



## ETHICS ADVISORY OPINION

**09-05**

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

### **Factual Background:**

A law clerk in a firm representing one party in a litigation matter conducts a telephone interview with a prospective witness likely to be called by the opposing counsel.

### **Question Presented:**

Absent hearsay concerns, can the law clerk testify about the substance of the conversation?

### **Summary:**

The law clerk is NOT precluded from testifying, subject to rulings from the court on the admissibility of the testimony.

### **Opinion:**

Rule 3.7 prevents a lawyer from acting as an advocate at a trial where the lawyer is likely to be a necessary witness. Rule 3.7 does not extend to employees of law firms, as they are not acting as advocates at trial, and does therefore not preclude the law clerk from testifying.

Assuming that the potential witness is not represented, a law clerk for a firm may interview that witness and may be called as a witness at the trial subject to the court's ruling on the admissibility of the testimony. There is no ethical rule that prohibits an employee of a law firm from testifying as to the substance of a telephone conversation.

The law clerk should take care, however, to identify himself properly as a law clerk and should inquire as to whether the potential witness is represented by counsel at the beginning of the interview.