No. 04-0138

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

UNAUTHORIZED PRACTICE OF LAW COMMITTEE,
Petitioner,

vs.

AMERICAN HOME ASSURANCE COMPANY, INC., and THE TRAVELERS INDEMNITY COMPANY,
Respondents.

On Petition for Review from the Eleventh District of Texas at Eastland, Texas

AMICUS CURIAE BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, THE ASSOCIATION OF CORPORATE COUNSEL, THE INSURANCE COUNCIL OF TEXAS, AND THE TEXAS ASSOCIATION OF BUSINESS IN SUPPORT OF RESPONDENTS

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I. ISSUE PRESENTED

WHETHER AN INSURANCE COMPANY'S USE OF DULY LICENSED ATTORNEYS EMPLOYED TO REPRESENT THE ALIGNED INTERESTS OF THE INSURANCE COMPANY AND ITS POLICYHOLDERS IN DEFENDING COVERED CLAIMS CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.

II. INTEREST OF *AMICI CURIAE*

Respondents, American Home Assurance Company, Inc., and The Travelers Indemnity Company, defend the following position in this appeal: **An insurer's use of duly licensed attorneys employed to provide legal representation in the defense of covered insurance claims ("staff attorneys") *does not* constitute the unauthorized practice of law in Texas (or elsewhere).** *Amici Curiae* submit this brief in full support of that position.

A. The Insurance Industry *Amici*

The following national trade associations join in the filing of this *Amicus Curiae* brief on behalf of the insurance industry: (1) the American Insurance Association ("AIA"); (2) the National Association of Mutual Insurance Companies ("NAMIC"); and (3) the Property Casualty Insurers Association of America ("PCI"). Their member companies provide property and casualty insurance products in every insurance regulatory jurisdiction in the United States, and collectively account for at least 75% of the national and Texas markets. In 2003, their members wrote an estimated 30 billion dollars of direct written premiums in Texas. Their purposes include providing a forum for discussion of public policy problems of common concern to their members and the

insurance industry and serving the public interest through appropriate activities, including the promotion of safety and security of persons and property.

The three national insurance trade associations are joined in this brief by the Insurance Council of Texas ("ICT"), which is a Texas non-profit trade association of property and casualty insurers doing business in Texas. It has approximately 530 member companies.

The vast majority of liability insurance policies written by the Insurance *Amici's* members include both the promise to indemnify their policyholders against liability and the insurer's contractual right and duty to defend the policyholders. As explained in the argument section of this brief, the issue before this Court will have a tremendous impact on insurers' ability to provide an economical, efficient, and competent defense against covered claims (which benefits all insureds by keeping the cost of insurance premiums in check). Insurer *Amici* estimate that one-half of the hundreds of thousands of insured lawsuits defended annually are defended by staff attorneys. **Insurer *Amici* further estimate that in Texas alone, insurance staff attorneys are currently defending at least 10,000 cases for policyholders.** Given these numbers, this Court's decision will have a staggering impact on staff attorneys and policyholders, disrupting thousands of cases -- not to mention the impact of this Court's decision on the cost of insurance in Texas.

B. The Texas Policyholder and Business Community *Amici*

The Texas Policyholder and Business Community *Amici* ("The Policyholder *Amici*") are represented by the Texas Association of Business ("TAB"). The TAB is a

broad-based organization representing more than 140,000 Texas employers and 200 local chambers of commerce. Relative to the issue before this Court, the Policyholder *Amici* represent the interests of the many businesses and individual policyholders in Texas who purchase insurance and who are often represented in litigation where insurance staff attorneys defend the claims filed against them. Relative to the issue before this Court, the Policyholder *Amici* represent the interests of the many businesses and individual policyholders in Texas who purchase insurance and who are often represented in litigation where insurance staff attorneys defend the claims filed against them. As explained hereinafter, the Policyholder *Amici* know that eliminating the ability of insurers to use staff counsel to defend claims will adversely impact virtually all Texans, including both businesses and individuals, who have purchased liability policies. Conservatively, a prohibition on insurers' ability to use staff counsel could cost policyholders in Texas "well over $150 million per year." *See* Actuarial Analysis of Texas House Bill 3563 (prepared by Michael Miller for *amicus* AIA in 2001). They also know that this Court's decision will have a significant, detrimental impact regarding the use of staff attorneys in areas other than insurance.

C. The Corporate Counsel *Amici*

The Association of Corporate Counsel ("ACC") was formed in 1982 as the bar association for in-house counsel. With over 17,500 members from over 8,000 private sector organizations in 54 countries, ACC members represent a diverse range of domestic and international public, private, and non-for-profit companies. ACC's members are employed by both large and small companies, both privately-held and publicly-traded.

Its members represent 98 of the Fortune 100 companies; internationally, its members represent 74 of the of the Global 100 companies. One of ACC's primary missions is to act as the voice of the in-house bar on matters that concern corporate legal practice and the ability of its members to fulfill their functions as in-house legal counsel to their companies.

ACC joins in this *Amicus Curiae* brief because the validity of insurance defense staff counsel is of great importance to ACC's members and their legal representation of their clients. Like insurance staff attorneys, ACC's members frequently represent both their employer company and third-parties in situations where the employer company has a direct interest in the outcome of the litigation. Indeed, the Texas Rules of Professional Conduct specifically authorize such representation. *See* Rule 1.12 cmt. 5 ("*A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholder, or other constituents*, subject to the provisions of Rule 1.06") (emphasis added). As explained in this brief, eliminating the ability of insurance staff attorneys to defend insureds would cast doubt on the long-established and vital practice of companies using their staff attorneys to represent the aligned interests of the company and third-parties. This practice is common to companies, unions, special interest organizations, and non-profits across the country and across every industry. The impact would be devastating.

III. *AMICI* FEE DISCLOSURE

The fees paid for drafting this *Amici Curiae* brief come from no source other than the *amici* listed above.

IV. SUMMARY OF ARGUMENT[1]

Amici are greatly troubled by the Texas Unauthorized Practice of Law Committee's ("UPLC") contention that the use of staff attorneys by insurance companies to defend claims constitutes the unauthorized practice of law. Staff attorneys have defended insurance claims in Texas for more than sixty years. Such representation has proven to be efficient, competent, and economical. It also is fully consistent with Texas law and the rules governing the conduct of Texas attorneys.

The purpose of regulating the practice of law is to protect the public. There is no issue of public protection involved in this case. Insurance staff attorneys are not second class lawyers unfit to practice in a private law firm – they are first class lawyers who are defending claims filed against policyholders in which both their employer and the policyholder have a direct financial interest. This clearly distinguishes the use of insurer staff attorneys from the cases cited by the UPLC in support of their claim, none of which, incidentally, were defended by staff counsel.

In addition to citing inapplicable case law to support its position, the UPLC contends that the use of insurance staff attorneys to defend claims is improper because of an alleged "inherent" conflict of interest resulting from staff attorneys' dependence on insurance companies for their livelihood. The UPLC asserts that this dependence dilutes staff attorney's responsibilities to policyholders whose claims are being defended. This argument confuses issues related to the unauthorized practice of law with issues related to

[1] This amicus brief incorporates by reference the arguments made by Respondents in their brief, and thus does not repeat those arguments here.

the rules of professional conduct, which govern all Texas attorneys. This argument also wrongfully demeans the hundreds of staff attorneys currently practicing law in Texas and is without merit.

Perhaps the most telling lack of evidence of any harm from the use of staff counsel is the Texas Association of Defense Counsel's ("TADC") *amicus brief.* In that brief, the TADC wildly speculates about alleged hypothetical conflicts – yet they provide not one actual example where any insured has ever been harmed in Texas or otherwise from an insurer's use of staff counsel to defend claims. As long as staff counsel comply with the conflict of interest rules, as the undisputed record in this case shows they do, those attorneys have no opportunity for disloyalty to the insured. Moreover, insurers have every incentive to have staff counsel avoid conflicts because any harm resulting from an actual conflict would result in huge bad faith exposure to insurers.

As would be expected, many outside insurance defense attorneys do much of their work for a handful of companies. Thus, any argument regarding the possible "dilution" of an attorney's responsibilities because of employment or compensation status applies with equal force to both staff and outside attorneys. Moreover, such a claim is simply untrue. As early as 1958, the Professional Ethics Committee of the Texas State Bar concluded that the mere employment status of staff attorneys in and of itself "is not any evidence of their being controlled or exploited" in violation of the ethics rules. Staff attorneys are not used to defend claims where a conflict of interest exists; thus, the interests of both the insurance company and the insured are aligned in the representation. The use of staff attorneys by insurers is no different than the use of such attorneys by the

many other organizations that provide legal services to those with aligned interests, such as trade associations, religious institutions, labor unions, legal service organizations, and the NAACP. Indeed, by virtue of insurers' dual contractual obligations to both defend *and* indemnify their insureds, the use of staff attorneys in the insurance context is both well-recognized and supported by decisions, opinions, and legislation across the United States.

Instead of trying to eliminate staff attorneys, the UPLC should be demonstrating faith in the integrity of all of their members, assuring Texas citizens that the quality of legal representation is not determined by artificial distinctions in employment status or compensation method.

The continued freedom of licensed Texas attorneys to sustain a viable insurance defense practice through either employment with an insurance company or an outside law firm benefits the citizens of Texas. Through staff attorneys, policyholders are provided with an efficient, economical, and competent defense that assists all other policyholders by keeping premiums in check. Eliminating the use of staff attorneys will increase the cost of insurance and will have broad-reaching, harmful ramifications on other organizations that use staff attorneys to represent their members or those with aligned interests.

We urge this Court to preserve the freedom of all duly-licensed attorneys to practice their profession in a setting of their choosing. There is simply no justification – legal, public policy, or otherwise – to discriminate against insurance staff attorneys

merely because they receive all of their income for providing legal services from one source.

V. ARGUMENT

AN INSURANCE COMPANY'S USE OF DULY LICENSED ATTORNEYS EMPLOYED TO REPRESENT THE ALIGNED INTERESTS OF THE INSURANCE COMPANY AND ITS POLICYHOLDERS IN DEFENDING COVERED CLAIMS IS BENEFICIAL TO THE PUBLIC AND DOES NOT CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW.

This Court should affirm the decision under review. Prohibiting insurance staff attorneys from defending policyholders, where the interests of the policyholders and the insurance companies are fully aligned and where the insurance companies have a direct financial interest in the outcome of the litigation, would set new, harmful public policy and law that would have far-reaching, damaging consequences. Such a prohibition is unwarranted and would be contrary to long-established law and practice in Texas. As three appellate courts have recently confirmed, the use of insurance staff attorneys to defend claims is consistent with Texas law and the Texas Disciplinary Rules of Professional Conduct. *See American Home Assurance Co. v. UPLC,* 121 S.W.3d 831 (Tex. App.—Eastland 2003, pet. filed)(decision under review in this proceeding); *Unauthorized Practice of Law Committee v. Nationwide Mutual Insurance Co.,* 155 S.W.3d 590 (Tex. App. – San Antonio 2004); *Nationwide Mutual Ins. Co. v. Unauthorized Practice of Law Committee,* 283 F.3d 650 (5th Cir. 2002).

A. The Prohibition Against The Corporate Practice Of Law Was Not Intended To Prohibit Entities With A Direct Interest In The Outcome Of The Litigation From Using Their Own Attorneys To Defend That Litigation

The purpose of regulating the practice of law is to protect the public from unscrupulous or untrained persons purporting to offer legal services. *See, e.g., Unauthorized Practice Comm. v. Cortez,* 692 S.W.2d 47, 50-51 (Tex. 1985); *Green v. Unauthorized Practice of Law Comm.*, 883 S.W.2d 293, 297-98 (Tex. App.--Dallas 1994, no writ); *Brown v. Unauthorized Practice of Law Comm.*, 742 S.W.2d 34, 41-42 (Tex. App. Dallas 1987, writ denied). To that end, like Texas, virtually all states, through legislation or court rule, prohibit the practice of law by persons who are not duly licensed. *See, e.g., Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 160 (Ind. 1999) (holding that the unauthorized practice of law issue "boils down to whether a non-lawyer is performing tasks requiring a lawyer"); *Gafcon, Inc. v. Ponsor & Assocs.*, 98 Cal. App. 4th 1388, 1405 n.8, 120 Cal. Rptr. 2d 392, 404 n.8 (2002, *review denied*) (noting that the rationale behind the prohibition on the unauthorized practice of law "is to protect the public from incompetent or unskilled nonlawyers"). The policy behind this prohibition is sound, and is not at issue in this case because insurance staff attorney are duly licensed to practice law in Texas.

The question in this case is whether insurance companies are engaging in the unauthorized corporate practice of law when they use duly licensed Texas attorneys to defend both their interests and those of their policyholders when lawsuits involving covered claims are filed against those policyholders. Both the Answer Brief of the

Respondents and the discussion hereinafter firmly establish that the answer is a resounding NO.

Unlike the policy considerations governing the unlicensed practice of law by non-attorneys, the policy considerations underlying the prohibition against the corporate practice of law involve ensuring lawyers' ability to exercise their independent judgment in the zealous pursuit of their clients' interests. Under the rules governing the corporate practice of law, lawyers are prohibited from sharing legal fees with non-lawyers, and companies are prohibited from selling legal services to third parties. Historically, the prohibition against the corporate practice of law developed because of the belief that if non-lawyers sold legal services, the profit motive would lead to sub-optimal representation of clients. Thus, the argument is, to maximize profits, non-lawyer corporate owners would be motivated to hire incompetent or unethical lawyers or deny the lawyers adequate resources. As applied to litigation, if a corporation with no stake in the outcome of litigation sold the legal services of the lawyer defending the case, the corporation would have little to lose and much to gain by keeping defense costs to a minimum, even if it involved mismanaging the legal services through control over a lawyer's independent professional judgment. Moreover, the personal service and fiduciary duty involved in the law practice is inconsistent with the selling of such services by a corporation. *See, e.g., Hexter Title & Abstract Co. v. Grievance Comm.*, 142 Tex. 506, 179 S.W.2d 946 (Tex. 1944); *In re Florida Bar*, 133 So. 2d 554, 556 (Fla. 1961) (explaining that the traditional prohibition against the practice of law through corporate entity is grounded in necessary personal relationship between lawyer and client and

lawyer's standard of duty and responsibility to that client, which is generally not present in ordinary commercial relationships). Ironically, today, most private law firms are themselves for-profit enterprises established as professional corporations, professional associations, limited liability partnerships, or professional limited liability companies. Such entities are created in part to provide protection for partners' personal assets, and those entities have no greater stake in the outcome than the fees they generate.[2]

Never has Texas (or any other state) applied this prohibition to say that no corporation can have a lawyer in its full-time employ to represent the interests of the corporation. It is only where the corporation itself has *no* interest in the subject matter of the legal representation, but nevertheless tries to sell legal services to third parties, that the prohibition of the corporate practice of law is offended. *See, e.g., Stewart Abstract Co. v. Judicial Comm'n of Jefferson Co.*, 131 S.W.2d 686 (Tex. Civ. App. – Beaumont 1939, no writ) (holding that a corporation has the right to have an employed attorney or a legal department to handle its own legal business); *Crain v. UPLC*, 11 S.W.3d 328 (Tex. App. – Houston 1999, pet. denied) (finding a debt collection company's preparing and filing of lien documents for customers was the unauthorized practice of law); *Hexter Title*, 179 S.W.2d at 952-54 (where corporation had no interest in the legal documents that it was drafting for others, it could not perform that service).

[2] In fact, counsel for the UPLC, at least two members of the UPLC; and indeed the majority of *Amicus* TADC's board members are employees of corporations or partners in limited liability partnerships.

Indeed, the Texas Disciplinary Rules of Professional Conduct specifically recognize that the prohibitions against the corporate practice of law do not apply, and organizations may use their staff attorneys to represent the interests of third-parties, where the organization and the third-party both have an aligned interest in the outcome of the litigation. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12 cmt. 4, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G App. A (Vernon 2004) (TEX. STATE BAR R. art. X, § 9) (where organization's interest is adverse to the organization's constituents, lawyer cannot represent the constituent and such person may wish to obtain *independent* representation); *id.* cmt 5 ("*A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholder, or other constituents*, subject to the provisions of Rule 1.06.") (emphasis added).

The comments to the disciplinary rules recognize the many instances in which staff attorneys of an organization are called upon to represent third parties. As but a few examples: Government and quasi-governmental bodies use staff attorneys to represent the aligned interests of both the government and individual state employees. Non-profit civil rights organizations such as the NAACP and ACLU and labor unions use staff attorneys to represent the aligned interests of their members. In one such noteworthy representation, Thurgood Marshall, then a staff lawyer for NAACP, represented appellants Briggs and Davis before the United States Supreme Court in 1954 in *Brown v. Board of Education of Topeka, Kansas,* 349 U.S. 294, 75 S. Ct. 753 (1955).[3]

[3] "In 1936 Marshall abandoned a private law practice in Baltimore and moved to New York City, where he became a ***staff lawyer*** of the National Association for the

For-profit corporations often use staff attorneys to represent the aligned interests of the corporation and its employees. Corporations in a joint venture also have been permitted to use their staff lawyers to represent the joint venture, given the corporation's financial interest in the venture. Tex. Comm. on Prof'l Ethics, Op. 512 (1995). Similarly, insurers use staff attorneys to defend the aligned interests of the insurer and its policyholders in claims filed against those policyholders.

Ironically, the attorneys who filed an amicus brief here on behalf of the Texas Medical Association (TMA) *and its members* are staff attorneys employed by that association and through that employment are engaging in the practice of law on behalf of third-parties. But instead of merely representing one insured in a lawsuit, they are purporting to represent the viewpoints of thousands of doctors, who probably have not considered the malpractice insurance premium impact of the position the TMA chose to take on their behalf.

Thus, the key to evaluating whether a staff attorney's representation of a third-party is permitted turns on whether the employing entity itself has an interest in the outcome of the litigation and whether that interest is aligned with the interests of the third party. Under the disciplinary rules, as with all other matters, whether a material conflict of interest exists to preclude such representation must be analyzed on a case by case basis. Where an entity has a direct interest in the litigation, and where the interests of the

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Advancement of Colored People (NAACP). From 1939 to 1961, he served as director and chief counsel for the NAACP Legal Defense and Education Fund." *See* http://encarta.msn.com/encyclopedia_761556389/ Marshall_Thurgood.html#endads (emphasis added) (last accessed July 26, 2005).

entity and a third party are aligned, the parties are entitled to use the attorney chosen to protect those interests, whether that attorney is on staff or outside.

In this case, the issue involves the long-established practice of allowing insurance staff attorneys to defend covered claims on behalf of policyholders where the insurer has a direct interest in the outcome of the litigation and the interests of the insurer and the policyholder in defeating or minimizing the claim of a third party are aligned. In providing a defense for covered claims, insurers have a vested interest in the outcome because, under most insurance contracts, they are contractually obligated to pay all costs of the defense and all damages up to policy limits. Moreover, under the insurance contract, the policyholder generally cedes the right to conduct the defense and select counsel to the insurance company,[4] and the insurer must exercise its authority in good faith to protect both interests. *See, e.g. Northern County Mut. Ins. Co., v. Davalos*, 140 S.W.3d 685, 688-90 (Tex. 2004) (explaining that absent an actual, material conflict of interest, where insurance contract cedes right to conduct defense to insurer, the right to conduct the defense includes the authority to select the attorney who will defend the claim and to make other decisions that would normally be vested in the insured as the named party in the case).

The alignment of the interests of the policyholder and the insurer is illustrated by the record in this case, which comports with the practice of the *Amici* insurers – staff counsel do not represent policyholders where there is a material conflict of interest on a

[4] While there are policies that give the policyholder the right to select counsel, normally a higher premium would be charged for retaining that right.

matter that is likely to be litigated in the underlying claim. For example, a late notice defense would not be an issue in the tort case. Absent some highly unusual circumstance, about which there is no evidence in the record of this case, the insurer has no motivation to mismanage or otherwise interfere in the independent professional judgment of the staff attorney. Given that the insurer must fund a negative outcome up to the policy limits as well as the costs of the defense, and may have to pay damages in excess of policy limits if it acts contrary to the policyholder's interests, it would be financially irresponsible for an insurer to do so. Moreover, the professionalism of the staff counsel as exemplified in the record before this Court demonstrates that staff counsel would not permit such interference if it were attempted.

B. How and When Insurers Use Staff Counsel.

Some of the briefs filed in this case make numerous hypothetical allegations of unethical practices by insurers, and by inference, insurance staff attorneys. None of these accusations are supported by evidence. In fact, the record establishes just the opposite – insurers have been using staff counsel in Texas for more than sixty years with an unblemished, enviable track record. An explanation regarding how and when insurers use staff attorneys to defend claims illustrates why insurers and their staff attorneys are not engaging in the unauthorized practice of law or unethical conduct through that practice.

Insurers are responsible for providing a competent defense in hundreds of thousands of lawsuits brought each year against their policyholders. Obviously, because of this volume, insurers are sophisticated buyers of legal services. Additionally, insurers

are responsible for *both* the defense *and* the outcome. Thus, insurers have a vested self-interest in obtaining not only cost-effective representation for their policyholders, but also competent representation, as the insurers are directly financially responsible for the indemnity payments. Both outside and staff attorneys are extremely important to the ability of insurers to meet their contractual obligations in defending covered claims.

Over one hundred years ago, insurers started employing attorneys on staff to defend policyholders. Today, one-half of the lawsuits that insurers are contractually obligated to defend involve staff attorneys. Insurers are particularly careful in how they structure and manage their staff counsel operations for a variety of reasons, including the realization that misconduct by staff counsel will ultimately be visited on the insurer. That the practices of staff attorneys are effective can be surmised from the virtual absence of malpractice suits filed against staff attorneys and complaints filed with bar grievance committees.[5]

Based on surveys of insurance companies, *Amici* know that certain concepts regarding insurance staff attorney law offices are universally consistent. All staff attorney law offices are staffed by fully licensed members of the Texas State Bar, and those offices are housed in a manner that makes those offices both physically and functionally separate from the insurer. For instance, information technology systems

[5] Indeed, even those very limited number of instances where a complaint has been made against an attorney employed by an insurer, such complaints have been found to be without merit or were unrelated to the attorney's employment status. *See, e.g., Steinberg v. American National Fire Ins. Co.,* 1998 WL 791841 (Tex. App. Hous. 1st Dist. Nov. 12, 1998) (unpublished decision).

provided to staff attorney law offices are separate from the systems used by others in the company. Claims personnel cannot access any confidential information in these systems and have no access whatsoever to staff attorney files. Notably, the UPLC asserts that insurers' Boards of Directors have access to the staff attorney's files. This is absolutely untrue and establishes a misconception regarding how staff attorney offices function.

At the outset of any representation, staff attorneys inform insureds that they are employees of the insurance company. An average staff attorney law office consists of seven to eight attorneys, along with a full complement of support staff, including paralegals and legal secretaries. Staff attorneys report only to other attorneys, both in their separate law offices and through the chain of command in the home office of the insurer. Staff attorneys are held to the same performance and reporting standards as outside attorneys. They have no more or less authority than outside attorneys, and they do just what outside attorneys do – the only difference is how they are paid. They defend the full range of cases that must be defended, including property and automobile liability, premises liability, products liability, and professional liability. Some insurers reserve staff counsel for very large exposures; some use them for routine litigation; and some use them for both. This varies from insurer to insurer.

Staff attorneys spend virtually all of their time (over 95%) defending and trying cases, and, unlike outside attorneys, they are not dependent upon marketing and other client development activities for their work. Unlike outside attorneys, staff attorneys need not justify their existence through fee recoveries. For example, time spent at seminars or training insurers' staff is encouraged, not criticized. Because staff attorneys

work for only one insurer, they gain deep and broad knowledge of the types of risks insured by that insurer and the law affecting those risks. They also often have access to sophisticated technology and better resources beyond what a private law firm can provide. Staff attorneys can challenge decisions of the claims professionals without the trepidation of losing a big client.

Additionally, as a general business practice, insurers prohibit staff attorneys from handling *any* case in which there is, or is likely to be, an actual material conflict between the insurer and a policyholder. In fact, many insurers provide their staff attorneys with ethics "hotlines," giving staff attorneys access to other attorneys with whom they can discuss ethics issues confidentially. Thus, while staff attorneys generally have ethics guidance and obligations, *they police themselves* and implement business practices to limit conflicts between staff counsel and their policyholders. Again, this is derivative of their employer insurers' obligations and exposures that outside firms do not have.

Insurers routinely survey policyholders who have been defended by staff attorneys to determine their level of satisfaction with the quality of legal services provided. Regarding the use of staff attorneys and the results they produce, this statement by an insurer, taken directly from a report from an insurer survey, speaks volumes:

> Insurers are vulnerable targets for extra contractual claims. Their margin of permissible error, most especially when defending their insureds, is small. No insurer could afford to assign such a wide variety of litigation, without regard to severity or complexity, to staff attorneys if the practice aggravated their exposure, no matter how much they could save in legal expenses. In this vein it's particularly noteworthy that of all the thousands of lawyers engaged as staff attorneys (handling hundreds of thousands of lawsuits), on only two occasions known to these insurers has one of their

> attorneys been disciplined by a state bar, and *in neither case did the matter involve the attorney's employment with the insurer.*

(Emphasis added.)

Obviously, staff attorneys are not used in all cases. In many situations, an outside law firm provides the best and most economical service, especially in specialized areas in which staff attorneys may have little or no experience. Many staff attorneys, however, routinely handle cases involving automobile bodily injury, products liability and professional liability. Thus, they are often best suited to provide a defense for these cases, regardless of complexity, because of the extensive expertise they have developed in handling these types of cases. Outside attorneys, however, can often provide expertise in specialized areas that are not routinely handled by staff attorneys, such as employment discrimination or securities litigation or those involving atypical complexities. Outside attorneys are also used when a conflict exists between the insurer and the policyholder. At bottom, the best and least expensive protection to the public exists where the option to use staff attorneys is available for those cases to which they are better suited.

C. Why Insurers Use Staff Counsel.

Despite the management burden of maintaining a corps of staff lawyers instead of outsourcing the work, the cost of the legal work provided by those attorneys in similar types of cases is typically substantially lower than when obtained from an outside firm, with similar results. *See, e.g.,* Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers,* 4 Conn. Ins. L. J. 205, 241-43 (1997-98); Actuarial Analysis of Texas

House Bill 3563 (prepared by Michael Miller for *Amicus* AIA in 2001). As noted, insurance companies have found that the use of staff attorneys allows for better representation in certain types of cases because those attorneys handle such cases on a regular basis. *Id.* The added expertise and the lower defense costs benefit the insurance-buying public by reducing pressures for higher premiums.

The use of staff counsel by insurance companies in handling the defense of insureds saves policyholders millions of dollars each year in premium. Illustrative is a 1997 AIA National Litigation Statistical Survey in which statistics were compiled from aggregated data from 34 insurer groups comprising 25.5% of the property casualty market. The Survey reflected that the average indemnity paid on automobile bodily injury cases defended by outside counsel was $34,044 per case and was $39,697 per case for other liability claims (excluding environmental, coverage and extra-contractual litigation). For the same period, the average amount paid on automobile bodily injury cases handled by staff counsel was $29,807 and just $21,097 for other liability cases. These averages equate to many millions of dollars in legal cost savings.

Moreover, using staff attorneys gives insurers increased freedom to challenge frivolous or fraudulent cases without the concern of high defense costs. This, in turn, provides insurers with the ability to take non-meritorious cases to trial rather than to settle "for defense costs." At no added cost, staff attorneys also are available to conduct training for the company's claim staff and underwriters, as well as provide advice on new laws and regulations – making them a tremendous resource.

In summary, the results speak for themselves – using staff attorneys provides extremely satisfactory results at a cost much lower than the cost of engaging outside counsel. Were the results otherwise, insurers would not continue to employ them, but would look solely to outside litigation counsel.

Of course, the benefits of using staff attorneys extend far beyond those accruing to insurers. For all of the same reasons the use of staff attorneys benefit insurers, the use of those attorneys also benefits policyholders. Additionally, the lower legal costs resulting from the use of staff attorneys assist in keeping premium in check for all policyholders. Policyholders also are provided with exceptional security because mishandling of the case by a staff attorney would invariably be visited back on the insurer. An insurer's financial ability to pay any damages is far, far greater than any law firm, regardless of the firm's legal malpractice limits.

Staff attorneys themselves receive significant benefits as a result of their employment as well. They work for employers with ample resources to "get the job done." There is no pressure to secure clients or bill fees. They have generous benefit packages. They have access to sophisticated technology. For all of these reasons and more, this is why most staff attorneys are recruited from outside attorney defense firms.

D. The Use Of Staff Attorneys Is Not The Unauthorized Practice of Law.

As thoroughly explained in the Brief of Respondents on the Merits, the use of staff attorneys to defend insurance claims is fully consistent with Texas law and the Texas Disciplinary Rules of Professional Conduct. Indeed, in each of the three recent Texas appellate decisions addressing the propriety of insurance staff attorneys, the courts have

concluded that this practice is permissible under Texas law. *See American Home Assurance Co. v. UPLC,* 121 S.W.3d 831 (Tex. App.—Eastland 2003, pet. filed)(decision under review in this proceeding); *Unauthorized Practice of Law Committee v. Nationwide Mutual Insurance Co.,* 155 S.W.3d 590 (Tex. App. – San Antonio 2004); *Nationwide Mutual Ins. Co. v. Unauthorized Practice of Law Committee,* 283 F.3d 650 (5th Cir. 2002). These cases recognize that (1) nothing in the Texas Unauthorized Practice of Law provisions or disciplinary rules prohibits insurance staff attorneys from representing insureds, (2) those staff attorneys are licensed members of the Texas State Bar, and (3) no Texas case prohibits such representation.

These propositions are not only true in Texas; they are supported by case law and ethics opinions from an overwhelming majority of other states and the American Bar Association. A chart listing the jurisdictions and authorities having addressed this issue either through case law or ethics opinions is attached. As early as 1939, states have recognized that there is "no difference" between staff and "outside" attorneys in the insurance defense practice. In 1939, an Ohio court described such practice in *Strother v. Ohio Casualty Ins. Co.* (C.P. 1939), 28 Ohio L. Abs. 550, 553, 14 Ohio Op. 139, 142[6], stating:

[6] The reprint in Ohio Opinions includes the notation: "Affirmed without opinion by the Court of Appeals."

> *The company is simply protecting its own rights in that litigation by having counsel of its own choosing to represent it*; it makes no difference whether the attorneys are hired by the case, whether they are hired by the year or whether they are the same attorneys in each and every case, or whether the company changes attorneys with each and every case, *so long as the company does not employ laymen to do any of these acts*, it is not engaged in the practice of law.

(Emphasis added.)

These distinctions are important ones to Texas citizens because the area of insurance is not the only realm in which the unauthorized practice of law issue has been raised. As noted above, many organizations use staff attorneys in a manner similar to that of insurers. Labor unions, such as the Railroad Workers, and civil rights organizations, such as the NAACP and ACLU, have been challenged for the very same practices for which insurers are being challenged today in Texas. *See, e.g., United Mineworkers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Whenever the use of staff attorneys has been questioned in other contexts and has been considered by the United States Supreme Court, the practice has, in each instance, been permitted to continue. *Id.*

The basis of the Supreme Court's opinions is simply a matter of balancing public benefit versus public harm: (1) using staff counsel to further the interests of both the entity paying for the services and those being represented is extremely beneficial to both; and (2) significant harm would occur if the staff attorney is not permitted to provide those services. As jointly stated by the Federal Trade Commission and the United States Department of Justice, restrictions regarding the practice of law are justified *only* by a

showing that the restriction is necessary to prevent significant consumer harm and is narrowly drawn to minimize its anticompetitive impact, *especially where the proposed restraint could prevent consumers from using an entire class of providers*. *See* FTC/DOJ Ltr. to ABA, Dec. 20, 2002; FTC/DOJ comments to the Georgia State Bar's Unauthorized Practice of Law Committee, Mar. 20, 2003. Weighing the significant benefits of using insurance staff attorneys described above against the harm that would be caused by eliminating that practice leads inevitably to one conclusion – the use of staff attorneys should be allowed to continue. This is especially true given that there has been no showing of any public harm from the use of staff attorneys.

E. There Has Been No Showing Of Any Public Harm From The Use Of Staff Attorneys.

The record in this case shows no instance of public harm from the use of staff attorneys and the *Amici* joining this brief know of no instances of such harm. The TADC *amicus brief* speculates as to hypothetical harm but provides not one single instance where any such alleged harm has occurred. Indeed, even where bar associations have actively sought out examples of such harm, none have been forthcoming. Illustrative are recent reports from special bar committees in both Florida and Ohio. In Florida, the Florida Bar's Special Commission on Insurance Practices II ("SCIPII") studied various insurer issues impacting the practice of law for three years, with special emphasis in the area of insurer staff attorneys.[7] The SCIPII solicited comments from all members of the

[7] A majority of the members of the SCIP II were also members of SCIP I, the committee that first evaluated insurer litigation management issues. While SCIP studied a variety of

public and the Florida Bar, held several public hearings, and heard testimony from the Florida Department of Insurance and experts in this area. Despite intensive study conducted by the Commission, it found *no* public harm from the use of insurer staff attorneys.[8]

Likewise, in Ohio, two separate committees recently studied and issued reports approving the use of staff attorneys after finding no public harm related to that practice: *See* Ohio Bar's House Counsel Task Force of the Ohio State Bar Association Report and Recommendations, Sept. 2003; *Cincinnati Bar Assn. v. Allstate Ins. Co.,* No. 02-02 (2003) (Final Report, Board of Commissioners on the Unauthorized Practice of Law of Supreme Court of Ohio), *rev. denied,* 2003-1834.

F. Elimination of insurer staff attorneys *will* cause significant harm.

Although there has been *no* showing of any public harm from insurers' use of staff attorneys to defend claims, it is clear that elimination of this practice will cause significant harm in three ways: (1) by raising the cost of insurance; (2) by setting precedent that will extend far beyond this case; and (3) by disrupting the professional

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issues, including staff attorneys, SCIP II concentrated almost exclusively on the use of staff attorneys by insurers.

[8] To ensure the consistency of the practice, however, and to ensure protection of Florida citizens, the Commission recommended codifying how staff attorney law offices must operate to protect policyholders. In 2003, the Florida Supreme Court adopted the proposed rules. *See Amendments to R. Reg. Fla. Bar,* 838 So. 2d 1140 (Fla. 2003). By approving the recommendations and approving the continued use of insurance staff attorneys, that Court reached an appropriate balance that recognized both the benefits of staff attorneys and the harms that would occur if that practice were eliminated. As discussed in more detail hereinafter, these rules also address how staff counsel offices must be named.

careers of staff attorneys and the defense of at least 10,000 cases currently being defended by staff attorneys in Texas.

First, as explained above, the use of staff attorneys is efficient, competent, and economical. If this Court concludes that the use of insurance staff attorneys constitutes the unauthorized practice of law, the loss of the experience and expertise of staff attorneys and the high cost of hourly legal fees in the private market will have a tremendous economic impact on insurance premiums. Such a finding will cause significant public harm by unjustifiably increasing the cost of legal services, which, in turn, will cause insurance premiums to rise.

Second, because there is no material difference in the use of staff attorneys by insurance companies and many other organizations providing legal services, *Amici* believe that eliminating insurance staff attorneys will be an open invitation to challenge other non-insurance organizations' right to employ and deploy staff attorneys to represent their or their members' interests, as they do today. If that were to happen, some public service organizations would not survive. At the very least, those organizations would be forced to scale back the services they offer. Organizations such as *Amici* Texas Medical Association would be unable to retain attorneys on staff to represent the interests of their members, as those staff attorneys have done in this case – such associations would be required to retain private counsel to represent the interests of their members. Undoubtedly, the impact of an adverse decision here will affect the ability of Texas non-profit and legal aid organizations, such as law school clinics and public service organizations defending the disabled, that depend on staff counsel to adequately and

affordably represent organizational and individual interests. Taken to its logical conclusion, the State would not be permitted to continue its practice of fielding staff public defenders to represent indigent criminal defendants.

Third, eliminating insurance staff attorneys will deny the *hundreds* of staff attorneys in Texas their right to practice in a setting of their choosing and leave them unemployed. It also will place at risk the *thousands* of policyholders whose cases currently are being handled by those staff attorneys.

Bar associations across the country have declared that competent legal advice should not be a luxury available only to the wealthy and that legal representation should be a right attainable by all. Those claims ring hollow when, as here, the UPLC advances a position that is hostile to the vision of those organizations. Indeed, if this Court were to adopt the UPLC's position, nothing would stand in the way of expanding the ruling to non-insurers.

G. There Is No Inherent Conflict Of Interest Resulting From Staff Attorneys' Dependence On Insurers For Their Livelihood.

Amici take issue with the contention that there is some "inherent" conflict of interest resulting from staff attorneys' dependence on an insurance company for their livelihood. Such a contention mixes two totally distinct issues. The first is whether staff attorneys are engaging in the unauthorized practice of law in defending claims filed against policyholders. The second is whether such representation is consistent with the Texas Disciplinary Rules of Professional Conduct.

Both the discussion above and the uncontested record materials in this case reflect how insurers manage their staff counsel operations. Insurers go to great pains, as they should: (a) to maintain an arms-length relationship between staff attorneys and claims personnel; (b) to ensure that attorneys are not assigned cases that could raise a conflict of interest and to promptly reassign those cases to outside counsel when a conflict does develop; (c) to maintain confidentiality of case materials; and (d) to fully inform policyholders that staff attorneys are employees of the insurer.

Staff attorneys do not defend policyholders where an actual conflict of interest is known to exist between insurer and policyholder. Thus, the occasion for divided loyalty diluting the attorney's efforts and responsibilities are minimal and no greater than if the attorney were employed by a law firm rather than an insurer. The Professional Ethics Committee of the Texas State Bar has concluded that the mere employment status of staff attorneys in and of itself "is not any evidence of their being controlled or exploited" in violation of the ethics rules. *See* Prof. Ethics Op. 167 (Mar. 1958).

Additionally, a number of outside insurance defense attorneys do almost all of their work for a handful of companies and depend on those clients for their livelihood. The same holds true for other lawyers whose billings for a single client or a small number of clients constitute their entire income. Thus, any argument regarding the possible "dilution" of an attorney's responsibilities because of employment or compensation status applies to all Texas attorneys, not just those employed by an insurer to defend a policyholder's covered claims.

More importantly, *all* attorneys in Texas, regardless of employment status, are required to provide legal services in accordance with the Disciplinary Rules of Professional Conduct. If those who argue that staff counsel face an inherent and irreconcilable ethics dilemma are correct, then attorneys who choose to work as staff attorneys either lack a moral compass or that compass is altered the first day they show up for work. This is an absurd assertion.

Certainly, the UPLC cannot expect this Court to believe that morally correct attorneys can only be found in outside law firms. And certainly, this Court does not believe that the hundreds of insurance staff attorneys in Texas are ethically weak lawyers simply because they practice law in a staff attorney law office rather than a private firm. Prosecutors and public defenders are staff attorneys employed by the State. One should not conclude, however, from that fact alone, that a prosecutor's invariable motive in filing criminal charges is to advance the political agendas of his or her superiors. Nor should one conclude that a public defender cannot adequately represent indigent defendants because their offices and salaries are provided by the same State government that employs the prosecutor.

Whether an attorney has acted ethically can only be measured by the attorney's conduct in a given fact situation; it cannot be inferred by the attorney's employment status. Questioning the ethics commitment of an attorney *by the mere virtue of that attorney's employment* is unfounded and does not speak highly of our self-regulatory structure. Disciplinary rules should not be exploited for purposes of developing a double standard of ethics for salaried and non-salaried lawyers. *All* attorneys, regardless of their

employment, should be held to the highest degree of loyalty and devotion to the causes of the clients whom they agree to serve.

H. *Stowers* Demands, Reservation of Rights Letters, And Claims In Excess Of Policy Limits Do Not Create *Per Se* Conflicts Of Interest.

The UPLC makes allegations of improper control by insurers based on information in the record reflecting that one of the insurers in this proceeding requires upper management to review "*Stowers*" letters before they are sent and directs that insureds be notified about *Stowers* rights orally rather than in writing. UPLC Reply Brf. at 12-13. Yet, the UPLC concedes that the *Stowers* demands are made by *plaintiffs,* not defendants. *Id.* at 13. Thus, the required review of a *Stowers* letter in the memorandum obviously references *responses* to *Stowers* demands. Of course an insurer would want to review those responses before they are sent because the demand, in reality, is being made to the insurer, not the insured. Moreover, the quotation from the memorandum in the UPLC's brief clearly reflects that insureds are orally advised of the possibility of a *Stowers* demand – obviously there would be no need to advise insureds of this in writing until such time as any such demand is actually made by a plaintiff.

The UPLC also asserts that insurers wrongly use staff attorneys after the issuance of a reservation of rights letter because the issuance of such a letter allegedly creates a *per se* conflict. This reflects a fundamental misconception of insurance law and operation. Insurers issue reservation of rights letters very liberally. This is done in self-defense because insurers have a duty to place policyholders on notice anytime there is

even a remote possibility that a coverage issue might arise. Otherwise, the insurer may be precluded from raising the issue at a later time.

As is the case with many issues regarding potential conflicts of interests, the issuance of a reservation of rights letter, in and of itself, does not warrant a *per se* prohibition against representation by staff counsel. Most often, the interests of the insurer and the insured are still aligned for purposes of defending the claim filed against the insured. This is because a coverage issue is often totally independent of or extrinsic to the issues in the defense (e.g., late notice of a claim) or may only involve a portion of the damages arising under the claim filed against the insured (e.g., punitive damages). In essence, these letters serve as a warning to an insured of a potential problem that may be unrelated to the representation. Thus, any potential conflict of interest issue raised by a reservation of rights letter must be evaluated under the facts specific to an individual case, just like any other potential conflict of interest issue must be evaluated by outside attorneys.

Likewise, no *per se* conflict of interest is created when a claim is filed against a policyholder in excess of policy limits. There is nothing wrong with using staff attorneys to defend claims over policy limits so long as insureds understand (as they should with outside counsel as well) the risks involved. Most insureds look to liability insurance for the defense it provides; that is why it is often referred to as litigation insurance. As discussed above, that defense can be provided equally well by staff or outside counsel, such that the question of claims in excess of limits is largely a red herring that presents no legitimate distinction between staff and outside counsel. Moreover, determining when "a

claim falls within the contract limits" is itself a quagmire. Often times astronomical amounts of damages are plead, or trebling of damages is sought. Additionally, most complaints, when filed, do not request a specific amount of damages; they merely state that the amount of damages claimed will exceed the minimum amount necessary to establish jurisdiction in a particular court. This would mean that almost all complaints, when filed, could potentially exceed policy limits even if, in reality, the underlying claim would certainly fall within policy limits and the chance for an excess judgment is remote.

The practice of law on behalf of insureds is simply too varied and complex to warrant a per se rule of disqualification of staff attorneys simply because a case is being defended under a reservation of rights or the lawsuit involves a claim potentially over policy limits.

I. The Use Of Law Office Names Is Not False, Deceptive, Or Misleading And Is Beneficial To The Public.

The UPLC also asserts that the use of "law office" type names by staff counsel offices is inappropriate. *Amici* disagree. The long-standing use of law office names by staff attorneys is fully consistent with decisions of this Court and the public policy of this State. Far from being misleading, the use of such names benefits the public.

First, characterizing a group of staff attorneys as a law office is factually accurate. Those attorneys are all professionals licensed to practice law in Texas. Those attorneys, as a group, function as an independent law office and are all providing legal services for their clients, just as any other group of attorneys practicing in a law office setting. The law office names used by staff attorneys also contain the name of the responsible

attorney. Thus, all of the law office names used by staff attorneys place their insured clients on notice as to the responsible attorney and denote that the responsible attorney is practicing with the assistance of other attorneys.

Second, full disclosure is made to insureds that the attorneys working under the law office name are working for a particular insurance company. As this Court has emphasized, one of the primary purposes of the ethics rules is to protect against public harm. Consistent with that concept, disclosure of insurance affiliation is required to avoid misleading the consumers of legal services provided by staff attorneys - their *clients*. In 2003 the ABA issued a formal ethics opinion approving the use of law office names for insurance staff counsel offices, stating: "We believe the use of traditional law firm names, without more, might mislead insureds-clients who do not know the firm's affiliation with the insurance company. *Such potential for misleading, however, is eliminated when insurance staff counsel disclose their employment status to their insureds-clients . . . .*" ABA Formal Ethics Adv. Op. 03-430 (emphasis added). *See also In re Weiss, Healey & Rea*, 536 A.2d 266 (N.J. 1988) (the "***clients*** of in-house counsel should have a full understanding of the kind and caliber of legal services that they are receiving.")(emphasis added).

To all but the consumers of the services provided by staff attorneys (their clients), it should be irrelevant whether an attorney is staff or retained. In either case, the attorney's income for a case is from the insurer, the fees are being borne by the insurer, and all experts are being paid by the insurer. This is especially true in the context of Texas's public policy of ensuring that the existence of insurance not be revealed in a

court proceeding against the insured. *See, e.g.,* Rule of Evidence 411, Vernon's Texas Rules Annotated ("Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully"). *See also AccuBanc Mortg. Corp. v. Drummonds,* 938 S.W.2d 135 (Tex. App. – Ft. Worth 1996) (theory behind the rule of exclusion incorporated into rule 411 is that a jury is more apt to render a judgment against a defendant and for a larger amount if it knows that the defendant is protected by insurance) (citing to *Myers v. Thomas,* 143 Tex. 502, 186 S.W.2d 811, 813 (1945)). In using law office names on pleadings, staff attorneys are ensuring that no influence of insurance will be interjected into the proceedings in even the slightest degree.

Should this Court nevertheless believe that further disclosure is required, this Court could implement rules such as those recently adopted in Florida – which permit the use of law office names for staff counsel offices, provided such names are followed by full disclosure of the attorney's employment status on business cards, letterhead, office signs and other places where the name is listed. Importantly, those rules direct that such disclosure must be only on the first pleading filed with the court, but thereafter, such disclosure is not required so as to avoid the mention of insurance to a jury. Those rules are attached to the Respondents' Brief on the Merits at Tab 7. For this Court's convenience, attached to this brief is a chart illustrating how other states have addressed this issue as well as a copy of ABA Formal Ethics Opinion 03-430.

J. Insurance Staff Attorneys Cannot Be Compared To The Unauthorized Corporate Practice Of Medicine.

Amicus, the Texas Medical Association, asserts that the use of staff attorneys is akin to the prohibited corporate practice of medicine, and thus, such practice must be prohibited under Texas law. The Association's staff attorneys assert that, because corporations cannot employ physicians to practice medicine, neither can corporations employ attorneys to practice law. As the appellate court stated in the opinion under review: "The short answer is that an insurance company is not organized to practice law. The purpose of an insurance company is to indemnify its insureds; the agreement to defend and pay attorney's fees is purely contractual and collateral to that purpose." *American Home Assurance Co.*, 121 S.W.3d at 839.

Moreover, unlike the corporate practice of medicine, the Texas Legislature has expressly refused to ban the use of insurance staff attorneys. "In 2001, two bills were introduced in the Texas House of Representatives to prevent staff counsel from representing insureds. TEX. H.B. 1383, 77th Leg., R.S. (2001), and TEX. H.B. 3563, 77th Leg., R.S. (2001). . . . Many of the arguments made here, especially the UPLC's ethical arguments, were also made before the Texas Legislature. The bills were not enacted into law." *American Home Assurance Co.*, 121 S.W.3d at 837.

The litigation that insurers defend on their insureds' behalf is tort litigation. Tort litigation is about money, plain and simple. As a corporation, an insurer, which has an obligation to both defend and indemnify its policyholders, can and does stand in its policyholder's shoes because the claim is about money and the insurer has money.

Through the insurance contract, the policyholder has authorized the insurer to act on its behalf and, in defending the claim, the insurer is defending both its own monetary interests as well as those of its policyholder. By contrast, medical care is not about money – it is about physical well-being. A corporation cannot stand in a patient's shoes; nor can it absorb the patient's pain and disability if the care given is below standard. It is inappropriate to draw analogies between these two wholly distinct circumstances.

K. Attacks On Staff Counsel Appear To Be Grounded In Economics, Not Ethics Or The Unauthorized Practice Of Law.

Given the legal precedent in Texas and elsewhere supporting insurance staff counsel, the arguments that staff counsel are engaged in the unauthorized corporate practice of law or that those attorneys are systematically violating the Texas disciplinary rules, are flimsy at best. Staff counsel are certainly competitors of outside counsel (just as other outside defense firms compete against each other for business), many of whom are members of the TADC. That fact alone, however, should not be grounds for concluding that staff attorneys are engaged in the unauthorized practice of law.

As this Court is surely aware, the number of licensed attorneys has increased during the last decade at a sharply greater rate than the increase in the population at large.[9] At the same time, organizations of all types, including non-profits, businesses,

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[9] According to the Bureau of Labor Statistics, US Dept. of Labor, in July, 1972, the United States had 274,300 lawyers and in July, 1999, the United States had 1,012,200 lawyers. That amounts to an increase, in 27 years, of 737,900 lawyers or 269% more lawyers. According to the US Census Bureau, in July, 1972, the United States population was 209,898,021, and in July, 1999, the United States population was 272,690,813. That amounts to an increase of 62,794,792 people or 30% more people. *See also In re Wehringer's Case*, 547 A.2d 252 (N.H. 1988) (since ethics rules were approved by

and insurance companies, have expanded their use of staff lawyers. Understandably, some Texas attorneys may have suffered economically from these developments. But, competition for legal services, as in the provision of any service, is part and parcel of doing business in a free market. This Court should reject any position that appears to advance specious legal arguments in order to limit competition for legal services. *See* FTC/DOJ Ltr. to ABA, Dec. 20, 2002 (restrictions regarding the practice of law must be narrowly drawn to minimize the anticompetitive impact, *especially where the proposed restraint could prevent consumers from using an entire class of providers*); FTC/DOJ Comments to Georgia State Bar's Unauthorized Practice of Law Committee, Mar. 20, 2003 (same). As noted, neither the UPLC nor the TADC have established no evidence of harm by the use of staff attorneys. Insurance staff attorneys are not second class lawyers unfit to practice in a private law firm – they are fully licensed lawyers who are delivering legal services in an evolving format. *See, e.g., In re Weiss, Health & Rea*, 536 A.2d 266, 269-70 (N.J. 1988). If the use of staff attorneys results in lower legal costs, the public has an interest in seeing that the practice continues.

The UPLC's assertion that insurance staff attorneys are engaged in the unauthorized practice of law disserves both the public and the legal profession when it eliminates a long-standing beneficial practice that is consistent with Texas law. Instead of eliminating staff attorneys, this Court should uphold the right of Texas attorneys to

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American Bar Association in 1908, state's population has increased by approximately 150% while number of practicing attorneys has increased by 600%).

continue representing the aligned interests of insurers and policyholders. Such a decision would demonstrate faith in the integrity of all licensed attorneys, assuring Texas citizens that the quality of legal representation is not determined by artificial distinctions in employment status.

Amici urge this Court to preserve the freedom of all attorneys to practice their profession in a setting of their choosing. There is simply no justification to discriminate against insurance staff attorneys simply because they receive all of their income in providing legal services from one source. So long as licensed staff attorneys are engaging in the practice of law under circumstances totally consistent with the Texas Disciplinary Rules of Professional Conduct and are properly exercising independent legal judgment in carrying out that representation, the fact that they are salaried should not be used as a basis to single them out for unwarranted discrimination.

VI. CONCLUSION

Amici respectfully urge this Court to (1) affirm the decision under review, (2) hold that an insurance company's use of duly licensed, salaried staff attorneys to defend covered claims filed against its policyholders does not constitute the unauthorized practice of law, and (3) hold that a determination regarding any conflict of interest issue between an insurer and its policyholder, like any other conflict issue, is one that must be resolved by the attorney defending the claim under the Texas Disciplinary Rules of Professional Conduct (and not an unauthorized practice of law analysis).

Respectfully submitted,

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American Bar Association – Formal Ethics Advisory Opinion 03-430

PROPRIETY OF INSURANCE STAFF COUNSEL REPRESENTING THE INSURANCE COMPANY AND ITS INSUREDS; PERMISSIBLE NAMES FOR AN ASSOCIATION OF INSURANCE STAFF COUNSEL

July 9, 2003

This opinion addresses two ethical issues arising under the Model Rules of Professional Conduct. [FN1] First, may insurance staff counsel [FN2] represent both their employer and their employer's insureds in a civil lawsuit resulting from an event defined in the insurance policy? Second, under what name may an association of insurance staff counsel practice?

For the reasons set forth below, the Committee reaffirms its prior opinions and concludes that insurance staff counsel ethically may undertake such representations so long as the lawyers (1) inform all insureds whom they represent that the lawyers are employees of the insurance company, and (2) exercise independent professional judgment in advising or otherwise representing the insureds.

The Committee also concludes that insurance staff counsel may practice under a trade name or under the names of one or more of the practicing lawyers, provided the lawyers function as a law firm and disclose their affiliation with the insurance company to all insureds whom they represent.

Background

A liability insurance policy, subject to stated policy limits, promises to pay on behalf of the insured any amount for which the insured is liable on claims falling within the policy's coverage. In addition to this duty to indemnify, the insurance company assumes the duty to defend the insured against any such claims. The insured, in turn, by entering into a liability insurance contract with an insurance company, consents to give the company considerable control over the direction of the defense and any settlement of the matter. [FN3]

If the insured asks the insurance company to defend a lawsuit, and the suit falls within the insurance company's duty to defend, the insurance company is contractually bound to retain a lawyer to represent the insured. Absent a conflict, the lawyer commonly represents the insurance company as well. [FN4] The determination of when and to whom the client-lawyer relationship attaches is a matter of state law and not governed by the rules of professional responsibility. However, once the client-lawyer relationship attaches, the rules of professional responsibility, not the insurance contract or the lawyer's employer, govern the lawyer's ethical obligations to clients. [FN5] These obligations, the Committee's prior opinions have found, largely are unaffected by the determination of whether or not the insurance company is a co-client. [FN6] In any event, the insurance company provides direction to defense counsel in accordance with the terms of the insurance policy, and often as a co-client as well.

Historically, most insurance defense lawyers practiced in private law firms. Today, however, many are employees of insurance companies. [FN7] Whether insurance companies may use employee-lawyers to defend insureds, therefore, has been the subject of numerous opinions by courts and state bar association

committees. [FN8] The focus of these opinions customarily has been twofold. First, as a matter of the state's substantive law, does an insurance company that employs insurance staff counsel to represent the company's insureds engage in the unauthorized practice of law? [FN9] And second, as an ethical consideration, does the defense of insureds by employee-lawyers of the insurance company create an inherent and impermissible conflict of interest for the lawyer? [FN10] Because issues of substantive state law are beyond the purview of this Committee, we do not address the issue of the unauthorized practice of law. Rather, we focus exclusively on the second question, namely, the ethical considerations associated with the use of insurance staff counsel.

Issue one: May insurance staff counsel represent both their employer and their employer's insureds in a lawsuit seeking damages resulting from an event for which the insurance policy imposes a duty to defend?

The Committee first considered the ethical implications of lawyers serving as insurance staff counsel in Formal Opinion 282 (1950). [FN11] Applying the provisions of the Canons of Professional Ethics, we stated that "[a] lawyer, employed and compensated by an ... insurance company, which holds a standard contract of insurance with an insured, may with propriety ... [d]efend the insured in an action brought by a third party...." [FN12] We noted that "a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest." [FN13]

We revisited the question in Informal Opinion 1370, [FN14] concluding that the then-applicable Code of Professional Responsibility suggested "no different results." [FN15] A year later, in Informal Opinion 1402, [FN16] we reaffirmed an observation made in Formal Opinion 282 that "[t]he essential point of ethics involved is that the lawyer so employed shall represent the insured as his client with undivided fidelity...." [FN17]

We acknowledge that insurance staff counsel operations, perhaps due to their evolution and growth, continue to spawn ethical challenges. [FN18] Therefore, we revisit the issue in the context of today's Model Rules.

Insurance Staff Counsel and the Model Rules of Professional Conduct

The defense of an insured under an insurance contract gives rise to interrelated duties between the insurance company, the insured, and the lawyer retained by the insurance company. The Model Rules provide considerable guidance to insurance defense lawyers who must address the potentially divergent interests of insureds and their insurance companies on a daily basis. Fortunately, in the great majority of liability cases, the interests of insureds and their insurance companies do not collide. [FN19]

This is particularly true in the "full coverage case" in which the probable monetary exposure of the insured is within the limits of the insurance policy and there is no dispute regarding coverage for the incident. The interests of the company and the insured in these situations are financially aligned. [FN20]

We do not view the employment status of insurance staff counsel as itself creating a conflict between the insurance company and the insured when they are both represented by insurance staff counsel in a lawsuit. [FN21] In fact, the Model Rules dealing with conflicts of interest between co-clients specifically

contemplate lawyers representing multiple clients. Of course, if a conflict of interest between the insurance company and the insured does arise in the course of the representation, the lawyer immediately must resolve it by either obtaining the insured's informed consent or terminating his representation of the insured. [FN22]

Some courts and commentators have argued that, when the insurance company uses insurance staff counsel to defend its insureds, the opportunity for undue influence by the insurance company is too great. [FN23] However, even if it were assumed that the insurance company has more control over its employees than it does over retained lawyers in private practice, that circumstance is of no significance in the full coverage case "in which there is no temptation to favor the insurer's interests over that of the insured." [FN24]

We do note, however, that in defending insureds, insurance staff counsel must be vigilant of Rule 5.4(c), [FN25] which requires a lawyer to exercise independent professional judgment in advising or otherwise representing clients, regardless of who may be paying for the lawyer's services. [FN26] This rule underscores the importance of undivided fidelity to the insured-client. [FN27] Nothing in the status of insurance staff counsel as employees diminishes their obligation or ability to comply with Rule 5.4(c) or any of the other Model Rules. [FN28]

Disclosure of Employment Status

In Formal Opinion 96-403, [FN29] we discussed certain disclosures that an insurance defense lawyer must make to the insured-client. We noted that the Model Rules require the lawyer "to communicate with the client, and convey information 'sufficient to permit the client to appreciate the significance of the matter in question.'" [FN30] We advised that a prudent lawyer would inform the client of "basic information concerning the nature of the representation and the insurer's right to control the defense and settlement under the insurance contract...." [FN31] We suggested that this information could be routinely included in the retainer letter, or otherwise provided near the outset of the representation.

Here we interpret Rule 1.8(f) to require insurance staff counsel to disclose their employment status and affiliation with the insurance company to all insureds-clients. [FN32] Such disclosure should occur at the earliest opportunity practicable, such as during the initial meeting with the client or through appropriate language in the initial letter to the client. [FN33]

In contrast, the Model Rules do not place a similar duty of affirmative disclosure on insurance staff counsel in respect to communications with the courts or persons other than insureds-clients. As an ethical consideration, whether a lawyer is a member of an outside law firm or an employee of an insurance company is rarely material to persons other than insureds-clients. Therefore, although local law or court rule may require affirmative disclosure to persons other than insureds-clients, the Model Rules do not.

Issue two: How may an association of insurance staff counsel identify itself?

We next turn to the matter of names by which an insurance staff counsel office may identify itself. This subject has been of some concern to courts and state bar associations. [FN34] As the New Jersey Supreme Court stated: "We recognize the genuine interest of the petitioners in being permitted to practice under a name that they believe reflects the nature of their association." [FN35]

The inquiry must begin, as the New Jersey Supreme Court correctly assessed, with a determination of the "nature of the association." Stated directly: does an association of insurance staff counsel constitute a "firm" or "law firm" within the meaning of the Model Rules?

Whether an association of lawyers constitutes a "law firm" turns upon (1) the manner in which the association functions, and (2) the association's compliance with the responsibilities of a law firm, including those imposed by the Model Rules. [FN36] We thus examine the structure and function of insurance staff counsel operations.

Although there is substantial variation in approaches taken by different insurance companies, insurance staff counsel operations are most commonly unincorporated divisions of the insurance company's corporate law department. Typically, the offices of insurance staff counsel are physically and organizationally separate from the insurance company's business operations. A senior lawyer, often called a managing or supervising lawyer, oversees business and professional responsibilities in the office. [FN37] The supervising lawyer must make reasonable efforts to ensure the office's compliance with the ethical rules of the jurisdiction, including conflict of interest provisions. In this regard, the supervising lawyer functions much like a managing partner in a private firm.

The lawyers work collectively, usually in teams with other lawyers, paralegals, and support personnel. Those lawyers in a single location commonly share confidences and consult with each other on assignments and strategies. [FN38] In addition to functioning as a law firm, insurance staff counsel frequently are part of the insurance company's legal organizational structure, thereby falling within Model Rule 1.0's definition of "firm" or "law firm." [FN39]

Having shouldered the responsibilities associated with law firm status, are insurance staff counsel permitted to refer to themselves as a "firm," "law firm," or an "association" of lawyers? We conclude they may do so provided that the names satisfy Rule 7.5(a), which cautions that, "[a] lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1." Rule 7.1, in turn, reads:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

We believe the use of traditional law firm names, without more, might mislead insureds-clients who do not know the firm's affiliation with the insurance company. Such potential for misleading, however, is eliminated when insurance staff counsel disclose their employment status to their insureds- clients in the manner described above. [FN40]

As it happens, insurance staff counsel commonly include explanatory language on their letterhead, business cards, office entry signs, and court pleadings. The language identifies the lawyers in the firm as employees of the insurance company, e.g., "Employees of the Corporate Law Department of ABC Insurance Company." Although permissible, the Model Rules do not require such explanatory language, provided that all insureds-clients are informed of the employment status of the lawyer. [FN41]

So long as disclosure is made to all insureds-clients, an insurance staff counsel office may refer to itself as an association of lawyers practicing under the name of the supervising lawyer, e.g., "John Smith and Associates," or "Law Offices of John Smith." In addition, it is permissible for the lawyers to practice under the names of a former member of the firm who is totally retired from the practice of law, so long as the retired lawyer is designated as "retired" on firm letterhead and other firm listings. [FN42]

Insurance staff counsel offices may also practice under the name of two or more of the lawyers in the office, e.g., "Smith and Jones." Care must be taken in the latter approach, however, to comply with the

dictate of Rule 7.5(d) that "[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact." Specific and prominent disclosure of the employee status of the lawyers may be used to dispel any potential implication that the firm is a partnership. [FN43]

Insurance staff counsel offices also may use a trade name, subject to the limitations of Rule 7.5(a). For example, insurance staff counsel may include the name of the insurance company in the law firm's name, e.g., "Law Offices of ABC Insurance Company." [FN44] The Model Rules allow for the use of trade names (including the name of a deceased member of the firm) so long as the name is not misleading or deceptive. [FN45]

FN1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in February 2002 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

FN2. "Insurance staff counsel" are insurance company employees. Alternatively, they are called "house," "in-house," "salaried," or, less precisely, "captive" counsel.

FN3. See JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4681 (1979).

FN4. Many jurisdictions have adopted this "dual client" rule. For a collection of cases and authorities, see ABA Comm. on Ethics and Professional Responsibility Formal Op. 01-421 (Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions) n. 6 (Feb. 16, 2001), and RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 29.3 at 213 (5th ed. 2000).
Other jurisdictions have adopted a "single client" rule, in which the lawyer's sole client is the insured. For a collection of cases and authorities, see ABA Formal Op. 01-421 n.7. The ABA Ethics Committee's analysis and conclusions in this opinion are equally applicable in both "dual client" and "single client" jurisdictions.

FN5. ABA Comm. on Ethics and Professional Responsibility Formal Op. 96-403 (Obligations of a Lawyer Representing an Insured Who Objects to a Proposed Settlement Within Policy Limits) (Aug. 2, 1996), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 405 (ABA 2000).

FN6. ABA Formal Ops. 01-421 and 96-403, supra notes 4 and 5.

FN7. Insurance companies reportedly have employed insurance staff counsel to defend insureds since the 1890's. It is estimated that there are several thousand insurance staff counsel presently representing hundreds of thousands of insureds. See Charles M. Silver, Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers, 4 CONN. INS. L.J. 205, 237-40 (1997-98).

FN8. Many of these court decisions and bar association opinions are collected in Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 155 (Ind. 1999).

FN9. A substantial majority of jurisdictions that have addressed the issue have concluded the use of insurance staff counsel does not constitute the unauthorized practice of law. See, e.g., Gafcon, Inc. v. Ponsor & Assoc., 98 Cal.App.4th 1388, 1396-97, 120 Cal.Rptr.2d 392, 397 (Cal. Ct. App. 2002). Illinois and Maryland have enacted

statutes permitting insurance companies to employ staff counsel to defend insureds. 705 Ill. Rev. Stat. ch. 220, para. 5 (2001); Md. Code Ann. Bus. Occ. & Prof. § 10-206 (2001). Kentucky and North Carolina, however, have interpreted their unauthorized practice of law statutes to prohibit staff counsel operations. American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 571 (Ky. 1996); Gardner v. N.C. State Bar, 341 S.E.2d 517, 521 (N.C. 1986).

FN10. See Robert J. Johnson, Comment: In-House Counsel Employed by Insurance Companies: A Difficult Dilemma Confronting the Model Code of Professional Responsibility, 57 OHIO ST. L.J. 945, 965 (1996).

FN11. ABA Comm. on Ethics and Professional Responsibility Formal Op. 282 (May 27, 1950), in OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 621 (ABA 1967).

FN12. Id.

FN13. Id. at 622.

FN14. ABA Comm. on Ethics and Professional Responsibility Informal Op. 1370 (Representation of Policy Holder by Insurance Company House Counsel) (July 16, 1976), in FORMAL AND INFORMAL ETHICS OPINIONS 252 (ABA 1985).

FN15. Id.

FN16. ABA Comm. on Ethics and Professional Responsibility Informal Op. 1402 (Insured's Contractual Obligation to Reimburse Liability Insurer for Legal Expenses up to Deductible Amount in Defending Claim When Insurer's House Counsel Acts in Behalf of Insured) (November 3, 1977), in FORMAL AND INFORMAL ETHICS OPINIONS 290 (ABA 1985).

FN17. Id. at 292.

FN18. See Silver, supra note 7 at 237-58.

FN19. See Kent D. Syverud, What Professional Responsibility Scholars Should Know About Insurance, 4 CONN. INS. L.J. 17, 22 (1997-98) ("Intractable conflicts between insured and company have rarely developed, even though the insurance company largely calls the shots in the defense of claims.").

FN20. See In re Allstate Ins. Co., 722 S.W.2d 947, 952 (Mo. 1987) ("When coverage is admitted and adequate the interests of the insurer and the insured are congruent. Both are interested in disposing of the case on the best possible terms. Only the insurer's money is involved. Even though the insured may be interested in minimizing liability and damages, perhaps because of apprehension about insurance coverage and rates, this concern introduces no conflict and there is no reason why the same lawyer may not represent both interests.").

FN21. See In re Youngblood, 895 S.W.2d 322, 330 (Tenn. 1995) (employment relationship does not, in and of itself, constitute a violation of the professional duties of lawyers).

FN22. In re Allstate Ins. Co. 722 S.W.2d at 953; Cincinnati Ins. Co. v. Wills, 717 N.E.2d at 163 ("if [a conflict] arises retention of new counsel to represent the policyholder may be either preferred or necessary").

FN23. See, e.g., American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d at 571, as well as Michael D. Morrison and James R. Old, Jr., Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice, 53 BAYLOR L. REV. 349, 401-02 (2001).

FN24. In re Allstate Ins. Co., 722 S.W.2d at 952. See also Cincinnati Ins. Co. v. Wills, 717 N.E.2d at 163 ("the potential for conflict is inherent in the insurer-insured relationship regardless of whether the attorney is house counsel or outside counsel, and the employment relationship is not qualitatively different in this respect"). Some authorities even assert that there is less opportunity for undue influence in an insurance staff counsel office than in a private law firm. See MALLEN & SMITH, supra, note 4, § 29.10 at 272 ("[I]n a properly structured corporate environment, salaried counsel does not face many of the economic pressures that can tempt outside counsel to favor the insurance company. Employed counsel has no bills to send out, justify or collect. There is no concern about receiving future assignments, and there is no economic benefit in seeking to increase the volume of the business."). For a description of the pressures placed upon outside insurance defense lawyers, see Stephen L. Pepper, Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice, 4 CONN. INS. L.J., 27, 46 (1997-98).

FN25. Rule 5.4(c) states "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

FN26. Although a lawyer has the duty to advise, the Model Rules leave to the client or the client's representative the decision whether to implement legal advice. As Rule 1.4(b) states, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

FN27. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 12.13, at 12- 31-12 to 32 (3d ed. 2002).

FN28. See, e.g., California State Bar Standing Comm. on Professional Responsibility and Conduct Formal Op. 1987-91, 1987 WL 109707 * 3 (1987) ("the mere fact that the lawyers are employees of Insurance Company does not necessarily compromise the attorney's independent professional judgment").

FN29. ABA Comm. on Ethics and Professional Responsibility Formal Op. 96-403, supra note 5.

FN30. Id. at 406.

FN31. Id.

FN32. Model Rule 1.8(f) provides: "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.6." It typically applies when the insurance company pays the fees of the defense lawyer to represent the policyholder, whether or not the insurance company also is a client. See also Restatement (Third) Of The Law Governing Lawyers § 16, cmt. e (2000). ("A lawyer may not knowingly make false statements to a client and must make disclosures to a client necessary to avoid misleading the client.").

FN33. These are not the exclusive means of informing insureds-clients. The disclosure of employment status to clients can be accomplished in a variety of ways, including a personal meeting with the insured or clear language in the engagement letter. As one bar association ethics committee has stated: "In this situation lawyers should exercise their own sound judgment as to how best to inform insureds whom they are designated to represent that they are paid by the insurers, whether as employees or independent contractors...." Nassau County Bar Ass'n Comm. on Professional Ethics Op. 95-5 (1995).

FN34. See MALLEN & SMITH, supra note 4, § 29.10 at 261 (setting out the various jurisdictional approaches).

FN35. In re Weiss, Healy & Rea, 536 A.2d 266, 269-70 (N.J. 1988).

FN36. See Florida Bar Ass'n Report of the Special Comm'n on Ins. Practices II at 16 (Mar.1, 2002), adopted by Florida Bar Bd. of Governors (Mar. 15, 2002) ("It is recognized that what constitutes a law firm for purposes of the rules is to be determined by a functional analysis of particular relationships and the purposes of the relevant ethical strictures in protecting the public interest."). See also Amendment to Rules Regulating The Florida Bar Re: Rules of Professional Conduct, 838 So.2d 1140 (Fla. 2003) (court formally adopted amendments to rules of professional conduct recommended in Special Commission report).

FN37. Report and Recommendations of the House Counsel Task Force of the Ohio State Bar Ass'n 10 (2002) ("Staff counsel organizations should be designed as law firms that are controlled by senior attorneys.").

FN38. If lawyers residing in separate offices function as insurance staff counsel for the same insurance company, the lawyers may share the confidences of clients among the offices. However, if they do so, or otherwise hold themselves out as associated with lawyers in other offices, the lawyers in all locations will be subject to the imputation of conflicts of interest under Rule 1.10. Whether various offices of insurance staff counsel constitute one law firm or multiple law firms for purposes other than maintaining client confidences and conflict avoidance has received scant attention from courts or scholars. Furthermore, it would seem to have few, if any, practical implications. Ultimately, as Comment [1] to Rule 1.10 suggests, the determination of whether offices operate as separate law firms comes down to "specific facts."
For example, in ABA Comm. on Ethics and Professional Responsibility Informal Op. 1309 (Legal Services Offices Representing Opposing Sides) (January 13, 1975), in FORMAL AND INFORMAL ETHICS OPINIONS 181 (ABA 1985), the ABA Ethics Committee addressed whether lawyers of the Neighborhood Law Office ("N.L.O.") and those of the state bar association's Legal Services Project, could represent opposing sides. The N.L.O. was an unincorporated legal services project that received indirect funding through the Legal Services Project. The Committee reviewed how the N.L.O. and Legal Services Project functioned, and concluded the lawyers could represent opposing sides because the offices "operate[d] as separate law firms." Id. at 182.

FN39. Rule 1.0(c) defines "firm" or "law firm" to include "lawyers employed in a legal services organization or the legal department of a corporation or other organization." Comment [1] to Rule 1.10 states, "[f]or purposes of the Rules of Professional Conduct, the term 'firm' includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization."

FN40. See supra note 33 and accompanying text.

FN41. We note that insurance staff counsel do not solicit clients. They obtain clients solely through their affiliation with their employer. Because the employment status of insurance staff counsel is seldom material to anyone other

than insureds-clients, Rule 7.1's threshold of a "material misrepresentation" rarely will be met in this context.

FN42. See ABA Comm. on Ethics and Professional Responsibility Informal Op. 85- 1511 (Use of Firm Name "The X Partnership" Where X is Retired) (March 26, 1995), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 547 (ABA 2000), finding it permissible for a firm to practice under the name of the "X Partnership" when founding partner X retired.

FN43. Accord New York State Bar Ass'n Comm. on Professional Ethics Op. 726, 2000 WL 567960 *3 (2000). Another means of preventing misunderstanding would be to incorporate the legend "an association of lawyers not in partnership" or similar language whenever the firm's name appears on letterhead, business cards, and signage.

FN44. But see Virginia Legal Ethics Op. 775 (1986) (impermissible to use on letterhead designation "Law Offices of the ABC Insurance Company," followed by names of staff counsel).

FN45. Comment [1] to Rule 7.5 provides an instructive example. "If a private firm uses a trade name that includes a geographic name such as 'Springfield Legal Clinic,' an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication."

ANALYSIS OF OTHER STATES' POSITIONS ON THE USE OF INSURANCE STAFF ATTORNEYS TO DEFEND INSUREDS

AS OF MAY 2005

JURISDICTIONS APPROVING THE USE OF STAFF ATTORNEYS TO DEFEND INSUREDS

1. Alabama	Ala. State Bar Ethics Op. No. 81-533 (1981).
2. Alaska	AK Bar Ethics Op. 99-3 (1999).
3. Arizona	Ariz. State Bar Assn. Ethics Op. No. 75-4 (1975).
4. California	*Gafcon, Inc. v. Ponsor & Associates*, 98 Cal. App. 4th 1388, 120 Cal. Rptr.2d 392 (2002). Cal. State Bar Op. No. 1987-91.
5. Colorado	Colo. Bar Assn., Formal Ethics Op. No. 91 (1993).
6. Connecticut	*King v. Guiliani*, 1993 Conn. Super. LEXIS 1889, 1993 WL 284462 (Conn. Super. 1993).
7. Florida	*Amendments to R. Reg. Fla. Bar,* 838 So. 2d 1140 (Fla. 2003); *In re Rules Governing the Conduct of Attys,* 220 So. 2d 6 (Fla. 1969).
8. Georgia	*Coscia v. Cunningham*, 299 S.E.2d 880 (Ga. 1983).
9. Illinois	Ill. State Bar Assn., Advisory Op. on Prof. Conduct, Op. No. 89-17 (1990). *Kittay v. Allstate,* 397 N.E.2d 200, 202 (Ill. App. 1979).
10. Indiana	*Cincinnati Ins. Co. v. Wills,* 717 N.E.2d 151 (Ind. 1999).
11. Iowa	Iowa State Bar Assn., Ethics Op. 88-14 (1989).
12. Maryland	Md. State Bar Assn., Ethics Op. 00-23 (2000).
13. Michigan	Mich. Ethics Op. No. CI-1146 (1986).
14. Missouri	*In Re Allstate Ins. Co.*, 722 S.W.2d 947 (Mo. 1987) (en banc).
15. New Jersey	*In re Weiss, Healey & Rea,* 536 A.2d 266 (N.J. 1988); N. J. Supreme Ct. Com. on Unauthorized Prac., Op. No. 23 (1984).
16. New York	N.Y. State Bar Assn., Prof. Ethics Com. Op. No. 109 (1969). N.Y. State Bar Assn., Prof. Ethics Com. Op. No. 726 (2000).

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17. Ohio	*Strother v. Ohio Cas. Ins. Co.*, 28 Ohio L.Abs. 550, 14 Ohio Op. 139 (C.P. 1939); *Cincinnati Bar Assn. v. Allstate Ins. Co.*, No. 02-02 (2003) (UPL Commission Board reaffirmed that use of staff counsel not UPL), *rev. denied, Cincinnati Bar Assn. v. Allstate Ins. Co.*, 2003-1834.
18. Oklahoma	Ok. Ethics Op. 309 (1998).
19. Oregon	Formal Ethics Op. 1998-153(9/98).
20. Pennsylvania	Schoffstall v. Nationwide Mut. Ins. Co., 2002 WL 31951309, 58 Pa. D. & C.4th 14 (Pa.Com.Pl. Jun 28, 2002) (NO. 1994-SU-04190-01), *Affirmed by Schoffstall v. Nationwide Mut.*, 844 A.2d 1297 (Pa.Super. Dec 02, 2003) (TABLE, NO. 1097MDA2002); *Appeal Denied by Schoffstall v. Nationwide Mut. Ins. Co.*, 578 Pa. 695, 851 A.2d 142 (Pa. May 25, 2004) (TABLE, NO. 2 MAL 2004); Pa. Bar Assn. Com. on Eth. and Prof. Resp., Formal Op. 96-196 (1997).
21. Tennessee	*In Re Petition of Youngblood*, 895 S.W.2d 322 (Tenn. 1995).
22. Virginia	Va. UPL Opinion No. 60 (1985), *approved by Virginia Supreme Court* (1985). Va. State Bar, Legal Ethics Op. No. 598 (1985).
23. West Virginia	W.Va. Bar Assoc. Unlawful Practice Comm. Op. (1999); W.Va. Lawyer Disc. Bd., Op. L.E.I. 99-01 (1999).
24. American Bar Association	ABA Formal Op. 03-431 (2003); ABA Formal Op. 282 (1950).

JURISDICTIONS DISAPPROVING THE USE OF STAFF ATTORNEYS TO DEFEND INSUREDS

1. Kentucky	*American Insurance Assoc. v. Kentucky Bar Assoc.*, 917 S.W.2d 568 (Ky. 1996).
2. North Carolina	*Gardner v. North Carolina State Bar* (N.C. 1986), 341 S.E.2d 517 (N.C. 1986).

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POSITION OF OTHER STATES HAVING APPROVED STAFF COUNSEL ON THE PROPER METHOD FOR NAMING STAFF COUNSEL OFFICES

AS OF MAY 2005

1. Alabama	Not addressed
2. Alaska	Not addressed
3. Arizona	Ariz. State Bar Assn. Ethics Op. No. 97-01 (lawyers employed as salaried in-house insurance company attorneys should not hold themselves out as a separate law firm under one or more of their surnames)
4. California	Cal. State Bar Op. No. 1987-91 (staff counsel may practice under their own names with a specification of the relationship to the insurance company, such as "Law Division for Insurance Company")
5. Colorado	Colo. Bar Assn. Formal Ethics Op. No. 91 (1993) (no specific guidance on staff counsel law office names; states that such offices must "take care to comply with Rules 7.1 & 7.5, which prohibit misleading communications with letterhead.")
6. Connecticut	Not addressed
7. Florida	Rule 4-7.10(g) (an insurance staff attorney law office may use a name that is not materially misleading; the law office name must include the name of a lawyer who has supervisory responsibility for all lawyers in the office; with exception of court pleadings, all documents containing the firm name must disclose that the lawyers in the firm are employees of the insurer; comment to rule: "Practicing under a name prohibited by subsection (f) is not permitted" – subsection (f) prohibits partnership type names unless office is a partnership) Special Insurance Practices Commission II Report (lawyer included in the law office name must have actual and primary responsibility for the functional unit of attorneys practicing under the name; approved two types of names (1) "Law Office of X" or (2) X & Associates" followed by

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	proper disclosure; expressed view that partnership type names were impermissible because Rule 4-7.10(f) prohibits lawyers from stating or implying that they practice in a partnership only if that is a fact; disclosure must include name of insurance company employer and the disclosure should appear on office entry signs, letterhead, business cards, websites, announcements, advertising, and listings or entries in a law list or bar publication bearing the law office name)
8. Georgia	Not addressed
9. Illinois	Not addressed
10. Indiana	*Cincinnati Ins. Co. v. Wills,* 717 N.E.2d 151 (Ind. 1999) (disclosures stating not a partnership were inadequate because type size was small and did not appear elsewhere, as in telephone directory listing or on door; misleading in implying the existence of an independent law firm – thus use of name suggesting legal entity other than insurer had to be discontinued) *In re Foos,* 770 N.E.2d 335 (Ind. 2002) (court held that staff counsel office name was misleading in violation of Rule 7.2 because it suggested law firm was independent from the insurer and disclosure was physically too remote and type size failed to cure misconception of independence)
11. Iowa	Not addressed
12. Maryland	Md. State Bar Assn., Ethics Op. 00-46 (2000) (adopting position from Indiana Supreme Court in *Wills*; states that staff counsel law offices may not use any name suggesting a separate legal entity and must use their employer's letterhead and that relationship between the attorneys and the insurance company must be disclosed to the insured)
13. Michigan	Not addressed
14. Missouri	Not addressed
15. New Jersey	*In re Weiss, Healey & Rea,* 536 A.2d 266 (N.J. 1988) (rejected ethics opinion that denied ability to use partnership type name and directed committee to study issue)

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	N.J. Ethics Comm. Report, 125 N.J.L.J. 316 (Jan. 9, 1990) & Ethics Op. Supplement No. 23 (Aug. 20, 1990) (use of multiple names by employed lawyers is common and has not resulted in complaints or unethical conduct. Use of disclaimer of partnership does not adequately describe the entity or eliminate confusion. Recommended ethical rule be changed to permit the existing practice but add the consequence that the principals share the legal responsibilities of partnership practice) Rule 7.5(d) amended per committee report (lawyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services)
16. New York	N.Y. State Bar Assn., Prof. Ethics Com. Op. No. 726 (2000) (staff counsel offices may use law firm type names if the office (1) discloses employment relationship on letterhead and all public communications; and (2) attorneys in the office undertake to act consistent with the professional responsibilities of a law firm, including the responsibilities imposed on law firms as entities under the disciplinary rules; relies in part on *Weiss* opinion from New Jersey; notes that attorneys with management responsibility in the firm must make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules and that conflicts of interest are imputed to other lawyers)
17. Ohio	Ohio Sup. Ct. Bd. of Comm. on Grievances and Discipline 95-14) (It is a violation of the Code of Prof. Conduct for staff attorneys to practice under firm name consisting of one or more attorneys)
18. Oklahoma	Not addressed
19. Oregon	Formal Ethics Op. No. 1998-153(9/98) (Use of a firm name other than Law Division or equivalent thereof would be misleading. Letterhead must indicate the relationship between the staff counsel office and the law division. For example, letterhead could contain an asterisk identifying the

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	firm as the Law Division for [Name of Insurer])
20. Pennsylvania	Pa. Bar Assn. Com. on Eth. and Prof. Resp., Formal Op. 96-196 (1997) (explanation and disclosure should be in the letterhead or the initial letter to the insured-client; policy of disclosure to insured should obviate need to disclose to anyone else; notes that unless there is a rule change similar to that in New Jersey, there is a danger that partnership-sounding names would violate the rules)
21. Tennessee	*In Re Petition of Youngblood*, 895 S.W.2d 322 (Tenn. 1995) (Use of a name suggesting the existence of a law firm could violate DR 2-101 and 2-102)
22. Virginia	Va. UPL Opinion No. 775, Standing Comm. on Legal Ethics (Apr. 3, 1986) (a staff attorney's employment relationship must be disclosed on name cards, letterhead, phone answering method, and name plates on office doors) Va. UPL Opinion No. 509 (1983) (same)
23. West Virginia	W.Va. Lawyer Disc. Bd., Op. L.E.I. 99-01 (1999) (use of a law firm type name by staff counsel offices would be misleading to the general public even where full disclosure is made by letter to insureds at the beginning of the representation; insurer must disclose affiliation with insurer on business cards, letterhead, pleadings, office areas and in answering the telephone)
24. American Bar Association	ABA Formal Op. 03-431 (2003) (so long as disclosure is made to all insured-clients, an insurance staff counsel office may refer to itself as an association of lawyers practicing under the name of the supervising lawyer, e.g. "John Smith and Associates," or "Law Offices of John Smith"; may also use name of former firm member who is totally retired from practice of law so long as "retired" is on firm letterhead and other listings; may also practice under name of two or more lawyers (e.g. "Smith and Jones"), but care must be taken to make sure that the disclosure of the employee status of the lawyers dispels any implication that the office is a partnership; may also use a trade name, e.g., "Law Offices of X Insurance Company")

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