ETHICS OPINION NUMBER 229
OF THE MISSISSIPPI BAR
RENDERED NOVEMBER 16, 1995

CONFLICT OF INTEREST - A law firm which is defending insureds of an insurance company may represent a client suing a party insured by that company if that client gives knowing and informed consent to the representation after consultation explaining the implications of the representation and the advantages and risks involved.

We have been requested to render an opinion involving the following facts:

> A law firm has represented clients insured by an insurance company. The law firm has decided to stop accepting cases from the company and has withdrawn from most of the cases it was handling for the company, but still has a few cases which it must finish for the company. Recently, the firm was hired to represent a party in a lawsuit and the firm has discovered that the prospective defendant is insured by that same insurance company.

The question posed is:

> May a law firm which has stopped accepting new cases from an insurance company, but which is still defending some cases insured by the company, represent a client in a suit against a party insured by that same insurance company?

We assume that three facts are present in this situation:

1. That the law firm has ended its ongoing relationship with the insurance company and does not plan to represent the company in the future;

2. That the law firm does not represent the insurance company directly in any matter, but only represents parties insured by the company in pending cases; and 3. That the insurance company will not be a named defendant in the suit to be filed by the law firm.(As will become apparent, of these facts assumed, only the latter two are germane.)

One aspect of the ethical minefield confronting attorneys hired by insurance companies to defend their insureds has been examined at length by the Supreme Court of Mississippi in *Hartford Accident & Indemnity Company v. Foster*, 528 So.2d 255 (Miss. 1988). In *Hartford*, the Supreme Court noted that an attorney hired by an insurance company to defend its insured has both the company and the insured as its clients. Hartford addresses the direct conflict arising when the plaintiff's judicial demand exceeds policy limits, creating potential exposure to the insured, and the plaintiff offers to settle the suit within policy limits.

Although instructive, *Hartford* does not answer the question posed here. We affirm here what was said earlier in Ethics Opinion No. 211 about *Hartford* and the various obligations it imposes:

We are mindful of the recent decision of the Mississippi Supreme Court regarding the duties of defense counsel to the insurer and insured . . . . 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 [insured] client.(In Ethics Opinion No. 211, we held ethically impermissible an attorney's agreement with an insurance company to defend lawsuits against the company's insureds on the condition that the attorney's legal judgment regarding the conduct of the litigation could be implemented solely upon approval by the insurer.)

We must construe the facts presented us in light of *Hartford*'s guidance as well as the provisions of the Mississippi Rules of Professional Conduct, particularly Rule 1.7:

> (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:
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> (1) the representation will not adversely affect the relationship with the other client; and
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> (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.
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> (b) A lawyer shall not represent a client if the representation of that client may be materially limited 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 adverse representation and the advantages and risks involved.

The question is not whether Rule 1.7 applies - clearly it does - but which subpart, (a) or (b), governs the situation we confront. Stated differently, is the representation of the new client directly adverse to the insurance company so that 1.7(a) applies, or is it only such that the lawyer's representation of the new client may be materially limited by the lawyer's responsibilities to another client, the insurance company?

The insurer will not be a named party in the suit to be filed by the law firm; indeed, our Mississippi practice does not provide for direct actions against the insurer as do many other jurisdiction. Likewise, the law firm does not represent the insurer directly in any matter; in the suits in which the law firm still is defending insureds of the company, the insurer is not a party. Depending upon the provisions of the insurance contract, the insurer may have some input into the conduct of those cases so long as that input does not run afoul of the defense lawyers' obligations to the insured. Nonetheless, it is clear both from Hartford and our recent F.I.O. 211 that the lawyers' primary obligations in those matters are to the insureds whom the lawyer has been retained to defend. Based upon the facts presented us, our view of Hartford, and the provisions of Rule 1.7, the Board of Bar Commissioners concludes that the new representation proposed here is not a representation directly adverse to the insurance company. Accordingly, the law firm may ethically undertake or continue that representation if it concludes that the representation will not be adversely affected by the lawyer's responsibilities to the insureds of the insurance company in the other, unrelated matters and if the new client has given knowing and informed consent after consultation. The consultation must include explanation of the implications of the adverse representation and the advantages and risks involved.