

**ETHICS OPINION NO. 266
OF THE MISSISSIPPI BAR
RENDERED NOVEMBER 3, 2022**

CAVEAT: This Opinion is limited strictly to the facts as presented for analysis under Mississippi’s Rules of Professional Conduct. The facts and questions outlined below and the opinion rendered is limited to ethical issues only.

The Ethics Committee of The Mississippi Bar has been asked to render an opinion on the following question and hypothetical:

When settlement of a case requires a release to be signed by a party (“Releasor”), can the attorney representing the Releasee require the signature of the Releasor’s attorney to “approve” or “agree to” the release?

This request referenced releases that the attorney was presumably being asked to sign that included obligations required of the Releasors, such as holding the Releasee harmless, requiring indemnification, reimbursement for claims, etc. The attorney clearly anticipates additional such requests in the future and seeks to determine whether such conduct is a violation of the Mississippi Rules of Professional Conduct.

Applicable Rules

The following Rules of Professional Conduct are applicable to this opinion. The relevant portions of those Rules provide:

Rule 1.2(a)

A lawyer shall abide by a client’s decisions concerning the objections of representation, subject to paragraphs (c), (d), (e) and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter...

Rule 1.7(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...

Rule 1.8(e)

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, ...

Rule 2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Rule 8.4(a)

It is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.

Analysis

The common scenario in Mississippi is:

Plaintiff's lawyer represents Plaintiff against Defendant in a personal injury lawsuit. Plaintiff has received third party benefits to pay for their medical care. The third-party benefit provider is making a subrogation claim against Plaintiff for reimbursement of amounts paid from a settlement or judgment.

In order to settle Plaintiff's case, Defendant sends a release that requires Plaintiff's lawyer to sign. The release contains a provision that Plaintiff and Plaintiff's lawyer agree to indemnify Defendant, and his/her insurers, agents, and lawyers, for any failure to reimburse, or set aside sufficient funds to reimburse, the third-party payer for medical expenses already paid and to hold Defendant harmless for any future liability.

In *Crowley v. Germany*, the Mississippi Supreme Court ruled that the circuit court abused its discretion by forcing lawyers representing the plaintiffs to sign a release of liability after a settlement of a case that stated the attorneys "agreed to" or "approved" the settlement. 268 So.3d 1277, 1278 (Miss. 2018). The Court ruled that if the attorneys representing the plaintiffs signed the release then it could be interpreted as making them a party to the contract, which could subject them to personal liability and/or indemnity obligations. *Id.* at 1279. The Court went on to state that a judgement cannot be enforced "against persons who are not parties to an action." *Id.* at 1280 citing *Commercial*

Bank of Magee v. Evans, 145 Miss. 643, 112 So. 482, 483 (1927). See also *A1 Fire Sprinkler Contractors, LLC v. B.W. Sullivan Bldg. Contractor, Inc.*, 217 So.3d 731 (Miss. Ct. App. 2017).

Given this legal background, the Committee examines the ethical implications of the Requestor's question. Requiring a lawyer to sign a release for "approval" or "agreement" of the terms can put that lawyer in direct conflict with the desires or wishes of their client. Rule 1.2(a) requires a lawyer to "abide by a client's decisions..." If the client wants to settle their case, but their lawyer does not want to sign the release to "approve" or "agree to" the terms because of fears of being bound by any of the terms of the release then the attorney cannot abide by Rule 1.2(a).

Generally, in Mississippi the "approval" or "agreement" sought by the Releasee and their counsel from the Releasor's lawyer is an agreement for indemnification and hold harmless agreements for subrogation interests.

"Agreeing to" or "approving" a release by a lawyer would also make it difficult for said lawyer to abide by Rule 2.1, which requires lawyers to "exercise independent professional judgment and render candid advice." If lawyers in Mississippi have to be concerned with whether they could face the threat of litigation for "approving" or "agreeing to" a release then it is likely the advice they give their clients could be affected, which could be to the detriment of the client. A lawyer prosecuting a case should not be asked to indemnify the other party if a subrogation claim is brought – the lawyer is not a party, and the responsibility should fall on the parties only. Any settlement agreement/release that makes settlement conditioned on the lawyer signing the release is asking said lawyer to violate Rules 1.2(a) and 2.1 of the Mississippi Rules of Professional Conduct. Defense counsel's insistence on such a release would be a violation of Rule 8.4(a).

Lawyers signing releases would also create a clear conflict of interest between the attorney and their client pursuant to Rules 1.7(b) as the lawyer's own interests could be affected. Lawyers should not be in the business of having to decide whether a release is going to negatively affect his relationship with his client in the future.

If a release were entered into by a client (Releasor) and his lawyer that required the lawyer and client to indemnify the Releasee, and a future claim is brought against the Releasee, then the Releasor and his lawyer could be contractually obligated to indemnify the Releasee. Since the client (Releasor) actually received the benefit of the settlement then the lawyer and client would likely have a conflict about who should pay or indemnify – the client or the lawyer. This dispute could easily rise to the level of litigation.

A conflict under Rule 1.7(b) between the lawyer and his client could be waived with the client's informed consent in writing. However, Rule 1.8(e) would also prevent a lawyer from entering into a release with his client because his agreement to indemnify the Releasee for unknown amounts would qualify as "financial assistance" to the client that is contemplated under the rule. Even though the Releasee would be who would be seeking the indemnification, the Releasor, the lawyer's client, is the one that would receive the benefit.

There are 23 state and local bar associations in the United States that have issued ethics opinions stating that it is a violation of their ethical rules for a lawyer to sign a release that calls for the lawyer to agree or approve an indemnification agreement. These include Tennessee, Georgia, South Carolina, Virginia, and Florida.

Conclusion

After a thorough analysis by the Ethics Committee of the Mississippi Bar, we find that it is a violation of the Mississippi Rules of Professional Conduct for an attorney to sign a release that in any way "approved" or "agreed to" terms that would obligate them unless they are a party to the matter.

We further find that it is a violation of the Mississippi Rules of Professional Conduct for a lawyer to ask another lawyer to sign a release that would require them to "approve" or "agree to" any of the terms of the settlement.