

**ETHICS OPINION NUMBER 195
OF THE MISSISSIPPI BAR
RENDERED DECEMBER 6, 1991
AMENDED APRIL 6, 2013**

LAWYER AS WITNESS - A lawyer who drafted a will for a long-time client and subsequently represents the Executrix may continue as attorney in a will contest, where he may be a witness, when there is no substantial conflict in the Attorney and client's testimony and the Attorney's withdrawal would work a substantial hardship to the client.

The Ethics Committee of The Mississippi Bar has been requested to render an opinion on the following facts:

Attorney A has represented a Testator previously in a contested divorce and in other related matters throughout the two years immediately preceding his preparing the Testator's Will. Immediately after the Testator's death, Attorney A began estate proceedings on behalf of the Executrix, the sister and sole beneficiary of the Testator. Testator's son has contested the Will on various grounds, and Attorney A conferred with the Executrix and they determined that there was no substantial conflict between the Attorney's testimony and that of the Executrix-client. However, Attorney B, who is the partner of Attorney A, assumed representation of Executrix in the Will contest, and Attorney A only represented Executrix in matters involving administration of the estate not related to the Will contest. The question presented is whether Attorney A may continue to represent the Executrix in the Will contest, and also whether Attorney B would be able to ethically represent the Executrix in the matter.

Opinion No. 122 of The Mississippi Bar rendered September 5, 1986, answered a similar question as the one presented here by stating that a lawyer representing a client in pending litigation could continue representation if he learned that it was obvious that he or a lawyer in his firm would be called as a witness unless it was apparent that the testimony is or may be prejudicial to the client. The question presented here would fall under Rule 3.7 of the Mississippi Rules of Professional Conduct which provides as follows:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of the legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 and Rule 1.9.

Rule 3.7 recognizes that combining the roles of advocate and witness present the possibility of two problems: prejudice to the opposing party and conflict of interest between the lawyer and client. The Comment to Rule 3.7 indicates that Paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party, and that whether the opposing party is like to suffer prejudice would depend upon various factors and the facts in each situation; and even if there is a risk of prejudice, the Attorney should look at the effect of his disqualification upon his client. The Comment further states that if there is no substantial conflict between the testimony of the client and that of the lawyer, that the continued representation would be proper.

Accordingly, based upon the facts presented, the Committee is of the opinion that, under Rule 3.7 and its Comment, there would be no ethical prohibition for Lawyer B to continue to represent the Executrix in the Will contest. Furthermore, Lawyer A had been the long-time Attorney for the deceased, and there is no conflict between Attorney A's testimony and that of the client. Lawyer A may continue active representation if his withdrawal will work substantial hardship to the client.