

**ETHICS OPINION NUMBER 28
OF THE MISSISSIPPI BAR
RENDERED NOVEMBER 15, 1974
AMENDED APRIL 6, 2013**

CONFLICT OF INTEREST - MULTIPLE REPRESENTATION – DECLINING/TERMINATING REPRESENTATION - Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client.

The Ethics Committee of the Mississippi Bar has been requested to render an opinion concerning representation of multiple clients in the following manner:

Two persons are charged with fraud and hire the same attorney to defend them. Defendant A pleads guilty to a reduced charge and agrees to testify for the prosecution in Defendant B's trial. The attorney attempts to withdraw as Defendant A's attorney as he will be defending Defendant B. Both defendants insist on the attorney continuing as their attorney. Defendant A will not be sentenced until after the trial of B is held and the attorney defends Defendant B and simultaneously serves as legal counsel to Defendant A who is a prosecution witness. Should the attorney have withdrawn from employment even though defendants wanted him to continue as their respective counsel?

The lawyer should withdraw from the representation of each client as soon as the lawyer discovers the conflict notwithstanding the fact the clients' wishes to the contrary.

Rule 1.7 of the Mississippi Rules of Professional Conduct 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.

In order to assess the lawyer's ethical duty, one should examine the elements of the rule. First, Rule 1.7(a) forbids the lawyer from representing a client if that representation is *directly* adverse to another client. The rule contains an exception for a situation in which the lawyer *reasonably* believes the representation will not adversely affect the client *and* the lawyer consults with each client and both give knowing and informed consent to the representation.

In the situation presented, the representation of client A is directly adverse to client B based on client A's agreement to testify against client B. (Assuming that the attorney consulted with client A prior to the agreement to testify against client B, the attorney would have already breached his or her duty to client B.)

Having determined that this scenario presents a direct conflict of interest, the lawyer should then proceed to Rule 1.7(a)(1) and examine whether or not he or she reasonably believes the representation will be adversely affected. In this scenario it would be unreasonable to determine otherwise. This determination is a prerequisite to obtaining the consent of each client under Rule 1.7(a)(2). In other words, if the lawyer determines that the representation will be adversely affected, the lawyer need not obtain the clients' consent for the dual representation.

If the lawyer believes the representation will be adversely affected it cannot be cured by obtaining the consent of the clients regardless of their insistence that the lawyer continue. The lawyer should follow the procedures outlined in Rule 1.16 for declining or terminating representation.