

**ETHICS OPINION NUMBER 246
OF THE MISSISSIPPI BAR
RENDERED APRIL 8, 1999**

INDEPENDENCE OF COUNSEL: CONFIDENTIALITY OF INFORMATION: CONFLICT OF INTEREST: An attorney may not ethically enter into any agreement that allows a third party insurer to interfere with the attorney's exercise of independent judgment for the benefit of an insured client and, with respect to that representation, may provide a detailed billing statement to a third party legal auditing service of review only with the informed consent of the insured client and that consent may not be requested by the lawyer if a disinterested lawyer would conclude that the client should not agree to such disclosure.

At the outset, the Committee issues the caveat that the scope of this Opinion is limited in general under the mandate of Article 9-13(e, f and g) of the Bylaws of The Mississippi Bar which prohibit this Committee from rendering opinions involving questions of law, past conduct or pending litigation which may determine or substantially affect the determination of the ethical question involved. Moreover, each opinion is rendered upon the specific factual situation or situations involved with the request for an ethics opinion. Consequently, the scope of this Opinion is limited to whether the proposed course of professional conduct is permissible under the Mississippi Rules of Professional Conduct. Any incidental reference to legal authorities is informational only and should not be taken as an indication of the Committee's interpretation of such authorities, legal issues arising out of the factual situation presented, or legal ramifications of the proposed conduct.

The Ethics Committee has been asked to address the ethical considerations related to the following facts:

An attorney is hired by an insurance carrier to represent its insured. Pursuant to the insurance contract, the attorney is paid by the carrier to provide its insured a defense to a lawsuit filed against the insured. As a condition precedent to representation of the insured, the attorney is required to sign a contract and/or agree to submit to billing guidelines and adhere to litigation management guidebooks which place certain restrictions on the defense of the lawsuit, including discovery, the use of experts and other third party vendors. The guidelines may restrict a second lawyer from working on the case and require pre-approval of time spent on a research, travel and the taking of third party depositions.

Other guidelines may include limitations on time spent doing research and travel time.

In addition, the attorney is required to submit statements for legal services rendered on behalf of the insured to a third party auditing firm for review. The attorney is further required to provide with the statement for services rendered a detailed description of all legal work performed on behalf of the insured including the identities of parties to conversations and correspondence, the subjects of conversations and correspondence, the nature and subject matter of legal research, etc. The attorney is advised by the auditing firm that the degree of detail is necessary to enable the auditing firm to determine whether, in its judgment, the charges for legal services rendered on behalf of the insured are reasonable.

Based on the foregoing factual situation, the Committee has been presented with three (3) questions.

First, whether, without reference to the right of an insured to exercise discretion in its choice of counsel to defend an insured, can any attorney ethically enter into an agreement with an insurer that, written or otherwise, restricts the attorney's exercise of the attorney's independent judgment on behalf of the insured client?

Second, whether an attorney who represents an insured on behalf of an insurer is permitted to provide a detailed billing statement to a third party legal auditing service for review prior to payment of the statement?

Third, whether an attorney who represents an insured on behalf of an insurer may ethically request that the insured client authorize statements to be released to a third party legal auditing service, or provide advice to the insured client regarding such a request?

The first question has, in fact, been previously addressed by this Committee in Opinion No. 211, rendered November 18, 1993. Relying on Rule 1.8(f)(2) of the Mississippi Rules of Professional Conduct which provides that a lawyer shall not accept compensation for representing a client from one other than the client unless there is no interference with the lawyer's independence of professional judgment or with the lawyer/client relationship, the Committee, held that counsel may not ethically enter into any agreement that allows a third party insurer to interfere with counsel's

exercise of independent judgment for the benefit of the insured client. The attorney, though selected by the insurance company, owes a duty to the insured client to exercise his or her independent legal judgment for the benefit of the insured client. The obligation may not be waived or ignored as a matter of law or ethics; thus, the attorney may not enter into any agreement which delegates the attorney's duty to exercise independent judgment to a third party insurer.

The second question, since the decision of the United States Court of Appeals for the First Circuit in *U.S. v. Massachusetts Institute of Technology*, 129 F.3rd 681 (1st Cir. 1997) holding that the University forfeited attorney-client privilege and work-product protection by disclosing billing statements of law firms representing MIT to Defense Department auditors, has become of increasing concern to the legal community, particularly those engaged in representing insureds for insurance companies. The question has previously been considered by the Office of General Counsel of Alabama State Bar, the Florida Bar Staff, the Utah State Bar Ethics Advising Opinion Committee, the Washington State Bar Association., the South Carolina Bar, the Kentucky Bar Association, the North Carolina State Bar, and the Committee on Professional Ethics of the Massachusetts Bar, among others. Relying on the equivalents of Rules 1.6(a), 1.7(b) and 1.8(f)(3) of the Mississippi Rules of Professional Conduct, the Bar Associations that have considered the question have all determined that billing statements may not be furnished to a third party audit service without the consent, and in many cases this is described as the informed consent, of the insured client.

MRPC Rule 1.6 provides in pertinent part, "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 to be disclosed."

MRPC Rule 1.7(b) provides that,

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 interest, unless a lawyer reasonably believes:

1. The representation will not be adversely affected; and
2. The client has given knowing and informed consent after consultation. This consultation shall include explanation of

the implications of the representation and the advantages and risks involved.

MRPC Rule. 1.8(f)(3) provides in pertinent part that,

A lawyer shall not accept compensation for representing a client from one other than the client unless;

3. Information relating to representation of a client is protected as required by Rule 1.6

Addressing the question of the ethical propriety of disclosing billing information to a third party audit service, the Office of General Counsel of the Alabama State Bar in Opinion No. PLO-98-02 held:

It is the opinion of the Disciplinary Commission that disclosure of billing information to a third party billing review company as required by the billing program of the insurance company may constitute a breach of client confidentiality and violation of Rules 1.6 and 1.8(f)(3) and, if such circumstances exist, such information should not be disclosed without the expressed consent of the insured.

The Committee finds the interpretations by our sister Bar Associations of the applicable Rules of Professional Conduct to the issue of whether an attorney representing an insured on behalf of an insurer is permitted to provide a detailed billing statement to a third party legal auditing service for review to be persuasive and we hold that such disclosure may not be made without the informed consent of the insured client.

This brings us to the third question. Given the Committee's opinion that billing statements can be released to a third party legal auditing service only after the informed consent of the insured client, can the attorney ethically request such consent or provide advice to the insured client regarding such a request, in light of the potential conflict of interest between insurer and insured?

As noted by the North Carolina Bar Association in its proposed Formal Ethics Opinion No. 10 dated July 16, 1998:

When the lawyer represents two clients, there is a delicate balance of the rights and duties owed by the lawyer to each client. With respect to the payment of legal fees, the interest of the insurance company and insured are usually not the same. The insurance company usually has a paramount interest in controlling or reducing its defense cost, while the paramount interest of the insured is generally to receive the best possible defense particularly if the claim may exceed the policy limits available for insured's protection. Even when policy limits are adequate, the insured will not generally benefit from the release of any confidential information and the release of such information to a third party may constitute a waiver of the insured's attorney-client or work product privileges. Therefore, in general, by consenting, the insured agrees to release confidential information that could possibly (even if remotely) be prejudicial to her or invade her privacy without any return benefit.

The comments to MRPC Rule 1.7 provides when consulting with and obtaining the consent of the client in conflict of interest cases with respect to material limitations on representation of a client, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent when a disinterested lawyer would conclude that the client should not agree under the circumstances. When the insured could be prejudiced by agreeing and gains nothing, a disinterested lawyer would not conclude that the insured should agree in the absence of some special circumstances. (Alabama and North Carolina Opinions). It follows then that, before the lawyer may seek the informed consent of the insured after adequate consultation, the lawyer must reasonably conclude there is some benefit to the insured to outweigh any reasonable expectation of prejudice or that the insured cannot be prejudiced by a release of the confidential information. The primary concern to the lawyer must be the protection of client confidentiality and the consequences to the client, given the client's informed consent, to the, release of information which may potentially constitute a waiver of the attorney-client or the work product privileges.

In summary, it is the opinion of the Committee that an attorney may not ethically enter into any agreement that allows a third party insurer to interfere with the attorney's exercise of independent judgment for the benefit of an insured client and with the respect to that representation, may provide a detailed billing statement to a third party legal auditing service for review only with the informed consent of the

insured client and that consent may not be requested by the lawyer if a disinterested lawyer would conclude that the client should not agree to such disclosure