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the wind. It did not cover damage caused by running surface water from a rainstorm and melting snow which entered the building through an opening made by the wind.

JOHN L. RENDLEMAN.

### Legal Ethics—Enforceability of Canon Prohibiting Attorney's Testimony on Behalf of Client

With regard to the propriety of an attorney's testifying for his client, the Canons of Professional Ethics of the American Bar Association have this to say:

"When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."<sup>1</sup>

The problem then arises as to whether such a provision is enforceable. Where an attorney, in a civil action, desires to testify for his client, and the need of his testimony should have been apparent within ample time for him to withdraw from the case, may the court enforce this canon by refusing to permit the attorney to testify unless he withdraws?

In the recent case of *Millican v. Hunter*,<sup>2</sup> the Supreme Court of Florida seems to answer this question in the affirmative. In that case an action was brought to recover a commission for the sale of a radio station. A question involved was whether there was sufficient evidence to show that the property had been listed for sale. Plaintiff's attorney sought to testify on this point in regard to statements made by one defendant to another in his presence. Defendant objected to the admission of this testimony without the attorney's withdrawal, on the ground that it violated the Code of Ethics.<sup>3</sup> The trial court determined that the testimony did not relate to formal matters and was not essential to the ends of justice, and therefore sustained defendant's objection. The Florida Supreme Court affirmed.

It should be noted that a technical appraisal of the language of Canon 19 seems to disclose two meanings of the word "withdrawal." The phrase, "he should leave the trial of the case to other counsel,"

<sup>1</sup> Canon 19. Practically every state has the same or a similar provision incorporated in its state bar association canons of ethics, or in its supreme court or trial court rules. Vol. 4 N. C. GEN. STAT., Rules, Regulations, etc., of the North Carolina State Bar, Art. X, § 19 (1943), is identical.

<sup>2</sup> 73 So. 2d 58 (Fla. 1954).

<sup>3</sup> 31 FLA. STAT. ANN., Supreme Court Rule B, §(1), subd. 19 (1950). This provision is identical to Canon 19, *supra* note 1.

appears to indicate that by not participating actively in the trial after testifying for his client, an attorney would be complying with the canon, even though his partner conducted the remainder of the trial.<sup>4</sup> On the other hand, "a lawyer should avoid testifying in court in behalf of his *client*" (italics added), seems technically to indicate that a mere withdrawal from active conduct of the trial would not be sufficient, but that the relationship between the client and the testifying attorney should be completely dissolved. While no court has specifically mentioned this distinction, a review of the cases shows that both meanings have been recognized.

The language of the *Millican* case, although not completely clear, tends toward the strict interpretation of "withdrawal."<sup>5</sup> If the Florida court actually adopted this view, then, on the basis of the cases surveyed, it seems to stand as the only American court committed to enforcing the canon on such a strict basis. There are some courts which indicate that they will "look the other way" when there is a violation of Canon 19 if the testifying attorney withdraws from active conduct of the trial, but that they might enforce the canon if there

<sup>4</sup>For a discussion of such a situation see *Erwin M. Jennings Co. v. Di Genova*, 107 Conn. 491, 496-501, 141 Atl. 866, 867-869 (1928), in which the court says there should be no ethical difference between a sole attorney's testifying for his client and one attorney of a partnership testifying while his partner actively conducts the case. However, the opinions of the American Bar Association Committee on Ethics no longer take such a strict view. Opinion 33 (1931) said that relations between partners of a law firm are so close that no member of a firm should take a case which any one member is prohibited from taking. In Opinion 50 (1931), the Committee stated broadly that an attorney should not accept a case in which he has reason to believe that he or any of his partners will be a material witness and should withdraw when and if such becomes apparent. Opinion 185 (1938) held that it was improper for a lawyer to accept employment in a case where it would be his duty to attack the essential testimony to be given by his partner on behalf of the other side. But in Opinion 220 (1941), the Committee says that the aforementioned opinions are too rigid and comes to the conclusion that it is not always improper for an attorney to appear in a case in which his partner is a material witness. The opinion says that the propriety of a lawyer's appearance in such a situation should depend on the particular facts of the case, and then suggests the advisability of the following addition to Canon 19: "It is improper for an attorney to act as counsel in a matter as to which he or his partner has testified or will be required to testify, except by special permission of the tribunal in which he is to appear as counsel."

<sup>5</sup>"The purpose of [the rule] is to inhibit a lawyer from testifying in his client's case except as to matters specified therein. If the urgency to testify arises after trial starts, other counsel should take charge or if that cannot be done with convenience to the parties, a continuance should be granted after a full disclosure to the court unless it is shown that prejudice and injustice can be avoided. If counsel is aware of the necessity for his testimony before the trial begins, he should discuss the matter with his client and decide whether other counsel should be substituted or if he should retire from the case. The rule on the point is so clear that counsel should anticipate the reason and effect of his testimony beforehand and if it goes beyond formal matters he should advise his client and make proper arrangements for other counsel to handle the trial." *Millican v. Hunter*, 73 So. 2d 58, 60 (Fla. 1954).

is not a withdrawal at least to that extent.<sup>6</sup> However, in most states in which this question has arisen, it is held that, despite the serious breach of professional ethics involved, an attorney may testify for his client without ceasing to take an active part in the conduct of the trial,<sup>7</sup> and though no emergency has arisen which would make his

<sup>6</sup>In *Christensen v. United States*, 90 F. 2d 152 (7th Cir. 1937), it was held error to exclude attorney's testimony, but it was said that the trial court would have been justified in excluding him from further participation in the trial. In *Nye Odorless Incinerator Corp. v. Felton*, 35 Del. 236, 162 Atl. 504 (1931), the testimony of defendant's attorney was upheld, but the court indicated that this was because it related only to formal matters. In *Storbeck v. Fridley*, 240 Iowa 879, 38 N. W. 2d 163 (1949), where defendant's attorney testified over objection after withdrawing from the case, the court upheld the testimony, but indicated that it did so only because the attorney withdrew. (*Query*: Does this indicate that the Iowa court intends to take a stricter view than that taken by the older cases cited in note 7, *infra*?) *Cox v. Kee*, 107 Neb. 587, 186 N. W. 974 (1922), was a case in which the refusal of the trial court to let plaintiff's attorney testify without withdrawing was affirmed. But, the court indicated that it required only a withdrawal from active participation: "[The propriety of withdrawing holds] especially true where, as in the instant case, other capable attorneys are associated and the interests of the litigant will not be jeopardized. . . ." *Id.* at 590, 186 N. W. at 975. *Weil v. Weil*, 125 N. Y. S. 2d 368 (1st Dep't 1953), was a divorce case based on adultery, where the husband's attorney, who had made the pretrial investigation, repeatedly referred to his presence at events he investigated, vouched for the truthfulness of his witnesses, and testified for his client. The court said this conduct alone *might* have been ground for reversal, but reversed for other reasons. Other cases in the same general tenor are: *Hagerty v. Radle*, 228 Minn. 487, 37 N. W. 2d 819 (1949); *Callen v. Gill*, 7 N. J. 312, 81 A. 2d 495 (1951); *Security Trust Co. v. Stapp*, 332 Pa. 9, 1 A. 2d 236 (1938); *Carey v. Powell*, 32 Wash. 2d 761, 204 P. 2d 193 (1949).

<sup>7</sup>*Ford v. District of Columbia*, 96 A. 2d 277 (D. C. Munic. Ct. App. 1953) (error where trial court refused to allow defendant's attorney to testify as to contradictory statements made by complaining witness at preliminary hearing before another judge unless he withdrew); *Miller v. Urban*, 123 Conn. 331, 195 Atl. 193 (1937) (Plaintiff's objection to defendant's attorney's testimony on grounds that he was defendant's only attorney of record and had participated in the conduct of the trial was sustained by the trial court. The court said that "the offer to testify was ethically improper, but the exclusion of the testimony, on that ground, was legally erroneous." *Id.* at 335, 195 Atl. at 195.); *Swaringen v. Swanstrom*, 67 Idaho 245, 175 P. 2d 692 (1946); *Shlensky v. Shlensky*, 369 Ill. 179, 15 N. E. 2d 694 (1938); *Reisch v. Bowie*, 367 Ill. 126, 10 N. E. 2d 663 (1937); *Waterman v. Bryson*, 178 Iowa 35, 158 N. W. 466 (1916) (Appellant contended that there had been no fair and impartial trial because plaintiff's attorney testified and then commented on his testimony in his summation to the jury. The court said, "it is not error for an attorney to testify, though he remain in the case. . . ." *Id.* at 39, 158 N. W. at 467.); *McLaren v. Gillispie*, 19 Utah 137, 56 Pac. 680 (1899) (error where trial court refused to allow defendant's sole attorney to testify unless he withdrew from the case).

In *Sengebush v. Edgerton*, 120 Conn. 367, 180 Atl. 694 (1935), it was held error for the trial court not to allow defendant's sole attorney to testify on hearing of a motion for a new trial in regard to alleged newly discovered evidence. "When the attorney in this case offered to testify, the court could not treat him as disqualified, but the most it could do would be to remind him of the impropriety of his conduct." *Id.* at 370, 180 Atl. at 696. However, the error was held harmless because of the cumulative and corroborative nature of the proposed new evidence.

In these cases attorneys were allowed to testify, but they had not participated actively in the conduct of the trial, although they had assisted in prepara-

testimony necessary to prevent injustice.<sup>8</sup>

Of course, where an attorney is himself a party in an action and chooses to conduct his own case, he may take the witness stand to testify for himself.<sup>9</sup>

The position of the federal courts on forcing an attorney to withdraw from the litigation if he testifies for his client as to a material matter is not quite clear. While, as in the vast majority of states,<sup>10</sup> it is well settled that a lawyer is a competent witness for his client,<sup>11</sup> it appears that whether he must withdraw is left to the discretion of the trial court.<sup>12</sup>

In North Carolina the question of the enforceability of this canon<sup>13</sup> has not been answered, although it is settled that a lawyer is competent to testify for his client.<sup>14</sup>

When an ethical standard is stated with enough clarity to make it undoubtedly a violation for an attorney to testify for his client without at least withdrawing from active participation in the trial, it may be asked what justification the courts can give for failing, in most cases, to enforce it. The reason most generally advanced is that it would be unfair to penalize the client for an ethical violation committed by his attorney.<sup>15</sup> Whatever validity this argument might have in relation

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tion and received fees: *Erwin M. Jennings Co. v. Di Genova*, 107 Conn. 491, 141 Atl. 866 (1928); *Barto v. Kellogg*, 289 Ill. 528, 124 N. E. 633 (1919).

<sup>8</sup> In these cases the courts upheld the trial courts' permitting of attorneys to testify without withdrawing, but justified on the ground that from the record it seemed possible that the testimony was necessary to prevent injustice: *Kintz v. R. J. Menz Lumber Co.*, 47 Ind. App. 475, 94 N. E. 802 (1911); *Burgdorf v. Keeven*, 351 Mo. 1003, 174 S. W. 2d 816 (1943).

For dicta indicating that it should be within the discretion of the trial court to determine whether an attorney's testimony is necessary to prevent injustice, see: *Holbrook v. Seagrove*, 228 Mass. 26, 29, 116 N. E. 889, 890 (1917); *Hagerty v. Radle*, 228 Minn. 487, 506, 37 N. W. 2d 819, 830 (1949); *Security Trust Co. v. Stapp*, 232 Pa. 9, 14, 1 A. 2d 236, 238 (1938).

<sup>9</sup> *Kaesser v. Bloomer*, 85 Conn. 209, 82 Atl. 112 (1912).

<sup>10</sup> "The overwhelming weight of authority supports the view that, although it is a grave breach of professional ethics for an attorney of a party to testify as to anything other than matters of a formal nature without withdrawing from the litigation, he is not incompetent so to testify, and his testimony is clearly admissible, if otherwise competent." Annotation, 118 A. L. R. 954 (1939); WIGMORE, EVIDENCE § 1911 (3d ed. 1940).

<sup>11</sup> *French v. Hall*, 119 U. S. 152 (1886); *Steiner v. United States*, 134 F. 2d 931 (5th Cir. 1943); *Modern Woodmen of America v. Watkins*, 132 F. 2d 352 (5th Cir. 1942); *Christensen v. United States*, 90 F. 2d 152 (7th Cir. 1937); *Baldwin v. National Hedge & Wire-Fence Co.*, 73 Fed. 574 (3d Cir. 1896).

<sup>12</sup> *Christensen v. United States*, 90 F. 2d 152, 154 (7th Cir. 1937) (It was error to exclude testimony of defendant's attorney, though the trial court would have been justified in excluding him from further participation in the trial.).

<sup>13</sup> See note 1 *supra*.

<sup>14</sup> *In re Will of Kemp*, 236 N. C. 680, 684, 73 S. E. 2d 906, 910 (1953); *County Trustee of Brunswick v. Woodside*, 31 N. C. 496, 502 (1849); *Slocum v. Newby*, 5 N. C. 423 (1810); STANSBURY, NORTH CAROLINA EVIDENCE § 62 (1946).

<sup>15</sup> *E.g.*, *Paine v. People*, 106 Colo. 258, 264, 103 P. 2d 686, 689 (1940); *Cuve-*

to appellate courts' refusals to reverse for violations of the canon, it does not excuse the trial court for allowing the violation in the first place.

On the other hand, there are sound reasons which can be advanced for not allowing an attorney to testify for his client. Professor Wigmore says that the most persuasive argument "is concerned with the dangerous effects of the practice upon the public mind. In short, it does not fear that lawyers may as witnesses distort the truth in favor of the client, but it fears that the public will *think* that they may, and that the respect for the profession and confidence in it will be effectively diminished. This is at once the most potent and most common reason judicially advanced."<sup>16</sup>

As it now stands, Canon 19 does not prohibit the testimony of attorneys in two situations: first, it permits lawyers to testify in behalf of their clients concerning formal matters, such testimony generally being of minor significance; and second, it permits lawyers to testify without withdrawing where the testimony is concerned with matters of very great significance, where the exclusion of the testimony would defeat the ends of justice. Therefore, it can be argued that even if Canon 19 were enforced strictly, there would still be only a limited middle area of testimony for which the testifying lawyer would be required to withdraw. This situation gives rise to the question of whether it might not be better to replace Canon 19 with a clearer and stricter canon which would, under no circumstances, allow an attorney to testify for his client without withdrawing from further participation in the trial.

However, if the present canon is not replaced, the following plan would seem to make its meaning clearer and its enforcement more certain, while providing some degree of protection for both the profession and the client:

- (1) Leave to the discretion of the trial judge the questions of whether the testimony the lawyer desires to give for the client is

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*Hier v. Town of Dumont*, 221 Iowa 1016, 1021, 266 N. W. 517, 520 (1936); *Waterman v. Bryson*, 178 Iowa 35, 39, 158 N. W. 466, 467 (1916).

<sup>16</sup> 6 WIGMORE, EVIDENCE § 1911 (3d ed. 1940). This argument is discussed at some length in *Erwin M. Jennings Co. v. Di Genova*, 107 Conn. 491, 496-501, 141 Atl. 866, 867-869 (1928). Other reasons given are: (1) Disqualification by interest, due to the general partisan relationship existing in favor of the client, regardless of any specific interest in the cause, such as money or prestige. This argument, says Prof. Wigmore, had considerable force when pecuniary interest was a disqualification in general, but the old cases refusing to allow lawyers to testify on these grounds have no present significance. (2) A rarely advanced argument that the testimony under oath of the attorney and his other statements during the course of the trial might be intermingled in the minds of the jurors, so that they unconsciously give the weight of the testimony under oath to all that he says.

of a formal nature or so significant that it is essential to the ends of justice.

(2) If the testimony is determined by the trial judge to fit either of these two categories, then the attorney should be allowed to testify for his client without withdrawing from the case.

(3) If the testimony is determined by the trial judge not to fit either of these categories, then the attorney should not be permitted to testify for his client unless he withdraws completely as counsel.

(4) If, however, a trial judge should allow an attorney to testify for his client without first determining the nature of the proposed testimony, and it is found on appeal that the testimony fits neither of the permitted categories and should not have been admitted without the withdrawal of the testifying attorney, then the appellate court should not reverse at the expense of the client.

(5) Rather, in such a situation, a stated and suitable punishment for the offending attorney should be incorporated into the rules and regulations of the state bar association, the enforcement procedure being handled by the regular enforcement machinery for such regulations.

WILLIAM E. ZIMTBAUM.

### Pleadings—Last Clear Chance—North Carolina Requirements

Last clear chance in North Carolina, as a substantive doctrine, can be defined in terms which have been consistently repeated and approved since the introduction of the concept late in the last century.<sup>1</sup> A typical definition would be that the "contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that the defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so."<sup>2</sup> Our inquiry here is to determine what allegations, if any, are required in the plaintiff's pleadings before a trial court in North Carolina should submit to the jury the issue of last clear chance.

The most recent declaration by the North Carolina Supreme Court concerning methods by which a plaintiff may avail himself of the doctrine of last clear chance was *Collas v. Regan*,<sup>3</sup> which held that he was

<sup>1</sup> *Gunter v. Wicker*, 85 N. C. 310 (1881).

<sup>2</sup> *Ingram v. Smoky Mt. Stages, Inc.*, 225 N. C. 444, 447, 35 S. E. 2d 337, 339 (1945).

<sup>3</sup> 240 N. C. 472, 82 S. E. 2d 215 (1954).