ETHICS OPINION NUMBER 220
OF THE MISSISSIPPI BAR
RENDERED JUNE 3, 1994

CONFLICT OF INTEREST: ATTORNEY'S ETHICAL OBLIGATION TO REPRESENT FORMER CLIENT; REPORTING PROFESSIONAL MISCONDUCT; ATTORNEY'S OBLIGATION TO REPORT ALLEGATIONS OF PROFESSIONAL MISCONDUCT ON THE PART OF ANOTHER ATTORNEY -- An attorney currently engaged personally in litigation against a former member of his firm cannot ethically represent a former client of that firm in a claim against the attorney with whom he formerly practiced, particularly when such claim could result in liability on the part of the firm. The Attorney has no ethical obligation to institute a Bar complaint against the attorney with whom he formerly practiced absent knowledge that that attorney has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that attorney's honesty, trustworthiness or fitness as a lawyer in other respects.

The Ethics Committee of the Mississippi Bar has been requested to issue an opinion as to the ethical considerations concerning the following situation:

> Lawyer A and Lawyer B practiced together in the firm of A&B, P.A. B gave notice that he was leaving, filed suit for dissolution in Chancery Court and eventually obtained appointment of a receiver. Prior to the appointment of a receiver, B filed a bar complaint against A alleging that A had engaged in dishonesty within the meaning of Rule 8.4. Prior to filing the complaint, B sought the opinion of legal counsel and was advised that Rule 8.3 required the filing of the complaint. The complaint alleged dishonesty in one particular client relationship, in representations made about the business of the firm and in representations made about made about employee relationships within the firm. A filed an answer denying that any dishonesty was involved. Documentary evidence was provided by both A and B; and, the complaint was dismissed without any further evidentiary hearing. No appeal was available. Some time later, a client not involved in the bar complaint presented B with claims that A had engaged in dishonesty in representing the client in a divorce. The particular allegation was that A had failed to seek sanctions against

> Lawyer C's firm, who was opposing counsel in the client's divorce, and that A had failed to do other specifically requested things because of a conflict of interest on the part of A. The client alleged that A intended to and did retain C to represent A in A's own divorce while opposing C in the client's divorce.

It is unclear when, if ever, A withdrew from representation of the client, and it is certain that C represented A in A's own divorce. The client made requests to A for specific actions to be taken, including the pursuit of sanctions in February of 1992. A consulted C on A's divorce some time during 1932, and C represented A in A's divorce that became final in December of 1992. If the two-year statute of limitations under 15-1-36 applies, then the statute of limitations may be running on some of A's conduct.

The client asked B to assist in the preparation of lawsuits and bar complaints against both A and C. B demurred on the grounds that he was an interested party and could not provide legal advice or assistance under Rule 4.3. B advised the client to get independent counsel.

The client demanded assistance on the grounds that he had been injured by A and that B and the firm of A&B, P.A. owed a duty to mitigate damages. The client also insisted that B had a duty to report the conduct of A because it involved dishonesty on the part of A.

After the experience of relying on a legal opinion that Rule 8.3 required the filing of the first bar complaint and then seeing the complaint summarily dismissed, B is loathe to enter upon another complaint proceeding. The first complaint did irreparable damage to the relationship between A and B; and B has a substantial interest in not being accused of using bar complaints in furtherance of his litigation against A in Chancery Court. B has referred the matter to the receiver appointed for A&B, P.A. by the Chancery Court.

Specifically, the Committee has been asked for an opinion on the following questions arising from the foregoing situation:

QUESTION A: Does B have a duty to represent or assist the client in pursuing claims or Bar Complaints against either A or C? QUESTION B: Does B have a duty to advise about the running of the statute of limitations on A's conduct?

QUESTION C: Does B have a duty to file a Bar Complaint under Rule 8.3? Can B delegate any duty he may have to the receiver to perform in the name of A&B, P.A.?

We address each in turn:

QUESTION A: B cannot ethically represent or assist the former client in pursuing claims or Bar Complaints against either A or C. (B already has so informed the former client. Under ordinary circumstances, B's having done so would constitute past conduct upon which this Committee cannot opine. It appears, though, that the former client has refused to accept that position and has again called upon B for such representation or assistance. Accordingly, we address that issue here.) Accordingly, the answer to Question A is in the negative. Rule 1.7(b), MRPC, provides that:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or bv the lawyer's own interests unless the lawyer reasonably believes:

(1) the representation will not be adversely affected; and

(2) the client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the representation and the advantages and risks involved. (Emphasis supplied).

Rule 1.7 is predicated upon the lawyer's duty of loyalty to his client. From the foregoing factual situation, it is clear that B has personal interests - either in his litigation with A or in the potential liability of his former firm to the former client (a legal question upon which the Committee takes no position) - which could and likely would compromise his loyalty to the former client. Even though the former client has exhibited a willingness for B to represent him under these circumstances, B cannot ethically do so since B reasonably believes (as should any attorney under the circumstances) that that representation may be materially limited or adversely affected by his own personal interest.

QUESTION B: From the facts stated, the former client's divorce became final in December of 1992. Absent some agreement for continued representation after that point, it appears that A's representation and Firm A&B, P.A.'s representation, was concluded at that point. Neither A, B, nor A&B, P.A. had any ethical obligation of continued representation once that matter were concluded. See Mississippi Ethics Opinions No. 166, 138.

As addressed earlier, B cannot now ethically undertake representation of the former client. Accordingly, that person is no longer, and will not be, a client. Rendering legal advice to a non-client when the lawyer's own interests may be adverse to those of the non-client is not ethically permissible. *See, e.g., Attorney Q v. Mississippi State Bar*, 587 So. 2d 228 (Miss. 1991). Accordingly, B should not attempt to advise with the former client in any respect concerning the limitations issue or any other legal issues.

That does not mean that B. has no obligation to the former client. Under these circumstances, B should immediately inform the former client that he should seek immediate counsel from another, disinterested attorney related to his legal rights, if any, arising from the situation he has presented to B. Likewise, B should inform the former client that a delay in seeking legal advice might prejudice those rights, if any.

QUESTION C: The foregoing situation, as described to the Committee, presents to B allegations by a former client of perceived misconduct on the part of A (and possibly C). It is not this Committee's prerogative to pass upon the ethical propriety of an attorney's past conduct. What we may address, though, is B's obligation to report the allegations made to him by the former client.

Rule 8.3(a), MRPC, requires that:

> A lawyer having knowledge that another lawyer has committed a violation of the Rule of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

The Rule requires reporting by a lawyer only when that lawyer has knowledge that another lawyer has committed a violation of the Rules of the nature stated therein. Based solely upon the Committee's reading of the factual situation presented to it, it does not appear that B has knowledge of a violation of the Rules by either A or C - only knowledge of the former client's allegations. For reporting to be mandatory, Rule 8.3 requires knowledge (Knowledge denotes "actual knowledge of the fact in question"; however, such knowledge may be inferred from circumstances. MRPC, "Terminology."); a suspicion of a violation is not enough to trigger the required reporting. See, Ala. State Bar Ethics Opinion 85-95 (1985) (a mere suspicion of a violation, as opposed to a lawyer's firm belief that a violation has occurred after investigation of the facts, does not trigger duty of reporting).

On the other hand, if B has knowledge of facts not set forth in the information provided to the Committees which are sufficient to establish a firm belief that an

ethical violation of the type which must be reported under Rule 8.3 has occurred, B would be obligated to report that violation. If that were the case, Rule 8.3 does not permit delegation of that obligation.

This request raises a number of potential legal issues. The Committee cannot render opinions regarding such issues; accordingly, nothing contained herein shall be read as impacting upon the legal rights or obligations of and between the parties involved.