

You have presented a hypothetical situation in which a client ("C") and her ex-husband ("X") were divorced in 1984, with C receiving sole custody of their minor child. C remarried in 1991 to an attorney ("A"). In 1992, X filed a petition for change of custody and support, giving C only seven days until the hearing. Attorney A sought to negotiate a settlement before the hearing with X's attorney, and, when that failed, appeared at the hearing on C's behalf, asking for a trial date to be set. Subsequent to the hearing, A continued to act as C's attorney, seeking to negotiate a settlement on C's behalf.

You indicate that although C would prefer to resolve the dispute with X by agreement, if there is to be a custody hearing, she is willing to proceed with A as her attorney. You also indicate that C has no intention of calling A as a witness and A would not be a necessary witness to prosecute her case at trial. Further, you indicate that there is no reason to believe that, if X called A as a witness, his testimony would be prejudicial to C. Finally you indicate that A's testimony, if he is called as a witness, would be merely cumulative of C's, and that it could also be prevented by the marital privilege.

You also indicate that C is unemployed and that employment of new counsel would be a significant, if not impossible, financial hardship for her. Moreover, you indicate that the minor child is emotionally disturbed and that A has unique experience in mental health issues.

Finally, you advise that X has filed a motion to remove A as counsel on the grounds that he would be a witness in the case as C's spouse and the minor child's stepfather. C has opposed this motion, stating her intention not to call A as a witness. X's motion also asks for referral to court mediation services, which C does not oppose.

You have asked the Committee to opine whether, under the facts of the inquiry, A may act as C's attorney in pre-trial negotiations and motions, court custody hearing, and court mediation proceedings.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-101(B)(3) which provides that a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify 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; and DR:5-102(A) and (B) which provide respectively that 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 (3) and if, after undertaking employment in contemplated or pending litigation, a

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lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Prior Legal Ethics Opinions issued by this Committee have demonstrated that the "substantial hardship" exception under DR:5-101(B)(3) rarely applies. See, e.g., LE Op. 976, LE Op. 1136, LE Op. 1359, LE Op. 1386; ABA Formal Opinion No. 339; cf. LE Op. 1386. The Committee feels, however, that the propriety of A's representation of C does not turn on the applicability of this exception.

Instead, the Committee believes primary concern deals with DR:5-102(A). Apparently, C does not intend to call A as a witness nor does the Committee believe it to be obvious that A ought to be called as a witness by C, simply by virtue of his status as husband of C and stepfather of the minor child. Therefore, the Committee opines that because A has neither learned nor is it obvious that A ought to be called as a witness on behalf of his client/wife C, continued representation of C by A is not improper under DR:5-102(A).

Furthermore, the Committee opines that under the plain language of DR:5-102(B), Attorney A may continue the representation of client C, even if called to testify by X, until it is apparent that his testimony is or may be prejudicial to C. See also LE Op. 866, LE Op. 1226, LE Op. 1240.

Thus, the Committee opines that it would not be improper for Attorney A to act as C's counsel in pretrial negotiations and motions, at a custody hearing, and in court mediation proceedings.