

## Ethical Lawyering

Ethical lawyering has many components in government civil practice. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Organized ethics materials designed and appropriate for state and local government lawyers are few and far between, however, and must often be gleaned from ethics opinions, explanatory comments to rules or in reported decisions applicable to attorneys generally<sup>8</sup>. Specific ethical guidelines for government lawyers do exist, and help in understanding and applying them can be found through a loose network of organizations. These include organized associations of government lawyers employed as civil counsel for agencies and Boards, private practitioners who regularly represent or appear before government entities covered by state tort claims acts or insurance, and members of the academic community conversant in public law<sup>9</sup>.

In a post-Enron environment that has witnessed sweeping reforms in corporate governance and securities regulation, much criticism has been heaped on the shoulders of in-house and outside counsel for "failing to discover, disclose or prevent corporate misconduct."<sup>10</sup> This criticism has not been lost on government lawyers, who have a strong motivation to know and understand the rules governing conflicts, disqualification, and confidentiality, especially when the public interest is at stake, public accountability is of paramount importance and the consequences of ethical miscalculation can be permanent.

### Public Law Ethics Primer for Government Lawyers

One of these organizations alluded to above is the Washington State Municipal Attorneys' Association, which recently published a "Public Law Ethics Primer for Government Lawyers,"<sup>11</sup> the result of strategic planning, cross-pollination with similar organizations, and untold hours of research, word processing, editing and pro bono sweat. To a limited extent this presentation follows the Primer's basic format, focusing on ethical rules commonly applied in the government setting and drawing upon the various sources for ethical guidelines

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<sup>8</sup>"There is no treatise on government ethics, no national newsletter devoted exclusively to the field, nor a web site where these types of cases and opinions are typically summarized and searchable. Thus, government lawyers must be creative in their research path and mindful of the jurisdictional differences in the law and in community values and standards that have so much to do with determining whether the conduct complained of is in fact unethical." P. Salkin, *Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers*, 14 *BYU J. Pub. L.* 209,225 (2000)

<sup>9</sup>To name a few, the ABA Section of State and Local Government Law, ABA Government and Public Sector Lawyers Division, International Municipal Attorneys Association, National Association of County Civil Attorneys, Governmental Liability Committees of DRI, TTIPS and Litigation Section of the ABA, and state level counterparts, such as the Mississippi Bar's Government Law Section, and the Mississippi Association of County Board Attorneys.

<sup>10</sup>D. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations?* 34 *St. Mary's L. J.* 873, 874 (2003)

<sup>11</sup><http://textonly.mrsc.org/Subjects/Legal/primer.aspx>

applicable to government lawyers.

### **Sources of Ethical Rules**

We begin with the Mississippi Rules of Professional Conduct provisions relating to confidentiality, conflicts of interest and the concept of "appearance of impropriety." These include rules that prevent a lawyer from exploiting public office a private client's advantage, rules that apply to lawyers who represent government agencies, whether employed or specially retained, rules that prevent a private client from improperly influencing or affecting the performance of a lawyer's professional functions on behalf of a public authority, and rules governing disqualification, screening and waiver applicable to lawyers entering or leaving public service. We will touch on some changes to the Mississippi Rules of Professional Conduct that the Board of Bar Commissioners resolved on June 26, 2003 to submit by Petition to the Mississippi Supreme Court for adoption. Parallel and sometimes very different ABA Model Rules adopted in 2002 will be addressed, as will formal, informal and advisory opinions interpreting and applying the ABA Model Rules and state counterparts, including opinions of the Mississippi Ethics Committee. Keeping a decidedly Mississippi focus, we will discuss relevant opinions of the Mississippi Ethics Commission and the Attorney General's Office dealing with lawyers in the public sector. Interspersed throughout this discussion will be an examination of judicial decisions from our own supreme court and from appellate courts of sister states as well as current perspectives of the leading authorities on ethics for government lawyers.

### **Mississippi Rules Of Professional Conduct**

The Preamble of the MRPC is entitled "A Lawyer's Responsibilities." It emphasizes the Rules of Professional Conduct as "rules of reason", some partly obligatory and disciplinary and others partly descriptive in defining a lawyer's professional role. The Rules should be interpreted "with reference to the purposes of the legal representation and of the law itself." The role of government lawyers is also addressed:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in the private client-lawyer relationship. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.<sup>12</sup> These Rules do not abrogate any such authority.

In describing the scope of the MRPC, the Mississippi Supreme Court emphasized in *Singleton v. Steagall*, 580 So. 2d 1242, 1244-45(Miss. 1991):

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a duty has been breached. ...[N]othing in the rules should be deemed to augment any substantive legal

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<sup>12</sup>This sentence is deleted in the 2003 proposed changes to the MRPC.

duties of lawyers or the extra-disciplinary consequences of violating such a duty.

Accord, *Wilbourn v. Stennett*, Wilkinson & Ward, 687 So. 2d 1205,1216 (Miss. 1996)(MRPC is “not used as a measuring stick to determine civil liability for legal malpractice.”).

### Confidentiality

MRPC Rule 1.6 deals with Confidentiality of Information<sup>13</sup>. In the context of government lawyers, the requirement of confidentiality clearly applies:

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance<sup>14</sup>

The open question is to what extent it applies. It has been recognized that the additional limitations placed on the attorney-client privilege in the public sector stem from “the government attorney’s special duty to uphold the public trust and the nature of the government as a corporate or organizational entity.” M. Radson and E. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 Stetson L. Rev. 799, 816 (2001).

### Conflicts of Interest

MRPC Rule 1.7 sets for the general rule for conflicts of interest<sup>15</sup>

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<sup>13</sup> MRPC Rule 1.6 provides in part:

- (a) A lawyer shall not reveal information, which is confidential or privileged by law, or relating to representation of a client, which a lawyer has reason to believe may be detrimental to the client or which client has requested not be disclosed.
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent the client from committing a criminal act; or
  - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

<sup>14</sup>Comment to MRPC Rule 1.6

<sup>15</sup>MRPC Rule 1.7 provides:

- (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

A difference of opinion exists in jurisdictions over whether a governmental entity can "consent" under Rule 1.7 and thereby cure a conflict of interest in the same way that a private client's consent can do so. See *State ex rel. Morgan Stanley & Co. v. MacQueen*, 416 S.E. 2d 55 (W. Va. 1992)(following the "government cannot consent" rule, court held that a government entity is inherently incapable of consenting to its law firm's concurrent representation of government employees who, though nonparties, were indirectly accused of acting contrary to government's interest) and N.Y. State Bar Assn Comm. On Professional Ethics, Op. 629 (1992)(contra). Other jurisdictions have rejected the rationale of Morgan Stanley that a governmental entity is inherently incapable of consenting to such concurrent representation. Annotated Model Rules of Professional Conduct 136 (5<sup>TH</sup> ed. 2003).

### **Prohibited Transactions**

MRPC Rule 1.8 identifies Prohibited Transactions as to which there is a conflict of interest<sup>16</sup>

There are several areas of concern for lawyers involved in government representation in regard to Rule 1.8. For example, the issue of using information to a client's disadvantage was addressed in *United States v. Delevo*, 2002 W.L. 844401 (D. Mass. 2002), a case in which a lawyer for criminal codefendants had previously represented a key government witness. The lawyer was held disqualified due to a conflict arising under Rule 1.8(b).

In the context of third-party payment of fees in criminal cases, at least one state has issued an ethics opinion to the effect that a lawyer should not enter into a contract with the County to represent indigent criminal defendants when the terms of the employment contract require authorization from nonlawyer third-parties and might induce the lawyer to act in a way contrary to the client's interest. Ariz. Ethics Op. 2001-06 (2001).

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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.

<sup>16</sup>MRPC Rule 1.8 provides in part:

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or pecuniary interest adverse to a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interests are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
  - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
  - (3) the client consents in writing thereto.
- (b) A lawyer shall not use information relating to 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.

## Former Clients

MRPC Rule 1.9 sets forth the conflict of interest rule applicable to former clients<sup>17</sup>

Rule 1.9 employs the substantial relationship test in determining whether, once it is established that a lawyer-client relationship existed and has ceased, a lawyer may represent another client in a matter adverse to the former client. If the previous representation and the new matter are substantially related, it is presumed that what the lawyer learned in the previous representation would be material to the new matter, thus prohibiting the subsequent representation. See *LaSalle National Bank v. County of Lake*, 703 F. 2d 252 (7<sup>th</sup> Cir. 1983), recognizing that the court has to determine if confidential information it reasonably infers was learned in the previous representation would be relevant to the issues raised in the subsequent litigation.

## Imputed Disqualification

MRPC Rule 1.10 sets forth the general rule for imputed disqualification, and its comment explains why the more extensive disqualification in this rule is not applied to former government lawyers, a result that better serves the government in the long run:

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

In *Young v. Cent. Square Sch. Dist.*, 213 F. Supp. 2d 202 (N.D. N.Y. 2002), a lawyer who worked at a firm that represented a teacher in a disability discrimination action against a school district had previously worked for a firm that represented the same school district and had been at least

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<sup>17</sup>MRPC Rule 1.9 provides:

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.

minimally involved in that case. Disqualification under Rule 1.10 was ordered. No disqualification resulted in *Dieter v. Regents of Univ. of California*, 963 F. Supp. 908 (E. D. Cal. 1977) where lawyers who had previously worked for a law firm that represented an adverse party were not personally involved in that representation, had no knowledge of the matter, and worked out of an office that did not handle the adverse party's account.

### **Successive Government and Private Employment**

MRPC Rule 1.11 deals with the subject of successive government and private employment. It sets forth a disqualification rule that is not as onerous or extensive as that provided by MRPC Rule 1.10:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

The comment to MRPC Rule 1.11 emphasizes the different provisions that are made for a lawyer's movement from government to a private firm or from a private firm to government, as compared to moving from one private firm to another:

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule .

### **Former Judges, Arbitrators and Third-Party Neutrals**

MRPC Rule 1.12 sets forth the rules for former judges or arbitrators.<sup>18</sup> The 2003 proposed changes to the

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<sup>18</sup>MRPC Rule 1.12 provides:

(a) Except as stated in paragraph (d), 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, arbitrator or law clerk to such a person.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain

MRPC add "other third-party neutral" to this rule, and the Comment makes it clear that lawyers who serve a third party neutrals are forbidden from representing a client in a matter in which the lawyer "participated personally and substantially," and that third-party neutrals are subject to the same requirements of confidentiality, disqualification imputation, disclosure of conflicts and consent.

The historical exposure of mediators to liability has been very limited; however, some commentators have recently warned of a "gathering storm." The prospect of mediators being sued and the ten most likely scenarios that could give rise to civil actions against mediators for their mediation-related conduct were recently addressed in M. Moffitt, Ten Ways to Get Sued: A Guide for Mediators, 8 Harv. Negotiation L. Rev. 81 (2003). These potential actions range from failure to disclose a conflict of interest, breach of confidentiality externally or internally, false advertising and infliction of emotional distress on a disputant, to fraud, misrepresentation and "engaging in the practice of law badly", and the good news is that most are within the mediator's control.

MRPC Rule 1.13 is entitled "Organization as Client."<sup>19</sup> The comment to MRPC Rule 1.13 emphasizes that this

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compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is prohibited from subsequently representing that party.

<sup>19</sup>MRPC Rule 1.13 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 and 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 of the organization and the risk of revealing information 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.

rule applies to governmental agencies and organizations:

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

### **Entity Approach to Identifying the Client**

Under the entity approach to determining the identity of a government lawyer's client, the lawyer represents the government entity as a whole, acting through its officials. This approach is embodied in Rule 1.13 and is consistent with a private corporate lawyer's role in taking direction from the Board of directors for the benefit of the corporation as a whole. *See Upjohn Company v. U.S.*, 449 U.S. 383 (1981).

### **Communications with Persons Represented by Counsel**

Rule 4.2 sets forth the rule for communication with persons represented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has consent of the other lawyer or is authorized by law to do so.

The comment to Rule 4.2 points out the practical limitations on restricting such communications when a governmental agency is involved:

[T]he existence of a controversy between a government agency and a private party ... does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a

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(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.

separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

While we have no case directly on point applying MRPC Rule 4.2, a leading case interpreting Rule 4.2 when the represented party is a governmental agency is *Camden v. State of Maryland*, 910 F. Supp. 1115 (D. Md. 1996), in which the court recognized that the First Amendment right of petition brings such communications within the "authorized by law" exception to Rule 4.2: "Insofar as a party's right to speak with government officials about a controversy is concerned, Rule 4.2 has been uniformly interpreted to be inapplicable."

### Mississippi Bar Ethics Opinions

- Municipality's bond counsel precluded from representation against municipality:  
MB Formal Interpretive Opinion # 210 Sept. 17, 1993  
Law firm which serves as bond counsel for a municipality may not simultaneously represent the County Board of Supervisors in annexation litigation against the same municipality, consistent with the general rule that a lawyer may not act as an advocate against a client whom the lawyer represents in some other matter, even if the other matter is wholly unrelated.
- Ex Parte Contact with unrepresented former employee of represented party:  
MB Formal Interpretive Opinion # 215 March 4, 1994  
  
*Curly v. Cumberland Farms, Inc.*, 134 F.R.D. 77, (D.N.J. 1991); *Polycast Technology Corp. v. Uniroyal Inc.*, 129 F.R.D. 621 (S.D. N.Y. 1990)(primary purpose of Rule 4.2 is to prevent improper approaches of those known to be represented by counsel and to protect the attorney/client relationship)
- Former judge precluded from later representation:  
MB Opinion # 226 April 6, 1995  
  
*Mississippi Commission on Judicial Performance v. Atkinson*, 645 So. 2d 1331 (Miss. 1994) (part-time Municipal judge pro tem publicly reprimanded where he conducted preliminary hearing on felony armed robbery charge, ordered defendant bound over to the grand jury and set bail at \$40,000, and subsequently was hired in capacity as private attorney to get defendant's bond reduced, filed and argued a petition for reduction of bond which was denied by the presiding judge)
- County Board Attorney precluded from representing criminal defendants in cases investigated or prosecuted by County sheriff:  
MB Opinion # 224 April 19, 1995
- No imputation of conflict based on marital status: MB Opinion # 235 Sept. 19, 1996

*Armstrong v. McAlpin*, 625 F.2d 433 2nd (Circuit. 1980)(A per se rule of disqualification on the sole ground that an attorney's spouse is a member of a firm representing an opposing party would be not only unfair to the lawyers so disqualified and to their client but would also have a significant detrimental upon the legal profession. Such a rule could be expected to affect the hiring practices of law firms and the professional opportunities of lawyers. A per se rule would effectively create a category of legal "Typhoid Marys," chilling both professional opportunities and personal choices.")

- Independence and third-party disclosure: MB Opinion # 246 April 8, 1999  
*U.S. v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997) (University forfeited attorney-client privilege and work-product protection by disclosing billing statements of law firms representing MIT to Defense Department auditors)

### **ABA Model Rules of Professional Conduct**

- From 1908 to the Present  
The concept of a legal code of ethics crystallized in 1908 when the ABA enacted the Canons of Professional Ethics.<sup>20</sup> In 1970 the ABA promulgated the Model Rules of Professional Responsibility to replace what were considered "outdated" Canons. The Model Rules were amended frequently in between ABA overhauls, with many states choosing to adopt them in toto, some adopting them in part and still others rejecting them. The variation among the states was seen as an indication that "certain states discovered approaches that were preferable to the majority approach."<sup>21</sup> To address major changes in the practice of law since 1970, the ABA appointed the Ethics 2000 Commission to revise the Model Rules, the new version of which was adopted by the ABA in 2002<sup>22</sup>

Nationwide adoption of the ABA Model Rules has been advocated as a necessary means of facilitating interstate practice of law, a trend that is accelerating by reason of a proliferation of reciprocal admission policies. As one commentator recently noted,

Even lawyers who do not desire membership in several states' bars must sometimes seek admission pro hac vice to handle their clients' legal affairs in another state. Federal prosecutors have become sensitive to the variation in states' ethical codes because, pursuant to the McDade Amendment of 1999, these prosecutors are now subject to the codes of each state in which they appear<sup>23</sup>

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<sup>20</sup>K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 *Idaho L. Rev.* 399, 413 (2003);

<sup>21</sup>T. Lininger, *Should Oregon Adopt the New ABA Model Rules of Professional Conduct?* 39 *Willamette L. Rev.* 1031, 1036-37 (2003)[hereinafter "Lininger"]

<sup>22</sup>*Id.* at 413-14.

<sup>23</sup>Lininger, *supra* n. 11, at 1037 n.31, citing 28 U.S.C. §530B (2000).

Facing a confusing array of disciplinary rules, some in conflict and some with significant variations from the ABA Model Rules, attorneys may be more likely not to understand what rules apply in an unfamiliar state. Such an "interstate patchwork of ethical rules" will not only lead to greater noncompliance, it will increase the potential for harm to clients who are involved in cases that transcend state boundaries, rendering it less likely that they will understand the applicable standards for their lawyers' conduct and recognize the opportunity to report misconduct.

### **Rule 1.7 Conflicts of Interest: Current Clients**

Rule 1.7 was amended to require a client's consent to concurrent representation to be in writing. This change is important for government defense lawyers who are frequently called upon to defend both the governmental entity and the entity's officers or employees. Even though a particular jurisdiction in which the lawyer practices may not yet have adopted this change, the better and more prudent practice would be for the government defense lawyer to obtain the clients' written consent to concurrent representation. The following cases illustrate the conflict of interest issues that can arise when a government lawyer represents the entity as well as its employees in the same action, and underscore the need for the lawyer to analyze at the earliest stage possible whether the multiple representation yields a potential or actual conflict of interest.

With regard to the consent requirement, it should be noted that the 2003 proposed changes to the MRPC also add a definition of "confirmed in writing" when used in the context of informed consent, stating that it "denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent."

- ***Dunton v. County of Suffolk***, 729 F. 2d 903,907 (2d Cir. 1984), modified, 748 F. 2d 69 (2d Cir. 1984)

This is the leading §1983 disqualification case in which conflicting defenses were asserted. A §1983 assault action was brought against the County, police officer and his wife, where the officer found the plaintiff in his car with the officer's wife who was also County employee. The officer appealed from a judgment entered against the County and each individual defendant on the ground that the County attorney failed to represent his interest adequately because of conflicting representation of the County. In vacating the judgment against the officer, the Second Circuit noted: "After *Monell* the interests of a municipality and its employee as defendants in a §1983 action are in conflict. ... A municipality may avoid liability by showing that the employee was not acting within the scope of his official duties, because his unofficial actions would not be pursuant to municipal policy. The employee, by contrast, may partially or completely avoid liability by showing that he was acting within the scope of his official duties."

- ***Gordon v. Norman***, 788 F. 2d 1194 (6<sup>th</sup> Cir. 1986)  
Where Law Director's principal client was City, but City was not a party to an excessive force suit by a plaintiff driver arrested for drunk driving, two officers who were sued and defended by

the Law Director appealed from an adverse verdict, claiming a conflict of interest in the Law Director's representation of them. Since the parties had stipulated that the defendants were acting under color of state law at all times as city employees, and since the officers' good faith/qualified immunity defenses were presented to the jury, the officers failed to show that they were adversely affected by the alleged conflict and failed to show their counsel had failed to use independent judgment in representing them. *Dunton* was not a clear basis for creating a universal per se conflict rule.

- ***Johnson v. Board of Commissioners for County of Fremont***, 85 F. 3d 489, 493 (10 Cir. 1996)

In Title VII and §1983 sex discrimination action by former female employee of sheriff's department against the County and sheriff in his official capacity, same outside counsel represented both County and sheriff. When complaint was amended to name sheriff individually as well as officially, sheriff responded pro se, asked County to provide separate counsel to represent him in his official capacity and later answered pro se. When other counsel sought to enter an appearance on behalf of the sheriff individually, the trial court struck all appearances. The 10<sup>th</sup> Circuit held that "when a governmental official is sued in his official and individual capacities for acts performed in each capacity, those acts are 'treated as the transactions of two different legal personages,'" and noted that "the distinctions between suits against an official in his individual and official capacities give rise to differing and potentially conflicting defenses." The Court held that "when a potential conflict exists because of the different defenses available to a government official sued in his official and individual capacities, it is permissible, but not required, for the official to have separate counsel for his two capacities." The Court then stated "ex post facto" that in the factual circumstances of this case, the following procedure should have been followed: (1) counsel must notify the court and government defendant of the potential conflict; (2) the court must then determine whether the government defendant fully understands the potential conflict; and (3) the government defendant is then allowed to choose joint representation.

- ***Guillen v. City of Chicago***, 956 F. Supp. 1416 (N. D. Ill. 1997)  
Plaintiff widow brought a §1983 civil rights action against several city police officers and the city. Nonparty paramedics who had taken Plaintiff's husband to the hospital where he died after arrival were to be deposed, and Plaintiff filed a motion to disqualify the city's counsel from representing the paramedics at their depositions. Distinguishing *Dalton*, the court noted that assertion of a good faith immunity defense for the officer may undermine a defense that the officer's action was outside the scope of employment or vice-versa, and when an individual officer and a municipality are sued jointly under §1983, "an attorney representing both defendants is often caught between a rock and a hard place," but in this case no conflicting defenses were asserted.
- ***Marderosian v. Shamshak***, 170 F.R.D. 335 (D. Mass. 1997)  
Terminated police officer prevailed in a 1983 action against the town, its selectmen and police

chief, in which police chief's trial counsel also represented the town and selectmen. Police chief filed a motion for relief from judgment, alleging he had an actual conflict of interest with his trial counsel. The trial court granting the motion, holding that the record revealed a conflict of interest in presenting the defenses.

Aside from conflict of interest issues arising from multiple representation<sup>24</sup> courts have also addressed conflict issues arising from successive representation. The general rule in such disqualification cases is that, upon proof of the existence of a former attorney-client relationship concerning substantially related matters, it will be presumed that a disclosure of confidences has taken place. In the following case, however, equity demanded an exception in light of a pragmatic recognition of emerging specialization inherent in contemporary legal practice. In view of increasing numbers of mega-firms and the fact that imputing to an attorney all confidential information obtained or presumed to have been obtained by other members of his law firm might severely limit the scope of an attorney's future career and his firm's effective operation.

- ***Cleveland v. Cleveland Electric Illuminating Co.***, 440 F. Supp. 193 (N.D. Ohio 1976), aff'd without op., 573 F. 2d 1310 (6th Cir.)  
This case centered on a Plaintiff municipality's motion to disqualify the law firm representing one of several electric companies being sued by the municipality for alleged anticompetitive practices in generating and selling electric energy to the municipality. The Court held that the municipality waived its right to object to the representation of defendant by a law firm that had formerly represented the municipality, where (1) the municipality had earlier requested and obtained the law firm's representation with a full understanding of the scope and depth of the law firm's longstanding general representation of the defendant and (2) communications between the Law Director of the municipality and members of the law firm conveyed with clarity that the municipality intended to waive any ethical objections that might arise as a result of the law firm's representation of the municipality.

### **Rule 1.9 Duties to Former Clients**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person 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 gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and

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<sup>24</sup>See generally *Annotated Model Rules of Professional Conduct* 113-14 (3d ed. 1996)(collecting cases); *Sanders v. Mississippi Bar Assn*, 466 So. 2d 891 (Miss. 1985), cert. denied, 474 U.S. 844 (1985)(improper for prosecutor to represent clients in civil matter that could foreseeably involve criminal proceedings at a later date)

- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;  
unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
  - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
  - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The Comment to Rule 1.9 states "Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11. As an example of matter that are "substantially related," a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations, but would not be precluded from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

### **Lawyers Moving Between Firms**

The Comment to Rule 1.9 also addresses the competing considerations that arise when lawyers associated within a firm end their association and join or create a new firm. "First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel."

No disqualification would occur, for example, if a lawyer while with one firm acquired no knowledge

or information relating to a particular client of the firm, and that lawyer later joined another firm. "Neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict."

### **Rule 1.11: Former and Current Government Officers and Employees**

Rule 1.11 as amended in 2002 sets forth the rule governing Special Conflicts of Interest for Former and Current Government Officers and Employees. The new rule has been praised as a practical and realistic response to overly restrictive conflict of interest rules that would otherwise inhibit transfer of employment to and from the government. It has also been condemned as "undermining the notion that the bar can rise self-interest on its mission for self-regulation"<sup>25</sup> The full text of Amended Rule 1.11 is as follows:

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
  - (1) is subject to Rule 1.9(c); and
  - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
  - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
  - (1) is subject to Rules 1.7 and 1.9; and
  - (2) shall not:
    - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

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<sup>25</sup>R. Lee, Modern Ethical Dilemmas for ALJs and Government Lawyers: Conflicts of Interest, Appearances of Impropriety, and Other Ethical Considerations: *The State of Self-Regulation of the Legal Profession: Have We Locked the Fox in the Chicken Coop?* 11 *Widener J. Pub. L.* 69,75-76 (2002)

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

The Comments to Rule 1.11 makes it clear that a lawyer who served or is serving "as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7," and may also be subject to "statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule."

Rule 1.10 does not apply to the conflicts of interest addressed by Rule 1.11, which has a special imputation rule for former government lawyers providing for "screening and notice." Because of special problems raised by imputation within a government agency, Rule 1.11 (d) "does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."

Rule 1.11(a)(2) and (d)(2) apply "regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client." The Comment provides examples of this restriction where a lawyer has pursued a claim on behalf of the government and later is prohibited from pursuing the claim on behalf of a private client after he has left government service, "except when authorized to do so by the government agency under paragraph (a)." Where a lawyer has pursued a claim on behalf of a private client, he may not later pursue the claim on behalf of the government, "except when authorized to do so by paragraph (d)."

The Comment to Rule 1.11 describes as a "balancing of interests" the new disqualification provisions for government-to-private practice employment transfers, noting first that "where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service." Balanced against that risk and unfair advantage is the specter of having the rules governing lawyers presently or formerly employed by a government agency "so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer

participated personally and substantially." Screening and waiver provisions of Rule 1.11(b), moreover, "are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service." A similar function is served by limiting the disqualification to " matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked."

### **Ethics 2000 Commission and the Rule 1.11 Debate**

For an excellent detailed discussion of the Ethics 2000 Commission's proceedings and later debate before the ABA House of Delegates that led to the amendment and adoption of revised Rule 1.11, see M. Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 *Geo. J. Legal Ethics* 441,456-57 (2002). In its initial August 2001 Report, the Ethics 2000 Commission concluded that Rule 1.9's substantive provisions, including its "substantial relationship" test, should apply to both current and former government lawyers where they would be adverse to a former client. The Commission "revisited the matter after hearing concerns expressed by several Association entities, and agreed to propose the narrower test in the existing rule to identify matters from which former government lawyers are disqualified.<sup>26</sup> With respect to the test for disqualification of former government lawyers visavis transferring from government to private practice and vice-versa, [t]he Commission wrestled with the issue whether former government lawyers should be subject to the requirements of Rule 1.9 when they are opposing their former government clients. After hearing concerns that applying the Rule 1.9 "substantial relationship" test to former government lawyers would inhibit transfer in and out of government, the Commission decided that the only applicable test for the disqualification of former government lawyers should be the one that already exists in Rule 1.11(a): a former government lawyer is disqualified only where she participated "personally and substantially" in "a particular matter," whether or not she is adverse to the government.

### **Appearance of Impropriety**

The concept of "appearance of impropriety" did not appear in the ABA Canons of Professional Ethics of 1908, but was included in the ABA Code of Professional Responsibility of 1969, formally adopted in 1970, in the form of Canon 9 and DR 9-101, as well as EC 5-6. However, "even under the Model Code, the 'appearance of impropriety' concept was not intended to be used as a disciplinary standard." E. Brewer, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the "Appearance of Impropriety" Disappear*, 39 *Idaho L. Rev.* 321,323-34 (2003). The appearance of impropriety concept was ultimately rejected and omitted from the ABA Model Rules of Professional Conduct in 1982, on the grounds that it (1) was overbroad as calling for a subjective judgment about whether a later representation might make a former client anxious and (2) used the undefined term "impropriety" and thus begged the question. The vagueness, overly general and apparent unlimited test for impropriety rendered the appearance of impropriety concept incompatible in the eyes of the draftsmen of the Model Rules with "a body of law that avoided the vagueness and ambiguity of some Model Code provisions" and "specific rules that contained fair notice of their import for lawyers' conduct."<sup>27</sup>

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<sup>26</sup> *Id.* at n. 31.

<sup>27</sup> *Id.* at 325-27.

While the concept has its critics, commentators have suggested that the concept of appearance of impropriety be retained only in cases "especially implicating the public interest."<sup>28</sup> Some courts have continued to use the appearance of impropriety concept in their disciplinary opinions, usually out of some apparent urge to improve the profession. For those who embrace the revival and enrichment of discussions about the legal profession's center and aspirations, but who also believe that vague and amorphous desiderata should not be elements of the disciplinary framework, the courts' treatment of the appearance of impropriety concept provides an important lens through which we may focus on what enforceable ethics rules and our higher aspirations have to do with one another, and how a court should respond to its aspirational urges when they flare up in the middle of a disciplinary enforcement proceeding.<sup>29</sup>

### **Rule 1.13 Organization as Client**

ABA Model Rule 1.13 embodies the entity concept: "An organizational client is a legal entity, but it cannot act except through its officers, directors, employee, shareholders and other constituents." Comment to R. 1.13(1). The principal duties, authority and responsibility defined in Rule 1.13 apply to governmental organizations. The Comment to this rule recognizes that it may be more difficult for a lawyer to define precisely the identity of the client in the government context, depending on whether the lawyer represents a particular branch of government, a specific agency or the government as a whole. When a matter involves the conduct of government officials, moreover, "a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances." Annotated Model Rules Of Professional Conduct 217 (5<sup>th</sup> ed. 2003).

[W]hen the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government ... may be defined by statutes and regulation. This rule does not limit that authority." The 2002 Changes to the ABA Model Rules of Professional Conduct 49 (Supp. to 5<sup>th</sup> ed. 2003)

Rule 1.13 was given a practical interpretation in *Cole v. Ruidoso Mun. Sch.*, 43 F. 3d 1373,1384-85 (10<sup>th</sup> Cir. 1994), a Title VII action in which the court held that no attorney-client relationship arose between the school district's lawyers, Simons, Cuddy & Friedman, and the school principal when she consulted with the one of the lawyers on personnel issues in order to carry out her duties. In finding no such relationship within the meaning of Rule 1.13, the 10<sup>th</sup> Circuit reasoned:

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<sup>28</sup>*Id.* at 327, citing B. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule be Eliminated in New Jersey - Or Revived Everywhere Else?*, 28 *Seton Hall L. Rev.* 315,325 (1997)

<sup>29</sup>*Id.* at 327-28. While the ABA Model Rules may have "long since discarded" the appearance-of-impropriety rationale, it "still lingers in some applications of Rule 1.11. Therefore, no opinion should be cited without checking to see how the issuing jurisdiction treats the appearance-of-impropriety test. **Annotated Model Rules of Professional Conduct** 199 (5<sup>th</sup> ed. 2003)

Here there was no reasonable basis for Cole's belief that SC & F represented her individually. Cole ignores the fact that she consulted the law firm only for the purpose of carrying out her duties as principal. Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. Although a lawyer is obligated not to disclose the information revealed by the client's constituents or employees, "this does not mean, . . . , that constituents of an organizational client are the clients of the lawyer." Rule 1.13 cmt. ...The information Cole communicated to the law firm on behalf of the School District was not protectable confidential communications of Cole's to the firm. It is the District which, as the client, holds the right to have those communications protected and which may decide whether and to whom that information may be disclosed. Therefore, it is clear that Cole is not a former client of SC & F and that there is no danger of improper disclosure of client confidences.

Rule 1.13's entity approach to determining the identity of the government lawyer's client found strong support in the 8<sup>th</sup> Circuit's decision in the *Whitewater* litigation, *In Re Grand Jury Subpoena Duces Tecum (Office of President v. Office of Independent Counsel)*, 112 F. 3d 910 (8<sup>th</sup> Cir. 1997, cert. denied, 1997 U.S. LEXIS 3898 (1997)). In requiring the White House attorneys to turn over their notes of conversations with First Lady Hillary Clinton, the Court held that no personal attorney-client relationship existed between Mrs. Clinton and the White House attorneys. The 8<sup>th</sup> Circuit based its decision on the fact that the White House itself is not subject to criminal liability and thus the creation of an attorney-client relationship between officials who may have committed criminal acts and the White House lawyers would "represent a gross misuse of public assets."

### **Presence of Third Party During Communication**

The presence of a third person is often seen as a circumstance by which it can be determined that communications are not confidential and protected by the attorney-client privilege. Following close on the heels of the 8<sup>th</sup> Circuit's *Whitewater* decision, the Sixth Circuit handed down a landmark decision in *Reed v. Baxter*, 134 F. 3d 351 (6<sup>th</sup> Cir. 1998). This was a reverse discrimination case brought against the City of Murfreesboro and its fire chief in which the issue of whether an attorney-client relationship existed centered on a meeting held by the city attorney with other city officials, including two councilmen, the city manager and the city fire chief. Plaintiffs sought and were denied the opportunity to present evidence of statements made in this meeting that allegedly supported their claim that a less-qualified African-American was appointed to the captain's position solely on the basis of race. The 6<sup>th</sup> Circuit held that it was error for the trial court to quash subpoenas served on the city attorney, councilmen and fire chief and that depositions seeking to inquire into the conversations that took place in this meeting were not protected by the attorney-client privilege. Reasoning that private corporations and other organizations may constitute clients for purposes of the attorney-client privilege, and heeding the caution of courts and commentators "against broadly applying the privilege to governmental entities," *Id.* at 356, the 6<sup>th</sup> Circuit noted that the meeting in question had been initiated by the two councilmen not to obtain the advice of the city attorney but to inquire into the basis for the promotion of the African-American to the position of captain, which their constituents had apparently challenged as race-based. Finding that the trial court had misapplied the law of attorney-client privilege, the 6<sup>th</sup> Circuit held that the interest of the two councilmen were adverse to those of the fire chief and city manager, and that because the two city councilmen participated in the meeting as third parties, "the discussion was not held in confidence for

purposes of the attorney-client privilege. ... Their discussion is not shielded from disclosure by the attorney-client privilege.”

A strong dissent in *Reed v. Baxter* took issue with what it characterized as too narrow a construction of the attorney-client privilege in a case where two city councilmen, acting in their official capacities, were deemed third parties in a confidential meeting with the city attorney. The dissent also pointed out that the majority’s opinion was contrary to the only other 6<sup>th</sup> Circuit precedent addressing the attorney-client privilege in the governmental context, *In Re Grand Jury Subpoena (United States v. Doe)*, 886 F. 2d 135 (6<sup>th</sup> Cir. 1989), wherein the court had held that a city and city council were the same entity for purposes of the attorney-client privilege and that a city council, as clients of the city attorney, could invoke the attorney-client privilege.

Another more recent application of the entity approach in the context of attorney-client privilege came in *Rojicek v. River Trails School District* 26, 2003 U.S. Dist. LEXIS 6324 (N.D. Ill. 2003), a reverse twist on the question of who may waive the privilege. A retaliatory discharge action was brought against a school district, its superintendent and others by the plaintiff, who has spearheaded a unionization effort for support staff of the school district. The defendant superintendent, who was occasionally advised by the school district’s counsel, claimed that it was necessary to obtain a blanket waiver of the privilege in order to reveal privileged communications with the school district’s attorney, and that the testimony of the school district’s attorneys may be necessary to advance her advice of counsel defense, thus requiring disqualification of the district’s attorneys. The other defendants did not deny the existence of the attorneys’ advice to the superintendent in her role as superintendent, and the Court found that she was thus a corporate officer and agent of the school district’s governing Board. Reasoning that the superintendent did not have the authority to waive the attorney-client privilege, which was not hers but was the school district’s privilege assertable only through its governing Board, the Court held:

As a rule, a corporate officer may only assert a personal attorney-client privilege for communications she made to her own counsel concerning personal liability unrelated to the corporation or unrelated to her role as a corporate officer. ... However, all communications that were made to Scariano (the school district’s attorney) were related to the District and Smalley’s role as Superintendent. Her communications were thus on behalf of the organization, not on her personal behalf. Accordingly, the attorney-client privilege at issue here is exclusively vested in the Board, and Smalley is not authorized to waive the privilege without the Board’s consent. *Id.* at \*7.

See generally **Government Officials as Attorneys and Clients: Why Privilege the Privileged?** 77 Ind. L. J. 469 (2002); **The Attorney-Client and Work-Product Privileges of Government Entities**, 30 Stetson L. Rev. 799 (2001).

#### ABA Formal Opinions

- Formal Opinion 97-405 Conflicts in Representing Government Entities  
A lawyer who is engaged to represent a government entity, whether on a full-time or part-time basis, may not agree simultaneously to represent a private party against her own government

client, absent the informed consent of both clients. See Model Rule 1.7(a). However, the lawyer may represent a private client against another government entity in the same jurisdiction in an unrelated matter, as long as the two government entities are not considered the same client, and as long as the requirements of Model Rule 1.7(b) are satisfied.

The identity of the government client for conflict of interest purposes, like that of any other organizational client, will be established in the first instance between the lawyer and government officials who are authorized to speak for the government client, in accordance with the general precepts of client autonomy set forth in Model Rule 1.2. The lawyer may not, by agreeing to a narrow definition of the government client, seek to defeat the reasonable expectation of her other clients that they will get a conflict-free representation from their lawyer.

In the absence of an express agreement, the identity of the government client may be inferred from the reasonable understandings and expectations of the lawyer and responsible government officials, taking into account such functional considerations as how the government client presented to the lawyer is legally defined and funded, whether it has independent legal authority with respect to the matter for which the lawyer has been retained -- e.g., contracting, litigating, or settling a claim -- and the extent to which the matter involved in the proposed representation has general importance for other government components in the jurisdiction. Uncertainty in identifying the government client should be resolved in favor of disclosure -- disclosure of the government representation to any private clients the lawyer may be representing against the government, and disclosure to the government client of any arguably conflicting private representations.

Even if two representations involving government entities are not "directly adverse," because the two government entities involved are not considered the same client for conflict of interest purposes, under Rule 1.7(b) the lawyer must satisfy herself that her responsibilities to one client will not be "materially limited" by her responsibilities to the other. Whether or not the lawyer's representation of a government client in one matter may be "materially limited" by her responsibilities to other clients (or vice versa) depends on the extent to which either client would be adversely affected by the outcome of the other's matter, and on whether the lawyer's diligence or judgment on behalf of one client would be compromised by her relationship or identification with the other. This in turn may depend upon the issues at stake in a matter, the particular role the lawyer is playing in it, and the intensity and duration of her relationship with the lawyers she is opposing. There may be situations in which a lawyer's representation of the government on an important issue of public policy so identifies her with an official public position that she would be effectively compromised in her ability convincingly to oppose any part of the government on behalf of a private client, even in an entirely unrelated matter.

- Formal Opinion 97-408 Communication with Government Agency Represented by Counsel

Model Rule 4.2 generally protects represented government entities from unconsented contacts

by opposing counsel, with an important exception based on the constitutional right to petition and the derivative public policy of ensuring a citizen's right of access to government decision makers. Thus Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. In such a situation the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials, to afford an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication. In situations where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication, Rule 4.2 prohibits communication without prior consent of government counsel. ABA Informal Opinion 1377 (1977) is limited to the extent of the conclusions in this opinion.

- Formal Opinion 97-409 Conflicts of Interest: Successive Government and Private Employment

The conflict of interest obligations of a former government lawyer under the Model Rules of Professional Conduct are determined by Rule 1.11 and not by Rule 1.9(a) and (b). A former government lawyer is, however, subject to the provisions of Rule 1.9(c), which prohibits the use of information relating to her representation of the government to the disadvantage of her former government client where the information has not become generally known, and the disclosure of such information, except as permitted or required by Rules 1.6 and 3.3.

Under Rule 1.11, a former government lawyer is disqualified from representing private clients where she "participated personally and substantially as a public officer or employee" in the same "particular matter" at issue in the subsequent representation, whether or not she would be adverse to her former government client; she is not forbidden from representing private parties in matters in which she did not so participate, or in any matters not involving "a discrete and isolatable transaction or set of transactions between identifiable parties," except where she has obtained "confidential government information" about an adverse third party. See Rule 1.11(a) and (b); ABA Formal Opinion 342.

A former government lawyer who is personally disqualified from representing a private client in a matter may be screened pursuant to Rule 1.11(a) to enable other lawyers in her new firm to undertake the representation, whether her disqualification arises under Rule 1.11(a) or Rule 1.9(c).

A lawyer formerly employed by a government claims administration agency is not disqualified under Rule 1.11 from representing private claimants before the agency except in connection with particular claims she personally handled while in government service. She may also represent a private party in a challenge to generally applicable agency rules, even though she was herself personally involved in the development and implementation of those rules, subject

only to the constraints imposed by Rule 1.9(c) on her use or disclosure of information relating to her representation of the government that has not become generally known. In any case, if the lawyer is herself personally disqualified, members of her firm may undertake the representation if she is appropriately screened.

### **Opinions of Attorney General on Separation of Powers**

- AG Op. 1978-0164, Dec. 1978 to Melvin McClure, Jr.  
A person who is a municipal judge belongs to the judicial department of the government. A County attorney is a person belonging to the executive department. Under the provisions of Sections 1 and 2 of the Mississippi Constitution of 1890, a person serving in the office of municipal judge who accepts the office of County attorney would vacate the first office.
- AG Op. 1979-0124, Aug. 21, 1979 to Vernon R. Cotton  
Although there are no conflicting duties as such inherent in dual service of County Prosecuting Attorney and Municipal Judge, County Prosecuting Attorney is a member of the Executive Branch of government and a Municipal Judge is a member of the Judicial Branch of government, hence such dual service may be precluded by separation of powers doctrine under Article 1, Sections 1 and 2 of the Mississippi Constitution of 1890.
- AG Op. 1990-0542, July 16, 1990 to James M. May  
Board of aldermen not be obligated to pay for legal work requested by one alderman unless the service falls within the contract for legal services previously approved by the Board.
- AG Op. 1993-0679, Sept. 30, 1993 to Charles Swayze, Jr.  
County attorney may not be compensated as a private attorney for services which he is obligated to perform as County attorney, including administrative and judicial representation of police department.

### **Mississippi Ethics in Government Act & MEC Advisory Opinions**

The ethical duties of lawyers employed by the government are also be defined by statutes and regulations other than the Rules of Professional Conduct, consistent with the scope of the lawyer's responsibilities as described in the Preamble to the MRPC, such as the Open Meetings Act and the Public Records Act. See M. Radson and E. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 *Stetson L. Rev.* 799 (2001)(noting that some state courts were led to conclude that the attorney-client privilege was waived completely by legislative enactment of open meetings laws and public records laws); but cf. *Hinds County Board of Supervisors v. Common Cause of Mississippi*, 551 So. 2d 107 (Miss.1989)(recognizing that Open Meetings Act's provision for strategy sessions regarding litigation could be held in executive session when an open meeting would have a detrimental effect of the litigating position of the County Board) and Miss. Code Ann. 25-1-102(1983)(exempting from the Mississippi Public Records Act records in the possession of public body which represent the work product of any attorney representing that body and which are "related to litigation by or against that body or in anticipation of prospective litigation, including all communications between

such attorney made in the course of an attorney-client relationship”)

The ABA Model Rules likewise make it clear that “[s]tatutes, regulations, and ordinances at every level of federal, state, and local government are the primary means of enforcement when it comes to conflicts and confidentiality issues arising out of successive government/private-sector employment.” **Annotated Model Rules of Professional Conduct** 199 (5<sup>th</sup> ed. 2003). In addition to opinions issued by the Mississippi Bar’s Ethics Committee and official opinions of the Attorney General, the principal statutory and regulatory sources are the Mississippi Ethics in Government Act and advisory opinions issued by the Mississippi Ethics Commission on matters relating to the propriety of certain activities and conduct of lawyers representing public Boards, commissions, agencies, special districts, and their officers and employees.

The key constitutional and statutory provisions that often serve as the underpinnings for advisory opinions issued by the Mississippi Ethics Commission are Miss. Const. §109 (1890) and Miss. Code §25-4-101, 25-4-105(1),(2),(3)(d), (5)

### **Section 109**

Section 109, entitled "Interest of public officer in contracts," provides:

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, County, city, or town thereof, authorized by any law passed or order made by any Board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Key decisions interpreting the scope and reach of Section 109 are *Frazier v. State* by and through Pittman, 504 So. 2d 675 (Miss. 1987)(appropriation of funds for programs that allow payments in which a public officer is interested covered by §109), *Smith v. Dorsey*, 530 So. 2d 5 (Miss. 1988)(one year trailer is for a period of one year after the defendant shall leave his official capacity), *Waller v. Moore ex rel. Quitman County*, 604 So. 2d 265 (Miss. 1992)(There is no provision by which an official’s negative vote on hiring his spouse can insulate him from a §109 violation of liabilities, since it is the official’s interest in his spouse’s contract, not his vote, that is prohibited), and *Hinds Community College District v. Muse*, 725 So. 2d 207 (Miss. 1998).

### **Declaration of Public Policy**

The Ethics in Government Act stems from Section 109. Miss. Code §25-4-101 (1983) contains the following declaration of public policy:

The legislature declares that elective and public office and employment is a public trust and any effort to realize personal gain through official conduct, other than as provided by law, or as a natural consequence of the employment or position, is a violation of that trust. Therefore, public servants shall endeavor to pursue a course of conduct which will not raise suspicion among the public that they are likely to be engaged in acts that are in violation of this trust and which will not reflect unfavorably upon

the state and local governments.

As noted in the Comment to the ABA Model Rule 1.11 amended in 2002, a lawyer who has served or is currently serving as a public officer or employee is "personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule." Among those statutes are state ethics laws governing the conduct, actions, activities and associations of officials, agents and employees of state or local governments or other public entities created under state law. Mississippi lawyers representing, appointed by, acting as officers or agents for, paid by or reimbursed by state or local governments are subject to the Mississippi Ethics in Government Act and advisory opinions interpreting the Act's provisions.

### **Prohibited and Authorized Conduct**

Miss. Code Ann. §25-4-105 (1998) delineates prohibited and authorized actions, activities and business relationships, and prescribes penalties for violations. Key provisions potentially applicable to government lawyers include the following:

(1) No public servant shall use his official position to obtain pecuniary benefit for himself other than that compensation provided for by law, or to obtain pecuniary benefit for any relative or any business with which he is associated. (2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, County, city or town thereof, authorized by any law passed or order made by any Board of which he may be or may have been a member. (3) No public servant shall: ... (d) Perform any service for any compensation during his term of office or employment by which he attempts to influence a decision of the authority of the governmental entity of which he is a member. (4) Notwithstanding the provisions of subsection (3) of this section, a public servant or his relative: (h) May be employed by or receive compensation from an authority of the governmental entity other than the authority of the governmental entity of which the public servant is an officer or employee. (i) If a member of the Legislature or other public servant employed on less than a full-time basis, may represent a person or organization for compensation before an authority of the governmental entity other than an authority of the governmental entity of which he is an officer or employee. (5) No person may intentionally use or disclose information gained in the course of or by reason of his official position or employment as a public servant in any way that could result in pecuniary benefit for himself, any relative, or any other person, if the information has not been communicated to the public or is not public information. (6) Any contract made in violation of this section may be declared void by the governing body of the contracting or selling authority of the governmental subdivision or a court of competent jurisdiction and the contractor or subcontractor shall retain or receive only the reasonable value, with no increment for profit or commission, of the property or the services furnished prior to the date of receiving notice that the contract has been voided.

### **Good Faith Immunity**

Miss. Code Ann. §25-4-17 (Supp. 1990) authorizes the Mississippi Ethics Commission to issue advisory opinions, upon written request by any individual required to file a statement of economic interest, which includes members of the Board of Supervisors. This statute provides for a limited “good faith” immunity:

When such an advisory opinion is issued pursuant to a complete and accurate request, then there shall be no liability, civil or criminal, accruing to or against the individual requesting such opinion who, in good faith, follows the direction of the opinion and makes disclosure in accordance therewith unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without substantial support. No opinion shall be given or considered if such opinion is given after suit is filed or prosecution begun. All requests for advisory opinions and all advisory opinions issued pursuant to the provisions of this paragraph shall be confidential and the Commission shall not publicly disclose any advisory opinion issued or the fact that an advisory opinion has been requested or issued unless the individual requesting the opinion gives his permission, in writing, to the Commission.

Requests for Advisory Opinions generally seek advice from the Mississippi Ethics Commission as to whether certain proposed action or conduct may be violative of either Section 109 of the Mississippi Constitution of 1890 or the general and specific prohibitions set forth in Miss. Code Ann. §25-4-105 (Supp. 1994), discussed herein above.

### **Limitations**

There are also limitations on the usefulness of Advisory Opinions from the Mississippi Ethics Commission, including the statutory restriction that no opinion shall be given or considered if the opinion was given after a suit was filed or prosecution begun. Advisory Opinions, like Official Opinions from the Office of the Attorney General, will likewise not be issued after the fact. Further, as is the case with Attorney General’s Opinions, Advisory Opinions are often based on specific factual situations set forth in an opinion request and may not be applicable to all cases.

### **Advisory Ethics Opinions**

The Mississippi Ethics Commission has issued a number of Advisory Ethics Opinions clarifying and interpreting a number of the statutory provisions cited above.

•Op. No. 88-21-E: Guidelines to distinguish between public office and public employment include:

- (1) The position should be prescribed by law;
- (2) The position should have some specified term;
- (3) The duties and powers of the office should be defined or implied by law and should include authority to exercise some sovereign powers of the state;
- (4) The duties of the office must concern the public; and,
- (5) The holder of the position should have the power and authority to act in his or her own right.

•Op. No. 92-086-E: Whenever Section 109 of the Mississippi Constitution is violated, §25-4-105(2) is also violated.

•Op. No. 91-137-E: Section 25-4-105 prohibits a County from contracting with a company that employs the spouse of one of the County's supervisors, and the spouse's salary constitutes a prohibited interest on the part of the supervisor in any contract with the spouse's employer.

•Op. No. 92-010-E: Section 25-4-105 prohibits a County supervisor from becoming employed by a County tourism Board or commission at the expiration of his term of office, where such tourism Board or commission is formed as a result of state, local and private legislation and implemented by the Board of Supervisors.

•Op. No. 92-031-E: Section 25-4-105 prohibits a corporation in which a County supervisor has a material financial interest from contracting with a regional mental health authority.

•Op. No. 92-075-E: Section 25-4-105 prohibits a County from contracting with an electric company owned by a person whose father is a member of the Board of Supervisors who rents the building to his son.

•Op. No. 92-216-E: Where a person is elected County Supervisor and later becomes affiliated with a law firm which contracts with an insurance company to represent certain County entities and public officials in the same and other counties, a violation of §25-4-105 would occur. Such a violation would not exist if the law firm did not represent any of the County personnel or entities of the County or if the Supervisor chose not to affiliate with the law firm.

•Op. No. 92-103-E: Section 25-4-105 may be violated if a Supervisor and his immediate family serve as teachers in the same County. If the Supervisor or a "relative," meaning a spouse, child or parent, become employed by the County school system, where all of the local funding portion or of salaries under the teaching contract comes from mandatory local tax levies, no violation would occur. However, where a portion of the salary derived by a public school teacher under a teaching contract or that of a "relative" comes from discretionary local tax levies, such teaching contract would violate Section 109 and §25-4-105(2), while the teacher is a member of the Board of the governing authority which makes such tax levies or within one year after the term on the governing Board expires.

•Op. No. 92-123-E: A business owned by a County Supervisor may contract with cities and towns within the County, provided no County funds are used by entities in payment pursuant to a purchase, such purchase is not a consequence of the town or city's compliance with a requirement of the County brought about by action of the Board of which the Supervisor was a member or within one year thereafter, and the Supervisor has not used his official position for pecuniary benefit for himself or his business in violation of the statute. Nor do the ethics laws prohibit a Supervisor from doing business with other counties and cities within the state or with the state.

•Op. No. 92-146-E: Section 25-4-105 prohibits a County from contracting with a bank as depository when one of the Supervisors received \$6,600.00 per year as an advisory member of the bank Board of

Directors.

•Op. No. 92-231-E: A member of the County Board of Supervisors simultaneously employed by the County hospital of the same County would have a prohibited interest in the contract authorized by the Board of which he is a member. Only complete recusal on the part of the Supervisor in all Board deliberations and voting as to matters involving the hospital, including appointment of its Trustees, would avoid a violation as to §25-4-105(1), but recusal removes only the vote, and not the prohibited interest subject to Section 109 and §25-4-105(2).

•Op. No. 93-208-E: Section 25-4-105 prohibits a volunteer fire department from purchasing gasoline from a service station owned by the son of a County Supervisor and from which the Supervisor receives monthly income.

•Op. No. 93-037-E: Section 25-4-105 prohibits an employee of the County Tax Assessor's office from writing bail bonds returnable to the County. Any bond written by a County employee or his bail bonding company and accepted by the County Court and returnable to the County would constitute a prohibited contract between the County and employee and his company.

•Op. No. 93-175-E: Section 25-4-105 prohibits an Assistant Data Clerk and Secretary for the County Tax Assessor from accepting a fee from a citizen to furnish the citizen with information from property record cards and tax receipts, if the public servant conducted such work during regular work hours, unless such duty was part of her official duties, and if it were considered her official duty, any receipt of a fee would constitute a violation of §25-4-105(1). Moreover, this Code section would also be violated if any of the records or facilities of the Tax Assessor which were not available to and freely used by the public after hours were used by a public servant after hours in fulfilling the desired request for a fee.

•Op. No. 92-085-E: Section 25-4-105 would be violated if a Sheriff employs his spouse. The Board of Supervisors must authorize the Sheriff's expenditures, including the hiring of employees, based on the recommendation of the Sheriff, and the Sheriff's recommendation or hiring would constitute use of his official position to obtain pecuniary benefit in violation of this Code section.

•Op. No. 91-111-E: Section 25-4-105 prohibits a newly elected County Supervisor from having his spouse employed as Deputy Justice Court Clerk. The violation would occur once the Board adopts the annual budget after the newly elected Supervisor takes office, based on the principle that any interest of one spouse accrues to the other spouse.

•Op. No. 89-98-E: The conflict of interest laws do not permit a Chancellor to lease his private law office property to the County for the use of the Court Administrator whose existence was created by Order of the Chancellor.

•Op. No. 89-98-E: A Chancellor may sell his private law office real property to a third party and thereafter lease the same or part of the same premises for his own use and the use of the Court Administrator whose existence was created by Order of the Chancellor, such lease to be paid at County expense, but only if

the sale to the disinterested third party is absolute and final with no future options and is not contingent upon any future action of the Chancellor, and the space leased from the third party would be that for use by the Chancellor.

### **Section 109 Cases Decided by the Mississippi Supreme Court**

Several key decisions have been handed down by the Mississippi Supreme Court dealing with Section 109:

The meaning of “direct interest” in a contract was clarified in *Cassibry v. State*, 404 So. 2d 1360 (Miss. 1981). In that case the Mississippi Supreme Court affirmed the conviction of a State Senator under the statutory counterpart to Section 109, prohibiting a legislator from being interested in a contract with the state authorized by any law passed during his term of office. The record revealed that the legislator had a direct interest in a contract between the Department of Public Welfare and a corporation, Developmental Learning Associates, Inc., which was represented by the legislator in his capacity as attorney. The legislator had voted in favor of appropriation bills authorizing the Department of Public Welfare to purchase services, and these appropriation bills were necessary before the Department of Public Welfare had authority to obligate the state to make payments of money. In upholding the conviction, the Court recognized the authority of the Mississippi Legislature, acting in furtherance of Section 109, to make it a misdemeanor for a legislator to have an interest in a contract with the state authorized by a law passed during his term of office, for the period of his term of office and for one year after the expiration of such term. Since the legislator in this case had a direct interest in the contract with Developmental Learning Associates, Inc., the Court found it unnecessary to define the line of demarcation between an “indirect interest” which would be prohibited by the statute and Section 109 and an indirect interest which would constitute no offense. The Court concluded at 1367:

We suggest the following as an accurate test for determining whether a person is directly interested in a contract. Does his compensation depend upon payment being made under the contract? On this test Mr. Cassibry made a passing grade.

The Court handed down a landmark decision on §109's application to County government in *Frazier v. State by and through Pittman*, 504 So. 2d 675 (Miss. 1987). In that case the Court held that an individual who serves as a member of a County Board of Supervisors which contracts with a bank of which he is an officer and stockholder violates §109. The Court further held that §109 was never intended to prohibit an individual from serving in the Mississippi Legislature and voting on general public school laws simply because his or her spouse was employed as a public school teacher, and that where a portion of the salary under a teaching contract came from discretionary rather than mandatory local tax levies, teachers cannot validly contract with the school district while on the Board of the governing authority making such tax levies or within one year after expiration of the term on the governing Board.

The reach of §109 was extended further in *Smith v. Dorsey*, 530 So. 2d 5 (Miss. 1988)[Dorsey I]. The Mississippi Supreme Court held in that case that Section 109 prohibited a school Board from contracting with spouses of its members, reasoning that the school Board members had a manifest and direct interest in the public school employment contracts of their wives and that they were “directly responsible for the hiring and firing of their spouses.” *Id.* at 7. While the Court did not question the integrity or fairness of these Board members in any way, it did recognize that each had an indirect interest in his wife's contract which violated Section 109. The Court declined to require the non-party spouses to make restitution for compensation they had received in the course of their school employment, absent some showing of bad faith by the Board members, reasoning that to require restitution under these facts would put the school teachers in a position where they would have served as public school teachers without pay, some for several years. See *Golden v. Thompson*, 11 So. 2d 906 (Miss. 1943)(a public official is not liable where he had acted in good faith in reliance upon an unconstitutional statute).

In *Smith v. Dorsey*, 599 So. 2d 529 (Miss. 1992)[Dorsey II], the issue before the Mississippi Supreme Court was whether taxpayer plaintiffs could establish that members of the school Board had engaged in illegal conduct in their application and expenditure of school funds, including payment of money to a State Senator and his wife for their assistance to the school Board as consultants in an effort to pass a bond issue. In its initial majority opinion authored by Justice Chuck McRae and handed down on September 4, 1991, the Court interpreted Section 109 to prohibit any public official, including Supervisors, school Board members and municipal officials, from doing any business with any other state or local government, and would have made any member of any governmental Board or entity which authorizes any business activity between that entity and a public official (or spouse of one) personally liable for any funds paid in connection with that activity, regardless of the Board member's good faith and regardless of the fact that the type of activity authorized was within the power and jurisdiction of the Board or other governmental entity. About 4,000 public officials held their breath until April 16, 1992, at which time the Court's original opinion of September 4, 1991, was withdrawn and a new opinion was issued on Petition for Rehearing. That new opinion simply concluded that the contracts with the state legislator and his spouse as public relations consultants were a “blatant and unauthorized expenditure” without finding a violation of Section 109, and that the school Board members who voted for them were personally liable. Justice McRae, concurring in part and dissenting in part as to that portion of the opinion dealing with the Section 109 conflict, had this to say:

Lay people who have never held public office understand well the meaning of Article IV, Section 109 of our Constitution.... Countless pages of our judicial decisions attempt to explain Section 109. The private citizenry of our state, however, encounter no such confusion.... The majority opinion leaves our public officeholders in a quandary. What constitutes an “unauthorized expenditure” and what doesn't?... Unfortunately, the majority opinion invites yet another interpretation for another day when some other officeholder will have his hand slapped because we have not done today what should have been done. I, therefore, dissent from this portion of the majority's holding. *Id.* at 558.

### **MEC Advisory Opinions Affecting Public or Private Lawyers**

- ❑ 03-013-E The conflict of interest laws do not prohibit city A's alderman from also serving as the

Board attorney of city B when city B's alderman is employed by city A. This finding is based on the two municipalities being separate governmental entities for purposes of the state conflict of interest laws. However, an alderman should avoid any action as a member of his respective Board of aldermen that would appear as an attempt to garner favor from the employee who is the other alderman of the municipality employing the first alderman. A total and complete recusal is a suitable way for an alderman to avoid an action that would appear to garner favor as discussed above and is the only way an alderman can be certain to avoid violating §25-4-105(1). Cautioned regarding Constitutional Section 109 and §25-4-105(2) and §25-4-101.

- ❑ 03-025-E Constitutional Section 109 and §25-4-105(2) will absolutely prohibit a legislator from being employed as legal counsel with a correctional facility when the facility's contract with the Department of Corrections to house, care and control state inmates is funded by legislative appropriation during the legislator's term or within one year thereafter.
- ❑ 03-025-ER The Legislature's passage of the corrections appropriation bill does not authorize a legislator/attorney's contract with a sheriff to provided legal services, other than those provided by the full-time attorney authorized by Code Section 47-5-937, when such other legal services would be solely funded with local tax revenues and be totally unrelated to the operation of a regional correctional facility funded with legislatively appropriated funds. Should a legislator/attorney be paid directly by funds arising from a regional correctional facility contracts and/or be paid by any other funds to perform legal services for sheriffs due to or created by regional correctional facilities, then the legislator/attorney will have a prohibited interest in the state-County inmate incarceration contracts in violation of Constitutional Section 109 and §25-4-105(2). Also, a legislator/attorney serving as a sheriff's attorney to providing other legal services to the sheriff not related to a regional correctional facility, and the sheriff being responsible for the operation of a regional correctional facility when the regional correctional facility's funding is authorized by the Legislature, can be expected to cause suspicion among the public and reflect unfavorably upon the Legislature and the County, and therefore, does not fully and completely comply with the public policy mandate set forth in §25-4-101. Caution regarding §25-4-105(1).
- ❑ 03-028-E The conflict of interest laws do not as such prohibit a municipal court judge from also serving as the County youth court prosecutor when the municipality is located within the County the youth court prosecutor serves. The Commission bases this finding on the fact the municipality and County are separate governmental entities under the above cited §25-4-103(g)(i)(ii) and (h). Cautioned regarding §25-4-105(1) and §25-4-101.
- ❑ 03-033-E 1. Constitutional Section 109 and §25-4-105(2) will prohibit a state university employee from remaining employed by the state university if elected to the Legislature but will not prohibit the state university's spouse from remaining employed with the state university. Cautioned regarding §25-4-105(1) and §25-4-101.

2. The state conflict of interest laws do not as such prohibit an individual's spouse from continuing to serve as a County public defender and the individual from continuing to serve as a city planning and zoning commissioner if the individual is elected to the Legislature nor will the one spouse serving on the

city planning and zoning commission prohibit the other spouse as an attorney from receiving compensation from the city related to city misdemeanor cases. However, the Attorney General must address whether dual service as a Legislator and a city planning and zoning commissioner is a violation of the Separation of Powers Sections of the Mississippi Constitution.

- 03-044-E 1. A legislator does not have an interest, direct or indirect, in a loan agreement contract between a regional utility authority and the Department of Environmental Quality, whose funds were authorized by the Legislature of which he was a member, if the legislator's law firm continues to serve as the regular attorney for the regional utility authority: 1) if the law firm provides only those services provided for in its current contract with the authority as its regular attorney; 2) if the law firm is not paid from the loan proceeds; and 3) if the law firm does not benefit from additional legal services or fees generated from the authority's use of the loan to build the pollution control project.
  2. A legislator's law firm will not as such be prohibited from performing litigation and/or matters such as bond issues for a regional utility authority as long as such actions are not a result of the regional utility authority's loan from the Water Pollution Control Revolving Loan Fund.
  3. Constitutional Section 109 and §25-4-105(2) will prohibit a legislator's law firm from being paid attorney fees out of loan funds received from the Water Pollution Control Revolving Loan Fund administered by DEQ as the legislator's law firm will have a direct interest in the loan agreement contract authorized by the laws passed by the Legislature of which the requestor was a member, i. e., two general obligation bond issues and DEQ's appropriation bill.
  4. Constitutional Section 109 and Code Section 25-4-105(2) will not prohibit a legislator and/or his law firm from continuing to serve as the attorney(ies) for the County Board of supervisors, as authorized in §19-3-47, should the regional utility authority repay County loans from the Water Pollution Control Revolving Loan Funds loan. Cautioned regarding §25-4-101.
- 03-067-E The fact that the vast majority of the other firm's clients and the work perform by the firm involve legal matters which are not pursuant to a state contract or funded with state dollars and the understanding that the legislator/attorney is not limited to providing legal services exclusively for the other firm are sufficient to support a finding that legislator/attorney will not be interested, directly or indirectly, in the other firm's limited number of state or state funded contracts under the proposed contractual agreement whereby the legislator/attorney will be hired by the other firm to work on specific, non-governmental files and not on any files where payment of legal fees is derived from a contract funded by an appropriation passed by the Legislature. Cautioned regarding Constitutional Section 109, §25-4-105(1), (2), (3)(d) and (5) and §25-4-101.
- 02-020-E Constitutional Section 109 and §25-4-105(2) prohibit a Board of aldermen from authorizing or re-authorization the town attorney's contract, compensated or uncompensated, when the town attorney is the spouse of one of the aldermen. If uncompensated, the attorney would limit any civil damage recovery should his/her contract be declared void by a court of competent jurisdiction. However, there would still be potential civil damages and civil penalties that a Court could impose

under §25-4-109 and §25-4-113. Cautioned regarding §25-4-101.

- ❑ 02-055-E An attorney for the Board of supervisors serving simultaneously as a member of the advisory Board of the County's depository is prohibited by §25-4-105(3)(a) when the County Board attorney has a material financial interest in the County's depository as defined in §25-4-103(k)(i)(ii). Therefore, § 25-4-105(3)(a) prohibits a County contracting with a bank to serve as its depository or contracting with a bank for any other reason when the Board attorney for the County is a member of the bank's advisory Board and has a material financial interest in the bank. Cautioned regarding §25-4-105(1) and §25-4-101 even if the attorney does not have a material financial interest in the bank.
  
- ❑ 02-081-E The conflict of interest laws do not expressly prohibit the city from hiring the child of an individual who serves the city as alderman as city prosecutor. Specific facts and circumstances determine whether the alderman has an interest in the employment contract between the city and the alderman's child as city prosecutor. The facts presented by the requestor are insufficient to determine the financial or pecuniary dependency existing between the alderman's child and the alderman, which is the primary factor in determining if the alderman has an interest in the contract. Cautioned regarding §25-4-105(1) and §25-4-101.
  
- ❑ 02-097-E As the employing and/or appointing entities are separate authorities for purposes of the conflict of interest laws, an individual may simultaneously hold the positions of public defender and justice court judge without violating §25-4-105(3)(a) as the exception set forth in §25-4-105(4)(h) is applicable. Cautioned regarding §25-4-105(1) and advised to present this matter to the Commission on Judicial Performance, concerning the Code of Judicial Conduct, and Attorney General's Office, concerning the Separation of Powers Doctrine.
  
- ❑ 02-120-E 1. The conflict of interest laws do not prohibit an attorney whose firm represents a municipality from simultaneously serve as a municipal school Board member as the municipality and the school district are separate governmental authorities as defined in §25-4-103(g)(h). Cautioned concerning §25-4-105(1) and (5).  
  
2. However, Constitutional Section 109 and §25-4-105(2) will prohibit the school Board from hiring the prospective school Board member's law firm and/or an insurance company hiring the prospective school Board member's law firm when the school district's contract with the law firm or the insurance company was authorized by the school Board during the prospective school Board member's term or within one year thereafter.
  
- ❑ 02-132-E The state conflict of interest laws do not as such prohibit a public servant, including a prosecuting attorney, from being employed by two totally separate governments, in this instance, the state and a municipality. Cautioned regarding §25-4-105(1) and §25-4-101. The requestor was referred to the State Bar Association related to this matter under the Rules of Professional Conduct.

- ❑ 01-007-E An individual simultaneously holding the positions of youth court referee/judge and attorney for the Board of supervisors is not prohibited by §25-4-105(3)(a) as the appointing and employing entities are separate governmental authorities. Cautioned regarding §25-4-105(1).
- ❑ 01-020-E It is not as such a violation of the state conflict of interest laws for an individual to simultaneously serve as the County's part-time public defender and as alderman of a municipality located within the County the individual serves as public defender. Cautioned regarding Constitutional Section 109 and §25-4-105(1), (2) and (5) and §25-4-101.
- ❑ 01-107-E An attorney who is a member of a port commission should consider resigning from the port commission in order to comply fully with the public policy mandate set forth in §25-4-101 if the port commission concludes that it is in the public's best interest for it to join in the litigation against the interest of the requestor's clients and the other parties which share the requestor's clients' interests in tidelands and the related tax liability. Cautioned regarding Constitutional Section 109 and §25-4-105(1), (2),(3)(d) and (5).
- ❑ 01-119-E The fact that the vast majority of the other firm's clients and the work perform by the firm involve legal matters which are not pursuant to a state contract or funded with state dollars and the understanding that the requestor's incorporated law firm will not be providing legal services exclusively for the other firm are sufficient to support a finding that the requestor's firm will not be interested, directly or indirectly, in the other firm's limited number of state or state funded contracts under the proposed contractual agreement whereby the requestor's firm will be hired by the other firm to work on specific, non-governmental files and not on any files where payment of legal fees is derived from a contract funded by an appropriation passed by the Legislature. Cautioned regarding Constitutional Section 109, §25-4-105(1), (2), (3)(d) and (5) and §25-4-101. [1, F] Modified 88-41-E
- ❑ 00-005-E An attorney for the Board of trustees of a public school district is a public servant as defined in §25-4-103(p) and therefore the Board attorney serving simultaneously as a member of the Board of directors of the school district's depository is prohibited by §25-4-105(3)(a), when the school district's Board attorney has a "material financial interest" in the school district's depository as defined in §25-4-103(k)(i)(ii). Being a member of a bank's Board of directors does not fall within the statutory exception found in §25-4-105(4)(a) which refers only to an officer or stockholder. Cautioned regarding §25-4-105(1) and (5).
- ❑ 00-006-E §25-4-105(3)(a) will prohibit a district attorney from agreeing to allow his personal law office to be used for district attorney office duties when the district attorney's office will be paying the utilities and/or the ad valorem taxes of the office for as long as it is used as a district attorney's office. Cautioned regarding §25-4-105(1) and §25-4-101.
- ❑ 00-024-E 1. It is not as such a violation of the state conflict of interest laws for one spouse to be employed by the Mississippi Department of Human Services as volunteer coordinator for the County youth court and the other spouse be employed by the County as victim/witness coordinator for the County youth court.

2. §25-4-101 precludes the County youth court public defender's spouse serving as the County youth court victim/witness coordinator because of public policy concerns arising from the duties of the County youth court victim/witness coordinator. Cautioned regarding §25-4-105(1) and (5).

- ❑ 00-031-E Constitutional Section 109 and §25-4-105(2) will prohibit an individual serving as the attorney for a nonprofit economic development foundation after being appointed to the Board of a port authority when the port authority funds the nonprofit foundation. A violation will occur when the port authority's Board funds the nonprofit foundation employing the individual as its attorney with monies approved in a budget authorized by the port authority's Board during the individual's term of office or within one year thereafter. Cautioned regarding §25-4-101 and §25-4-105(1).
- ❑ 00-044-E A legislator is advised to totally and completely recuse himself from any matters before the Legislature or its committees that concern community/junior colleges should an attorney in the legislator's law firm be retained by a private foundation established for the purpose of pursuing litigation for and/on behalf of the community/junior colleges' interests in order that the legislator may be certain to avoid violating §25-4-105(1) and (3)(d) and to comply with the public policy mandate set forth in §25-4-101. Cautioned regarding Constitutional Section 109 and §25-4-105(2).
- ❑ 00-054-E §25-4-105(1) would prohibit a district attorney's office from contracting for computer services with the son of the district attorney's business administrator. Cautioned regarding §25-4-101.
- ❑ 00-057-E 1. The attorney for the County Board of supervisors is not as such prohibited from simultaneously serving as a special master in a lunacy hearing. Cautioned regarding §25-4-105(1).  
  
2. A Board attorney for the County Board of supervisors who accepts payment from County funds for services as an indigent counsel in the County youth court violates §25-4-105(3)(a), unless the exception set forth in §25-4-105(4)(b) can be applied to the particular circumstance in question.
- ❑ 00-069-E A former district attorney would be prohibited by §25-4-105(3)(e) from serving as a criminal defense counsel on a case reviewed by the former district attorney's assistants prior to his term ending. Cautioned regarding §25-4-101.
- ❑ 00-082-E It is not as such a violation of the state conflict of interest laws for an alderman who is an attorney to have a part-time, hourly contract with the Attorney General's office to do legal research. However, Constitutional Section 109 and §25-4-105(2) prohibit the alderman from directly or indirectly having an inherent interest in and/or receiving a pecuniary benefit from the Attorney General's office or the city by way of any grant contracts with the Attorney General's office authorized by the city Board during the alderman's term or within one year thereafter. Cautioned regarding §25-4-105(1) and §25-4-101.
- ❑ 00-097-E §25-4-105(3)(a) will not prohibit an attorney for the Board of trustees of a public school

district and the attorney's law firm from performing and being compensated for the duties as legal counsel for the school district which are deemed necessary by the Board of trustees when such duties and compensation are set forth in a single contract authorized by §37-7-301(x).

- ❑ 00-101-E 1. An appointee to the Mississippi Home Corporation Board of directors will have an indirect interest in the MHC contracts associated with the bond funds to be loaned in violation of Constitutional Section 109 and §25-4-105(2) when the appointee's attorney/spouse or the attorney/spouse's law firm receives fees as the closing attorney on the loan paid from monies provided the buyer/borrower from MHC bond funds by way of a 3% cash advance or a 1% premium cash advance or if the seller employs the closing attorney and the sales contract provides that the buyer/borrower shall reimburse the seller for such costs and the buyer/borrower does so with the 3% cash advance or the 1% premium cash advance. Also, Constitutional Section 109 and §25-4-105(2) will prohibit the appointee's attorney/spouse or the attorney/spouse's law firm from serving as closing attorney with respect to a MHC bond loan if the attorney fees are not paid with monies from the MHC bond funds because there would be no buyer/seller transaction and no mortgage loan of MHC bond funds, and therefore no closing, except for the availability of the MHC bond funds made possible by the contracts authorized by the MHC Board of directors. These prohibitions apply during the appointee's term and for one year thereafter.

2. Constitutional Section 109 and §25-4-105(2) will prohibit the attorney/spouse of an appointee to Mississippi Home Corporation Board of directors or the attorney/spouse's law firm from being compensated to do the closing on an MHC second mortgage loan under MHC's down-payment assistance program when such second mortgage loans are authorized by the MHC's Board of directors of which the new appointee is a member. This prohibition applies during the new appointee's term and for one year thereafter. Cautioned regarding § 25-4-101.
- ❑ 00-110-E The position set forth in the prior advisory opinion would not be altered by the community hospital's Board of trustees selecting the liability insurance contracts and/or the workers' compensation claims service provider contract or the Board of trustees ratifying the administrator's selection of the liability insurance contracts and/or the workers' compensation claims service provider contract. Cautioned regarding §25-4-105(1).
- ❑ 00-120-E §25-4-105(1) would not be violated nor would §25-4-101 preclude an alderman who is a part-time, contract employee of the Attorney General's Office from participating in matters which have been the issue of an official opinion from the Attorney General to the city or other public entity if the following are true. The alderman's participation does not result in his obtaining a pecuniary benefit. The alderman did not participate as a contract attorney in the Attorney General's issuance of the official opinion and recused himself from the city's decision to seek an Attorney General's opinion. Cautioned regarding Constitutional Section 109 and §25-4-105(2).
- ❑ 00-139-E A law partner of an attorney of a County Board of supervisors may serve on the Board of directors of a bank selected by the County Board of supervisors as its depository without violating §25-4-105(3)(a) if certain narrow and limited circumstances exist. Cautioned regarding §25-4-101.

- ❑ 99-017-E An attorney's holding of such positions simultaneously with a County and a municipality is not as such a violation of the conflict of interest laws. This finding is based on the County and the municipality being two separate governmental entities within the definition set forth in the above cited Code Section 25-4-103(h).
- ❑ 99-048-E An attorney from the same firm as the attorney for the Board of supervisors may accept a youth court appointment as a guardian ad litem as anticipated in §43-21-121 without violating the state conflict of interest laws if the payments to the attorney for the guardian ad litem services are paid outside of the Board attorney's firm with no financial benefit flowing to the firm in order to not violate §25-4-105(3)(a), unless the exception set forth in §25-4-105(4)(b) can be applied to the particular circumstances in question.
- ❑ 99-059-E 1. Constitutional Section 109 and §25-4-105(2) will not prohibit a partner in a law firm from continuing to personally serve as the attorney for a joint city/County port commission and receive a monthly salary for his service if a legislator joins the partner's law firm and if the County port commission receives a loan from the Mississippi Port Revitalization Revolving Loan Fund. Constitutional Section 109 and §25-4-105(2) will not prohibit the partner and/or his law firm from being employed by the joint city/County port commission to perform legal work involving litigation and/or matters other than normal representation and other than the port revitalization loan if a legislator joins the partner's law firm and if the County port commission receives the loan from the Mississippi Port Revitalization Revolving Loan Fund. Constitutional Section 109 and §25-4-105(2) would prohibit the partner and/or his law firm from being employed by the joint city/County port commission to make the application through the port commission's parent body, the County Board of supervisors, for the loan from the Mississippi Port Revitalization Revolving Loan Fund. Also, the partner and/or his law firm would be precluded from doing any other legal work for the joint city/County port commission related to the port revitalization loan. Cautioned regarding §25-4-101.
- ❑ 99-062-E It is not as such a violation of the state conflict of interest laws for a County prosecuting attorney to simultaneously serve as the Board attorney for a County school district. Cautioned regarding §25-4-101.
- ❑ 99-063-E 1. A school Board member would have an interest in any contract between the bank and the school Board authorized by his Board as prohibited by Constitutional Section 109 and §25-4-105(2), both cited above, due to his bank stock interest, his dependent son's bank stock interest held in trust of which the school Board member is trustee, his law firm's legal services to the bank and his law partner's position as local bank advisory Board member.

2. If §37-7-333 has an effect on the application of Constitutional Section 109, than it would have to eliminate the bank contract(s) being authorized by an order made by the school Board. To avoid a violation of Constitutional Section 109 by avoiding the contract authorization by the school Board, not only must the school Board be fully and completely removed and replaced by a designated entity for

the purposes of soliciting bids from depositories and for selecting depositories, the school Board also must be removed and replaced by a designated entity for purposes of selecting and opening accounts; for approval of securities; for the transfer and deposit of funds between depositories; and for all other such related functions. Cautioned regarding §25-4-101.

- ❑ 99-112-E §25-4-105(3)(e) would prohibit a former district attorney or a former assistant district attorney from being compensated by a person or business to defend a criminal defendant against any charges brought by the office of the district attorney when the former district attorney or the former assistant district attorney, while still serving in the office of district attorney, reviewed the criminal defendant's file and/or presented the criminal defendant's case to the Grand Jury.
- ❑ 98-001-E The state conflict of interest laws do not prohibit a district attorney from contracting with a former assistant district attorney to provide continued research and assistance on an ongoing case that the former assistant district attorney was personally participating in before resigning his position with the district attorney's office. [1]98-019-E §25-4-105(3)(a) prohibits the city attorney's spouse from selling real property to the city.
- ❑ 98-020-E It is not as such a violation of the conflict of interest laws for a municipal Board attorney to simultaneously serve on the County's economic development district's governing Board, even though, the municipality contributes funds to the County's economic development district. Cautioned regarding Constitutional Section 109, §25-4-105(1) and (2), and §25-4-101.
- ❑ 98-053-E It is not as such a violation of the state conflict of interest laws for a state legislator, who is also an attorney, to file suit on behalf of a client against the State, its agencies or employees involving coverage by the Mississippi Tort Claims Board. Also, there would not be a violation should a court of competent jurisdiction award a judgment, including attorney fees, in favor of the state legislator/attorney's client. However, Constitutional Section 109 and § 25-4-105(2) would prohibit a state legislator/attorney from receiving attorney fees, directly or indirectly, through a settlement agreement in such cases involving the Mississippi Tort Claims Board on behalf of his or her client. The settlement agreement would constitute a government contract for purposes of Constitutional Section 109 and §25-4-105(2). This with the understanding that the funds paid by way of the settlement agreement were appropriated by the State Legislature during the state legislator/attorney's term or within one year thereafter.
- ❑ 98-064-E The state's public policy of public trust, found in §25-4-101, prohibits an attorney employed by casino developers from simultaneously serving as counsel for the city port commission when the port commission must approve the sites being sought by the casino developers. Cautioned regarding §25-4-105(1), (3)(a)(d) and (5).
- ❑ 98-092-E It is not as such a violation of the state conflict of interest laws for an individual to serve as circuit clerk when the individual's spouse is an attorney who handles civil and criminal cases in the Circuit Court. Cautioned regarding §25-4-105(1) and (5).

- ❑ 98-095-E The state public policy established by §25-4-101 precludes a state commission from temporarily hiring an attorney to serve as its staff attorney and to represent it in court or before other state or federal agencies when other members of the attorney's law firm will represent clients before the state commission even if the attorney has no duties directly in regard to the proceedings in which his law firm is participating before the state commission.
  - ❑ 98-097-E The partners or associates in the law firm that represents the city as its Board attorneys are not as such prohibited by the state conflict of interest laws from defending individuals charged with DUI violations in their municipality's court, in other municipalities' courts and in the County's courts. Cautioned regarding §25-4-105(1) and (3)(a).
  - ❑ 97-008-E Constitutional Section 109 and §25-4-105(2) and (3)(a) prohibit an attorney's continued employment as an associate with his law firm if the law firm contracts with the city's insurance organization to provide representation to the organization and/or the city after the attorney's election to the city council.
  - ❑ 97-030-E Each case must be examined on its facts and circumstances to determine if a "Chinese Wall," that prevents a legislator's law firm from sharing with him fees that pertain to legislation, is sufficient to place the legislator in a position of not having to recuse himself from certain legislation because he could not reasonably believe or expect that his law firm is involved in that certain legislation. Cautioned regarding §25-4-101 and §25-4-105(1).
  - ❑ 97-045-E A legislator does have a prohibited interest in any of his law firm's contracts, regardless of what member of the firm does the actual work, with a client related to the client's development project should any state funds granted to the development project be appropriated or reappropriated by the Legislature during the legislator's term, or within one year thereafter. The legislator's interest by virtue of the appropriation process is prohibited by the above cited Constitutional Section 109 and §25-4-105(2). Cautioned regarding §25-4-105(1) and (3)(a)(d) and §25-4-101.
  - ❑ 97-062-E §25-4-105(1) prohibits a partner in the County prosecuting attorney's law firm from contracting with the County Board of supervisors to represent the County in civil forfeiture proceedings. Cautioned regarding §25-4-101.
  - ❑ 97-102-E It is not as such a conflict of interest for an alderman who is an attorney to represent clients in a law suit to object to an annexation Ordinance passed by the city the alderman serves. Cautioned regarding Constitutional Section 109, §25-4-105(1), (2) and (3), and §25-4-101.
  - ❑ 97-103-E 1. The state conflict of interest laws do not as such prohibit the supervisor's publication from providing advertising from the County's depository. Cautioned regarding §25-4-101 and §25-4-105(1).
2. The state conflict of interest laws do not as such prohibit the supervisor's publication from providing services free of charge to the County economic council.

3. The state conflict of interest laws do not as such prohibit the supervisor's publication from accepting contracts with commercial land developers.

4a. The state conflict of interest laws do not as such prohibit the supervisor's publication from accepting contracts with an architectural firm that has contracted with another authority of the County government such as the County's civic center commission.

4b. The state conflict of interest laws do not as such prohibit the supervisor's publication from accepting contracts with an architectural firm that has contracted with the County. Cautioned regarding §25-4-101 and §25-4-105(1).

5. The state conflict of interest laws do not as such prohibit the supervisor's publication from accepting articles from a law firm that advertises in and submits articles to another publication.

- ❑ 97-108-E Constitutional Section 109 and §25-4-105(2) prohibit an alderman's law firm from contracting with a planning and development district that is being funded by the alderman's city.
- ❑ 97-126-E 1. An attorney acting as counsel to a governmental entity's Board and as counsel to the governmental entity's depository can easily violate the conflict of interest laws by asserting his influence as the governmental entity's Board's counsel by urging the governmental entity's Board to select the bank he represents as its depository. Cautioned regarding §25-4-101 and §25-4-105(1), (3)(d) and (5).
- 2. The prohibitions set forth in Constitutional Section 109 and Code Section 25-4-105(2) apply to governmental entities' Board members that are employees of banks serving as the governmental entities' depositories in two distinct instances. The prohibitions are applied when the depository is directly selected by the governmental entity's Board. Also, the prohibitions are applied when a superior governmental entity's Board selects multiple depositories and the subject governmental entity's Board chooses its depository from those multiple depositories selected by the superior governmental entity's Board. Cautioned regarding §25-4-105(1) and (3)(d).
- ❑ 97-127-E It is not as such a violation of the state conflict of interest laws for an attorney to simultaneously serve as the Board attorney for the County Board of supervisors and as the Board attorney for the County owned hospital. Cautioned regarding §25-4-101 and §25-4-105(1) and (5).
- ❑ 97-132-E Constitutional Section 109 and §25-4-105(2) prohibit a state agency from compensating a legislator's law partner from special fund monies that are required to be appropriated by the Legislature and therefore are appropriated by the Legislature during the legislator's term and for one year thereafter.
- ❑ 97-140-E §25-4-105(3)(a) prohibits an attorney from simultaneously serving as the attorney for the Board of aldermen, when the attorney is employed as Board attorney under Code Section 21-15-25, and as the municipal prosecuting attorney, when the attorney is appointed under Code Section

21-23-5, for the same municipality. An attorney employed as municipal Board attorney under Code Section 21-15-25 may perform the duties set forth in his employment contract as Board attorney, including prosecutorial duties, without violating the conflict of interest laws.

- ❑ 97-143-E It is not a violation of the conflict of interest laws for a law firm to contract with either of two record storage companies that are partially owned by Board members of governmental entities that the law firm represents as either their general or special counsel. Cautioned regarding Constitutional Section 109, §25-4-101 and §25-4-105(1), (2) and (3)(a).
- ❑ 97-146-E §25-4-105(3)(a) does not prohibit a municipality from contracting with its municipal attorney or attorneys to provide additional services for additional compensation as anticipated and authorized in §§21-15-25 and 27.
- ❑ 97-156-E A state attorney is not as such prohibited by the state conflict of interest laws from serving as a member of the County head start policy council. Cautioned regarding §25-4-101.
- ❑ 96-002-E A civil service commissioner is not prohibited from serving on the civil service commission because he represented a current client before the civil service commission prior to his appointment. Cautioned regarding §25-4-105 (1), (3)(d) and (5).
- ❑ 96-008-E A legal secretary for the municipal Board attorney may not remain in that employment position if she is elected to the Board of aldermen because there would be a violation Constitutional Section 109 and §25-4-105(2) and (3)(a).
- ❑ 96-025-E 1. An attorney for the County Board of supervisors may represent criminal defendants before the County's courts but may not serve as part-time public defender or as an indigent's counsel as it would violate §25-4-105(3)(a) unless the exception in §25-4- 105(4)(b) applies.  
  
2. An attorney for the County Board of supervisors and members of the County Board of supervisors may serve as members of their regional planning and development district.
- ❑ 96-055-E A law firm that serves as the regular attorneys for the County Board of supervisors may serve as bond counsel if provided for in their contract as the regular attorneys but may not have a separate contract to provide bond counsel services as it would violate §25-4-105(3)(a).
- ❑ 96-064-E A constable may use his personal vehicle that he also uses as his constable vehicle to serve process for a law firm if he removes the insignia and decals that identify it as a constable vehicle. Cautioned regarding §25-4-101 and §25-4-105(1).
- ❑ 96-074-E A youth court prosecutor may take court appointed cases as a defendant's attorney in the justice court of the County he or she serves as the youth court prosecutor. Cautioned regarding §25-4-101 and §25-4-105(1).

- ❑ 96-080-E A Board of supervisors' leasing of office space for the district attorney from the district attorney's father is not prohibited. Cautioned regarding §25-4-101 and §25-4-105(1).
- ❑ 96-081-E A school Board may employ the sons of one of its members as an architect and as an attorney if they are financially independent from the father. Cautioned regarding §25-4-101 and §25-4-105(1).
- ❑ 96-099-E Constitutional Section 109 and §25-4-105(2) prohibit the law firm of a former state agency Board member from being bond counsel on a bond issue that includes the state agency's project(s) within one (1) year of the end of the former member's term.
- ❑ 96-132-E 1. §25-4-105(3)(a) prohibits the assistant district attorney leasing office space to the district attorney's office.  
  
2. §25-4-105(1) prohibits the assistant district attorney from deeding his property to his father for the purpose of allowing the property to be leased by the district attorney's office.
- ❑ 96-137-E An attorney or a law firm that serves as the regular attorney[s] for the County Board of supervisors may serve as bond counsel if provided for in their contract as the regular attorneys but may not have a separate contract to provide bond counsel services as it would violate §25-4-105(3)(a). A Board attorney may be present when the Board of supervisors considers the appointment of outside counsel if requested to be present by the Board. Cautioned regarding §25-4-105(1).
- ❑ 96-145-E A member of a law firm or the law firm is not as such prohibited from simultaneously serving as counsel to a municipal joint action agency and to municipalities or municipal utility commissions contracting with the municipal joint action agency. Cautioned regarding §25-4-101 and §25-4-105(1) and (5).
- ❑ 95-008-E The appointment as assistant public defender of a salaried attorney in the County Board attorney's law firm is not a violation if the individual and not the firm serves as Board attorney; if the salaried attorney does not perform work for the Board; or if the salaried attorney's public defender's salary does not accrue to the firm. Should any of the above occur there is a violation of 25-4-105(3)(a).
- ❑ 95-020-E A municipal council member who has litigation pending against one of the municipality's police officers with whom the municipality has entered into an indemnity agreement:
  1. may participate in all council matters other than those relating to pending litigations;
  2. may participate in council matters relating to the police department's claims docket and budgetary items; and
  3. should recuse himself/herself from participation during executive sessions in discussions concerning litigation other than his own involving plaintiffs represented by the attorney representing the council

member in his suit against the police officer.

- 95-026-E A salaried associate for a law firm may serve on the state legislature when a partner/shareholder of the law firm is a registered lobbyist and is paid an annual flat fee by his lobbyist client which is placed into the law firm's funds to be distributed among the partners/shareholders, provided the legislator recuse himself from actions concerning legislation the partner/shareholder lobbied for or against on behalf of the lobbyist client.]
- 95-028-E A district attorney may contract with a municipality within his judicial district for the district attorney's office to serve as municipal prosecuting attorney.
- 95-049-E 1. A shareholder in a law firm elected to the state legislature and/or the firm may represent a private company in negotiating a contract on behalf of the private company with the state or any agency of the state when the firm's fee arrangement is not contingent upon the success of negotiating the contract or the terms of the contract.
  2. The shareholder and/or the firm may represent a client in litigation between the state or any agency of the state and the private client when the representation would be on a fee basis and not contingent upon the outcome of the litigation.
  3. The firm may continue its current representation of numerous health care providers, including community hospitals, private hospitals and private physicians most of which receive Medicaid reimbursement when the firm is retained by these health care providers on a hourly fee basis.
- 95-051-E 1. A legislator/attorney's law partner's providing of legal representation to a state agency that receives money appropriated by the legislature results in a violation of Constitutional Section 109 even if the legislator/attorney does not share in the fees received by his law firm for that particular representation.
  2. If the law partner of a legislator/attorney represents a client in such ways as drafting legislation which the client then tries to have introduced and passed by the legislature, the legislator/attorney may avoid a violation of Code Section 25-4-105 by:
    - a. completely recusing himself/herself as a legislator from any action or consideration of the particular piece of legislation which his law partner has drafted; and
    - b. not sharing in the fees generated from the representation by the attorney/legislator's partner (although this would not remove a potential violation of Constitutional Section 109).
- 95-053-E The law firm of a legislator may not represent an insurance company's interest in defense of medical practitioners employed by a state institution when the insurance coverage is purchased by the state institution.
- 95-070-E A newly elected legislator's law firm:
  1. may not continue to accept any contracts entered into during his term or for one year thereafter with the Dept. of Transportation in eminent domain proceedings which would be in violation of

Constitutional Section 109 and Code Section 25-4-105(2).

2. may conclude pending litigation representing the Dept. of Transportation in eminent domain proceedings that were filed prior to the law partner/legislator's election. However, the legislator does have a prohibited interest in existing contracts should state funds be used to compensate the law firm appropriated by the Legislature during the legislator's term or within one year thereafter violating Constitutional Section 109 and Code Section 25-4-105(2). A recusal will not prevent a violation.

- ❑ 95-072-E An attorney of a municipal governing Board may simultaneously serve as the attorney for a municipal utilities commission whose members are appointed by the municipal governing Board. The attorney should recuse himself from matters concerning the municipal utilities commission coming before the municipal governing Board and the municipal governing authority coming before the municipal utilities commission.
- ❑ 95-076-E An attorney for the County Board of supervisors may practice before the court's within the County but may not be paid by the County as a public defender or share in the fees of his attorney/son who is a part-time public defender.
- ❑ 95-079-E One attorney may not simultaneous serve as municipal Board attorney and as municipal judge for the same municipality as such dual service violates 25-4-105(3)(a).
- ❑ 95-080-E An attorney for a municipal housing authority may continue to represent the housing authority after his father-in-law is appointed to the housing authority's Board if they are completely financially independent of each other and the father-in-law recuses himself from matters concerning his son-in-law.
- ❑ 95-090-E A former staff attorney for a state agency may contract with a company which he was involved on behalf of the state in a permit process against that company if the contract with the company is unrelated to the permit process.
- ❑ 95-133-E The corporation addressed below meets the definition of "government" as set forth in Code Section 25-4-103(g)(v).
  1. A corporation's maintaining of a bank account/deposit agreement with a bank in which any member of its Board holds corporate stock or is an employee would be prohibited by Constitutional Section 109 and Code Section 25-4-105(2).
  2. The corporation's attorney's serving as chairman and as a member of the Board of directors of the corporation's depository is prohibited by Code Section 25-4-105(3)(a) if the attorney has a "material financial interest" in the bank.
- ❑ 95-134-E A insurance agency owned by the father of the attorney for the County Board of supervisors may not contract with the County if the County Board attorney is a part owner of the insurance agency and if the father is a partner in the County Board attorney's law firm.

- ❑ 95-139-E A Board attorney for the County Board of supervisors may simultaneously serve as a youth court referee/judge.
- ❑ 95-156-E 1. An attorney serving as County prosecuting attorney and/or attorney for the Board of supervisors may simultaneously serve as a municipal Board attorney.
  2. An attorney serving as County prosecuting attorney may simultaneously serve as a attorney for the County Board of supervisors.
- ❑ 94-057-E A County Board of Supervisors may not select as bond or legal council an attorney who has an agreement with one of the members of the Board of Supervisors to share anticipated legal fees earned in a legal matter now being handled solely by the attorney.
- ❑ 94-064-E The governing body of a municipality, following an election, may vote to approve an invoice submitted by an authorized attorney which includes payment of fees to a separate attorney retained by the Mayor-elect before he took office to defend the city's interest in an election contest, provided the mayor-elect recused himself from all deliberations and/or Board action relating to this matter.
- ❑ 94-072-E A legislator/attorney may represent a client in civil litigation against the state and/or an agency or department of the state, provided the legislator/attorney receives no benefit in the event the case(s) is settled out of court.
- ❑ 94-080-E 1. An attorney representing a Board of supervisors may represent a gambling casino in a County which has legalized gambling, provided the County represented by the attorney has no contracts with the casino represented by the attorney.
  2. An attorney representing a Board of supervisors may represent a hospital Board which receives County money, provided the attorney recuses himself in the event of a possible conflict of interest.
  3. An attorney representing a Board of supervisors may represent a Board or entity which may come before the Board of supervisors for approval of funding, with the same provisions found in 1 and 2.
- ❑ 94-090-E A District Attorney may delegate to a Board of Supervisors the responsibility and authority to employ and set the salary of one employee who is the spouse of the District Attorney.
- ❑ 94-102-E An attorney may be appointed as a County's public defender when the attorney also serves as special master on all lunacies, city attorney, and school Board attorney.
- ❑ 94-107-E 1. A city councilman and the city attorney may be father and son.
  2. A city councilman may also be a member of the County school Board.
- ❑ 94-119-E The attorney for a wastewater district may be re-employed since his brother is now one of

the commissioners of the district.

- 94-149-E A Legislator's spouse may be employed as an Assistant District Attorney when he or she will be paid with funds appropriated by the Legislature and paid by the Department of Finance and Administration.
- 93-023-E A County Supervisor who was represented by one member of a law firm in a private matter on a standard hourly charge may or may not make a motion or vote as to the Board's hiring of another member of the same law firm as its council, depending on determination of pecuniary benefit.
- 93-028-E An attorney who is retained council for a County School Board and also the County Prosecuting Attorney may serve as mayor of a city within the same County.
- 93-070-E A prior public servant or the law firm of which he is a member may represent a group of land owners in a suit against a company allegedly responsible for an oil spill witnessed by the former public servant during the course of his governmental employment but not witnessed in relation to any case or proceeding in which he personally participated.
- 93-091-E A Legislator/attorney may not receive compensation from a department of the State in payment of his legal services rendered in the course of an adoption proceeding.
- 93-093-E 1. A legal assistant may not sell law books to the District Attorney.  
  
2. The spouse of the District Attorney may not remain his secretary following their marriage when her initial employment occurred before the marriage.  
  
3. A District Attorney or a "relative" may not be paid from funds appropriated by the state for office expense allowance for monthly rental of real or personal property owned by him (or the "relative").  
  
4. A School Attendance Officer may not be paid from the compulsory school attendance officer's office expense allowance rent for use of his home as an office.
- 93-094-E 1. An attorney for a Board of Supervisors may represent the Board of Supervisors when his law partner represents a town within the County which contracts with the County.  
  
2. An attorney for a Board of Supervisors may be a compensated member of the Board and minor stockholder of a bank depository in the County.
- 93-105-E A practicing attorney may become a member of the Board of Supervisors in the County of his practice.
- 93-124-E An Assistant District Attorney may use a vehicle for official business which was provided him by a state narcotics unit, provided. . .

- ❑ 93-130-E An attorney may not become City Attorney of a town while the Mayor of the town is a Secretary for the attorney.
- ❑ 93-133-E The spouse of a Councilperson may not serve as a Public Defender following the spouse's appointment by the Mayor in a Mayor-Council form of government.
- ❑ 93-134-E A spouse of a District Attorney may not remain his secretary following their marriage when her initial employment occurred before their marriage.
- ❑ 93-144-E
  1. A Board of Aldermen may retain an attorney as City Attorney who is the brother of one of the members of the Board of Aldermen.
  2. The Board of Aldermen may appoint a part-time judge who is the brother of one of the members of the Board of Aldermen.
  3. A Board of Aldermen may appoint a Department Head whose wife's sister is married to a member of the Board of Aldermen.
- ❑ 93-178-E The respective Boards of two state or local government political subdivisions may select as a bank depository one of two banks; one of which has an attorney as a member of its Advisory Board who represents the political subdivisions, and the other of which has as a member if its Advisory Board a law partner of the same attorney, provided. . .
- ❑ 93-185-E
  1. A city may contract with a legal firm for services when an Alderman of the city is a mother of a member of the legal firm, provided.
  2. The mother should recuse herself from voting on such matters.
  3. The members of the legal firm may appear before the city Board of Aldermen as regards appeals from the city Planning and Zoning Board, provided.
- ❑ 93-216-E A person elected as County Supervisor may not thereafter become affiliated with a law firm which contracts with an insurance company to represent certain County entities and public officials in the same and other counties.
- ❑ 92-003-E The spouse of a city attorney may be appointed a city judge of the same city.
- ❑ 92-004-E A County law librarian may simultaneously be employed as a family master as appointed by a chancery judge.
- ❑ 92-006-E An attorney for a County Board of supervisors may also serve as attorney for a city Board of mayor and commissioners.

- ❑ 92-020-E A County supervisor may vote to retain his brother or his brother's law firm as legal counsel for the Board of supervisors.
- ❑ 92-022-E A justice court judge may appoint an attorney with whom she was formerly employed to represent persons before her court.
- ❑ 92-025-E The spouse of a city attorney/ex-legislator may become employed by the same city's school district.
- ❑ 92-027-E A public entity contracts for custodial services with a bank:
  1. The spouse of a public servant/employee of the public entity may be a senior vice-president of a department of the bank, the public servant being legal counsel for the public entity. Caution: 25-4-105(1) and (5).
  2. The spouse of a public servant/employee of the public entity may be a commercial loan officer of the bank, having no involvement in the bid or contract, the public servant being involved in evaluating bank bids by extracting information for use by the public entity's trustees. Caution: 25-4-105(1) and (5).
  3. Not enough info to render a decision.
- ❑ 92-029-E A law firm of a person who is legal counsel to a Board of supervisors may not become public defender of the same County. Violation: 25-4-103(a).
- ❑ 92-045-E A former Legislator may not restructure his law firm so that he does not receive income from clients who would be prohibited from contracting with the law firm of which he is associated, as the keeping of contracts falling under Smith with the law firm inures to the present and future financial and organizational benefit of the law firm of which the former Legislator is associated. Violation: Section 109.
- ❑ 92-051-E An attorney may simultaneously serve as attorney for a County school district and a County Board of supervisors.
- ❑ 92-055-E An attorney representing a Board of supervisors may defend a private client being sued by a County hospital which is a political subdivision of the state and subsidized by the County.
- ❑ 92-062-E A law firm may represent clients before a state commission whose legal counsel is the spouse of one of the partners of the law firm.
- ❑ 92-078-E A special master of a chancery court may become a city attorney.
- ❑ 92-086-E 1. A Legislator may not own more than 10% of a corporation which does subcontracting work on road construction projects funded, in part, by the state highway department. Violation: Section 109.

2. A Legislator interest of more than 10% of a corporation which does subcontracting work on sanitary water and sewer projects for counties, districts, cities, and towns needs to be evaluated on a case by case basis. Generally, no prohibited contract exists.

3. The "material financial interest" clause does not apply to Section 109.

- 92-087-E The spouse of a deputy city attorney may be awarded a contract by the city based on a low bid to supply furniture.
- 92-109-E A city may not purchase title insurance from a company, the local agent of the company and writer of the policy being the city attorney. Violations: 25-4-105(3)(a); 25-4-105(1).
- 92-134-E The governing Board of a city may not authorize payment of fees of legal counsel under circumstances deemed by the office of the AG to be an "after the fact" reimbursement for which there was no authority. Violation: 25-4-105(1)(*supra*).
- 92-139-E An attorney whose term as mayor expired in July, 1989:
  1. may represent and be compensated by a any person who contracts with or otherwise does business with the city, its subgrantees, its lessees or others who have interests in or with HUD assisted projects.
  2. may represent and be compensated by governmental agencies, any private person who obtained a contract or a property interest in a HUD assisted project during his term as mayor.
  3. may have a personal investment or as part of a legal fee now obtained a contractual interest or a property interest related to a project that was assisted by HUD grants during the term of the former mayor.
- 92-155-E A Legislator whose term expired Dec. 31, 1991, may become legal counsel for a company who has applied for a gaming license for the state.
- 92-179-E A member of a state commission may participate in formal action of the commission concerning a group of businesses previously legally represented by a spouse who now does not represent the group, but does represent one business of the group. Cautions: 25-4-105(1).
- 92-183-E A Legislator/attorney may represent private clients before state agencies. Caution: 25-4-105(1).
- 92-195-E Relatives of a County supervisor who are attorneys may appear before the Board of supervisors representing third party clients or another governmental entity. Caution: 25-4-105(1).
- 92-216-E An alderman may not participate in Board deliberations and voting as to rezoning by a city of property owned by a corporation which employs a law firm of which the alderman is an associate. Violation: 25-4-105(1).

- ❑ 92-223-E An attorney/Legislator-elect (service begins January 1993) may not share in fees paid a member of his law firm who is co-bond council for an entity of the state beginning fiscal year 1993.
- ❑ 92-226-E 1. A Legislator who is an attorney may continue as a member of a city park commission.
- 2. A Legislator who is an attorney may continue to represent a city school district.
- 3. A Legislator who is an attorney may continue to represent two towns.
- ❑ 91-007-E A Legislator/attorney may represent a state municipal association. Caution: 25-4-101; 25-4-105(1) and (3)(d).
- ❑ 91-029-E A Legislator/attorney may represent private clients in eminent domain matters brought about by the Mississippi State Department of Economic Development. Caution: 25-4-105(1).
- ❑ 91-044-E 1. A city councilman who is a teacher with the city's school system should not vote to confirm an appointment to the city school Board. Reference 86-16-E.
- 2. A city councilman whose wife is a teacher with the city's school system should not vote to confirm an appointment (or related issue) to the city school Board. Reference 86-16-E.
- 3. A city councilman may simultaneously serve as a probation and parole officer. Caution: 25-4-105(1).
- 4. A city councilman may serve in that position when her husband is a County prosecuting attorney sharing office space with the city prosecuting attorney.
- 5. A city judge, appointed by the mayor and confirmed by the council, may not represent council members as to their actions involving their service on the council. Violation: 25-4-105(3)(a).
- ❑ 91-047-E An attorney may be appointed to a state commission before which he practiced and before which his son currently practices. Caution: 25-4-105(1).
- ❑ 91-048-E An attorney/lobbyist should not join the law firm of a Legislator. Possible violations: 25-4-101; 25-4-105(1).
- ❑ 91-051-E A law firm of a Legislator may not represent an insurance company's interest in defense of a civil action brought by an accident victim against a department of the State of Mississippi. Violations: Section 109; 25-4-105(2).
- ❑ 91-072-E A Legislator may simultaneously be a County public defender. Caution: 25-4-105(1).
- ❑ 91-101-E 1. A district attorney's spouse may serve as a County victim assistance coordinator.

2. A DA may serve as an adjunct faculty member or pursuant to federal grant as an instructor after hours or on weekends with an institute believed to be associated with a university.

3. A DA may recommend to a judge the treatment, supervision, counseling, etc., of probationers at a non-governmental facility employing the spouse of the DA.

4. Re: *Smith v. Dorsey*.

91-121-E An attorney who, within a few weeks following his public employment, is asked to represent a client having a matter pending before his former public employer, said matter being one which the attorney had no direct concern or personal participation, may do so without violating the ethics laws.

91-122-E An attorney who, within a few weeks following his public employment, is asked to represent a client in the acquisition of real property subject of pending concern of his prior public employer but whose only personal involvement occurred two years previous and was neither substantial nor continuing, would violate 25-4-105(3)(e) if he chooses to represent the client.

91-125-E An attorney may not represent multi-governmental agencies within one geographic area and also a bank which does business with the County of which same attorney represents the Board of supervisors. Possible violations: Section 109; 25-4-105(1), (3)(d) and (5).

91-138-E An attorney may simultaneously serve as a municipal judge, County youth court referee, and attorney for a County Board of supervisors.

90-017-E An attorney serving as legal council for a city's Community Development Block Grant may not be appointed to or serve as city attorney for the same city. Violation: 25-4-105(3)(a).

90-052-E 1. A city may contract a portion of the city's work to a Legislator/attorney who practices in the same city where his father is a councilman and his law associate is the city attorney.

2. The Legislator/attorney may serve as Assistant City Attorney.

3. The Legislator/attorney may serve as Acting City Attorney, City Prosecutor, or City Judge.

90-078-E A Board of supervisors may appoint a County employee (financial comptroller) as a member of a County commission (separate authority).

90-079-E 1. A city attorney (as a private attorney or via his law firm) may represent private clients before the Board of Aldermen. Caution: 25-4-105(3)(d); 25-4-105(5).

2. a city attorney of a city owning its own natural gas system may represent a private electric power association which does business within the city and competes against the city gas system. Caution:

25-4-105(1); 25-4-105(3)(d).

- ❑ 90-082-E A school Board of a municipal separate school district may not employ as its legal counsel an attorney whose spouse is employed by the same district as a school principal. Violation: 25-4-105(3)(a).
- ❑ 90-109-E A Legislator may serve as legal counsel for a Farm Credit Bank or a Federal Land Bank.
- ❑ 90-123-E 1. An attorney employed on a monthly retainer or hourly rate basis by a public agency is a "public servant."  
  
2. A public agency's retained attorney may advocate a position consistent with that of his agency which enures to the benefit of a private client(s).
- ❑ 90-135-E A County prosecuting attorney may represent in his private practice a corporation and/or two principals of the corporation in a civil action, one allegation of which of that a criminal statute has been violated, concerning which the County prosecuting attorney has recused himself.
- ❑ 89-23-E An attorney/partner of a law firm representing local school districts as to public bond financing transactions may serve as a member of the State Board of Education without violating the conflict of interest laws. However, representation on issues of state school bonds which are approved by the State Board would cause the attorney to violate Section 109 and 25-4-105(2). Cautioned regarding 25-4-105(1).
- ❑ 89-32-E A city may not award the attorney for the city a contract for legal services to be performed in connection with and to be paid from funds of a Mississippi Housing Community Development Block Grant of Community Development Federal-State Programs. Violation: 25-4-105(3)(a).
- ❑ 89-49-E A state bond attorney, who is also a member of a County Development Commission (CDC), may carry out his official (bond) duties when the County in which the CDC is located issues bonds on behalf of the Commission, if the County does not have any rule or regulation requiring the CDC to approve bond issues. Caution: 25-4-105(1). Otherwise, Violations: Section 109; 25-4-105(2). Recusal will eliminate violation of 25-4-105(1), but not Section 109 or 25-4-105(2).
- ❑ 89-54-E A chancellor may employ as a law clerk the son of an attorney whose law firm employs the son of the chancellor. Cautioned regarding 25-4-101 and 25-4-105(1).
- ❑ 89-59-E A city attorney/Legislator may participate in and negotiate an attorney's fee relative to the refunding of a bond issue by the city as authorized by enacted legislation.
- ❑ 89-62-E An attorney for a school district should refrain from recommending to the district's Board of trustees the selection of bank depositories and/or placement of school funds in a bank for which he is council, a director, and stockholder. Violation: 25-4-105(1).

- ❑ 89-69-E An attorney whose law partner is mayor may not serve as city prosecutor for the same city. Violation: 25-4-105(3)(a).
- ❑ 89-99-E The private law firm of a city judge may not be retained as bond council for the same city. Violation: 25-4-105(3)(a).
- ❑ 89-123-E A part-time County prosecuting attorney may simultaneously serve as a part-time criminal appeals prosecuting attorney for a municipal court in a municipality located within the County.
- ❑ 89-152-E The firm of an attorney appointed as a commissioner of a city's civil service commission may not become a contractor, subcontractor, or vendor of the city. Violation: 25-4-105(3)(a).
- ❑ 89-155-E A legislator receiving compensation as an attorney resultant from a bond issue authorized during his term of office violates Section 109 and 25-4-105(2).
- ❑ 88-74-E An alderman who, prior to his election, was involved in litigation with the city, may be awarded attorney fees, provided that any fees paid to the attorney/alderman are ordered by the court. Caution: 25-4-101; 25-4-105(4).
  
- ❑ 88-107-E 1. The spouse of a city attorney may serve as a municipal judge for the same city.  
  
2. The municipal judge may rent office space to a city prosecutor who practices before the judge. Cautions on 1 and 2: Use of office for personal benefit; Section 25-4-101, et. seq.
- ❑ 88-132-E 1. A city's mayor and councilmen may not hold an interest in a contract authorized by the city. (Concerns a grant.) Violations: Section 109; 25-4-105(2)(f); 25-4-105(1).  
  
2. City attorneys are prohibited from holding an interest in a contract authorized by the city (grant), as they are often called upon for advice in the grant application and the handling of the grant monies. Violation: 25-4-105(1).
- ❑ 88-138-E An attorney may simultaneously serve a both a city and the Board of trustees of the city's municipal separate school district. Cautions: recusal; 25-4-105(1) and (4).
- ❑ 88-146-E An attorney may not represent a public agency when another member of the attorney's firm is an active Board member for the public agency. Violations: Section 109; 25-4-105 (1), (2)(a), and (2)(f).

- ❑ 88-157-E A consolidated school district Board may use as a depository a bank of which the Board attorney is a member of the Board of directors. Based upon the fact that the County school district has total control over the placement of funds in the depository, even though the funds are designated for the consolidated school district's use.
- ❑ 88-168-E A Legislator may not participate in a program funded by federal monies awarded through the Governor's Office of Federal and State Programs. Violation: Section109. Reference: 88-03-E.
- ❑ 87-07-E 1. A city attorney may simultaneously serve as a member of the Legislature.
  2. An attorney for a public school system may simultaneously serve as a member of the Legislature.
  3. An elected official for a City may work as a sub-teacher for the city's school district, provided. . . Reference 87-16-E.
  4. An elected official for a City may be employed by a Department of the State as director of a Title XX Daycare Center.
- ❑ 87-92-E The son of the law partner of the city attorney may serve as alderman for the city. Caution: 25-4-105(1).
- ❑ 87-105-E The law partner of a County attorney may serve as city judge for a city located within the County, as long as the County attorney does not appear as prosecutor in the city court.

### **Ethical Lawyering as a Habit**

As government civil lawyers launch into the world of public entity representation, they will encounter a different breed of ethical challenges not found in non-governmental service. We have just barely scratched the surface of many of those challenges. Government civil lawyers face conflict of interest issues, disqualification dilemmas, confidentiality concerns and ethical obligations that appear at times strikingly different from the rules and guidelines to which their privately employed counterparts must adhere. In light of the public interest that is often an overriding concern in such representation, the burden is on government lawyers to develop and enhance the moral qualities that make it possible to be lawyers with integrity. They do so as members of our profession who understand the concept of ethical lawyering.

- ❑ Ethical lawyering requires us to be more than "neutral partisans" who pass no judgments on the morality of our clients' actions and decision making. There is no feasible alternative when the public trust and the public interest are implicated.
- ❑ Ethical lawyering by government civil lawyers may even require some tempering of the unmitigated and unconditional zeal we might otherwise display as advocates for our clients, especially when the public is indirectly the beneficiary of our representation.

- ❑ Such ethical lawyering, at its core, entails a level of integrity beyond the norm expected in private practice. It is the opposite of the growing commercialism that threatens to reduce the identification of the younger members of the bar with established ethical norms and guidelines. It is the opposite of the morals of the marketplace, the lowest common denominator of which is profit maximization without accountability.
- ❑ Such ethical lawyering in the public law context requires us to exercise moral judgment and take personal moral responsibility for the consequences of our professional acts.

A County Board attorney, and for that matter any local government civil lawyer, should strive for professionalism and accountability as he or she serves the public interest by representing with integrity the County Board of supervisors, state agencies or other local government Boards, councils and commissions. Take up the challenge to identify and implement character traits commonly associated with persons of integrity. Do so while balancing the demands of family, community, and career advancement. Meet the demands of professionalism in an environment where confidential communications are kept confidential and where loyalty is fiercely defended. Do all of these things while realizing that it is a balancing act on a high wire without a net. You cannot afford to slip, and your actions must be transparent. Amidst the swirl of massive corporate scandals, almost daily disclosures of conflicts of interest in corporate governance, accounting, politics, investment banking and the chutzpah of Martha Stewart's recent state visit to the Southern District of New York, you know - or should know - that you have entered an era of stricter interpretation of ethical duties. You are expected to uphold those ethical duties as a condition of membership in the self-regulating legal profession and as an attorney appointed to serve in a public sector position of responsibility. Such a lawyer must accept the challenge to have a solid ethical grounding, while exercising independence of judgment in order to promote justice and protect the public interest. Enter the ranks of lawyers whose professionalism comes as naturally as breathing.

### **Ethical Considerations for Attorneys in the Public Sector**

When an attorney provides legal representation to a local government entity, a number of ethical considerations and concerns arise that do not necessarily pertain to non-governmental clients. A local government attorney must often face ethical issues in both non-litigation and litigation contexts. For example, a question may arise concerning a conflict of interest between an elected County supervisor or a County employee and the governmental entity itself. *See Huey Stockstill, Inc. v. Hales*, 730 So. 2d 539 (Miss. 1999). For a good example of the multiple pressures that are brought to bear upon a Board and certainly upon the Board attorney while trying to resolve a prohibited conflict of interest during the competitive bid process. While knowledge of the Mississippi Rules of Professional Conduct is essential in order for any lawyer to even attempt to address what is or may not be ethical conduct, a local government attorney would be well advised to have at least a working knowledge of the ABA Model Rules of Professional Responsibility, the Restatement of the Law Governing Lawyers, the Uniform Local Rules of the Circuit and Chancery Courts, the Uniform Local Rules of the United States District Courts for the Northern District and Southern District of Mississippi, as well as the national standards used and looked to by the federal courts. *See FDIC v. U. S. Fire Ins. Co.*, 50 F.3d 1304, 1314-15 (5<sup>th</sup> Cir. 1995).

Many of the ethical dilemmas and professional responsibility concerns faced by Board Attorneys, while

extremely fact-specific, revolve around conflicts of interest in non-litigation County government matters and conflicts in dual representation in litigation.<sup>30</sup> Moreover, a cursory review of the Official Opinions and Advisory Opinions rendered by the Ethics Committee of The Mississippi Bar during the past two decades reveals a significant number of inquiries involving attorneys representing counties, cities, school Boards and other public sector clients.

### **Conflicts of Interest in Section 1983 Defense Representation**

When defense counsel is called upon to represent multiple parties in §1983 litigation, the issues become exceedingly complex and troublesome. One specific context in which the actual or apparent conflict issues may arise is where the attorney is called upon to defend both an individual County employee and the County that employs him in a civil suit for damages. A number of these practical problems were recently addressed in *Sword and Shield Revisited: A Practical Approach to Section 1983* (1998 ABA Section of State & Local Govt. Law).

The interest of a governmental entity defendant may well be in showing that the defendant employee did not act in accordance with the established policies, procedures, and customs of the governmental unit, but acted erratically and unpredictably in such a manner that it would be unjustified to impose liability for his actions on the governmental unit. Conversely, the interest of the employee may be best served by showing that he followed an accepted, standard, approved course of conduct sanctioned by the policies of the governmental unit in question.

A less common but just as troublesome example is that of the governmental employee who has clearly committed an unlawful act for which the plaintiff seeks to impose liability on this individual's employer on "a failure to train" basis. One possible strategy for defending the governmental unit would be to attempt to defeat causation by establishing that the employee was so bent on committing misconduct that no amount of training would have made any difference. Of course, such an argument could not be made by an attorney who also represents the individual employee. *Id.* at 22.

Before local government counsel decides to undertake multiple representation, a frank analysis must be

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<sup>30</sup>Cf. *Twin City Fire Insurance Company v. City of Madison*, 309 F. 3d 901 (5<sup>th</sup> Cir. 2002)(City's insurer provided a defense subject to a reservation of rights and appointed an attorney to defend the City with respect to claims in state and federal court based on the City's impact fee ordinance (IFO). 5<sup>th</sup> Circuit held that summary judgment should not have been granted to the insurer due to fact issues over whether the insurer breached or discharged its duty to defend, was grossly negligent in mishandling the claim, and was estopped from denying liability where the same attorney defending the City sent status reports containing confidential information to the insurer. The 5<sup>th</sup> Circuit rejected the notion that Madison's city attorney bore responsibility for discerning whether a conflict existed, since it was the insurer's choice to defend under an ROR and it created the conflict of interest by choosing to furnish legal representation for the claims with the single law firm. "One might find that Madison learned only within that month before trial that its insurer had hired counsel to defeat coverage, was using Levy's work product against Madison, and was suing Madison for the costs of defense." *Id.* at 908).

undertaken to determine whether there are any obvious or perhaps subtle ways in which the interests of these multiple clients may diverge. The wrong time to begin that analysis is at the conclusion of litigation in which defense counsel is facing a number of disgruntled individual defendants and potential questions of compromised advocacy resulting from the joint representation. While full disclosure and client consent are indispensable in such cases, constant communication with the client and thorough documentation of the file are just as important:

It may be possible to avoid the worst potential conflicts through governmental unit decisions to fully indemnify its individual employees in some types of case situations, or through stipulations as to some issues which could otherwise create conflicts. However, even these situations may expose defense counsel to increased risks, and therefore call for careful communication and file documentation about such things as informing all clients of litigation risks and settlement offers, diligence in following up on evidentiary leads suggested by clients. It is clear that mere boilerplate, pro forma “disclosure” and “consent” are not enough. In addition to exercising caution about the acceptance of joint representation in the first place, counsel should also remain on the alert as the case develops for unexpected circumstances that increase the seriousness of potential conflicts, and that may mandate the hiring of separate counsel, even if it must be at the expense of the governmental unit. *Id.* at 23.

Patricia E. Salkin, Associate Dean and Director of the Government Law Center of Albany Law School, presented a Survey of Issues in Ethics for Municipal Lawyers in 1999, before the ABA Section of State and Local Government Law in Kansas City, Missouri, in which she addressed cases arising from conflicts of interest relating to personal financial gain, as well as ethical issues arising from conflicting duties owed to clients and employers:

In *State of New Jersey v. Clark*, 735 A.2d 1 (N.J. 1999), for example, the Court held that a Defendant’s constitutional right to a fair trial was violated when his defense counsel was also employed as a part-time municipal prosecutor in the same County where the trial took place, the Court noting that “what happened here can undermine public confidence in our system of government and in the independence and integrity of the legal profession.”

In a case focusing on “who is the client,” the Court in *Salt Lake County Commission v. Salt Lake County Attorney Douglas R. Short*, 1999 WL 561538 (Utah 1999), held that an elected County Attorney had an attorney-client relationship only with the County as an entity, and not with each individual commissioner. In examining the applicable requirements of state law for County attorneys, including the statutory designation of the County attorney as “the legal advisor of the Board of County Commissioners,” the Court concluded that there was no explicit statutory suggestion that the County Attorney had an attorney-client relationship with each individual commissioner or with the commission as a group of individuals, and further noted that the County Attorney performed a dual role, acting as an attorney for the County and in carrying out his statutory duties as an elected official. Turning to the question of when a County Commission may hire outside, independent counsel, the Court stated:

The County must be represented by the elected attorney in all matters falling within the scope of the attorney-client relationship unless the person cannot act, either because of a refusal to do

so, an incapacity, or a disqualification, as by a conflict of interest. *Id.*

In an election contest brought by an unsuccessful candidate for the office of Mayor, the Mississippi Supreme Court in *Esco v. Scott*, 735 So. 2d 1002 (Miss. 1999), held that an attorney who was “of counsel” to the law firm of the attorney representing the unsuccessful candidate was ineligible to make the required statutory certification of a practicing attorney that an independent assessment of a claim had been made. Miss. Code Ann. §23-15-927 (1986) requires certification by two practicing attorneys, as a condition precedent to bringing such an election contest, that the attorneys have each “fully made an independent investigation into the matters of fact and law upon which the protest and petition are based and that after such investigation they verily believe that the said protest and petition should be sustained and that the relief prayed therein should be granted.” In concluding that the “of counsel” relationship triggered disqualification, the Court stated:

Given the close, regular, personal relationship between attorney and law firm contemplated by the ABA where the “of counsel” designation is employed, ...an attorney listed as being “of counsel” on the letterhead of the firm representing the contestant...is not eligible to make the certification required by the election code. *Id.* at 1005.