

**ETHICS OPINION NUMBER 211
OF THE MISSISSIPPI BAR
RENDERED NOVEMBER 18, 1993**

CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS: Counsel may not enter into any agreement which delegates to a third party his or her duty to exercise independent judgment for the benefit of his client.

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

An insurance company has selected counsel to represent an insured under a standard automobile liability policy. There exist no coverage questions nor are there any limits of liability. The insurance company conditions employment of the attorney upon the attorney's agreement that the insurance company will manage and control the litigation and will allow the attorney to prepare the defense i.e., to make independent legal judgments regarding the taking of depositions, the retention of experts and the conduct of pretrial proceedings only upon the approval of the insurer.

The Ethics Committee of The Mississippi Bar has been asked to opine whether an attorney may represent an insured at the request of an insurer upon condition that the insurer and not the attorney will manage and control the defense, i.e., the insurance company will ultimately approve all decisions regarding depositions, retention of experts and other pretrial procedures, notwithstanding the provisions of MRPC 1.8 (f)(2).

An insurance company has selected counsel to represent an insured under a standard automobile liability policy. There exists no coverage questions. There are no limits of liability. The insurance company conditions employment of the attorney upon the attorney's agreement that the insurance company will manage and control the litigation i.e., the attorney will make independent legal judgments regarding the taking of depositions, the retention of experts and the conduct of pretrial proceedings solely upon the approval of the insurer.

MRPC 1.8 (f)(2) reads:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; . . .

Under the provisions of this Rule, a lawyer owes absolute loyalty to his or her client, the insured. In that capacity, the lawyer is duty bound to exercise independent professional judgment for the benefit of the client. We are mindful of the recent decision of the Mississippi Supreme Court regarding the duties of defense counsel to the insurer and insured. *Hartford A.C.C. & Indem. Co. v. Foster*, 528 So.2d 255 (Miss. 1988). We agree and adhere to the finding that "[t]he fact that the insurance contract authorizes the insurance company to employ an attorney to handle the defense of a case in no way impairs or diminishes the duty of the lawyer to the insured client." *Hartford*, 528 So.2d at 268.

Insurers are rightfully concerned with the quality and economy of performance of the counsel they select to fulfill their promise of defense to an insured. The selection of counsel, however, once made, does not further empower the insurer to supplant the independent legal judgment of selected counsel or to interfere, alter or deter the decisions of such counsel in exercise of the attorney's duty to the client.

We therefore, conclude that counsel may not ethically enter into any prohibited transaction that allows a third party insurer to interfere with his or her exercise of independent judgment for the benefit of his client. This finding does not alter or deter the right of the insurance company to exercise reasonable discretion in its choice of counsel. The insurer may exercise its judgment to select counsel that best serves its interests and protects its insureds. Nevertheless, the selected defense counsel owes a client a duty to exercise his or her independent legal judgment for the benefit of the insured. Defense counsel may not waive or ignore that obligation as a matter of law or ethics. Hence, defense counsel may not enter into any agreement which delegates his or her duty to exercise independent judgment to a third party insurer.