

**ETHICS OPINION NUMBER 231
OF THE MISSISSIPPI BAR
RENDERED APRIL 11, 1996**

CONFLICT OF INTEREST - It is improper for a law firm, after having represented the partners of a general accounting firm, to counsel several of the partners of the accounting firm as to the termination of another partner in the accounting firm, or to represent several of the remaining partners of the accounting firm in litigation against the terminated partner, without disclosing any potential conflict and obtaining knowing and informed consent after consultation concerning any potential conflict.

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

A Senior Partner in an accounting firm organized as a general partnership owns 25% of that partnership. The partnership engages a law firm to provide it with services associated with various aspects of partnership affairs within the accounting practice. Over a number of years the Senior Partner of the accounting firm has repeated contacts with various members of the law firm, which, for the sake of this hypothetical, is also organized as a general partnership. Assuming that the law firm provides advice to the accounting firm, can the law firm then assume a position adverse to any of the partners or former partners of the accounting firm? Also, could this firm ethically undertake representation adverse to the former senior partner in litigation?

The following specific issues were raised:

Question 1: Can a law firm, after having represented the partners of a general accounting partnership, choose sides in a dispute between those partners, and participate in counseling certain partners as to termination of another partner (the Senior Partner), when he seeks to retire and receive retirement benefits without advising the Senior Partner that they are representing other partners against his interest?

Question 2: Can a law firm operating as a general partnership bring suit against a former general partner (the Senior Partner) in an accounting firm represented by that law firm, without disclosing the potential conflict or otherwise seeking the consent of the former Senior Partner to take a position adverse to his interest after having represented him as a general partner?

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer reasonably believes:

the representation will not be adversely affected; and

the client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the representation and the advantages and risks involved.

The Comment to Rule 1.7 points out that "loyalty is an essential element in the lawyer's relationship to a client." That loyalty "prohibits undertaking representation directly adverse to that client without that client's consent." Comment to Rule 1.7. Even though each client can consent to the representation after consultation, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent." Id.

Other matters to consider "in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise." Id.

Also, M.R.P.C. Rule 1.8(b) states, "A lawyer shall not use information relating to representation of a client (1) to the disadvantage of a client, or (2) to the advantage of himself or a third person, unless the client consents after consultation." M.R.P.C. Rule 1.9 governs potential conflicts of interest involving former clients:

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

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

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.

Under the factual situation presented, the prohibitions of the foregoing rules apply. Both of the specific issues as set forth above contemplate the law firm's representing certain partners in an action concerning the termination of another partner of the same general accounting firm (the Senior Partner and 25% owner, with whom that firm has had repeated contacts related to partnership business and legal services) without disclosing to the terminated partner any potential conflict, consulting with each concerning same and obtaining knowing and informed consent.

The law firm provided this general accounting firm with legal services relating to various aspects of the accounting practice, including partnership affairs within the accounting practice, over a period of several years. Specifically, various members of the law firm worked directly with the Senior Partner and advised him and the other members of the accounting firm as to various legal matters. Rule 1.13, M.R.P.C., deals with the organization as a client. The ABA Model Rule upon which our Rule 1.13 is predicated has been interpreted to provide that if the relationship is not clarified at an early stage, a lawyer-client relationship may arise between the lawyer and an individual constituent of the organization. *See, e.g.*, ABA Annotated Model Rules of Professional Conduct (2d. Ed. 1992) at 228 (lawyer-client relationship may be found between an individual constituent and an organization's lawyer). *See also E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969) (lawyers disqualified from representing brokerage firm in action against former vice president based on presumption that lawyers represented him as individual as well as brokerage firm); *Margulies v. Upchurch*, 696 P.2d 1195 (Utah 1985) (lawyer-client relationship existed between limited partners and lawyer for limited partnership).

Further, the comment to Rule 1.13 requires that if the organization's interest becomes adverse to those of one or more of its constituents, the lawyer should advise the constituent(s) of the conflict or potential conflict of interest. For purposes of this opinion, we assume that the subject lawyers did not comply with this requirement.

Further, in the scenario proposed, the Senior Partner's termination would be based on advice provided by the law firm. That action, coupled with the fact that the same law firm proposes thereafter to represent several of the remaining partners of the

accounting firm in litigation against the former Senior Partner, all without obtaining his consent after consultation, would violate M.R.P.C. Rule 1.9(a) and the general principles set forth in M.R.P.C. Rule 1.7. The conduct described may also violate Rule 1.9(b) and 1.8(b).

Accordingly, we conclude that the actions proposed in both Questions 1 and 2 violate the lawyers' obligations pursuant to the Mississippi Rules of Professional Conduct. We do not know the specifics of the law firm's representation of the accounting partnership nor the bases for the proposed termination of the Senior Partner; therefore, we offer no opinion as to whether the law firm may obtain an effective waiver for the proposed representation from the Senior Partner after consultation. The questions posed also state that the subject law firm is organized as a general partnership. That factor plays no part in our analysis, and the result we reach would be the same regardless of the manner in which the law firm is organized.