

**ETHICS OPINION NUMBER 255
OF THE MISSISSIPPI BAR
RENDERED APRIL 12, 2007**

CONFLICT OF INTEREST; ORGANIZATION AS A CLIENT: A lawyer who serves as a duly appointed city attorney for a municipality that operates under the mayor-council form of government pursuant to M.C.A. Section 21-8-1 et seq. may not represent the executive branch of that municipality against the legislative branch of that municipality or vice versa.

The Ethics Committee of The Mississippi Bar has been asked to render an opinion of the following hypothetical representation arrangement. The Ethics Committee has rephrased the hypothetical for clarity:

Whether a municipal attorney can represent the executive branch (mayor) in legal action brought by the legislative branch (city council) against the executive branch through the legislative branch's privately obtained counsel?

Rule 1.13 of the Mississippi Rules of Professional Conduct provides:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation, its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken

shall be designed to minimize disruption relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter
 - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
 - (3) referring the matter to higher authority in the organization, including, if warranted, by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.
- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

The Committee believes that the pertinent part of Rule 1.13 that applies to this hypothetical is 1.13(e) which requires a consideration of Rule 1.7 of the Mississippi Rules of Professional Conduct which states:

(a) 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.

(b) 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:

(1) the representation will not be adversely affected: and

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

The "knowing and informed consent after consultation" mandate of Rule 1.7 would necessarily require the attorney representing a municipality to consult with and obtain the consent of both the executive and legislative branches before representing one against the other. The Committee is of the opinion that such representation is impermissible, in that a duly appointed municipal attorney, under any set of circumstances, may not obtain consent to represent in litigation one branch against another. To allow such representation would improperly circumvent the lawyer's ethical obligations to his or her client. Even if they could be considered to be two clients, it would unnecessarily place the lawyer in the position of representing one of his clients against another in litigation. Such representation undoubtedly will involve the use of information relating to the representation of one client to the disadvantage of that client, which is strictly prohibited by Rule 1.8(b) of the Mississippi Rules of Professional Conduct.