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SUPPLEMENT TO STATEMENT OF THE CASE
SUPPLEMENTAL AND COUNTER-STATEMENT OF FACTS

The facts relevant to the Edmonds-Healy file dispute

On May 20, 2002, George W. Healy, IV, George W. Healy, IV & Associates,[1] undertook to prosecute claims by Edmonds against Edward A. Williamson, Edward A. Williamson, P.A., and, ultimately, Michael Miller. *Affidavit of Lisa Edmonds, ¶¶ 4-6* (pp. 000002-000003, Supplemental Record Excerpts).[2] Healy asserted the claims by Edmonds against Williamson in a civil action Healy filed in the Circuit Court of Kemper County that the Circuit Clerk assigned Cause No. 2002-CV-42. Later, Healy asserted claims against Miller in a civil action Healy filed in the Circuit Court of Kemper County that the Circuit Clerk assigned Cause No. 2004-CV-17. The trial court consolidated Cause No. 2002-CV-42 with Cause No. 2004-CV-17. The consolidated action proceeds under Cause No. 2002-CV-42.

Between May 20, 2002, and September 30, 2005, Healy represented Edmonds in Cause No. 2002-CV-42. *Edmonds Affidavit ¶ 7* (p. 000003, Supplemental Record Excerpts). During the course of representing Edmonds in Cause No. 2002-CV-42, Healy created, and maintained, a "case file" concerning Cause No. 2002-CV-42. *Edmonds Affidavit ¶ 8* (p. 000003, Supplemental Record Excerpts).

More than nine months after Healy began representing Edmonds, Healy undertook to

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[1] In this brief, Lisa Edmonds and Larry Edmonds will refer to George W. Healy, IV, and George W. Healy, IV & Associates jointly or collectively as "Healy."

[2] Hereafter, Edmonds will cite to this affidavit as "*Edmonds Affidavit ¶ ___*"; *Exhibit 1, Affidavit of Lisa Edmonds*. Hereafter, Edmonds will cite to exhibits to *Edmonds Affidavit* as "*Exhibit ___, Edmonds Affidavit.*"

represent Carolyn Williams on claims against Williamson.[3]

Almost three years after Healy began representing Edmonds, Healy began representing Alonzo Washington and Janice Washington.[4] Healy began representing the Washingtons sometime about February, 2005.[5]

Likewise, almost three years after Healy began representing Edmonds, Healy began representing Annie Haynes. Healy began representing Haynes about March, 2005.[6]

During the time Healy represented both Edmonds and Williams, Healy never sought from Edmonds permission or authority to "unify" the Edmonds file with the Williams file. More important, during the time Healy represented both Edmonds and Williams, Edmonds never gave Healy permission or authority to "unify" the Edmonds file with the Williams file.

During the time Healy represented both Edmonds and Washington, Healy never sought from Edmonds permission or authority to "unify" the Edmonds file with the Washington file. More important, during the time Healy represented both Edmonds and Washington, Edmonds never gave Healy permission or authority to "unify" the Edmonds file with the Washington file.

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[3] The docket in *Carolyn Williams v. Edward A. Williamson, Individually, Edward A. Williamson, P.A., and Michael Miller,* Civil Action No. 4:03cv88, United States District Court for the Southern District of Mississippi, Eastern Division, shows Healy filed the complaint that began the civil action on February 13, 2003.

[4] In this reply memorandum, for convenience and ease-of-reference, the Edmondses will refer to Alonzo Washington and Janice Washington jointly or collectively as "Washington."

[5] The docket in *Alonzo Washington and Janice Washington v. Edward A. Williamson, Individually, Edward A. Williamson, P.A., and Michael Miller,* Civil Action No. 251-05-112 CIV, Circuit Court of Hinds County, Mississippi, shows Healy filed the complaint that began the civil action on February 11, 2005.

[6] The docket in *Annie Haynes v. Edward A. Williamson, Individually, Edward A. Williamson, P.A., and Michael Miller,* Civil Action No. 3:05cv00186, United States District Court for the Southern District of Mississippi, Jackson Division, shows Healy filed the complaint that began the civil action on March 21, 2003.

During the time Healy represented both Edmonds and Haynes, Healy never sought from Edmonds permission or authority to "unify" the Edmonds file with the Haynes file. More important, during the time Healy represented both Edmonds and Haynes, Edmonds never gave Healy permission or authority to "unify" the Edmonds file with the Haynes file.

On September 30, 2005, this Court heard a motion that Healy had served on September 21, 2005. In that motion, Healy sought permission from the trial court to withdraw as counsel for Edmonds. *Edmonds Affidavit ¶¶* 9-10 and 12; *Exhibits 2 and 3, Edmonds Affidavit* (pp. 000003, 000004, 000010, and 000014, Supplemental Record Excerpts). The trial court granted Healy's motion and entered an order on October 6, 2005, permitting Healy to withdraw as counsel for Edmonds. *Edmonds Affidavit ¶ 11-12; Exhibit 2, Edmonds Affidavit* (pp. 000003-000004 and 000010, Supplemental Record Excerpts).

After October 6, 2005, Edmonds demanded that Healy deliver the original "case file" to a designee. *Edmonds Affidavit ¶¶ 13-14* (p. 000004, Supplemental Record Excerpts). Healy refused to do so. *Edmonds Affidavit ¶ 15-16; Exhibit 4, Edmonds Affidavit* (pp. 000004 and 000016, Supplemental Record Excerpts). Healy refused to do so saying that "I believe that Mr. and Mrs. Edmonds have all of the documents." *Exhibit 4, Edmonds Affidavit* (p. 000016, Supplemental Record Excerpts). When refusing to deliver the original "case file," Healy claimed that "[Edmonds] picked up a great majority of the documents from the Federal Court in Jackson, Mississippi and reviewed them thoroughly before they delivered copies to this office." *Exhibit 4, Edmonds Affidavit* (p. 000016, Supplemental Record Excerpts). Healy also claimed that "we gave them access to the entire file on at least 10 occasions and they were given access to our copy machine." *Exhibit 4, Edmonds Affidavit* (p. 000016, Supplemental Record Excerpts). Healy went on to claim "[Edmonds has] copied each and every document that [Edmonds]

wanted." *Exhibit 4, Edmonds Affidavit* (p. 000016, Supplemental Record Excerpts). According to Healy, Edmonds "actually spent the night over here on my sailboat on occasions and copied whatever documents [Edmonds] wanted." *Exhibit 4, Edmonds Affidavit* (p. 000016, Supplemental Record Excerpts). Finally, Healy said, "[Edmonds has] also been given copies or made copies themselves of all deposition transcripts." *Exhibit 4, Edmonds Affidavit* (p. 000016, Supplemental Record Excerpts).

In the face of Healy's refusal to deliver to Edmonds property that Edmonds had a right to receive from Healy following the termination of Healy's representation of Edmonds, Edmonds filed a motion seeking an order from the trial court compelling Healy to deliver the original "case file" to Edmonds or the designee of Edmonds. After briefing and hearing, the trial court effectively denied the motion by Edmonds. Rather than order Healy to deliver all of the original contents of the "case file" to Edmonds, the trial court ordered Healy to allow Edmonds access to the file to copy whatever portions of the "case file" Edmonds wanted. Edmonds would have to pay for any copies Edmonds made. The trial court also ordered Healy to return all original papers and property Edmonds had delivered to Healy.

LEGAL ARGUMENT

I. The applicable law requires Healy to deliver to Edmonds or a designee of Edmonds all of the original contents of the "case file"

Healy cites no statute to support his position. Healy cites no rule of professional conduct to support his position. And Healy cites no decisional law to support his position.

Rather, to support his position, Healy relies exclusively on Ethics Opinion No. 144 of the Mississippi State Bar.

Healy misplaces his reliance on this ethics opinion for two reasons. First, by its nature,

an ethics opinion addresses an ethics issue, as opposed to a legal issue. Second, ethics opinions are advisory in nature, as opposed to adjudicatory in nature.

Ethics Opinion No. 144 addresses an issue of ethics and only an issue of ethics. Ethics Opinion No. 144 itself recognizes that "[t]he ownership of the specific items contained in a file is a matter of law."

But, this case involves a legal issue. This case raises the question whether Edmonds owns the "case file" relating to Cause No. 2002-CV-42 and, consequently, Healy has a legal duty to return to Edmonds all or merely part of the "case file." Because this case raises the question whether Edmonds owns the "case file" relating to Cause No. 2002-CV-42 and Ethics Opinion No. 144 itself recognizes that "[t]he ownership of the specific items contained in a file is a matter of law," Ethics Opinion No. 144 simply fails to address, let alone resolve, the issue in this case.

Moreover, the By-Laws of the Mississippi Bar preclude Ethics Opinion No. 144 from addressing the legal issue before this Court. The Bylaws of the Mississippi Bar prohibit "the Ethics Committee...[from rendering] opinions on questions of law..." *ART. 9, §§ 9-12(e), BYLAWS OF THE MISSISSIPPI BAR.* Therefore, by its own terms, Ethics Opinion No. 144 fails to provide any authority, let alone persuasive or controlling authority, on the legal issue before this Court.

The Ethics Committee may only issue advisory opinions. The Mississippi Bar prohibits its Ethics Committee from issuing ethics opinions, such as Ethics Opinion No. 144, that address any issue involved in pending litigation. The Bylaws of the Mississippi Bar prohibit "the Ethics Committee...[from rendering] opinions as to the ethics or conduct of a lawyer in a matter in which such conduct is involved in pending litigation, which may determine or substantially affect the determination of the ethical question involved..." *ART. 9, §§ 9-12(f), BYLAWS OF THE*

MISSISSIPPI BAR.

In stark contrast to the citation by Healy of no legal authority for his position, the Edmonds brief cited overwhelming decisional law from jurisdictions other than Mississippi that have considered the issue of ownership of a lawyer's "case file" in various circumstances, including circumstances similar to those involved in this case.

"Simply put, [Edmonds] is entitled to the entire file...and...[Healy] is not entitled to refuse to turn over that file or any portion thereof." *Matter of Kaleidoscope, Inc.*, 15 B.R. 232, 241 (Bankr.N.D.Ga. 1981), *rev'd on other grounds,* 25 B.R. 729 (N.D.Ga. 1982). "[T]he entire contents of the files belong to [Edmonds]," *Resolution Trust Corp. v. H—, P.C.*, 128 F.R.D. 647 (N.D.Tex.1989), including those contents of the file of which Edmonds may already have a copy and those contents of the file Healy needs in conjunction with representing clients other than Edmonds.

Healy suggests, rather than argues that Edmonds has no right to the entire "case file" because Healy commingled documents properly forming a part of the Edmonds "case file" with documents Healy used on other cases for other clients having claims against Williamson similar to the claims Healy was prosecuting for Edmonds against Williamson. Healy states that "Healy ultimately filed four parallel lawsuits against Attorney Williamson and others on behalf of the Edmonds and other clients. Discovery in the four cases was consolidated. The various clients shared the cost of discovery, resulting in a single unified file in Attorney Healy's office which included thousands of documents pertaining to the claims of all of Attorney Healy's clients." *Brief of Appellee – George W. Healy, IV*, p. 1 (Statement of the Case). Healy thereafter in his brief never argues in his brief that the law treats "a single unified file," a "commingled" file, differently than it treats other "case files." Healy thereafter in his brief never cites any authority

to support the position he implies, that the law treats "a single unified file," a "commingled" file, differently than it treats other "case files."

Healy cites no authority to support the position he implies, that the law treats "a single unified file," a "commingled" file, differently than it treats other "case files" because no such authority exists.

Rather, the authority that addresses "commingled" "case files" contradicts the position Healy implied but never explicitly argued.

The court in *Matter of Kaleidoscope, Inc.* addressed a similar claim, saying "the Court does not believe that when an attorney jointly represents more than one client in a transaction, the attorney can selectively choose to remove documents from the legal files created or amassed during that joint representation either on the grounds that the legal files are the property of [another] of the jointly represented clients..." 15 B.R. at 244. The court continued discussing this issue and concluded "that with regard to legal files created or amassed by an attorney during the course of joint representation of more than one client, the entire contents of those legal files belong jointly to the clients in question, with each having an undivided ownership interest in, and equal right of access to, all of those files." 15 B.R. at 244.

The circumstances in *Matter of Kaleidoscope, Inc.* bear striking resemblence to the circumstances in this case. The lawyers and law firm in *Matter of Kaleidoscope, Inc.* initially represented Kaleidoscope, Inc. "in the creation and implementation of a so-called 'Stock Redemption Agreement'..." 15 B.R. at 235. Later, the lawyers and law firm "participated, on behalf of [Kaleidoscope, Inc., two shareholder-principals of Kaleidoscope, Inc., and a later-formed corporation, MOA Corporation], in the negotiation, creation, implementation, and execution of [a certain business] transaction..." 15 B.R. at 235. After Kaleidoscope, Inc. filed

for bankruptcy protection and the trustee sought the files the law firm amassed when representing Kaleidoscope, Inc., the law firm "offered to make substantial portions of these legal files available to the Trustee and his counsel for inspection, but have refused to turn over the originals of these files." 15 B.R. at 237. Initially, the law firm "asserted, in its own right, that it has title to all of these files, and its former client, Kaleidoscope (or the legal successor to the property rights of Kaleidoscope, the Trustee), has no proprietary interest in these legal files." 15 B.R. at 237. "Alternatively, [the lawyers and law firm asserted] that even if title to the legal files might otherwise reside with the Trustee, as a factual matter [the lawyers and law firm had] co-mingled these legal files with the legal files of its other former clients...(presumably as a result of the joint representation of these persons, along with Kaleidoscope, in the so-called "Kaleidoscope transaction")..." 15 B.R. at 237. Thus, "according to [the lawyers] it is virtually impossible to separate the "Kaleidoscope" files from the other files." 15 B.R. at 237.

After rejecting the claim the lawyers owned the files, the court considered the commingling claim and its effect on the obligation of the lawyers to turn over the files. In rejecting the claim of "work product," as a prelude to the court's consideration of the commingling issue, the court said, "[t]o again emphasize the simple and all-important fact in this situation – an attorney is in a fiduciary relationship to his client, owing the highest duty of good faith and diligence, and has no right or ability to unilaterally cull or strip from the files created or amassed during his representation of that client documents which he determines the client is not entitled to see. The client is either entitled to all of the file or none of it." 15 B.R. at 244. The court continued by saying, "[m]oreover, the Court does not believe that when an attorney jointly represents more than one client in a transaction, the attorney can selectively choose to remove documents from the legal files created or amassed during that joint representation...on the

grounds that the legal files are the property of the other of the jointly represented clients..." 15 B.R. at 244. "Rather, the Court believes that with regard to legal files created or amassed by an attorney during the course of joint representation of more than one client, the entire contents of those legal files belong jointly to the clients in question, with each having an undivided ownership interest in, and equal right of access to, all of those files." 15 B.R. at 244.

According to Healy, this case involves a joint representation of his four separate clients, at least a joint representation on discovery of the separate claims. Healy contends that "[d]iscovery in the four cases was consolidated. The various clients shared the cost of discovery, resulting in a single unified file in Attorney Healy's office which included thousands of documents pertaining to the claims of all of Attorney Healy's clients." *Brief of Appellee – George W. Healy, IV*, p. 1 (Statement of the Case). Accepting Healy's contention concerning this factual matter, the entire contents of the part of the "case file" constituting the documents produced by Williamson during discovery "belong jointly to the clients in question, with each having an undivided ownership interest in, and equal right of access to, all of those files." 15 B.R. at 244.

Thus, Healy must provide Edmonds with the entire contents of the part of the "case file" constituting the documents produced by Williamson during discovery. Edmonds acknowledges that to permit Healy to discharge his duties to clients other than Edmonds, Healy needs to retain a copy of the entire contents of the part of the "case file" constituting the documents produced by Williamson during discovery.

II. The law requires Healy to pay for any copy of the "case file," or of any part of the "case file," Healy retains for his own purposes, including the purpose of discharging obligations he owes jointly represented clients other than Edmonds

Just as Healy cited no statute to support his position concerning the issue involving the

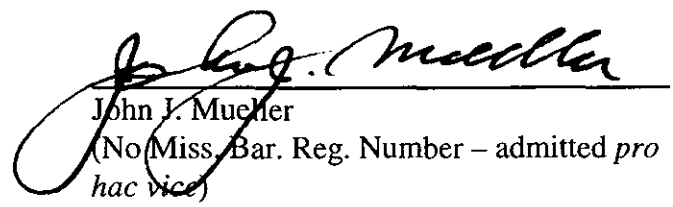
ownership of the "case file," Healy cites no statute to support his position concerning this issue. Just as Healy cited no rule of professional conduct to support his position concerning the issue involving the ownership of the "case file," Healy cites no rule of professional conduct to support his position concerning this issue. And just as Healy cited no decisional law to support his position concerning the issue involving the ownership of the "case file," Healy cites no decisional law to support his position concerning this issue.

Rather, to support his position concerning this issue, Healy again relies exclusively on Ethics Opinion No. 144 of the Mississippi State Bar.

Again, Healy misplaces his reliance on this ethics opinion for the same two reasons he misplaced his reliance on this ethics opinion to support his position concerning the issue involving the ownership of the "case file."

But, this issue, like the issue involving the ownership of the "case file," is a legal issue.

Succinctly stated, under the law, Healy, as opposed to Edmonds, must bear the cost of the copies of the documents Healy retains to discharge his obligations to clients other than Edmonds. *Averill v. Cox*, 45 N.H. 328, 339, 761 A.2d 1083, 1092 (N.H. 2000) ("We agree with those jurisdictions that require the attorney to bear the expense of retaining a copy."). Thus, Healy must provide Edmonds with the entire contents of the part of the "case file" constituting the documents produced by Williamson during discovery at no cost to Edmonds.



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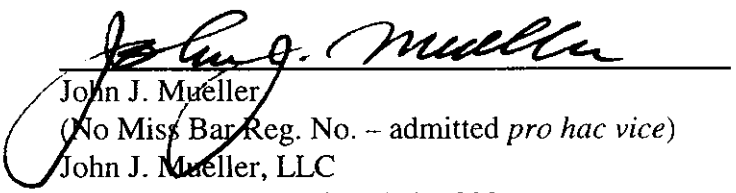
CERTIFICATION BY COUNSEL OF MAILING OF BRIEF AND RECORD EXCERPTS

John J. Mueller certifies that today, February 19, 2008, I deposited with DHL Courier a package addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, Gartin Justice Building, 450 High Street, Jackson, Mississippi 39201, containing:

1. the original of Brief For Appellants Replying to "Brief Of Appellee George W. Healy, IV;" and

2. four photocopies of Brief For Appellants Replying to "Brief Of Appellee George W. Healy, IV."



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I certify that by ordinary U. S. mail, postage pre-paid, I served a copy of this reply brief on:

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Dated: February 19, 2008

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MS BAR FOUNDATION

ARTICLE ONE

CREATION, MEMBERSHIP AND GOVERNMENT

1-1. Creation. The Mississippi Bar (the Bar) has been created by the State of Mississippi. These Bylaws are adopted pursuant to authority from the State of Mississippi and are at all times subject to the Laws of the State of Mississippi. In case of any conflict between these Bylaws and any existing or future laws of the State of Mississippi, these Bylaws shall yield to such law.

1-2. Membership. The Membership of the Bar is as provided by law. All persons duly admitted to practice law in the State of Mississippi shall be members of the Bar unless such member-ship is terminated as provided by law.

1-3. Government. The Bar shall be governed by a Board of Commissioners (the Commissioners) and as further provided herein.

1-4. Purpose. The Purpose of the Bar shall be:

(a) to promote improvements in the administration of justice;

(b) to improve the delivery of legal services;

(c) to provide leadership in the improvement of the law;

(d) to increase the public's understanding of the law and the role of the legal profession;

(e) to promote service to the public by members of the Bar;

(f) to assure the highest standards of professional competence and ethical conduct;

(g) to serve as the state representative of the legal profession;

(h) to enhance the professional growth of the members; and

(i) and to uphold the honor, dignity and integrity of the legal profession.

ARTICLE TWO

MEETINGS OF THE YEAR

2-1. Annual Meeting. The Annual Meeting of the Bar shall be its Convention and shall be held at a time and place selected by the Commissioners. At the Annual Meeting the President shall report to the members of the Bar.

2-2. Special Meetings. Special Meetings of the Bar may be called at any time (a) by the President, with the concurrence of a majority of the Commissioners, (b) by a majority of the Commissioners or (c) by 100 members of the Bar. The call of any Special Meeting shall state the time and place of the special meeting, and the business proposed to be transacted at such meeting.

2-3. Mid-Winter Meeting. The President, in his discretion, may call a Mid-Winter Meeting of the Bar at a time and place of his designation. At the Mid-Winter Meeting, any business, except amendment of these Bylaws, elections, or reversal or nullification of policy statements issued by the Bar may be transacted.

2-4. Notice of Meetings of the Bar. The Secretary of the Bar shall give notice of any meeting of the Bar to all members. Such notice shall be mailed to all members not less than 15 nor more than 45 days prior to the beginning of the meeting, or such notice may be published at least one time in any official publication of the Bar in general circulation among its members.

2-5. Parliamentary Procedure. The President may prescribe time limits for debate and no person shall be heard more than twice on the same subject. Except as provided herein the most recent edition of Roberts Rules of Order shall govern in all questions of Parliamentary Procedure.

2-6. Resolutions. Resolutions modifying policy statements of the Bar previously adopted by the Board of Commissioners may be presented to the membership for approval at the Annual meeting of the Bar or at any special meeting of the Bar called specifically for that purpose. Subject to the requirements of Section 9-16, any such resolution shall require the vote of a majority of those members present and voting for passage.

ARTICLE THREE

BOARD OF COMMISIONERS

3-1. Powers and Duties. The Commissioners shall be the executive agency of the Bar and shall have the powers and duties set forth in Article 3 of Chapter 3 of Title 73, Mississippi Code, 1972 (Section 73-3-103 et seq.). The Commissioners:

(a) shall make such regulations, not inconsistent with law, as shall be necessary and proper for the protection of the property of the Bar and for the preservation of good order and the conduct of its affairs;

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(b) shall direct the manner and the purposes for which all funds of the Bar shall be disbursed, provided, however, the Commissioners shall have no authority to incur liability for any debts in excess of the amount of the treasury of the Bar not already appropriated;

(c) may adopt resolutions and take other actions which reflect statements of policy on behalf of the Bar; and

(d) subject to the provisions of Article 10, take such other actions necessary and proper for the effective governance of The Mississippi Bar and for effectuation
of the purposes of the Bar. In all its actions, the Commissioners shall speak on behalf of The Mississippi Bar. The Commissioners shall keep a record of their proceedings.

3-2. Number and Term of Commissioners. Each circuit court district shall be entitled to one Commissioner for every 400 members of the Bar, or a fraction thereof, within that district as noted on the official rolls of the Bar as of August 1 of each year, but in no event shall any circuit court district have more than five (5) elected Commissioners; provided however, that there shall be at least one Commissioner from each circuit court district in the State. In addition, there shall also be one (1) Commissioner from the state at large who shall be an African-American lawyer. This Commissioner shall be elected by African-American lawyers in the state. Each Commissioner shall be elected for a term of three (3) years and shall either reside in or have his principal place of business in the Circuit Court District that he/she is elected to serve during such term. One-third of the Commissioners shall be elected each year. No person shall serve two (2) successive terms as Commissioner. The term of each Commissioner shall commence at the adjournment of the Annual Meeting of the Bar next following his election and expire at the adjournment of the Annual Meeting of the Bar at which the election of his successor occurs. The President, the First Vice President/ President Elect, the Second Vice- President, and the Immediate Past President of the Bar and the President and President-Elect of the Young Lawyers Division of the Bar shall also be Commissioners.

3-3. Special Meetings. Special Meetings of the Commissioners may be called by the President and shall be called by him upon the request in writing of a majority of the Commissioners. Notice of the time and place of any special meeting shall be mailed to the Commissioners for a reasonable time prior thereto, not less than seven (7) days, if practicable.

3-4. Quorum. At all meetings of the Commissioners a majority of the entire membership shall constitute a quorum for action upon any questions that may come before the Board except as may otherwise be provided by statute or these Bylaws.

3-5. Action by Commissioners Without Assembly. The Commissioners may transact business by correspondence which is intended to include, by way of example and not limitation, telephone, mail, e-mail, facsimile, and video conferencing without the necessity of actual assembly provided that a majority of the Commissioners confirm such action in writing.

3-6. Executive Committee. The Board of Commissioners shall have an Executive Committee which shall be composed of the President, First Vice President, President-Elect, Second Vice President, Past President, President of the Young Lawyers Division and two (2) Commissioners appointed by the Board. The Executive Committee shall have the power to act for the Commissioners between meetings of the Board of Commissioners. The Executive Committee shall take no action that would be in conflict with previous policy of the Board, nor take any action that would effectively change or alter a previous position or policy of the Board of Commissioners.

ARTICLE FOUR

ELECTION OF COMMISSIONERS

4-1. Terms of Office. Upon the creation of additional circuit court districts or consolidation or realignment of existing circuit court districts, or upon the entitlement of any circuit district to additional Commissioners as provided in Section 3-2 above, the terms of Commissioner shall be adjusted so that approximately one-third of the Commissioners are elected each year and that the terms of the Commissioners within a circuit court district are staggered.

In the event that any circuit court district is entitled to more than one Commissioner, as provided in Section 3-2 above, any additional Commissioner shall be nominated and elected according to the regular election procedures set forth in these Bylaws, and the term of such Commissioner shall commence at the adjournment of the Annual Meeting of the Bar next following his election.

4-2. Nominating Committee. On or before July 1 of each year, the county bar of each county within a circuit court district having a commissioner whose term of office is scheduled to expire at the adjournment of the next following Annual Meeting of the Bar shall appoint a representative from such county who shall be a member in good standing of the Bar and who shall either reside in or has his principal place of business in that circuit court district as a member of a nominating committee for such circuit court district; provided, however, that in any circuit court district in which there is only one (1) county, such county bar shall appoint four (4) members and in any circuit court district in which there are only two (2) counties, each county shall appoint two (2) members of the nominating committee. Such appointments may be made by the President or by the Board of Directors of a county bar association in accordance with its bylaws. The county bars shall immediately certify such appointments to the Executive Director of The Mississippi Bar. On or before July 15 the President of The Mississippi Bar shall appoint four (4) members to a Nominating Committee to nominate at least one but not more than two African-American lawyers for the state at large district. Also, on or before July 15, the President of The Mississippi Bar shall designate one of such representatives as Chairman of the Nominating Committee. Each Circuit Court District Nominating Committee shall meet on or before August 15 next following its appointment and shall nominate two (2) members of the Bar from that district for the office of Commissioner in accordance with the requirements of Section 3-2 above for the term beginning at the adjournment of the next Annual Meeting of the Bar. The Nominating Committee shall immediately certify such nominations to the Commissioners. If the Nominating Committee of any district fails to certify such nominations as above provided for, the Commissioners shall nominate two (2) members of the Bar from that district and such nominees shall then be the nominees from that district.

4-3. Nominations by Petitions. Any member of the Bar not nominated by the Nominating Committee for the district in which such member lives, may be nominated by petition filed with the Executive Director of the Bar signed by not less than ten (10) members of the Bar in good standing who are shall either reside in or have their principal place of business in such district. Such petition shall be filed on or before December 10 next following the date provided for making nominations by the Nominating Committee, and such petition shall be certified to the Commissioners by the Executive Director.

4-4. Nominations Published. The names of all persons to be nominated shall be published in an official publication of the Bar or mailed to all members of the Bar in the affected districts.

4-5. Election Procedure. The election of Commissioners shall be conducted substantially in the same manner and at the same time as prescribed for the election of the First Vice President/President-Elect.

4-6. Death, Withdrawal, etc. of a Nominee. In the event that a nominee dies, withdraws or becomes unable to serve as a commissioner prior to the certification of final election and there is a remaining nominee, the remaining nominee shall be declared elected. If there is no remaining nominee, the Nominating Committee (or upon default the Commissioners) shall immediately nominate two new candidates from that Circuit Court District and the election shall proceed as provided in these Bylaws. If no votes are received from a circuit court district or the state at large district prior to the voting deadline, the

Commissioners shall elect the commissioner from the circuit court district.

4-7. Vacancies. In the event that a commissioner has been elected and certified as provided in these Bylaws and thereafter dies, resigns or becomes unable to serve or is no longer eligible pursuant to Section 3-2 above, the vacancy in office shall be filled as provided by Section 73-3-135, Mississippi Code, 1972.

ARTICLE FIVE

OFFICERS

5-1. Officers. The Officers of the Bar shall be a President, a First Vice-President/President-Elect, and a Second Vice President.

5-2. President. The President shall preside at all meetings of the Bar and of the Commissioners. He shall have such powers and duties as prescribed in these Bylaws or that may be conferred on him by the Commissioners.

5-3. First Vice-President/ President-Elect. The First Vice President/ President-Elect shall perform the duties of the President upon his absence or inability to act and, in case of death of the President, the First Vice President/President Elect shall become President. He shall automatically become President at the beginning of the next Bar year.

5-4. Second Vice-President. The Second Vice-President shall perform the duties of the First Vice-President upon his absence or inability to act and, in case of he death of the First Vice-President, shall become First Vice-President, but not the President-Elect. The outgoing President of the Young Lawyers Division shall automatically become Second Vice President at the time the President takes office.

5-5. Secretary.

(a) A Secretary, who may be designated as Executive Director shall be elected by the Commissioners and shall hold office for one (1) year.

(b) The Secretary shall perform the duties set forth under Section 73-3-111, Mississippi Code of 1972, Annotated, and in addition, keep a record of all meetings of the Commissioners, and all other meetings of which a record shall be deemed advisable by the Commissioners and shall likewise keep a record of all minutes of the Bar and of all minutes directed by it to be kept. He shall conduct correspondence both of the Commissioners and of the Bar with the concurrence of the Executive Director and President.

(c) The Secretary shall collect and compile all data and information required by the Commissioners, or any committee thereof, or by the Bar in any committee thereof, relative to any investigation, study, or other matter.

(d) The Secretary shall notify all officers of their election, or committee-men of their appointment and shall keep a complete and current role of the members of the Bar which he shall compile as required by law.

(e) The Secretary shall issue notice of all meetings either of the Commissioners or of the Bar.

(f) The Secretary shall perform the duties of Treasurer.

5-6. Treasurer.

(a) The Treasurer shall collect and receive all monies, keeping a correct account thereof and deposit the same in the name of the Bar in such bank or banks as may be approved by the Commissioners. He shall submit an annual report in writing of the financial condition of the Bar, which shall previously have been approved by the Commissioners.

(b) The Treasurer shall, as required by the Commissioners, give such security for the faithful discharge of these duties as the Board may direct.

5-7. Executive Director.

(a) The Executive Director and such assistants as may be needed, shall be appointed annually by the Commissioners upon the recommendation of the President.

(b) The Executive Director shall be in charge of the office of the Bar; perform such duties as may be requested of him by the President and as may pertain to this office; direct and supervise the work of his assistants; serve on all committees ex-officio; and attend in an ex-officio capacity the meetings of the Bar Commissioners.

5-8. American Bar Association Delegates. Subject to the Rules of the American Bar Association, Delegates shall be appointed by the Board of Commissioners provided that no Delegate shall serve more than four (4) consecutive terms. In the event an ABA delegate is unable to attend the House of Delegates meeting, in accordance with the rules of the American Bar Association, the President may appoint an alternate delegate to serve temporarily during the absence of said ABA delegate.

ARTICLE SIX

ELECTION OF FIRST VICE-PRESIDENT AND PRESIDENT-ELECT

6-1. Alternation of Office. The office of First Vice President/President-Elect shall be alternated among the following districts:

District 1 shall consist of the following counties: Alcorn, Attala, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Clay, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Itawamba, Kemper, Lafayette, Leake, Lee, Leflore, Lowndes, Marshall, Monroe, Montgomery, Neshoba, Noxubee, Okitbbeha, Panola, Pontotoc, Prentiss, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tippah, Tishomingo,Tunica, Union, Warren, Washington, Webster, Winston, Yalobusha and Yazoo.

District 2 shall consist of the following counties: Hinds, Madison and Rankin.

District 3 shall consist of the following counties: Adams, Amite, Clairborne, Clarke, Copiah, Covington, Forrest, Franklin, George, Greene, Hancock, Harrison, Jackson, Jasper, Jefferson, Jefferson Davis, Jones, Lamar, Lauderdale, Lawrence, Lincoln, Newton, Marion, Pearl River, Perry, Pike, Scott, Simpson, Smith, Stone, Walthall, Wayne and Wilkinson.

The First Vice President/President-Elect shall be a resident of District 1 for the term 1986-87; of District 3 for the term 1987-88; and of District 2 for the term 1988-89. Thereafter, the First Vice President/ President Elect will be rotated in the same order. For purposes of this section, the residence of the First Vice President/ President-Elect shall be either the county in which he resides or has his principal place of business.

6-2. Nominating Committee. There shall be a Nominating Committee composed of the President, the four (4) Immediate Past Presidents, the two (2) Immediate Past Presidents of the Young Lawyers Division, and six (6) members, two (2) from each district, appointed by the Board of Commissioners. The appointments by the Commissioners shall be made on or before May 31. The President of the Bar shall be chairman of the Nominating Committee. Should he be unable to serve, the committee shall elect a chairman from its membership. The President-Elect shall be an ex-officio non-voting member of the Nominating Committee. The Nominating Committee shall meet on or before August 15 of each year and shall nominate two (2) candidates from the appropriate District for the office of First Vice President/President-Elect with the term beginning at the close of the next Annual Meeting of the Bar. The Nominating Committee shall immediately certify such nominations to the Commissioners.

6-3. Nomination by Petition. Any member of the Bar not nominated by the Nominating Committee who satisfies the requirements of Section 6-1 above, may be nominated by petition filed with the Executive Director of the Bar, signed by not less than twenty-five (25) members of the Bar in good standing. Such petition shall be filed on or before December 10 immediately following the date provided for making nominations by the Nominating Committee, and such petition shall be certified to the Commissioners by the Executive Director.

6-4. Publication of Nominations. The names of all persons nominated together with a brief biographical sketch, shall be published in an official publication of the Bar or mailed to all members of The Mississippi Bar on or before January 1.

6-5. Procedure for Election. The election of the First Vice President/ President-Elect shall be conducted by mail ballot in accordance with Rules of Procedure as adopted by the Board of Commissioners. Only active members of the Bar in good standing shall have the right to vote.

6-6. Run-off Elections. If no candidate receives a majority of the votes cast for First Vice-President/President-Elect, there shall be a run-off election between the two persons receiving the highest number and the next highest number of votes. In this event the Executive Director shall forthwith prepare ballots and voting envelopes for a run-off election as here and above set forth and the same shall be mailed to the membership of the Bar not later than ten (10) days after the results of the first balloting has been determined. The manner and method of voting and the deadline for receiving and counting votes in the event that there is a second primary shall be in accordance with the Rules of Procedure adopted by the Board of Commissioners.

6-7. Contest of Elections. Any nominee desiring to contest an election, shall, within five (5) days after the certification of the person declared elected, or eligible for a second primary election, file with the President a written petition addressed to the Commissioners stating the basis of the complaint. Upon receipt of such petition, the President shall call a special meeting of the Commissioners to hear the complaint, which meeting shall be held within three (3) days from the date the petition is received and at a time and place to be designated by the President. At this hearing, the Board shall consider any evidence in support of the complaint. The decision of the Commissioners shall be announced within forty-eight (48) hours after the closing of the hearing and such decision shall be final.

6-8. Death, Withdrawal, etc. of Nominee. In the event that a nominee dies, withdraws or becomes unable to serve as First Vice President/President-Elect prior to the certification of final election and there be only one remaining nominee, such nominee shall be declared elected. If all nominees die, withdraw or become unable to serve as First Vice President/President-Elect prior to the certification of final election, the Nominating Committee shall immediately nominate at least one additional candidate and the election shall proceed as provided in these Bylaws.

6-9. Filling of Vacancies. In the event that a First Vice President/ President-Elect has been elected and certified as provided in these Bylaws and thereafter dies, withdraws or become unable to serve, the vacancy shall be filled as provided by 73-3-135, Mississippi Code (1972).

ARTICLE SEVEN

DIVISION

7-1. Young Lawyers Division. There shall be a Division of the Bar to be known as the Young Lawyers Division of The Mississippi Bar. It shall assist the Bar in the accomplishment of its purposes and functions promote the advancement of legal knowledge, ethics, prestige and integrity of the Bar among younger lawyers; and make reports and recommendations, as called upon, to the Commissioners. The Young Lawyers Division shall meet at least annually in conjunction with the Annual Meeting of the Bar.

ARTICLE EIGHT

SECTIONS

8-1 Creation and Discontinuance. The Commissioners may create a Section of the Bar at any time. The Commissioners shall give notice of the creation of the Section and the purposes for which it is created to all members of the Bar at least thirty (30) days prior to the Annual Meeting. If the Bar in its convention does not disapprove the Section, it shall come in to existence on the first day of the month next following the termination of the Convention. All Sections shall be responsible to the Commissioners.

8-2. Bylaws of Sections. Each Section may adopt, amend and repeal Bylaws by a vote of 2/3 of its members present at any meeting thereof. The Bylaws of any Section shall not be in conflict with these Bylaws. The initial Bylaws of each Section shall conform to model Bylaws approved by the Board of Commissioners, and no amendment thereto shall be effective without approval by the Board of Bar Commissioners.

8-3. Notice. The Bylaws of any Section shall provide for at least fifteen (15) days notice of any meeting of the Section and for at least fifteen (15) days notice of any proposal to amend or repeal the Bylaws of the Section.

8-4. Meetings. Each Section shall meet at least annually in conjunction with the annual meeting of The Mississippi Bar.

8-5. Officers and Executive Committee. Each Section shall have a Chairperson and such other offices as its Bylaws provide. Each Section shall also have an Executive Committee consisting of the Section officers and such other members as its Bylaws provide.

8-6. Fiscal Year. The fiscal year of each Section shall be the same as the fiscal year of The Mississippi Bar. Each Section shall file with the Executive Director of the Bar within thirty (30) days after the close of its fiscal year and an accounting of the Section's finances for the preceding fiscal year and an annual report which describes the work and activities of the Section during the preceding fiscal year.

8-7. In General. Any member of the Bar shall be entitled to enroll in one or more Sections. No Section shall incur any obligation in excess of funds actually available to it from its own dues and fees unless prior approval therefore is obtained from the Board of Commissioners.

ARTICLE NINE

COMMITTEES

9-1. Appointment. The President shall appoint the members of all committees of the Bar. As nearly as practicable, all committee members shall be appointed for staggered terms.

9-2. Chairmen. The President shall appoint the Chairmen and Vice Chairmen of each committee, whose terms expire (a) when their successors are appointed and (b) after the adjournment of the Annual Meeting of the Bar following such appointment.

9-3. Standing Committees. The Standing Committees of the Bar shall be those that are specified in these Bylaws.

9-4. Ad Hoc Committees. The President, with the consent of the Commissioners, may appoint such ad hoc committees as the Commissioners determine to be necessary or desirable. No ad hoc committee shall be created for a period longer than two years.

9-5. Lay Members of Committees. Upon direction of the Commissioners the President may appoint laymen to be advisory members of any committee. Any lay member of a committee of the Bar shall serve for such term as the Commissioners may provide and shall have the right to vote in the deliberations of the committee if specifically authorized by the Commissioners.

9-6. Reports of Committees. An annual report shall, and interim reports may, be filed by each committee with the President and the Commissioners. The Executive Director shall furnish a copy of such reports together with this section of the Bylaws to every committee chairman upon his appointment as chairman.

9-7. Adjustment of Terms; Filling Vacancies. The President as needed, may adjust terms of appointees to maintain continuity and may appoint additional members for one-year terms. Failure of a member to attend meetings or perform assigned and accepted duties, without reasonable excuse, shall be deemed a resignation, at the discretion of the President. The President shall fill all vacancies for the remainder of the unexpired term.

Standing Committees

9-8. Budget and Finance Committee. (First Vice President/ President Elect, Immediate Past President and four other members, each serving a two-year term). The Budget and Finance Committee shall prepare and present an annual budget to the Commissioners and perform such other related duties as the President may assign.

9-9. Clients' Security Fund Committee. (Six members on three-year terms, two from each district as provided in Article 6-1 of these Bylaws). The Clients' Security Fund Committee shall administer the Client Security Fund in accordance with the resolution creating the same.

9-10. Committee on Professional Responsibility. (Six members on three year terms, two from each district as provided in Article 6-1 of these Bylaws). The Committee on Professional Responsibility shall have the powers and duties provided by the Rules of Discipline for The Mississippi Bar adopted September 7, 1983 by the Supreme Court of Mississippi and 73-3-103 et seq., Miss. Code 1972.

9-11. Bench-Bar Liaison Committee. (Nine members, three-year terms, three from each district as provided in Article 6-1 of these Bylaws). The Court Liaison and Judicial Administration Committee shall maintain and improve relations between the Bar and the state and federal judiciary in Mississippi; shall study and make recommendations regarding improvements in the judicial system and shall perform such other functions as will improve the administration of justice.

9-12. Ethics Committee. (Nine members, three-year terms.) Subject to final approval of the Commissioners, the Ethics Committee shall:

(a) formulate and recommend standards of ethics and conduct in the practice of law as a profession and consider the Code of Professional Responsibility of The Mississippi Bar, and recommend amendments it deems desirable;

(b) upon request, advise or assist local bar associations in their activities in respect to the interpretation of the Code;

(c) be authorized, when consulted by any member or committee of the Bar, or a local bar association to give its informal advisory opinion or its formal interpretive opinion concerning proper professional conduct, but formal interpretive opinions shall not be given until submitted to the members of the committee and approved by a majority thereof, as well as by the Board of Commissioners.

(d) be authorized to adopt, subject to the prior approval of and subsequent alternation by the Commissioners, such rules as it may deem desirable for the methods and procedures to be used in expressing opinions;

(e) not render opinions on questions of law;

(f) not render opinions as to the ethics or conduct of a lawyer in a matter in which such conduct is involved in pending litigation, which may determine or substantially affect the determination of the ethical question involved;

(g) as provided by 73-3-143 (2), Miss. Code 1972, advise any member of the Bar of its opinion as to whether an course of professional conduct understated circumstances is or is not in violation of the Code of Professional Responsibility; and

(h) render opinions involving the ethics or the past conduct of a lawyer upon request only of the Complaints Committee of the Bar or a duly constituted Complaints Committee of a local bar association.

All opinions of the Committee shall be adopted or authorized at a meeting of the Committee and be concurred in by at least a majority of its members; provided that between meetings of the Committee any opinion may be adopted if it be concurred in by at least a majority of the members, providing any non-concurring member shall have considered the opinion and shall not specifically request the discussion of the question involved at a meeting of the Committee. Upon adoption of the formal interpretive opinions in said manner and approval thereafter by the Commissioners, said opinions will be final and be in force and effect. Informal advisory opinions may be overruled by subsequent formal interpretive opinions.

9-13. Insurance. (Six members, three-year terms). The Insurance Committee shall supervise all Bar sponsored insurance programs, receive reports from the Bar agent, and report at least annually to the Commissioners.

9-14. Lawyers and Judges Assistance Committee. (Fifteen members on three-year terms, three from each district as provided in Article 6-1 of the Bylaws and six members from the state at large). The Lawyers and Judges Assistance Committee shall provide 1) assistance to members of the legal profession who suffer from addictive behavior problems; 2) education for the legal profession regarding the disease of addiction, particularly as it affects professional conduct; and 3) protection to the public served by the Bar. The Lawyers and Judges Assistance Committee shall have all powers and duties as provided by Rule

3(g) of the Rules of Discipline for The Mississippi Bar adopted August 1988 by the Supreme Court of Mississippi."

9-15. Public Information Committee. (Twelve members, three-year terms). The Public Information Committee shall maintain and develop programs and resource materials for dissemination to the public concerning the law, the legal profession and our system of justice; shall oversee the Bar's media relations strategy, and shall serve as the Bar's liaison with the media covering the law, the legal profession and our system of justice.

9-16. Resolutions Committee. (Three to five members, one-year term). The Resolutions Committee shall receive, approve, edit or disapprove all resolutions submitted for Bar action; no resolutions may be presented to any meeting of the Bar unless it shall first be referred to the Resolutions Committee at least 30 days prior to such meeting, and unless the Resolutions Committee shall have approved the resolution, without the consent of two-thirds of the members of the Bar who are present and voting at such meeting.

9-17. Unauthorized Practice of Law Committee. (Six to nine members, three-year terms). The Unauthorized Practice of Law Committee shall investigate all claims concerning the unauthorized practice of law in Mississippi. The Committee shall make recommendations to the Board of Commissioners in regard to the authorized practice of law and shall have authority, subject to Board ratification, to take whatever steps are needed to prevent the unauthorized practice of law in Mississippi.

9-18. Women In The Profession Committee. (Fifteen members: three members to serve for three-year terms from each district as provided in Article 6-1 of the Bylaws of The Mississippi Bar, and six members from the state at-large to serve for three year terms.) The goals of the Women In The Profession Committee are to (1) assess and identify a) issues related to the status of women in the legal profession, b) barriers that may prevent women attorneys from full participation in the work, responsibilities and rewards of the profession, c) quality of life issues in the profession which affect both women and men; (2) make recommendations to the Bar for action to create solutions to problems observed by the Committee and to address issues raised by the Committee.

ARTICLE TEN

PUBLIC STATEMENTS

10-1. Policy. No Division, Section, or Committee of The Mississippi Bar (including any governing body or member thereof) shall assume to represent The Mississippi Bar before any legislative body, any court, or any other tribunal, or to the public unless authorized to do so by the Board of Commissioners. No report, recommendation or any action of any such Division, Section, or Committee of The Mississippi Bar, shall be considered as the action of The Mississippi Bar, unless and until such report, recommendation or action has been approved by the Board of Commissioners or the General Assembly in accordance with these Bylaws.

Any reports, recommendations, or other actions of any Division, Section, or any committee of The Mississippi Bar which are not inconsistent with any policy adopted by the Board or General Assembly may be released, announced or published as the action of such Division, Section or committee of The Mississippi Bar, provided such report, recommendation or act:

(a) is germane to the purpose of such Division, Section or Committee;

(b) clearly indicates that it is the action of the Division, Section, or committee only and not the Bar if it does not in fact represent the view or action of the Bar;

(c) does not conflict with the Bylaws or the established policy of The Mississippi Bar; and

(d) is communicated in writing to the Executive Director of The Mississippi Bar in advance of the issuance of the public statement if feasible, or if not feasible, as soon after the issuance of the public statement as practicable.

ARTICLE ELEVEN

AMENDMENTS

These Bylaws may be amended at any Annual Meeting of the Bar or at any special Meeting of the Bar called for that purpose by two-thirds of those present and voting, provided that the Executive Director shall have mailed notice of the proposed amendment to all members of the Bar, or the proposed amendment shall have been published in an official publication of the Bar in either case at least two weeks prior to the meeting at which the amendment is to be voted upon.

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ETHICS OPINIONS

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OPINION NO.144
OF THE MISSISSIPPI STATE BAR

RENDERED MARCH 11, 1988

FEES - A lawyer may contract for any reasonable fee. Special ethical considerations apply to contingent fee contracts.

CLIENT FILE - The right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause. The ownership of specific items in a client's file is a matter of law. However, ethically, the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client.

TERMINATION OF EMPLOYMENT - A lawyer may not ethically prohibit his client from terminating the contract. Likewise, the lawyer may terminate the contract, but ethically, he must take such reasonable steps as necessary to avoid foreseeable prejudice to the client by his withdrawal.

ATTORNEY LIENS - The existence and enforceability of attorney liens (retaining and charging) are matters of law. However, the

ethics of the profession does play a part in the lawyer's determination of whether to seek enforcement of these legal remedies. If the matter is pending, a lawyer may not ethically retain the client's papers or property, if to do so would prejudice the client or his cause. Further, a lawyer should not enforce a retaining lien, unless necessary to prevent fraud or gross imposition by the client.

SUBSTITUTION OF COUNSEL - A substituting lawyer may not accept employment until the substituted lawyer has been notified of his discharge by the client. The substituting lawyer does not owe an ethical duty to the substituted lawyer with regard to any fees.

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

Lawyer wants to develop a contingent fee contract which protects his fee for services and expenses. The proposed contract would provide as follows:

1. Client may terminate lawyer.

2. Upon termination, client agrees, at lawyer's option, to:

a. pay $60.00 per hour and all out-of-pocket expenses, or

b. pay twenty (20%) percent of the total amount of any judgment or settlement received, plus out-of-pocket costs.

3. If lawyer selects option for hourly fee, then until all fees and costs are paid:

a. client cannot obtain another lawyer, and

b. lawyer will retain client files.

4. New lawyer must accept, in writing, the terms and conditions of the discharged lawyer's contract before the discharged lawyer will release the client files.

I. Law or Ethics

The area of fees involves both legal and ethical considerations. The law permits persons to contract with each other on any terms not prohibited by statute or public policy. However, lawyers, as members of a learned profession, have historically considered themselves engaged in more than "a mere money -getting trade" and have imposed upon themselves restraints in the charging and collecting of fees. See ABA Canons of Professional Ethics, canons No 12-14.

Hundreds of ethical opinions and numerous rules dealing with the employment relationship between the lawyer and the client have been written. Several of the more notable areas which have been addressed ethically are:

1. the need for written contracts in contingency fee matters; M.R.P.C. 1.5 and Canon 13

2. the basis for determining what is a reasonable fee; M.R.P.C. 1.5 and Canon 12

3. the means by which a lawyer may collect a fee; Canon 14

4. the splitting of fees between lawyers and non-lawyers; M.R.P.C. 1.5 and Canon 34

5. the depositing of advance payments in trust accounts; M.R.P.C. 1.15 and 1.16(d), and

6. the prohibition against contingency fee contracts for certain types of matters. M.R.P.C. 1.5

Each of these areas involves significant legal issues, and yet the profession has historically involved itself with each area.

Brief History & Purpose
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Perhaps the reason for the profession's involvement lies in the recognition that the relationship between lawyer and client is one of trust and confidence with fiduciary obligations. Wade, 21 La. Law Review 130 (1960). If the profession fails to provide the ethical self-restraint for the protection of the client, then the law must. As a profession, lawyers have sought, by self-governance, to maintain the highest standard so that neither the courts nor the legislatures needed to involve themselves in protecting the client from his own lawyer. The courts, legislatures, and, in recent years, the Federal Trade Commission have sought to provide guidance in cases between lawyers and clients. See 56 ALR 2d 13. The involvement of these branches of government in the relationship between the lawyer and the client has resulted from the failure of the profession to adequately address the issue.

II. Fees

A lawyer may contract for any fee so long as it is not clearly excessive. Formal Opinion ABA No. 190 (Feb. 17, 1939). This early Opinion points out that the profession has not involved itself in fee disputes, unless they were clearly excessive. ABA Canons of Professional Ethics, Canon No. 12 guided lawyers in fixing the amount of the fee and contained six matters which lawyers were to consider in fixing the fee.

This Canon was succeeded by ethical considerations and disciplinary rules which sought to solve specific problems. In most instances, the disciplinary rules mirrored the opinions of courts and amounted to the profession adopting, as ethics, the better-reasoned cases.

The current Mississippi Rules of Professional Conduct 1.5 require that legal fees be reasonable, and following in the pattern of Canon 12, sets out eight factors to be considered in determining the reasonableness of a fee. In addition, Rule 1.5(c) specifically recognizes contingent fee contracts as ethical, except in the areas of domestic relations and criminal defense. However, Rule 1.5(c) places certain ethical limitations on contingency fee arrangements, including the requirement that the agreement be in writing.

The Mississippi Rules do not limit the amount of the contingency contract, but that issue is covered by the general requirement that all fees be reasonable. Only to the extent that the contingency fee is determined to have been unreasonable will the lawyer be involved in a violation of the Rules. The reasonableness issue applies to both the fee earned at the conclusion of the case and to the fee earned by the discharged lawyer prior to its conclusion. Therefore, a termination fee provision in a contract will be judged ethically on the basis of whether or not the provision required the client to pay an unreasonable fee to the discharged lawyer.

The Mississippi Bar has previously adopted the rule that a discharged lawyer in a contingency fee case is entitled to receive a fee based on quantum meruit. See Advisory Ethical Opinion MSB No. 49 (May 4, 1979). This ethical Rule follows the legal rule adopted by most courts. Newman V. Melton Truck Lines, 443 F.2d 896 (1971). However, the current Mississippi Rules of Professional Conduct did not specifically adopt this prior ethical opinion. Therefore, to the extent the prior ethical opinion imposes an ethical requirement of using a quantum meruit basis only in determining a reasonable fee for the discharged lawyer, this committee concludes that the prior opinion should be overruled. Rule 1.5 requires only that the fees be reasonable and does not require the use of a quantum meruit basis in arriving at a reasonable fee. Accordingly, this committee concludes that a lawyer may include in his employment contract any termination fee agreement which does not result in an unreasonable fee. This committee points out that it is concerned with the ethics of the fee which is a matter of reasonableness, and that the courts must determine the enforceability of the fee. The quantum meruit basis of arriving at a fee for the discharged lawyer provides a safe harbor ethically for the lawyer.

III. Attorney Liens

Under the laws of most states, lawyers acquire attorney liens (either retaining or charging) in the course of performing legal services. The issues concerning the enforceability of these liens are generally matters of law, not ethics. Formal Opinion ABA No. 209 (Nov. 23, 1940).

When a lawyer withholds a client's paper and property for the purpose of securing a fee, he is enforcing a retaining lien. As stated above, his right to do this is a legal matter. See cases cited in Mississippi Digest, "Attorney and Client", No. 182.

However, ethics does play a part for the lawyer in deciding when to invoke these legal remedies. A lawyer has an ethical duty to turn over the client's files when requested by the client. Although this duty was not listed as one of the Canons of Professional Ethics, it was stated as Ethical Consideration 2-32 and had at least two disciplinary rules, namely: DR2-110A2 and DR9-102B4. The current Mississippi Rules of Professional Conduct recognize this duty in Rule 1.16(d) where a discharged lawyer is required to:

take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advanced payment which has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

The lawyer considering enforcement of an attorney lien by retaining a file to secure payment of the fee is admonished that "the mere existence of a legal right does not entitle a lawyer to stand on that right if ethical considerations require that he forego it." Informal Opinion ABA No. 1461 (Nov. 11, 1980). As was pointed out in Informal Opinion No. 1461, the enforcement of a retaining lien should be considered on the same basis as suing a client over a fee. Generally, it should only be done if "necessary to prevent fraud or gross imposition by the client". Citing EC2-23.

Prior to adoption of the current Mississippi Rules of Professional Conduct, Mississippi followed the rule that a discharged lawyer must deliver the client file, even if he has not been paid. Advisory Ethics Opinion No. 49 (May 4, 1979) and No. 105 (Sept. 9, 1985). This rule followed the majority view. See Informal Opinion ABA No. 1376 (Feb. 18, 1977). Citing DR9-102(b)(4); Informal Opinion ABA No. 1461 (Nov. 11, 1980); Informal Opinion San Francisco Bar Association 1973-12; Informal Opinion Maryland Bar Association, Maryland Opinions 76-50 March 1, 1976); Informal Opinion Missouri Bar Bulletin May, 1978 (Jan. 6, 1978).

This committee concludes that M.R.P.C. 1.16 modified the prior ethical rules of the Mississippi Bar Association only to the extent that the prior opinions required the unconditional delivery of the file by the lawyer. The current Rule only requires that the lawyer surrender papers and property to which the client is entitled. The Rule recognizes the lawyer's right to retain papers to the extent permitted by law. Thus, the issue is primarily a legal matter concerning the ownership of the items in the file and the legal enforceability of the attorney's lien. However, the ethical issue which the lawyer must weigh in the balance with his legal rights is at what point will the enforcement of his legal right breach his ethical duty under 1.16(d) to "take steps to the extent reasonably practicable to protect a client's interest." Each case will turn on its own facts, and it is not possible to anticipate each situation. Generally, if retaining the client's file prevents the client from obtaining another lawyer or from proceeding with his case in a timely manner, then the lawyer may have breached the ethical duty owed to the client.

IV. Client's File

The ownership of the specific items contained in a file is a matter of law. Informal Opinion ABA No. 790 (Oct. 26, 1964). The client's file consists of the papers and property delivered by the client or which the client caused to be delivered to the lawyer.

DR9-102(b) (4). In addition, the "end product", or in other words, what the lawyer was hired to do, is usually also considered to belong to the client. Wisconsin Bar Bulletin, June 1970 Supplement (Memo Opinion 4-78). On the other hand, the notes and memorandums are usually considered to belong to the lawyer and be his work product. Missouri Bar Bulletin, May 1978, Informal Opinion (Jan. 6, 1978). Contrary opinions can be found which indicate the client has no absolute right to the files. Maryland Opinions Informal Opinion 76-50 (March 1, 1976). This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. San Diego Bar Association, 25 Dicta, May 1978 (Opinion 1977-3). However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.

V. Substitution of Counsel

Almost all Bar associations recognize that a lawyer cannot ethically keep a client from discharging him and hiring another lawyer. Informal Opinion ABA No. 1142 (Jan. 20, 1970). Mississippi recognizes this general Rule in its Mississippi Rules of Professional Conduct 1.16 by implication in Subparagraph (d). However, the implication of the Rule is made specific by the comment:

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment of the lawyer's services.

This committee concludes that the comment was not intended to create a condition on the right of the client to discharge the lawyer. Accordingly, a lawyer may not ethically condition his discharge by the client on the prior payment of all fees. However, the discharge does not terminate the client's liability for the lawyer's services. If the discharged lawyer wishes to sue for breach of contract, he may do so. Informal Opinion ABA No. 834 (April 26, 1965). The ethical issue with regard to the discharged lawyer's fee will ultimately be the reasonableness of the fee. M.R.P.C. 1.5.

VI. Duties of Substituting Lawyer

Ethically, the substituting lawyer should not accept a client until the client has notified the substituted lawyer of his discharge. Informal Opinion ABA 834 (April 26, 1965). A substituting lawyer has no ethical obligation to see that the fee of the substituted lawyer is paid. See Informal Opinion ABA 1142 (Jan. 20, 1970), followed by Maryland Opinion 76-50 (March 1, 1976) and, to a limited extent, followed in Florida Opinion 76-29 (April 26, 1977). A contrary opinion was issued by the Connecticut Bar Association in 53 Connecticut Bar Journal 466 (1979) (Opinion 31, October 11, 1978) where the Connecticut Bar found that, in a contingency fee arrangement, the burden was on the substituting lawyer to protect the fee of the substituted lawyer by either entering into an express agreement prior to taking the case, or by withholding from the client sufficient funds with which to pay the fee.

This committee concludes that, unless the substituting lawyer agrees to take over the client's obligation to the substituted lawyer, then the substituting lawyer owes no ethical duty to the substituted lawyer.

VII. Right of Lawyer to Withdraw

Generally speaking, a lawyer has the ethical right to withdraw from representation of a client and, in some instances, is required to do so. The area is fully covered by M.R.P.C. 1.16. In exercising the right to withdraw, the lawyer should take reasonable steps to avoid foreseeable prejudice caused to the client by his withdrawal. EC 2-32 and DR2-110(a)(2). See also Informal Opinion ABA No. 1455 (June 4, 1980). Although a lawyer has the right of withdrawal, a lawyer is ethically admonished to exercise this right cautiously. Canon 44 required the lawyer to show good cause before withdrawing from representation of a client once he assumed employment. That Canon also reminded lawyers that the consent or desire of the client was not always sufficient, and indeed, M.R.P.C. 1.16(c) reminds lawyers that they shall continue representation notwithstanding good cause if a court requires them to do so. As stated in Canon 44, "the lawyer should not throw up the unfinished task to the detriment of his client, except for reasons of honor or self-respect." A lawyer has a duty to fulfill his employment obligation. Informal Opinion ABA No. 1461 (Nov. 11, 1980). However, in certain instances, the lawyer has an equal obligation to withdraw. DR7-IOI(a)(2). In both instances, the ultimate ethical consideration is for the lawyer to take those reasonable steps necessary to avoid foreseeable prejudice to the client.

VIII. Specific Inquiry

1. Although it is not a per se violation, the provision in the contract allowing the discharged lawyer to select at his option either $60.00 an hour or 20% of the recovery as his fee may result in an unreasonable fee in violation of M.R.P.C. 1.5. Each case will turn on its own facts as to the unreasonableness of the fee. For legal purposes, the courts have adopted the quantum meruit basis for compensating discharged lawyers, and the inclusion of such a provision in the contract would be ethically safe.

2. Although it is not a per se violation, the provision in the contract which permits the lawyer to retain the client's file, even if the case is pending, until all fees and costs are paid may result in a violation of M.R.P.C. 1.16(d), if retaining the file prejudices the rights of the client.

3. The provision which denies the client the right to change lawyers until all fees and costs are paid is a per se violation of M.R.P.C. 1.16.

4. The provision which requires the client to have the substituted lawyer accept the discharged lawyer's contract in writing is a per se violation of M.R.P.C. 1.16. This provision effectively deprives the client of the right to change lawyers. The substituted lawyer is forced to become the surety for the client's obligations to the discharged lawyer. Such a provision will surely chill, if not totally freeze out, the client's ability to discharge the lawyer.

In conclusion, the relationship of lawyers and their clients regarding fees is interwoven with the law and ethics. What is legal may not be ethical, and the mere existence of a legal right does not entitle a lawyer to stand on that right if ethical consideration requires that he forego it. Informal Opinion ABA No. 1461 (Nov. 11, 1980).

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