

**ETHICS OPINION NUMBER 242
OF THE MISSISSIPPI BAR
RENDERED APRIL 2, 1998**

CONFLICT OF INTEREST: GENERAL; CONFLICT OF INTEREST: FORMER CLIENT; CONFIDENTIALITY: Conflict rules apply in non-litigative arbitration action; plaintiff's attorney may represent former defendant in post-litigative arbitration controversy with co-defendants so long as former representation of plaintiff has ended and/or plaintiff and new prospective client provide valid consents to subsequent representation and attorney maintains all ethical obligations to former client; the duty of attorney to assure that former or present client provides valid and informed consent is continuing.

LAWYER AS WITNESS: To be disqualified as a witness, a lawyer must have personal knowledge on some fact at issue and not merely be called to explain or comment on evidence.

FAIRNESS TO OPPOSING PARTY AND COUNSEL: Violation of Rule 3.4 must rest upon specific violation of the prohibitions listed in said provision.

The Ethics Committee of The Mississippi Bar has been requested to render an opinion as to the ethical consideration in the following situation:

An attorney has settled a claim arising from a product liability claim pursued on behalf of plaintiff against five separate corporations. During the litigation, an extensive deposition of the plaintiff was taken by the corporate defendants. In the underlying action there was no joint defense arrangement. The four corporations have interests distinctly adverse one to the other.

As a result of the representation by the Attorney, the plaintiff was paid a substantial sum by four of the five corporations, who entered into a "settlement agreement" with plaintiff. As a result, the four corporations agreed to contribute proceeds to fund the settlement with the plaintiff to resolve the plaintiff's claims against the four corporations. The claim against the fifth corporation was dismissed without prejudice for lack of in personam jurisdiction. Plaintiff is no longer pursuing any claim against

the fifth corporation for reasons unrelated to the questions presented herein.

After the entry of the settlement agreement, the four corporations entered into an "arbitration agreement" whereby an independent arbitrator would discern the final monetary obligation of each of the four corporations for their respective portion of the settlement paid to the plaintiff by determination of the degree of fault to be allocated to each corporation. The Plaintiff was not a party to the "arbitration agreement." Thereafter, one of the four corporations asked Attorney to represent it in the arbitration to determine the degree of fault by and between the said corporate entities. Prior to acceptance of this representation, Attorney obtained an informed waiver or consent from both the Plaintiff and the Corporation in the arbitration proceedings. The remaining corporations, however, objected to said representation and have indicated their intent to call the plaintiff and Attorney as a witness in the arbitration proceedings.

Initially, we are asked to determine whether Attorney's proposed representation of one of the four Corporations in a subsequent "arbitration proceeding" constitutes a conflict of interest because Attorney previously represented Plaintiff in the underlying litigation against the four corporations, including the entity that Attorney now seeks to represent.

MRPC 1.7 reads:

Conflict of Interest: General Rule

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless the lawyer reasonably believes:

the representation will not adversely affect the relationship with the other client; and

each client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the adverse representation and the advantages and risks involved.

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 by the lawyer's own interests, unless the lawyer reasonably believes:

the representation will not be adversely affected; and
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.

MRPC 1.7 does apply to this situation, because the Attorney has specific confidential information regarding the knowledge of the plaintiff arising from their past relationship. Under such a circumstance, ethical issues regarding conflicts of interest may arise in contexts other than litigation, including even administrative or other arbitration hearings. The comments to MRPC 1.7 note "Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise."

Under the unique circumstances described herein, Attorney is not seeking to engage in a representation "adverse" to the interests of Plaintiff insofar as the Attorney will represent a single corporation which has heretofore terminated all litigation with the former client and uses the professional services of the Attorney to handle the subsequent arbitration of apportionment claims of the other corporations. The plaintiff is not a party to the arbitration proceedings. Indeed, Plaintiff has executed a waiver and consent as required by MRPC 1.7. Hence, Attorney may represent the said corporation in the arbitration within the following constraints.

In the subsequent representation of the corporation, however, the plaintiff may be called as a witness in the arbitration proceeding and face examination by his or her former counsel. Even though the Attorney's representation is not adverse and an informed consent provided by the Plaintiff, Attorney, acting as new counsel for the single corporation, may not breach any confidentiality or other duty owed to Plaintiff under the requisites of MRPC 1.6 [Confidentiality], 1.7 [Conflicts: General], 1.9 [Conflicts: Former Clients]. In pertinent part, Rule 1.9 reads:

Conflict of Interest. Former Client

A lawyer who formerly represented a client in a matter shall not thereafter:

represent another in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
use information relating to the representation to the disadvantage of the former client except as Rule 1.6 [Confidentiality of Information] would permit with respect to a client, or when the information has become generally known.

Great caution must be exercised under the circumstances regarding the continuing validity of the informed consultation and consent provided by the Plaintiff. If Attorney is called upon to address issues or ask questions that may raise issues of confidentiality or otherwise "adversely" affect or address the prior attorney-client privilege with Plaintiff, there exists the possibility that such facts may negate the previously executed consent agreement.

We remind Attorney that while a client may consent to representation notwithstanding a conflict, a lawyer cannot properly ask for such consent when a disinterested lawyer would conclude that the client should not agree to the representational agreement. This duty is continuing in nature and Attorney may not avoid reassessment of the validity of the "consent" in the face of an unexpected representational conflict arising in the heat of litigative battle.

Secondly, we are asked whether Attorney is precluded from acting as a lawyer for the corporation under MRPC 3.7 because the other corporations intend to call Attorney as a witness at the arbitration, even though there is no indication that the Attorney acted in the underlying action in any capacity beyond advocate for plaintiff. In pertinent part, MRPC 3.7 states:

Lawyer as Witness

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

the testimony relates to an uncontested issue;

the testimony relates to the nature and value of legal services rendered in the case; or
disqualification of the lawyer would work a substantial hardship on the client. . .

Where the lawyer is a "necessary witness" that testimony may be barred unless otherwise excepted. The comments to Rule 3.7 note that "[a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others." There is no indication that Attorney's participation in the underlying litigation was anything beyond that of advocate. In determining issues of liability between putative joint tort-feasors, there is no basis to conclude that Attorney's prior advocacy on behalf of the plaintiff would make him a "necessary witness." Moreover, we are mindful of judicial rulings in other jurisdictions that the lawyer witness rule has been historically subject to tactical abuse and should be subject to strict scrutiny. We conclude Rule 3.7 was not enacted to permit disqualification of opposing counsel by calling him as a witness.

Finally, we are asked whether Attorney's representation of one of the subject corporations violates MRPC 3.4. Rule 3.4 reads:

Fairness to Opposing Party and Counsel

A lawyer shall not:

- unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a

personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- the person is a relative or an employee or other agent of a client; and
- the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

There is no indication that the appearance of the Attorney as an advocate for one of the corporations in the foregoing arbitration proceedings will infect the proceedings with unfairness or competitive imbalance. Rule 3.4 sets forth bars to specific attorney conduct which are inapplicable in the subject matter at bar. Hence, we see no basis in Rule 3.4, MRPC, to bar the employment of the Attorney.