

**ETHICS OPINION NUMBER 258
OF THE MISSISSIPPI BAR
RENDERED DECEMBER 1, 2011**

**CONFLICT OF INTEREST: FORMER CLIENT; RESPONSIBILITIES
REGARDING NON-LAWYER ASSISTANTS**

CAVEAT: This opinion is limited strictly to the facts set forth in the hypothetical submitted and is limited to the question of whether the proposed conduct is permissible under the Mississippi Rules of Professional Conduct. The Ethics Committee is prohibited from rendering opinions on questions of law by Article 8-15(c) of the Bylaws of The Mississippi Bar. Any incidental reference to legal authorities is informational only and should not be taken as the Committee's interpretation of such authorities or of the legal issues arising from the hypothetical presented or of the legal ramifications of the proposed conduct. The Committee's opinion is limited to ethical issues only.

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

A paralegal worked for approximately six years at Firm 1. Corporation A was one of numerous Defendants in a lawsuit in which Firm 1 represented Corporation A as local counsel. The paralegal's involvement in the lawsuit was minimal with the total time spent being approximately fifteen (15) hours and consisting primarily of filing documents with the Court for Corporation A's national counsel. The paralegal never met with representatives of Corporation A. Corporation A settled the lawsuit with the Plaintiff approximately two years ago. Firm 2 and other firms represent the Plaintiff in the lawsuit against the remaining Defendants. The paralegal has now joined Firm 2. Under the Mississippi Rules of Professional Conduct, does the paralegal's employment at Firm 2, wherein she would assist counsel for the Plaintiff in the lawsuit against the remaining Defendants, constitute an ethical violation due to her involvement with Firm 1, who defended Corporation A in the same lawsuit.

The Mississippi Rules of Professional Conduct do not apply to non-lawyers. However, lawyers are responsible for assuring that their non-lawyer staff acts in accordance with the lawyer's ethical obligations.

Rule 5.3 of the Mississippi Rules of Professional Conduct provides:

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action

Given this Rule, the question becomes whether a non-lawyer can impute disqualification to a law firm.

As to lawyers, Rules 1.7 and 1.9 provide:

Rule 1.7 states in part:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client,...

Rule 1.9 states in part:

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.

Rule 1.6 states in part:

- (a) a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

Further, Rule 1.8(b) states:

A lawyer shall not use information relating to the representation of a client

- (1) to the disadvantage of the client, or
- (2) to the advantage of himself or a third person, unless the client consents after consultation.

Rule 1.10 states in part:

- (b) when a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm in which the lawyer was associated, had previously represented the client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

Most attorneys employ assistants in their law practice. Such assistants include secretaries, investigators, interns and paralegals. These assistants act on behalf of the attorney in carrying out the attorney's professional services. Every attorney must make reasonable efforts to give these assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly as regards the obligation not to disclose information relating to the representation of any particular client. In law firms, lawyers with managerial authority must make all reasonable efforts to establish internal policies and procedures which are designed to provide reasonable assurance that the non-lawyers in the firm will act in a way compatible with the Mississippi Rules of Professional Conduct.

A lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another and no employment should be accepted that might require such disclosure. The obligations of a lawyer to preserve the confidences and secrets of his client continue after the termination of his employment.

MRPC Rule 1.9 and ABA Model Rule 1.9 use the term "substantially related". This means a matter involving the same transaction or legal dispute or where there is a substantial risk that confidential factual information obtained in the prior representation would materially advance the client's position in the subsequent matter. We live in a world where attorneys and paralegals move from one firm to the other. When an attorney ends his/her association with the firm, there are several factors to be considered when undertaking new representation. First, the former client must be reasonably assured that the principal of loyalty to him/her is not compromised by the attorney. Second, the rule should not be so broad as to preclude other clients from having a reasonable choice of counsel. Third, the rule should not unreasonably deter attorneys from forming new associations and taking on new clients, after having left a prior firm.

MRPC Rule 1.10 does not speak to the issue; however, ABA Model Rule 1.10 does not prohibit representation by others in a firm where the person prohibited from involvement in a matter is a non-lawyer. A comment to the 2011 ABA Model Rule 1.10 indicates that the majority view of the states is that conflicts of interest of non-lawyers ordinarily will not be imputed to firm lawyers if the non-lawyer is properly screened to protect confidential information.

ABA Informal Opinion 88-1526 (June 22, 1988) states:

A law firm that employs a non-lawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer on whose matters the non-lawyer has worked, as long as the employing firm screens the non-lawyer from information about or participating in matters involving those clients and strictly adheres to the screening process described in this opinion and as long as no information relating to the representation of the clients of the former employer is revealed by the non-lawyer to any person in the employing firm. In addition, the non-lawyer's former employer must admonish the non-lawyer against revelation of information relating to the representation of clients of the former employer.

Under Rule 5.3 lawyers must give non-lawyers appropriate instruction and supervision concerning the ethical aspects of their employment, particularly as it relates to disclosure of confidential information. Part of this responsibility requires lawyers with managerial authority to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that non-lawyers in the firm will act in a way compatible with the rules of professional conduct. Trust between attorneys and clients is the hallmark of the lawyer/client relationship. A lawyer must act confidentially to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. This duty of confidentiality continues after the lawyer/client relationship has been terminated.

It is the opinion of the Ethics Committee that disqualification of a paralegal is not imputed to the firm so long as the non-lawyer is screened to protect confidential information. The screening process of a non-lawyer should involve the supervisory lawyer cautioning the non-lawyer (1) not to disclose any information relating to the representation of a client of the former employer; and (2) that the employee should not work on any matter in which the employee worked for the prior employer or respecting which the employee has information relating to the representation of the client of the former employer. When the new firm becomes aware of such matters, the employing firm must also take reasonable steps to ensure that the employee takes no action and does no work in relation to matters on which the non-lawyer worked in the prior employment absent written consent from the prior client.

Sometimes a firm may be disqualified from representing a client when the firm employs a non-lawyer who formerly was employed by another firm. These circumstances are present either (1) where information relating to the representation of an adverse party gained by the non-lawyer while employed in another firm has been revealed to lawyers or other personnel in the new firm; or (2) where screening would be ineffective or the non-lawyer necessarily would be required to work on the other side of the same or a substantially related matter on which the non-lawyer worked or respecting which the non-lawyer has gained information relating to the representation of the opponent while in the former employment.

CONCLUSION:

Under the hypothetical situation presented to the Ethics Committee of the Mississippi Bar, the non-lawyer must be screened by all supervising lawyers from information about or participating in matters involving the present clients and must make the non-lawyer aware that no information relating to the representation of the clients of the former employer shall be revealed by the non-lawyer to any person in the current law firm. The non-lawyer should not be allowed to work on any matter in which he/she worked for the prior employer or respecting which the non-lawyer has information relating to the representation of the client of the former employer. The current law firm must take all necessary steps to ensure that the non-lawyer takes no action and performs no work in relation to matters on which the non-lawyer worked in the prior employment unless a written consent is obtained by the client of the prior employer.