

**ETHICS OPINION NUMBER 218
OF THE MISSISSIPPI BAR
RENDERED JUNE 3, 1994**

CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS: An attorney who represented a defendant in litigation involving other co-defendants, attended joint defense counsel meetings with attorneys representing other co-defendants, and who actively participated in presentation and/or development of confidential combined defense strategy of the multi-party defendants, may not represent plaintiffs in subsequent litigation against the former co-defendants of his client in cases involving the same and/or similar claims and defenses, even if his former client is not a defendant in the subsequent litigation.

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

Prior to moving to a new firm, attorney was an associate in firm which represented a defendant in multi-party litigation, in which attorney attended joint defense counsel meetings on behalf of his client, a co-defendant in the said case. During the course of said conferences, co-defendant counsel discussed numerous confidential matters pertaining to the strategy for defending the cause, including issues pertaining to change of venue motions, motions for recusal of the trial judge, motions for summary judgment based upon limitation of actions, and discovery matters. Counsel representing the foregoing co-defendants failed to enter into any agreement of confidentiality, or otherwise sought to limit, by written or other agreement, the ability of defense counsel to represent potential plaintiffs against other co-defendants. In the new firm, attorney has been approached by potential plaintiffs, who desire him to prosecute an action against certain defendants in another lawsuit. Some or all of the defendants in the new litigation were defendants in the previous multi-party litigation, but attorney's former client is not party to the proposed litigation. The putative plaintiffs desire the attorney to prosecute the same and/or similar claims against the former co-defendants that were the subject of the joint defense counsel meetings, which attorney attended as representative of a former co-defendant.

The Ethics Committee has been requested to opine whether the attorney who helped develop strategy on behalf of his client, and who otherwise worked with him in conjunction with former co-defendants to develop defense strategy, may now pursue or prosecute the same and/or similar claims against those same co-defendants. M.R.P.C. 1.6 reads, in pertinent part:

(a) 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 paragraphs (b) and (c).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(c) A lawyer may reveal such information to the extent required by law or court order.

M.R.P.C. 1.9 reads as follows:

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 interests of the former client unless the former client consents after consultation; or

(b) use information relating 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.

Lawyers commonly work together for the benefit of multiple co-parties, raising the same and/or similar claims and/or defenses. To that end, they may work in concert to develop and/or prosecute varying strategies, claims and/or defenses. Likewise, in the course of such joint relationship, counsel representing co-parties may share confidential information for the specific purpose of advancing joint and concurring interests for the benefit of the claims of individual defendants or defenses. To the extent that counsel for co-parties share or disseminate information, or otherwise develop joint strategies, that information is governed by M.R.P.C. 1.6, meaning that said attorney may not reveal information gathered in such meeting, except in accord with the strict and mandatory requirements of M.R.P.C. 1.6. An attorney who develops strategies with co-defendants, on behalf of his client(s), is still bound by the rules of confidentiality, regardless of the source of said confidential information.

The 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. A lawyer may not disclose such information, except as authorized or required by the Rules of Professional Conduct, or other law. M.R.P.C. 1.6 comment.

Hence, information garnered or learned from whatever source which is confidential for the benefit of a client from whatever source is governed by the proscriptions of M.R.P.C. 1.6.

M.R.P.C. 1.9 requires that a lawyer, who has formerly represented a client in a matter, shall not thereafter represent another in the same or substantially related matter, in which that person's interests are materially adverse to the interests of the former client, without consent. Information acquired by the attorney in the course of representing a co-party in the initial case may not subsequently be used by the lawyer in another case, in derogation of his or her duty of nondisclosure. Hence, to the extent that an attorney seeks to use information confidentially gathered or developed on behalf of a client, "whatever its source", said information may not be used for the benefit of a subsequent client, where disclosure would otherwise breach the confidentiality requirements of M.R.P.C. 1.6.

Since the attorney has received, garnered, and/or otherwise developed confidential information, gained through joint defense counsel conferences for the benefit of his former client, counsel may not use that confidential information and/or maintain a materially adverse representation, i.e., a claim against a former co-party, absent compliance with the provisions of M.R.P.C. 1.6 and 1.9.