

**ETHICS OPINION NUMBER 204
OF THE MISSISSIPPI BAR
RENDERED OCTOBER 30, 1992
AMENDED APRIL 6, 2013**

CONFLICT OF INTEREST - It is improper for an attorney who represents a guardian of minor wards to file a complaint against the guardian for the guardian's inability to account for Social Security payments received by the guardian during the guardianship.

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

May an attorney who represents a guardian of minor children file a complaint against the guardian for inability to account for Social Security payments received during the guardianship when the attorney has discussed this matter with the guardian?

In the facts presented, the attorney states that he has represented the guardian in a Chancery Court minor's guardianship. It has been discovered that the guardian has received and spent Social Security funds belonging to the children and cannot account for the funds. The attorney has discussed this matter with the guardian. Despite the attorney's attempt to withdraw from the case, the Chancellor has ordered the attorney to file a complaint against the guardian. The attorney wants to know if he may ethically do it.

An attorney who represents a guardian is the attorney for the guardian and not the attorney for the ward. In *Hutton v. Gwin*, 188 Miss. 763, 195 So. 486 (1940), the Supreme Court of Mississippi held that attorney fees incurred in representing the guardian of a minor's estate are the guardian's personal obligations and are not an obligation of the minor's estate itself, except where the Court has ordered that the guardian may be reimbursed his attorney's fees in accordance with Mississippi Code Annotated, Section 93-13-79 (1972). The attorney's duties and loyalty are owed to the guardian and not to the wards of the guardianship.

In view of the attorney/client relationship between the guardian and the guardian's attorney and the privileged communication which the attorney says he has acquired from his client on the subject matter of the proposed complaint, the Ethics Committee is of the opinion that Rules 1.6(a) and 1.7(a) of the Mississippi Rules of

Professional Conduct prohibit the attorney from filing the complaint against his client.

Rule 1.6(a) of the MRPC says that:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

In the facts presented, the attorney states that he has acquired privileged communication concerning the subject matter of the complaint which the Chancellor has ordered him to file. Consequently, the attorney must invoke the privilege, unless his client waives it.

More to the point, Rule 1.7(a) provides that:

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:

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

(2) 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.

In effect, the Chancellor has ordered the attorney to represent the wards against the guardian, and that representation is directly adverse to the guardian and would have to affect the attorney/client relationship adversely. The Comment to 1.7(a) states that "loyalty is an essential element in the lawyer's relationship to a client." That loyalty will be destroyed if the attorney is compelled to file the complaint.

The better practice would be for the Chancellor to appoint an attorney to serve as guardian ad litem to represent the interests of the minor children. *See e.g., Griffith, Mississippi Chancery Practice*, §§. 531 and 532 (2nd ed. 1950). The guardian ad litem, unencumbered by past representation of the guardian, could pursue the case

vigorously for the children, without the possibility of betraying any privileged communication or loyalty owed to the guardian.