

**ETHICS OPINION NUMBER 201
OF THE MISSISSIPPI BAR
RENDERED JUNE 12, 1992
AMENDED JUNE 25, 2009*
AMENDED APRIL 6, 2013**

CONFLICT OF INTEREST -- BAR ASSOCIATION COMMITTEES : 1) It is improper for an attorney who is a member of the Committee on Professional Responsibility, the Executive Committee, the Board of Bar Commissioners, or a Complaint Tribunal to represent an attorney, other than himself, against a disciplinary complaint. 2) It is improper for a member of a firm with which an attorney who is a member of the Committee on Professional Responsibility, the Executive Committee, or the Board of Bar Commissioners, is associated, to represent an attorney, other than himself, against a disciplinary complaint.

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

May an attorney who is a member of the Committee on Professional Responsibility or a member of the Executive Committee or a member of the Board of Bar Commissioners or a member of a Complaint Tribunal represent an attorney, other than himself, against a disciplinary complaint or may a member of that attorney's firm represent an attorney, other than himself, against a disciplinary complaint?

In order to answer this question, one must first determine what each entity does in relation to disciplinary complaints. The Bylaws of The Mississippi Bar and the Rules of Discipline for the Mississippi State Bar ("MRD") as adopted by the Supreme Court of Mississippi, described the duties of the entities in question insofar as disciplinary complaints are concerned. First, the Court has designated each of these entities as a disciplinary agent of the court. *See* Rule 3, MRD.

Board of Bar Commissioners ("Board")—The Board hires and controls the salary of the Bar's General Counsel, who is charged with investigating and prosecuting disciplinary complaints. The Board has also been designated as a special master of the Supreme Court of Mississippi in all disciplinary matters and decides what position the Bar shall take on disciplinary matters including whether the Bar should accept an offer of settlement from an accused attorney; when the Bar shall appeal a Complaint Tribunal's decision whether the Bar will oppose a Petition for Reinstatement filed by a

suspended or disbarred attorney. *See* Rule 3, MRD; *See also* The Mississippi Bar Bylaws, Article III (July 18, 2009).

Executive Committee--The Executive Committee is composed of the President, Vice-President/President-Elect, Second Vice-President, Past President, President of Young Lawyers Division, and two Bar Commissioners. All of these officers are members of the Board of Bar Commissioners. (It should be noted, of course, that the President is the one who makes all committee appointments and that the President-Elect will make all committee appointments when he assumes the Presidency.) The Executive Committee acts for the Board between Board meetings, including decisions regarding disciplinary matters. *See* The Mississippi Bar Bylaws, Article III, 3-6 (July 18, 2009).

Committee on Professional Responsibility--The Committee on Professional Responsibility determines whether a disciplinary complaint shall be dismissed; investigated further; prosecuted as a Formal Complaint; or treated as a minor violation which should be handled by a letter of admonition, private reprimand or public reprimand. *See* Rule 7, MRD.

Complaint Tribunal—Complaint Tribunals are appointed by the Supreme Court of Mississippi. Each tribunal is composed of a presiding judge and two practicing attorneys. The Tribunals hear and decide all formal disciplinary complaints including what punishment, if any, is warranted. *See* Rule 8, MRD

All of these entities have direct control over disciplinary matters, at one stage or another.

Members of the Board of Bar Commissioners, the Executive Committee, and the Committee on Professional Responsibility are confronted with the prohibitions of Rules 1.7 and 8.4 of the Mississippi Rules of Professional Conduct (“MRPC”). Rule 1.7 (b) states a lawyer shall not represent a client if the representation may be materially limited by the lawyer’s responsibility to a third person. In this scenario, the lawyer’s responsibility to the Bar and the Court as its disciplinary agent materially limits his or her ability to represent an accused attorney in a disciplinary matter. The situation is analogous to the lawyer who is a member of a hospital’s board of directors. The lawyer owes the hospital a fiduciary duty not to take any action that conflicts with that duty, such a filing suit on behalf of a private client. *See Berry v. Saline Memorial Hospital*, 907 S.W.2d 736, 739 (Ark. 1995). The court in *Berry* explained that the lawyer’s fiduciary relationship to the hospital created an impermissible conflict under ABA Model Rule 1.7(b) and disqualified the lawyer and his law firm. *Id.*

While Rule 1.7(b) does provide a mechanism for waiving conflict, if a disinterested lawyer would not conclude that the client should agree to the representation the circumstances, then the lawyer cannot properly ask the client to waive the conflict. *See* Cmt. MRPC 1.7. The need to maintain the integrity of the disciplinary process presents just such a conflict that cannot be waived. Rule 8.4(d), MRPC provides it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

The Committee is of the opinion that it is prejudicial to the administration of the disciplinary process for attorneys who have authority over various stages of the disciplinary process to represent other attorneys against disciplinary complaints.

The situations are analogous to the situations considered by the Ethics Committee in Opinion Nos. 38 and 87. In these opinions, the Ethics Committee has determined; that a city judge may not defend cases in the same municipal court before another judge and that a city prosecutor's partner may not defend a criminal case filed in municipal court even if the case is transferred to county court; The guiding light in all of these cases was stated in *Erwin M. Jennings Co. v. DiGenova*:

Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites toward the administration of justice a doubt or distrust of its integrity.

107 Conn. 491, 499, 141 A. 866, 868 (1928).

The Ethics Committee is of the opinion that confidence in the disciplinary system of the Bar cannot be maintained if the attorneys who have authority over various stages of the disciplinary process are allowed to represent other attorneys in the process.

Furthermore, under Rule 1.10(a), this prohibition of representing private clients in disciplinary proceedings extends to members of the same firms with which these attorneys are associated. The integrity of the system demands no less. However, the concern expressed regarding the representation of private clients is not present when a member of the Board or Committee member's law firm represents fellow member of their own firm.

Rule 1.11, MRPC, dealing with successive government and private employment is inapplicable to the question posed. This rule and its comment anticipate a "transfer of employment" and is intended to resolve conflicts between the new employer and

former clients. It is not intended to address concurrent conflicts that arise when serving in a volunteer capacity on an agency's governing board while also engaged in private practice. Further, the comment to ABA Model Rule 1.11 makes clear that a lawyer currently serving as a public officer is still subject to the prohibition of concurrent conflicts of interest as stated in Rule 1.7.

Members of the Complaint Tribunals are faced with a slightly different quandary. Rule 1.12, MRPC, addresses conflicts that may arise for judges and other adjudicative officers who are also engaged in private practice. Rule 1.12(a) provides that a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, unless all parties to the proceeding give informed consent. Rule 1.12(c) states this disqualification will be imputed to the lawyer's firm if certain screening steps are not taken. The basis for allowing a screening mechanism in this rule, that is not present in Rule 1.10 is that a third party neutral does not have access to confidential information of either party that would be protected under Rule 1.6, MRPC. However, the lawyer acting as a Complaint Tribunal member must also consider his or her obligations under the Code of Judicial Conduct, including the lawyer's obligation to promote public confidence in the integrity and impartiality of the judiciary. Interpretation of the Code of Judicial Conduct is beyond the scope of this Committee.

*Note: The Board of Bar Commissioners amended the opinion to remove the prohibition as it applied to the Ethics Committee given that the Ethics Committee has no role or direct control over disciplinary actions.