committee's opinion that the present Canons of Professional Ethics do not permit an attorney to accept employment if he knows or it is obvious that he may be called as a witness other than as permitted by the four exceptions in Disciplinary Rule 5-101(B).