BBA Ethics Opinion 93-5

Summary of Opinion: A lawyer and his firm ordinarily must withdraw from pending litigation when the lawyer learns that he ought to be called as a witness on behalf of his client even though he has a longstanding relationship with his client. The "substantial" hardship exception in D.R. 5-101(B)(4) has been and ought to be narrowly construed. It does not apply either (1), where the lawyer ought to testify concerning negotiations and agreements which are the subject of litigation or (2) where there is a longstanding professional (or personal) relationship between the lawyer and client. Whether the "substantial hardship" exception applies due to the client's financial exigencies cannot be determined.

Facts: L represents C (a natural person), individually and as trustee of a trust which was formed in 1984. The trust owns real property upon which a restaurant has operated. L represented C in connection with the formation of the trust, purchase of the building on the real property, subsequent transfer of liquor license and lease arrangements to another entity, operation of the restaurant, and all other legal matters. These included negotiation of various agreements with XYZ (the defendants) in 1990 to open a restaurant in the building and the purchase of a liquor license in the trust's possession as a pledgee. After the Alcohol Beverage Control Commission (ABCC) initially denied the liquor license transfer request, a dispute arose between C and XYZ. C and XYZ then entered into modifications of their initial agreements; however, the defendants vacated the premises while the second application for license transfer was pending before the AECC.

L's firm filed suit on behalf of the trust for breach of contract; the defendants counterclaimed against the trust and C, personally, for rescission, breach of contract, misrepresentation, and alleged violations of c. 93A. After pre- trial discovery, the defendants' firm listed one of its partners (not trial counsel) as a witness in a draft joint pre-trial memorandum. Although L's firm initially did not intend to have L testify, it then decided that L should also be listed as a trial witness. Both firms were willing to consent to this procedure, although the testimony of L and XYZ's lawyer-witness would involve contested issues concerning negotiations between the parties and related issues. Both parties waived trial by jury.

At a pre-trial conference, the judge raised a question as to this procedure and asked counsel to obtain ethical advice. Since then, the trial lawyer for XYZ has joined a new firm, thereby obviating any lawyer-witness issue with respect to it. L inquires whether the substantial hardship exception in D.R. 5- 101(B) permits him to testify while another lawyer in his firm tries the case. No motion to disqualify has been filed. L additionally states that he has represented C's related business entities for many years, and that there is a substantial degree of trust between him and C. L is also the brother-in-law of C.

Discussion: D.R. 5-102(A) provides:

"If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may

testify in the circumstances enumerated in DR 5-101(B), (1) through (4)."

The inquiry makes clear that the only applicable exception is (4), which provides that the lawyer may testify:

"(4) as to any matter, if refusal 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."

The "substantial hardship" exception has been narrowly construed. See, e.g., Draganescu v. First Nat'l Bank of Hollywood, 502 F.2d 550, 552 (5th Cir. 1974), cert. denied, 421 U.S. 929 (1975) (long familiarity with clients and their language (Rumanian) insufficient to create hardship); Estate of Andrews by Andrews v. U.S., 804 F. Supp. 820, 829 (E.D. Va. 1992), and cases cited ("The 'substantial hardship' exception to the witness- advocate rule is construed narrowly"); MacArthur v. Bank of New York, 524 P. Supp. 1205, 1210 (S.D.N.Y. 1981) (" ... the substantial-hardship exception invoked by defendant must be narrowly construed"); Wickes v. Ward, 706 P. Supp. 290, 293 (S.D.N.Y. 1989) (same); Connell v. Clairol, Inc., 440 P. Supp. 17, 19 (N.D. Ga. 1977) (dearth of competent patent counsel in Atlanta area insufficient to fall within hardship exception); United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating and Plumbing Co., 423 F. Supp. 486, 490 (S.D.N.Y. 1976) (ten-year representation insufficient); and MBA Ethics Opinion 75-2. See also Universal Athletic Sales Co. v. American Gym, Etc., 546 F.2d 530, 538-39 (3d Cir. 1976) (law firm should have withdrawn in patent case once it decided to call associate as expert witness - dictum).

The language in the Rule does not distinguish between jury and non-jury cases. We agree with the MBA that the assent of opposing counsel is irrelevant. See MBA Ethics Op. 75-2, p. 2. Also irrelevant is the fact that the lawyer is the brother-in- law of the client. The Rule does not contain exceptions for siblings or in-laws. See Federated Adjustment Co. v. Sobie, 455 N.Y.S.2d 820, 822 (App. Div. 1982) (marital relationship between lawyer and client does not meet substantial hardship exception).

The "distinctive value" aspect of the Rule has also been narrowly construed to apply to circumstances where the attorney or law firm has a unique expertise. MacArthur, supra, 524 F. Supp. at 1210 (dictum that exception might apply to attorney with "unique expertise"); Bottaro v. Hatton Associates, 528 P. Supp. 1116, 1119 (B.D.N.Y. 1981) (general assertions about firm's experience in securities fraud insufficient), and Supreme Beef Processors v. Am. Consumer Industries, 441 P. Supp. 1064, 1069 (N.D. Tex. 1977) (exception limited to lawyer with expertise in specialized area whose distinctive value is recognized at outset of employment). A mere longstanding relationship, as here, has been held to be insufficient. Bottaro, supra, Wickes v. Ward, supra, 708 F. Supp. at 293.

Courts have generally rejected the notion that the expense and delay resulting in new counsel coming into the case falls within the "substantial hardship" exception. Estate of Andrews, supra, 804 F. Supp. at 829; May's Family Centers, Inc. v. Goodman's, Inc., 590 F. Supp. 1163, 1165 (N.D. 111. 1984) ("If substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case equated with delay and expense incurred in bringing new counsel into the case, the exception would swallow the rule"). See General Mill

Supply Co. v. SCA Services, Inc., 505 F. Supp. 1093, 1098-1100 (E.D. Mich. 1981), aff'd, 697 P.2d 704, 713 (6th Cir. 1982) ("We think ... that the hardship situation covered by subparagraph (4) is one where the lawyer-client team come unexpectedly upon a disqualification situation, against which they neither actually did nor could have safeguarded themselves. We do not think it was meant for a case where a possible disqualification dilemma was visible years before it arose, yet the parties went right on increasing the helpless dependence of client upon lawyer"). A careful review by the Committee did not find any case or ethics opinion interpreting the Rule adopted in Massachusetts which permitted counsel who negotiated a deal that went sour to remain in the case when litigation erupted.

There is some authority that the exception should apply where there is a serious question whether the client is financially able to retain substitute counsel. See Lumbard v. Maglia, Inc., 621 F. Supp. 1529, 1540 (D.C.N.Y. 1985) (" ... where the plaintiffs are bankruptcy trustees, the hardship would be particularly acute. Disqualification would force two bankrupt estates, one with no resources, the other with finite resources, to sink deep into their pockets to pay new counsel to simply familiarize themselves with the litigations, and Gorovitz v. Planning Board of Nantucket, 394 Mass. 246, 250 n.6 (1985) (dictum intimating that financial burden might be "hardships"). The facts supplied to the Committee do not indicate one way or the other whether C is financially unable to retain new counsel.

Addendum

The Committee notes that the current lawyer-witness Rule, especially the narrow interpretation given to the substantial hardship exception, has been widely criticized. see, for example, Note, "The Advocate-Witness Rule: If Z, Then X, But Why?", 52 N.Y.U. L. Rev. 1365, 1367-68 (1977), and Brown & Brown, "Disqualification of the Testifying Advocate -- A Firm Rule?", 57 N.C. L. Rev. 597, 606-07 (1979). At least in circumstances where the lawyer's need to be a witness could not be anticipated, it seems unduly harsh to require that new counsel be retained in circumstances where another lawyer in the firm tries the case. Unlike other Rules (see, for example, D.R. 5-101(A) and 5- 105(C)), the lawyer-witness Rule does not permit the intelligent, informed consent of the client to waive the Rule after disclosure of any possible disadvantage of having one lawyer try a case in which another lawyer in the same firm acts as a witness. Furthermore, the traditional rationale for the advocate witness rule concerning sparing the adversary the discomfort and possible disadvantage of having to cross-examine an opposing counsel seems remote when there is no jury and opposing counsel apparently does not object.

The Model Rules of Professional Conduct, promulgated in 1983 by the American Bar Association and adopted by a majority of states, but not by the Supreme Judicial Court; included a more liberal "substantial hardship" exception, which does not rely on the "distinctive value" of the lawyer's services. See Model Rules of Professional Conduct, Rule 3.7, Comment S (4]. Essentially, the Model Rule disqualifies an individual attorney- witness but limits vicarious disqualification of the attorney's firm to circumstances where the firm is precluded from representing the client by reason of the conflict of interest rules (Model Rule 1.7 and 1.9). Although New York did not adopt the Model Rules, it recognized the harshness of its original lawyer-witness Rule (identical to the current Massachusetts D.R.) and, at the recommendation of the New York Bar Association, revised it to provide "that only the attorney-witness who ought to

testify on behalf of his client should be disqualified." Kubin v. Miller, 801 F. Supp. 1101, 1114 (S.D.N.Y. 1992).

Although the Committee believes that its analysis of the interpretation given to the existing Rule is correct, it recommends that the Supreme Judicial Court adopt a more flexible rule which would permit, at least in certain circumstances, the inquiring law firm to remain in this case. Finally, the Committee observes that independent of the Disciplinary Rules, Superior Court Rule 12 states,

"No attorney shall be permitted to take part in the conduct of
a trial in which he has been or intends to be a witness for his client, except by special leave of court."