

**ETHICS OPINION NUMBER 164
OF THE MISSISSIPPI BAR
RENDERED JUNE 23, 1989
AMENDED APRIL 6, 2013**

CONFLICT OF INTEREST – CLIENT CONFIDENCES – LAWYER AS WITNESS- An attorney who received a forty percent mineral interest in certain oil wells as a result of a contingent fee arrangement whereby the attorney agreed to represent the owners in a suit to confirm title to the interest may represent the present owners of the mineral interest, including himself, in a subsequent suit to enforce the prior judgment even though the attorney is likely to be a necessary witness provided that disqualification of the lawyer would work substantial hardship on the client.

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

A lawyer represented the owners of a mineral interest in oil wells in an action to confirm the plaintiff's title to the interest. After successfully pursuing the action to the Mississippi Supreme Court, the lawyer received a forty percent mineral interest in the wells pursuant to the contingent fee arrangement between the lawyer and his clients. Subsequently, when the defendant refused to pay the amount due to plaintiffs, the lawyer filed suit to enforce the judgment on behalf of the present owners of the mineral interest, including himself. Defendant thereafter filed a Motion to Disqualify the attorney on the grounds that he is a plaintiff in the action and will likely be a witness. The lawyer contends that disqualification would work substantial hardship on his clients.

The lawyer requests an ethics opinion regarding his representation of himself and his clients in the suit to enforce judgment.

Accepting as true the attorney's assertion that disqualification would work substantial hardship on his clients, the lawyers' continued representation of himself and the other owners of the mineral interest constitutes no ethical violation provided that, in the course of testifying, he observes the dictates of Rules 1.6, 1.7, and 1.9 of the Mississippi Rules of Professional Conduct regarding client confidences and conflicts of interest.

Rule 3.7 of the Mississippi Rules of Professional Conduct governs the circumstances under which a lawyer may act as an advocate at a trial in which the lawyer is likely to be called to testify. Subsection (a)(3) provides that an attorney "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where ... disqualification of the lawyer would work substantial hardship on the client." The Comment accompanying Rule 3.7 advises that, in determining whether the lawyer should be disqualified, "due regard must be given to the effect of disqualification on the lawyer's client." Rule 3.7(b) cautions that a lawyer may not testify if precluded from doing so by Rule 1.7 or Rule 1.9, regarding conflicts of interest. Throughout, the lawyer must take care to preserve the confidences of the client as required by Rule 1.6.

Mississippi Bar Ethics opinion No. 122, instructs that a lawyer representing a client in pending litigation may continue the representation after he learns that he may be called as a witness until it is apparent that the testimony is or may be prejudicial to the client. In that opinion, the Committee found that a lawyer representing a divorced woman in a proceeding to modify a divorce decree could continue representation, despite his being subpoenaed by the defendant's lawyer to testify as to his relationship with his client, until such time as it became apparent that his testimony might be prejudicial to his client. Similarly instructive is Rule 3.7 of the American Bar Association Model Rules of Professional Conduct which provides that an attorney may act as both advocate and witness under the exact circumstances outlined in the Rules of Professional Conduct.

On the facts presented, the lawyer's continued representation of himself and his clients in the subsequent suit to enforce the prior judgment presents no ethical violation provided that the factual circumstances of potential substantial hardship on the client in the event of disqualification is met. The Committee reminds the attorney that in acting as an advocate and witness, a lawyer must preserve the confidences of his client and avoid conflicts of interest as outlined in Rules 1.6, 1.7, and 1.9 of the Mississippi Rules of Professional Conduct.