

**ETHICS OPINION NUMBER 122
OF THE MISSISSIPPI BAR
RENDERED SEPTEMBER 5, 1986
AMENDED APRIL 6, 2013**

LAWYER AS WITNESS - A lawyer representing a client in pending litigation may continue the representation after he learns or it is obvious that he or a lawyer in his firm may be called as a witness on behalf of the adverse party unless it is apparent that the testimony is or may be prejudicial to the client.

The Ethics Committee of The Mississippi Bar has been asked to render its opinion on the following situation:

Lawyer A represents a divorced woman and has filed on her behalf a Petition for Citation for Contempt and Modification of Former Decree in the court of appropriate jurisdiction. The client's ex-husband and natural father of their two children, of whom Lawyer A's client has custody, filed a cross-petition for custody. On the day set for trial of the petition and cross-petition, Lawyer A was subpoenaed as a witness for the ex-husband. The lawyer for the ex-husband explained to the trial judge that the ex-husband believed that Lawyer A was having an affair with his client. Lawyer A denies this allegation. Lawyer A and his client are close personal friends but are not having an illicit affair. At an in chambers conference, the judge requested that Lawyer A consider withdrawing from the case in view of his personal relationship with his client. However, the judge did not order Lawyer A to withdraw and continued the hearing. Lawyer A's client desires to retain Lawyer A as her attorney.

Based on these facts, Lawyer A requests an ethics opinion addressing two questions. (1) May Lawyer A ethically continue representation of his client? (2) Did the opposing attorney breach any ethical duty in issuing or aiding in the issuance of a subpoena for Lawyer A?

Because he is already employed in pending litigation and it is the opponent who may call him as a witness, Lawyer A's ethical dilemma is governed by Rule 3.7(a) of Mississippi Rules of Professional Conduct (MRPC) which states in full:

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 legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

On these facts, Lawyer A may continue the representation until it is apparent that his testimony is or may be prejudicial to his client. The Committee is not empowered to investigate whether this proposed testimony would be prejudicial to the client. The Committee must accept as true Lawyer A's statement that the allegation that he has had or is having an affair with his client is untrue. Taking that statement as true, the Committee does not believe it is apparent that Lawyer A's testimony is or prejudicial to his client. Accordingly, the Committee is of the opinion that Lawyer A may continue the representation until it does become apparent that his testimony is or may be prejudicial to his client. See generally ABA Formal Opinion No. 339 (Jan. 31, 1975); State Bar of Wisconsin Opinion No. E-82-3 (Aug. 1982) (in action by city against former city employee where adverse attorney calls city attorney to testify, city attorney may continue representation of city unless it becomes apparent that his testimony will be prejudicial to the city). The Committee notes that if Lawyer A has any doubts about whether his testimony is or may be prejudicial to his client, such doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

The Committee may not render an opinion as to the second question concerning the ethical propriety of the conduct of the lawyer representing the adverse party. The by-laws of the Mississippi State Bar provide that the Committee may render an opinion on the past conduct of a lawyer only at the request of the Committee on Professional Responsibility. Since this request is not from the Committee on Professional Responsibility, this Committee may not render an opinion on the second question.