ETHICS OPINION NUMBER 159
OF THE MISSISSIPPI BAR
RENDERED DECEMBER 2, 1988

CONTINGENT FEES - A lawyer holding a contingent fee should not join with his client as a party to the action.

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

> Is there anything ethically wrong with a plaintiff's attorney joining with his client in-instituting a damage suit where the attorney takes an assignment of a portion of the cause of action?

As written, the question requires the Committee to make two certain, factual assumptions. First, the Committee assumes that the phrase "joining with" means that the lawyer will be a named party plaintiff. Second, the Committee assumes that the assignment of a portion of the cause of action represents the lawyer's contingent fee. Based on these assumptions, this Committee concludes that it is ethically improper for a plaintiff's attorney with a contingent fee to join with his client as a named party plaintiff in the litigation.

Rule 1.5(c) permits contingent fee agreements and itemizes certain requirements which must be contained in the written contingent fee agreement. The Rule does not address the issue of incorporating an assignment of a portion of the cause of action. The traditional, general rule prohibits lawyers from acquiring a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client. This traditional rule has been brought forward as Rule 1.8(j) with two notable exceptions, namely: (1) the right of the lawyer to acquire a lien granted by law to secure the lawyer's fee or expenses and (2) the right of the lawyer to contract with a client for a reasonable contingent fee in a civil case. Therefore, the proprietary interest in the cause of action acquired by the contingent fee is ethically permissible.

The Rules [1.5(c) and 1.8(j)] view the contingent fee agreement itself as the proprietary interest. However, the question presented to the Committee goes further and asks if the lawyer may ethically take an assignment of a portion of a cause of action. The ethical substance of the transaction is the taking of the proprietary interest and not the form by which that interest is acquired. Therefore, the further securing of the ethically permissible contingent fee by an assignment of a portion of a cause of action is likewise ethically permissible.

The Committee is aware of the holding in *Lamar Hardwood Co. v. Case*, 107 So. 868 (Miss. 1926) where a lawyer contracted for a contingent fee and took an assignment of a portion of the right of action. The lawyer promptly notified the intended defendant of the assignment. The defendant, through its insurance agent, unsuccessfully negotiated with the lawyer. The defendant then negotiated a settlement with the lawyer's client. The lawyer (Case) sued on his contingent contract which contained an assignment of interest in the action. Lamar Hardwood recognizes that the lawyer holding a contingent fee contract with an assignment holds a real interest in the cause of action upon which the lawyer may independently proceed. A legal argument may exist as to whether a lawyer holding a contingent fee agreement with an assignment of a portion of the claim is or is not a proper or necessary party. Further, that legal issue may become more entangled if the lawyer takes a proprietary interest by assignment or otherwise in the subject matter of the litigation. Whatever may be the legal conclusion of these-issues, this Committee concludes that ethically a lawyer whose interests in the outcome of the litigation are solely in the nature of a contingent fee arrangement should not join as a party with the client in the litigation.