

**ETHICS OPINION NUMBER 130
OF THE MISSISSIPPI BAR
RENDERED DECEMBER 5, 1986**

ATTORNEY'S DUTY TO PROSECUTE APPEAL - Attorney who served as public defender for approximately one year and who tried and appealed a felony case while serving as public defender must prosecute the appeal unless allowed to withdraw for bona fide reasons after application to the lower court or to the Supreme Court.

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

An attorney served as public defender for approximately one year and then submitted his resignation. While serving as public defender, the attorney tried a felony case to a jury and a verdict was rendered against his client. While still serving as public defender, the attorney appealed the case to the Supreme Court of the State of Mississippi. The attorney then resigned the office of public defender and became engaged in the private practice of law. Some nine months after resigning from the public defender's office, the Circuit judge notified the attorney in question that he must prosecute the appeal. It is the understanding of the attorney in question that he would have to prosecute the appeal at his own expense and without compensation.

The request for opinion really is a legal matter and not one of ethics. However, there are ethical considerations which give us some guidance in rendering an opinion. It would be the opinion of this committee that the Circuit judge notified the attorney in question that he must handle the appeal with or without compensation, the attorney had both an ethical and legal obligation to prosecute the appeal.

Although this appears to be a legal matter, ethical consideration EC 2-31 fully advises the attorney of his responsibilities. EC 2-31 reads as follows:

Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the

appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

Since the appropriate court has not permitted the withdrawal of the attorney in question or substitution of another attorney, the appeal must be prosecuted by the attorney in question, with or without compensation.

The Supreme Court of the State of Mississippi in *Allison v. State of Mississippi*, 436 So. 2d 792, (Miss. 1983), held an attorney in contempt of court for failing to prosecute an appeal which he had perfected.

The Supreme Court held the following:

. . . [T]here are obligations a lawyer may not shirk no matter how inconvenient he may find them. As much as ever, today's lawyer shoulders dual and sometimes conflicting responsibilities of fidelity and service to his clients and to the court. Lawyers differ in the ever present controversy which of these has priority over the other. One thing is certain: both outrank the lawyer's personal whim or convenience.

. . . Thereafter, Taylor acting as counsel for Allison took the necessary steps to perfect an appeal to this court. By virtue thereof, Taylor assumed the duty under Rule 40 to prosecute the appeal. We emphasize that this was not merely a duty to his client, Allison, but equally and independently a duty Taylor owed to this Court.

. . . [W]hen an individual accepts a license to practice law and becomes a member of the bar of this state and of this Court, he assumes many obligations. At least two of these have priority over his certainly legitimate prerogative to charge a legitimate fee for his services. Along with his fellow members of the bar, each lawyer assumes a duty to assume that every person in substantial need of legal service receives the service without regard to ability to pay. Beyond that, each lawyer, in conjunction with his fellow members of the bar assume an obligation as an officer of the Court to assure that, before this Court makes the life shattering

decisions tendered to it, it has the benefit of competent advocacy on behalf of both sides.

What we say here is a simple reiteration of the values and traditions of the legal profession. These premises are articulated in the ethical considerations underlying the canons of the Code of Professional Responsibility by which all lawyers are bound. There is no doubt that parts of that code relegate to third and fourth priority a consideration of the economics of the practice of law. This is merely a part of the quid pro quo the lawyer must be prepared to give when he accepts his license to practice law.

Yes, the world is much with today's lawyer. But so are the ideals and traditions of professional responsibility within the Bar, and so are the Ethical Considerations underlying our Code of Professional Responsibility, with all of which we find the lawyer's obligation under Rule 40 of the rules of this Court to be wholly consistent.

436 So. 2d pp. 794, 796. 797).

Supreme Court Rule 40 also provides as follows:

An attorney who perfects an appeal to this Court on behalf of the appellant shall continue to prosecute the appeal by filing an assignment of errors and brief when due, unless the Court permits such attorney to withdraw from the case (Rule 40, Mississippi Supreme Court Rules).

In conclusion, it appears that the ethical considerations are consistent with legal rules that once an attorney perfects an appeal he has a duty to prosecute that appeal unless given permission to withdraw by a court of competent jurisdiction.