

**ETHICS OPINION NUMBER 45
OF THE MISSISSIPPI BAR
RENDERED NOVEMBER 30, 1978
AMENDED APRIL 6, 2013**

CONFLICT OF INTEREST – GOVERNMENT ATTORNEYS - A part time prosecuting attorney should not accept private employment arising from any factual situation which he was actively engaged in as prosecuting attorney in the employ of the State.

The Ethics Committee of The Mississippi Bar has been requested to render an opinion of the ethical propriety of the following question. When a prosecuting attorney has been employed by a political subdivision of the State of Mississippi to prosecute an action, and he is paid by the political subdivision to investigate the facts, interview witnesses, and prepare legal proceedings, can he in turn, accept employment as a private attorney, based on the same factual situation, using the results of his prior investigation, institute a civil action for recovery of monetary damages or benefits.

The immediate question involves an assistant county prosecuting attorney who filed paternity suits against alleged fathers for recovery of aid to dependent children previously paid out by the county. After an unsuccessful paternity suit, the attorney has been employed by the mother to institute a civil action for recovery of death benefits and social security benefits. His clients would be the same mother and child in whose name (along with the county) he had previously filed the paternity suit. He was paid by the county to investigate the facts, and he made a full investigation at the expense of the county.

In a larger sense, the question could include a prosecuting attorney who, at the state's expense, investigated a matter, filed criminal proceedings based on an automobile accident, and then, using the same investigatory knowledge gained from the criminal suit, filed a civil action as a private attorney for the widow of the deceased (killed in the automobile accident) for recovery of damages.

In each situation, the attorney employed part time by the State of Mississippi or its political subdivision, and his entry into the facts and parties was as state's attorney and he was paid by the state to investigate the facts, etc.

The question before this committee is whether or not an attorney can with propriety enter into a factual situation as an employee of the State, prosecute a criminal action based thereon and then accept private employment to institute civil action based on the same factual matter.

Rule 1.11 of the Mississippi Rules of Professional Conduct (MRPC) states: “except as law may otherwise expressly permit, a lawyers shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.”

In this situation the factual matter is basically the same, but the relief sought and thus, the controversy is different. However, an attorney should not allow himself to be placed in a position which could be misconstrued by the public. The Bar should strive to remove any possible basis for unfavorable public opinion. The public should not be allowed to believe that a county attorney, or any prosecuting attorney, would be in a better position to render legal service, merely because of his office. Nor should the public be allowed to believe that public funds were used to finance an investigation which resulted in direct monetary gain to the client or to the attorney. It could be construed that such a prosecuting attorney was using his office to solicit business improperly.

While this is a very close ethical question, this Committee feels and must find that it would be to the best interest of the Bar that a prosecuting attorney should not accept private employment to institute a civil action which is based upon a factual situation which he actively investigated and pursued while serving as public prosecutor. A lawyer should, by his actions, promote public confidence in our system and in the legal profession.