ETHICS OPINION NUMBER 213
OF THE MISSISSIPPI BAR
RENDERED NOVEMBER 18, 1993

ETHICAL OBLIGATION TO REPORT PROBABLE PAST CRIMINAL VIOLATION BY NON-CLIENT - An attorney who learns in the course of taking a deposition or sworn statement from a non-client that the non-client has failed to file federal or state income tax returns or has failed to report earned income on returns he has filed is under no ethical obligation to report such probable past criminal violations by the non-client. In the absence of a legal obligation to report such probable violations, the attorney may report such probable violations with his client's informed consent. If the attorney is required by law to report such violations, he may do so even though his client does not consent.

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

> 1. Taking a deposition of a non-client, a lawyer learns that the non-client either has failed to file federal and state income tax returns or that the non-client has not reported earned income on returns the non-client has filed:
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> 2. The lawyer learns the same information while taking a sworn statement from the non-client.

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

Question A: Does an attorney who becomes privy to information in a sworn statement by a non-client regarding a probable past violation of state or federal law have an ethical duty to report such violation of law to the appropriate legal authorities?

Question B: Does the fact that the attorney represents an adverse party in litigation and obtained the non-clients (sic) sworn statement by way of discovery in a civil action affect the duty addressed in Question A?

Question C: Does the fact that the attorney represents the non-client's insurance company and obtained the non-client's statement under a provision of an insurance policy requiring the non-client to submit to examination under oath in connection with a claim under the insurance policy affect the duty addressed in Question A?

Question D: Whether or not reporting is required, would a report of probable criminal conduct on the part of the non-client under either Situation 1 or Situation 2 violate any ethical duty owed by Lawyer D to his client?

Question E: Whether or not reporting is required, would a report of probable criminal conduct under either Situation 1 or Situation 2 violate any ethical duty owed by Lawyer D to the non-client?

Question F: Is information regarding a non-client, obtained in the circumstances set out in Situations 1 and 2 above, considered "information relating to representation of the client" subject to the confidentiality provisions of Rule 1.6?

Question G: If a duty to report a probable past violation of law by a non-client exists, would a failure to report be excusable?

Question H: If a duty to report a probable past violation of law by a non-client exists, would a failure to report be ethically excusable if the lawyer reasonably believes that to make the report would injure the interests of his client and/or his client refuses to consent to reporting after consultation?

The questions raised here differ from those addressed by this Committee in Opinion No. 205. There, we held that the Mississippi Rules of Professional Conduct impose obligations of disclosure upon both counsel representing a party and counsel adverse to the party upon admission by the party to having committed perjury in another proceeding - a clear admission of a criminal violation prejudicial to the administration of justice. M.R.P.C. 3.3(a)(2) and the comment thereto deal specifically with a lawyer's obligations when the lawyer learns of his client's perjury. We recognized in Opinion No. 205 opposing counsel's similar obligation to report admitted perjury regardless of whether the attorney's own client believed that to be in the client's best interest because:

the necessity to protect the integrity of the administration of justice outweighs the personal considerations of the client and in fact, inures to the client's benefit by insuring the client of the same nonprejudicial administration of justice in the various tribunals in which the liens may appear.

The probable past criminal violations posited here are of a different nature: they do not directly impact the administration of justice in any tribunal in which the parties are appearing or have appeared. Under the circumstances, Rule 8.4(d), which prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice,

does not impose upon the attorney the ethical obligation to report the admission by the non-client. Accordingly, the answers to Questions A, B, and C are no - the attorney has no ethical obligation under the Mississippi Rules of Professional Conduct to report the probable past violation. This conclusion renders Question G moot.

Question E inquires of any ethical obligation owed by the lawyer to the non-client not to report the probable past criminal conduct by the non-client. M.R.P.C. 1.6, which deals with confidentiality of information, establishes ethical obligations between the lawyer and that lawyer's own client, not non-clients. Accordingly, a lawyer's decision, for whatever reason, to report a non-client's probable past criminal violation under the circumstances here presented does not violate any ethical obligation to the non-client.

The Committee recognizes that there may be legal obligations concerning reporting of probable violations of federal or state income tax laws. Such obligations, if any, are beyond the scope of matters upon which this Committee can opine. The existence or non-existence of such obligations, though, impacts upon the remaining questions posed. Those questions - D, F, and H - relate to considerations of ethical obligations to a lawyer's own client arising from a report of the probable past criminal conduct by the non-client.

Question D is abstract and cannot be answered as stated; however, when that question is read in conjunction with Questions F and H, the overall inquiry is how Rule 1.6 impacts upon the lawyer's obligation to his own client if the lawyer has determined that he should report the non-client's probable past criminal violation. The Committee concludes that:

1. The information regarding the non-client, obtained under circumstances presented here, is "information relating to representation of a client" subject to the provisions of Rule 1.6. As the comment to Rule 1.6 states, "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." The circumstances under which the attorney learned this information (deposition, sworn statement) does not affect this analysis.

2. Since the lawyer is under no ethical obligation of disclosure, in the absence of any legal obligation to disclose the information, the lawyer may not do so without the consent of his client after consultation. M.R.P.C. 1.6(a). Of course, the lawyer must explain the matter to the extent necessary to permit the client to make an informed decision concerning that question, including any potential negative ramification for the client. See M.R.P.C. 1.4(b);

3. If the lawyer determines that he is obligated by law to report the probable past criminal violation, he should first seek his client's informed consent. If the client refuses that consent, the lawyer may proceed to make any report required by law. Rule 1.6(c) provides that "[a] lawyer may reveal such information to the extent required by law or court order." (Emphasis supplied). See also, Mississippi Bar Informal Advisory Opinion No. 64 (May 20, 1993) (an attorney may disclose information about a non-client otherwise falling within the scope of Rule 1.6 when disclosure is mandated by law).