The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 95-14
Issued December 1, 1995

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: Salaried attorneys employed by an insurance company may pursue subrogation claims against a tortfeasor on behalf of an insurer who has a derivative right to stand in the place of an insured and with the insured's consent may include the insured's deductible, if any, in the subrogation demands. However, the in-house counsel must exercise independent judgment, must disclose to the insured the employment relationship, must disclose any differing interests, must inform the insured of options as to representation by outside counsel, and must discuss whether deductibility of expenses is applicable. In reaching this conclusion, the Board withdraws Opinion 94-9, issued August 12, 1994.

Salaried attorneys of an insurance company may not participate in an "in-house law firm" established by the insurance company using a "firm name" consisting of one or more of the names of the attorneys.

OPINION: The question presented is whether salaried attorneys employed by an insurance company may participate in an "in-house law firm" established by the insurance company for purposes of pursuing subrogation claims against tortfeasors and collecting deductibles incurred by the insureds.

For purposes of analysis, the Board separates the inquiry into two questions.

1. Is it proper for salaried attorneys employed by an insurance company to pursue subrogation claims against tortfeasors and also to attempt collection of deductibles on behalf of insureds with their consent?

2. Is it proper for salaried attorneys employed by an insurance company to participate in an "in-house law firm" established by the insurance company using a "firm name" consisting of one or more of the names of the attorneys?

Question 1

> Is it proper for salaried attorneys employed by an insurance company to pursue subrogation claims against tortfeasors and also to attempt collection of deductibles on behalf of insureds with their consent?

For clarification, an insurance company's salaried employee attorneys are often referred to as "in-house counsel." Attorneys retained by insurance companies to represent insureds are commonly referred to as "outside counsel." These terms are used within this opinion.

The proper scope of representation by in-house counsel employed by insurance companies involves two major issues--whether the activities of the in-house counsel constitute the unauthorized practice of law by a corporation and whether multiple representation of both the insurer and the insured create unresolvable conflicts of interest. This opinion addresses the question raised from the perspective of whether the pursuit of subrogation claims against tortfeasors and the collection of deductibles on behalf of insureds with their consent by salaried employees of an insurance company creates a conflict of interest under the Ohio Code of Professional Responsibility. This opinion does not address whether the activities would constitute the unauthorized practice of law. See Gov.Bar R. VII §2 (C) through which the Board of Commissioners on the Unauthorized Practice of Law may render advisory opinions regarding the unauthorized practice of law.

Three rules with the Code of Professional Responsibility apply in addressing the conflicts issue -- DR 5-101, DR 5-105, and Canon 9.

> **DR 5-101** REFUSING EMPLOYMENT WHEN THE INTERESTS OF THE LAWYER MAY IMPAIR HIS [HER] INDEPENDENT PROFESSIONAL JUDGMENT
>
> > **(A)** Except with the consent of his [her] client after full disclosure, a lawyer shall not accept employment if the exercise of his [her] professional judgment on behalf of his [her] client will be or reasonably may be affected by his [her] own financial, business, property, or personal interests.

DR 5-105 REFUSING TO ACCEPT OR CONTINUE EMPLOYMENT IF THE INTERESTS OF ANOTHER CLIENT MAY IMPAIR THE INDEPENDENT PROFESSIONAL JUDGMENT OF THE LAWYER

> **(A)** A lawyer shall decline proffered employment if the exercise of his [her] independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105 (C).
>
> **(B)** A lawyer shall not continue multiple employment if the exercise of his [her] independent professional judgment in behalf of a client will be or is likely to be adversely affected by his [her] representation of another client, except to the extent permitted under DR 5-105 (C).
>
> **(C)** In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he [she] can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his [her] independent professional judgment on behalf of each.
>
> **(D)** If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his [her] or his [her] firm may accept or continue such employment.

Canon 9 A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

These rules safeguard the attorney-client relationship. The conflict of interest rules, DR 5-101 and 5-105, promote and protect the duty of loyalty that must exist in each attorney-client relationship. The appearance of impropriety rule, Canon 9, prohibits conduct that casts doubt upon the integrity of the attorney-client relationship.

The Board does not find the above cited rules to prohibit in-house counsel from pursuing subrogation claims. Subrogation

is a derivative right of the insurer recognized by contract, statute, and case law. See, e.g., McDonald v. Republic-Franklin Insurance Co., 45 Ohio St. 3d 27 (1989), Bogan v. Progressive Casualty Insurance Co., 36 Ohio St. 3d (1988), overruled in part by McDonald v. Republic-

Franklin Insurance Co., 45 Ohio St. 3d 27 (1989), and Ohio Rev. Code Ann. §3937.18 (E). Subrogation is defined as "[t]he lawful substitution of a third party in place of a party having a claim against another party. Insurance companies, guarantors and bonding companies generally have the right to step into the shoes of the party whom they compensate and sue any party whom the compensated party could have sued." Black's Law Dictionary 1279 (5th ed. 1979).

In pursuing subrogation claims the attorney is representing the insurer. "[T]he loss is, in the first instance, that of the insured, after reimbursement or compensation, it becomes the loss of the insurer." Bogan v. Progressive Casualty Insurance Co., 36 Ohio St. 3d 22, 29 (1988), [quoting Newcomb v. Cincinnati Insurance Co., 22 Ohio St. 382, 387 (1872) relying on the opinion of Lord Hardwick in Randal v. Cockran, 1 Ves. Sen. 98, 27 Eng. Rep. 916 (1748).]

The Board acknowledges that under Ohio Department of Insurance Rule 3901-1-54 (H) (10) an insurer must include the insured's deductible in its subrogation demands.

> **Rule 3901-1-54 (H) (10)** An insurer shall include the first party claimant's deductible, if any, in subrogation demands. The insurer shall share any subrogation recovery received on a proportionate basis with the first party claimant, unless the first party claimant's deductible has been paid in advance or recovered. The insurer shall not deduct expenses from this amount except that an outside attorney or collection agency retained to collect such recovery may be paid a pro rata share of his [her] expenses for collecting this amount.

Since insurers are required to include the deductible in the subrogation demands, it is common practice for the insurer's attorney to do so. Yet, in order to comply with DR 5-101, 5-105 and Canon 9 of the Code of Professional Responsibility, the in-house attorney who brings a subrogation demand on behalf of the insurer and who with the insured's consent includes an insured's deductible in the demand, must exercise independent judgment, must disclose to the insured the employment relationship, must disclose any differing interests, must inform the insured of options as to representation by outside counsel, and must discuss whether deductibility of expenses is applicable.

Disclosure and consent are necessary safeguards for three reasons. First, under DR 5-101(A), the employer-employee relationship is a type of financial, business, and personal relationship that may affect the attorney's exercise of his or her professional judgment. An employee-attorney works for

the good of the company and has a fiduciary duty to the company. An employee-attorney has a personal interest in maintaining employment with the company. An employee-attorney might place the welfare of the employer, or even his or her own interest in maintaining or enhancing employment, above the best interest of the policyholder. Full disclosure of the employment relationship and consent by the insured help alleviate concerns that the attorney's interests will unknowingly supersede the client's interests. Second, under Canon 9, full disclosure of the employment relationship and consent by the insured also protects against an appearance of impropriety that would exist if the employment relationship was not within the insured's knowledge. Third, under DR 5-105, there are potentially differing interests between an insurer and an insured that could affect the lawyer's independent professional judgment. This is acknowledged within Ethical Consideration 5-17.

> **EC 5-17** Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his [her] insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his [her] judgment is not unlikely.

In including a deductible in a subrogation demand, there may exist little chance that the judgment of the lawyer will be adversely affected by the slight possibility that the interests will become actually different. Nevertheless, under DR 5-105 (A) and (C), consent after full disclosure is required.

In reviewing, authorities across the nation, there is guidance but no consensus as to the proper scope of representation by an insurance company's in-house counsel. The analysis is usually both legal and ethical, depending upon the particular state's statutes and rules of professional responsibility. Some authorities are permissive. See, e.g., ABA Standing Comm. on Ethics and Professional Responsibility, Informal Op. 1370

(1976) (may represent subrogated interests of the carrier arising from settlement of claims of insureds and may represent insured's interest arising from the deductible feature of the policy); Philadelphia Bar Ass'n, Op. 86-108 (undated) (may represent an insured if all foreseeable issues of

conflict have been resolved or do not exist and may pursue subrogation claims), Virginia State Bar, Op. 598 (1985) (may represent insured); In re Petition of Youngblood, 1995 WL 65441 *6 (Tenn.) (vacating, inter alia, the conclusion in SupCt of Tennessee, Bd of Professional Responsibility, Formal Op.93-F-132 that it is improper for in-house attorney employees of an insurance company to represent individual insureds in legal matters arising under that company's policy).

Other authorities are more restrictive. See e.g., Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E. 2d 517 (1986) (may not represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage); North Carolina Bar Ass'n, Op. CPR 326 (1982) (may not appear as counsel of record in an action brought against an insured by a third party for a claim covered by the insurance policy and may not appear in the prosecution of subrogation claims for property damage unless the actions are defended or prosecuted only in the name of the insurance company and the insurance company assumes or is subrogated to the complete legal liability and pecuniary interest of the claim); North Carolina State Bar Ass'n, Op. RPR 151 (1993) (may not pursue a subrogation claim on behalf of the insurer with the insured as co-plaintiff); Kansas Bar Ass'n, LEO 83-6 [agreeing with view expressed in North Carolina Bar Ass'n, Op. CPR 326 (1982)]; Kentucky Bar Ass'n Unauthorized Practice Op. U-2 (1962) (a district adjuster, a full-time salaried employee of a Workmen's Compensation insurer, who is also an attorney, admitted to the Bar of this state, may not practice Workmen's Compensation cases for his employer).

In conclusion, it is this Board's view that salaried attorneys employed by an insurance company may pursue subrogation claims against a tortfeasor on behalf of an insurer who has a derivative right to stand in the place of an insured and with the insured's consent may include the insured's deductible, if any, in the subrogation demands. However, the in-house counsel must exercise independent judgment, must disclose to the insured the employment relationship, must disclose any differing interests, must inform the insured of options as to representation by outside counsel, and must discuss whether deductibility of expenses is applicable. In reaching this conclusion, the Board withdraws Opinion 94-9, issued August 12,1994.

Question 2

> Is it proper under the Ohio Code of Professional Responsibility for salaried attorneys employed by an insurance company to participate in an "in-house law firm" established by the insurance company using a "firm name" consisting of one or more of the names of the attorneys?

Several rules within the Code of Professional Responsibility apply.

> **DR 1-102 (A) (4)** A lawyer shall not: Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> **DR 3-101(A)** A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
>
> **DR 3-103(A)** A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

All of the above cited rules would be violated by an attorney-employee of an insurance company participating in an "in-house law firm" established by an insurance company under a "firm name" consisting of one or more of the names of the attorneys. Such conduct is false and misleading under DR 1-102 (A) (4) since a firm name is being used when in fact no law firm exists and the relationship between the attorney and the insurer is being disguised. Further, such conduct by a lawyer may aid a non-lawyer in the unauthorized practice of law under DR 3-101 (A) since the use of a fictitious firm name allows the insurance company to hold itself out as a law firm. Finally, such conduct creates an improper relationship between attorneys and non-attorneys under DR 3-103 (A) because the insurance company and the attorneys are improperly joined together as an "in-house law firm" in the practice of law. The "in-house law firm" would not be independent. The clients would be policyholders referred by the insurance company. Although it is asserted that the insurance company would neither control the manner in which the attorneys practice law, nor direct that a matter be handled in a specific way, the reality is that the company as employer could exercise considerable control.

The Board's view is that attorneys employed by an insurance company may not represent themselves to be outside counsel when they are actually in-house counsel. This view is in keeping with the views of other authorities. See e.g., In re Petition of Youngblood, 1995 WL 65441 *8

(1995) (affirming the conclusion in SupCt of Tennessee, Bd of Professional Responsibility, Formal Op. 93-F-132 that "[t]he holding out of an in-house attorney employee as a separate and independent law firm constitutes an unethical and deceptive practice"); Nassau County Bar Ass'n Op. 89-41 (1989) (attorney's professional corporation may not represent itself as "outside counsel" when it is "house counsel"); Virginia State Bar, Op. 775 (1986) (improper for attorney employee of insurance carrier to fail to disclose his or her status as an employee on name cards, letterhead, phone answering method, and office door); New Jersey SupCt, Advisory Comm. on Professional Ethics, Op. 593 (1986) (attorney employees of insurance carrier may not combine their names for an office designation that implies a partnership). For a contrasting view see Bar Ass'n of Nassau County, Op. 95-5 (undated) (advising that "an insurance company's attorneys, who are employed on a salaried basis as house counsel to represent and defend insureds, need not identify themselves as insurance company employees on their professional letterhead, business card, and other identifying indicia used in their law practice; however, it is not ethically improper for them to do so").

In conclusion, for the reasons stated above, the Board advises that an attorney who is a salaried employee of an insurance company may not participate in an "in-house law firm "established by an insurance company using a "firm name" consisting of one or more of the names of the attorneys.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.