



## ETHICS ADVISORY OPINION

19-04

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

### **South Carolina Rules of Professional Conduct: 1.2, 1.4, 1.8**

**Factual Background:** Attorney is retained by Insurance Carrier to defend Insured in a lawsuit alleging negligent construction of a condominium project. Plaintiff's counsel could not locate the Insured. Insured was served by publication. Despite repeated attempts, neither Insurance Carrier nor Attorney can locate Insured regarding the pending lawsuit.

**Question:** May Attorney appear on behalf of Insured, filing pleadings, conducting discovery and otherwise defending the case on behalf of the Insured at the request of the Insurance Carrier?

**Summary:** Attorney may appear for and defend an Insured who cannot be located at the request of the Insurance Carrier if Insurance Carrier's insurance contract with the Insured gives it the right to retain counsel to defend claims made against the Insured. Where a person has, by contract, including insurance contract, delegated authority to another to choose counsel, conduct the defense of a claim, and perhaps even settle a matter within certain boundaries, an attorney may reasonably rely upon the instruction of the person's agent, in this situation Insurance Carrier, to appear and conduct the defense of the case in the absence of any direction from the missing Insured to the contrary.

**Response:** Yes, Attorney may appear for and defend Insured at the request of the Insurance Carrier if Insurance Carrier's insurance contract with the Insured gives it the right to retain counsel to defend claims made against the Insured. "When an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured – his client. Pursuant to that relationship, the attorney owes the client – not the insurer – a fiduciary duty." *Sentry Select Insurance Company v. Maybank Law Firm, LLC*, 426 S.C. 154, 156, 826 S.E.2d 270, 271 (2019).

The question presumes that Insurance Carrier and Insured have a binding contract of insurance that at least arguably applies to the factual situation involving negligent construction and either requires Insurance Carrier to hire counsel to defend the claims asserted against Insured or at least gives it the right to select counsel to defend Insured.



By the terms of an insurance policy an insured may also delegate to an insurance carrier the right to settle claims against the Insured within the coverage limits of the insurance policy. *Cf. Allstate Ins. Co. v. Wilson*, 259 S.C. 586, 193 S.E.2d 527 (noting that under particular terms of the policy at issue, the insurer, not the insured, “had the right and the duty to control the defense until such time as it was determined that it had no liability insurance coverage”); *Sentry Select*, 426 S.C. at 157-8, 826 S.E.2d at 271 (“[A]n insurance company that hires an attorney to represent its insured is in a unique position in relation to the resulting attorney-client relationship. Pursuant to the insurance contract, the insurer has a duty to defend its insured, and must compensate the attorney for his time in defense of his client. If the insured settles or has judgement imposed against him, the insurance contract ordinarily requires the insurer to pay the settlement or judgement. Many insurance contracts provide the insurer has a right to investigate and settle claims as a representative of the insured. Finally, the insurer’s right to settle must be exercised in good faith, and that duty of good faith must requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits”). The rights and duties as between any particular insured and insured’s insurance carrier in any particular insurance policy are a question of law, not ethics, beyond the scope of the committee’s review.

Ordinarily, an attorney may not simply appear for and defend a person or entity at the attorney’s whim without entering into an engagement, whether oral or written, for representation. *A Fast Photo Express, Inc. v. First Nat’l Bank of Chicago*, 369 S.C. 80, 90, 630 S.E.2d 285, 290 (Ct. App. 2006) (citing *Dunkley v. Shoemate*, 350 N.C. 573, 515 S.E.2d 442 (N.C.1999) for the proposition that a lawyer may not act on behalf of a person or entity where he or she “had no contact with the client and had not been authorized by the client to act on his behalf”). Where, however, a person has, by contract, including insurance contracts, delegated authority to another to choose counsel, conduct the defense of a claim, and perhaps even settle a matter within certain boundaries, an attorney may reasonably rely upon the instruction of the person’s agent, in this situation Insurance Carrier, to appear and conduct the defense of the case in the absence of any direction from the missing Insured to the contrary.<sup>1</sup> Insured’s contracting with Insurance Carrier through the insurance policy for a defense constitutes consent (in the absence of any further communications from the Insured to the contrary) for Attorney to receive compensation from insurance Carrier for undertaking defense for Insured subject to S.C.R. Prof. Conduct 1.8(f). Attorneys appointed by insurance carriers to defend the carrier’s insureds are reminded that the insured and not the insurance company is the client to whom a fiduciary duty is owed and whose interests are to be protected. *See Sentry Select*, 426 S.C. at 156, 826 S.E.2d at 271 (“When an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney to represent its insured – his client. Pursuant to that relationship, the attorney owes the client – not the insurer – a fiduciary duty”).