

**ETHICS OPINION NUMBER 106
OF THE MISSISSIPPI BAR
RENDERED SEPTEMBER 13, 1985
AMENDED APRIL 6, 2013**

CONFLICT OF INTERESTS--An attorney need not withdraw from representing a present client in a suit against a former client when there is no substantial relationship between the two matters and no secrets of the former clients are known by the attorney to be used against the former clients.

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

Attorney A has handled some title matters for H & W and later undertook to represent W in a divorce action against H. During that representation no information about a cattle farm operation was given to A.

Subsequently W decided A was too good a friend to both her and H. so she picked up her file, terminated A's employment and retained Attorney B to represent her in concluding the divorce.

Later Insurance Co. C sought to retain Attorney A to represent its insured Lab, in an action brought against it by W. Attorney A contacted Attorney B to see if he objected to A's representation of Lab and for permission to speak to B's client W to ask if she objected to his representing Lab whom (W) was suing. B and W each said they did not object.

Later C denied coverage and Lab retained Attorney A to represent it individually.

Various discovery processes were begun but before dispositions were had Attorney B requested Attorney A to withdraw because A "knew too much about the business affairs of W." Later W herself wrote a letter requesting that Attorney A withdraw from representing Lab.

May A continue to represent Lab?

Rule 1.9, MRCP, provides that:

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

(a) represent another in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation; or

(b) use information relation to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

The major issues determining disqualification in subsequent representation questions are there:

First, does the former representation have a substantial relationship to the matters involved in the present representation? And second, does the attorney have information from the former representation that can be used in the new matter against the former client? *See Spragins v. Huber Farm Service, Inc.*, 542 F. Supp. 166 (ND Miss 1982) which follows the rule in *Duncan v. Merrill Lynch, Pierce, Fenner and Smith*, 646 F.2d 1020 (5th Cir. 1981).

If those 2 questions can be answered in the negative, there is no need to withdraw. In fact, in disqualification motions, the burden is on the former client to prove the substantial relationship. The *Duncan* case, *supra* said:

In applying the substantial relationship test, the court should require Merrill Lynch (former client) to delineate with greater specificity the scope of the prior representation and to demonstrate precisely how the subject matters of the prior representation are connected with the matters embraced within the pending suit. *Id.* at 1033.

There is even stronger justification, it appears, in the present case, because consent had been given before the subsequent representation was begun. The case of *Unified Sewerage Agency v. Jelco, Inc.*, 646 F. 2d 1339 (9th Cir. 1981) found that since prior consent had been given the law firm would not be disqualified. Attorney A does not have to withdraw.