No. 79A02-9806-CV-503

In The Court Of Appeals Of Indiana

CINCINNATI INSURANCE COMPANY, INC., (Intervenor Below), CELINA INSURANCE GROUP, (Defendants Suters' Insurer Below), and KEITH Interlocutory Appeal from the FABER, (Defendants Suters' Counsel Tippecanoe Superior Court Below), Appellants,

v.

DAVID J. WILLS and MARSHA Lower Court Cause No. WILLS, (Plaintiffs Below), ELAINE 79D01-9605-CP-00132 MELLINGER, (Defendant Below), and ROBERT SUTER and BETTY SUTER, The Honorable Thomas K. Milligan, (Defendants Below), Special Judge Appellees.

AMICI CURIAE BRIEF OF INDIANA CHAMBER OF COMMERCE, INDIANA LEGAL EDUCATION FOUNDATION, INC., AMERICAN CORPORATE COUNSEL ASSOCIATION, CINERGY SERVICES, INC., INDIANA MANUFACTURERS ASSOCIATION, INSURANCE INSTITUTE OF INDIANA, INC. AND ASSOCIATION OF INDIANA LIFE INSURANCE COMPANIES

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ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950)
ABA Comm. on Professional Ethics and Grievances, Informal Op. 1402 (1977)
Cal. St. Bar Comm. on Professional Responsibility., Formal Op. 1987-91 (1987)
N.J. Comm. on the Unauthorized Practice of Law, Op. 23 (1984)

Paul J. Galanti, 17 Indiana Practice § 8.2 (1991)
Anne B. Fisher, How to Cut Your Legal Costs, Fortune, Apr. 23, 1990, at 185

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 (1998)
Edward Adams, 24% Less for Outside Lawyers, N.Y. L.J., Dec. 11, 1992, at 1
Grace M. Giesel, The Kentucky Ban on Insurers' In-House Attorneys Representing Insureds, 25 N. Ky. L. Rev. 365 (1998)
Harold A. Segall, Then and Now: The Commercial Practice Of Law For Over Fifty Years, 24 Fordham Urb. L.J. 567 (1997)
Having Criticisms of In-House Counsel Put Outside Counsel in the Dog House? Litigation Reporter, 512 (Nov. 1995)
Jeff Barge, For In-house Counsel, Safety in Numbers: Survey Shows Ernst & Young's Legal Department Cutback Not Typical, 81 A.B.A.J. 28 (1995)
Jeffrey W. Jackson and Roy Alan Cohen, Defending the Insured with Salaried Counsel: Legal and Ethical Considerations, The Brief (ABA Winter 1998)
Leo J. Jordan and Hilde E. Kahn, Ethical Issues Relating to Staff Counsel Representation of Insureds, 30 Tort & Ins. L.J. 25 (1998)
Managing the Corporate Legal Function: The Law Department, Outside Counsel, and Legal Costs, 13 Bus. Law Monographs 1 (1991)
Mary Daly, The Role of General Counsel: Perspective: The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of General Counsel, 46 Emory L.J. 1057 (1997)
Michael E. Neben, And Here's to You Inside Counsel for Your Competitive Edge, Chi. Daily Bull., June 17, 1992, at 5
Ronald E. Mallen, Defense By Salaried Counsel: A Bane Or A Blessing?, 61 Def. Couns. J. 518 (1994)
William Anthony, Vicarious Liability Concerns For Insurers Using In-House Insurance Defense Counsel, 27 S.W. U. L. Rev. 125 (1997)
William Kursland Edwards, The Unauthorized Practice of Law by Corporations: North Carolina Holds The Line, 52 N.C. L. Rev. 1422 (1987)

STATEMENT OF INTERESTS[1]

This *Amici Curiae* brief is filed on behalf of several associations which represent various business, industrial, insurance, manufacturing and professional concerns; a bar association whose membership consists of corporate in-house counsel; and a corporation which utilizes in-house attorneys to represent itself and its subsidiaries and affiliates. Therefore, individually and collectively, the *amici curiae* have a paramount interest in the issues raised in the above-captioned appeal and in the rules of law announced by the Indiana Appellate Courts with respect to whether the use of in-house counsel by corporations to represent third parties who share a community of interest with those corporations constitutes the unauthorized practice of law. The *amici curiae* respectfully request that this Court consider the overwhelming and far-reaching ramifications of the trial court's decision should it be allowed

to stand. As written, the trial court's order adversely affects the ability of all corporations to utilize in-house counsel. Based upon important public interests, this *Amici Curiae* brief supports the appeal of Appellants, Cincinnati Insurance Company, Celina Insurance Company, and Keith Faber, and requests that the trial court's order be reversed and that an opinion be adopted by this Court declaring that a corporation may assign in-house counsel to represent third parties who share a community of interest with the corporation. The *amici curiae* represented in this brief are as follows:

. The Indiana Chamber of Commerce ("Chamber") seeks to provide the maximum opportunity for meaningful employment for all the citizens of Indiana by ensuring that a world-competitive business climate exists in this state. The Chamber does this by advancing thoughtful public policy in the legislature and before Indiana courts. With more than 5,000 member businesses, the Chamber is the largest broad-based business organization in the state. Its members include 130 local chambers of commerce and 72 trade associations representing many more thousands of businesses. Many of these businesses utilize in-house counsel to meet their legal needs.

. The Indiana Legal Education Foundation, Inc. ("Foundation") is a private non-profit corporation representing a statewide group of business and industrial concerns. The purpose of the Foundation is to represent these concerns in litigation involving broad and significant legal questions that will affect the general welfare of the state. Many of the businesses the Foundation represents utilize in-house counsel to meet their legal needs.

. The American Corporate Counsel Association ("ACCA") is a non-profit bar association for attorneys who are employed as in-house counsel by their clients. As the only national bar association whose membership is exclusively limited to in-house lawyers, ACCA has grown from its founding in 1982 to a membership of over 10,500 individual counsel who represent over 4,600 corporations and other private sector organizations. Nationally, more than 600 members of ACCA are employed as staff counsel by insurance companies; these counsel represent over 250 different insurance companies (and thousands of those companies' insureds) across the United States. Locally, there are more than 125 individual members of ACCA who practice in the State of Indiana, and who are a part of ACCA's Indiana Chapter, including staff counsel who are employed by insurance companies located in the state. The ability of any corporate counsel to practice law as fully licensed, responsible and equally empowered advocates on behalf of their clients is of direct concern to ACCA, its members in Indiana, and the insurance companies and third-party clients who are represented by many of these in-house counsel.

. Cinergy Services, Inc., ("CSI") is a subsidiary of Cinergy Corp., a Delaware corporation which has annual revenues in excess of $4 billion. Cinergy Corp., owns a number of utility and non-utility companies which provide gas, electric and other services to more than 2 _ million customers around the world. Virtually all holding companies organized under the PUHCA have a subsidiary "service" company to provide centralized managerial, administrative and other support functions, such as accounting, legal and purchasing, for themselves and their subsidiaries and affiliates. As relevant herein, CSI provides the legal services for Cinergy Corp. and its subsidiaries and affiliates, including PSI Energy, Inc., an Indiana corporation. Those services are provided primarily by an in-house legal department of 30 attorneys, many of whom regularly practice in the Indiana courts and before administrative agencies. CSI's attorneys practice in the areas

of contracts, litigation, real estate, intellectual property, utility law, securities, environmental law, employment and labor law, general corporate law, bankruptcy, regulatory law, and mergers and acquisitions. The use of in-house counsel is crucial to the success of Cinergy Corp. and in controlling its costs, thereby affecting the rates paid for gas and electric utility services by its customers in Indiana and elsewhere.

. The Indiana Manufacturers Association ("IMA") represents the interests of its 1,700 regular and associate members with regard to issues of importance to the manufacturing community within the State of Indiana. Members of IMA employ more than 600,000 persons and do business at 2400 sites throughout the State of Indiana. Many members of IMA utilize in-house counsel to meet their legal needs.

. The Insurance Institute of Indiana, Inc. ("III") is a non-profit corporation which represents 80 member-insurers, as well as 58 other insurers who subscribe to its services and do business in Indiana. The members and subscribers of III represent a large segment of the insurance industry in Indiana which has approximately 11,000 individuals who are employed in the insurance industry in this state. Several members of III utilize staff counsel to represent their own interests as well as those interests which the members share in common with their insureds.

. The Association of Indiana Life Insurance Companies ("AILIC") represents the life insurance industry in legislative, administrative and judicial matters at the state, county and municipal levels of government. AILIC is a clearinghouse for the exchange of information concerning governmental and quasi-governmental regulations relating to the life insurance industry and represents its members with regard to issues of importance to the life insurance industry. Many members of AILIC utilize in-house counsel to meet their legal needs.

SUMMARY OF ARGUMENT

The trial court held that a corporation is engaged in the unauthorized practice of law when it assigns an employee-attorney to represent third parties who share a community of interest with the attorney's employer. The trial court did not base this conclusion on a finding that the employee-attorney's professional judgment would be adversely affected by his relationship with his employer or that the attorney could not competently or ethically represent the third party. Rather, the trial court based its conclusion on an agency rule which is limited to conspiracy law and on an unfounded belief that Indiana has *implicitly* barred such practice by enacting a professional corporation act and an admission and discipline rule which allow attorneys to form professional corporations. Neither principles of agency law nor the rules authorizing attorneys to form professional corporations, however, support a finding that a corporation engages in the unauthorized practice of law when it utilizes in-house counsel. The rule prohibiting the unauthorized practice of law was promulgated to protect the public against unscrupulous professionals and to protect the independent judgment of attorneys. The trial court specifically found that the professional judgment of employee-attorneys are not affected by their corporate employers and that such attorneys are no more prone to engage in unethical behavior or provide ineffective counsel than outside attorneys. Thus, the evils sought to be eradicated by the prohibition on the unauthorized practice of law are not implicated by the use of staff counsel. Moreover, the corporations and clients served by staff counsel derive great benefit from using such counsel. Staff counsel are able to provide high quality legal services for lower costs. These reduced legal costs lead to lower costs for consumers who patronize companies who utilize staff counsel. Consequently, the public

benefits from the use of in-house counsel. In the absence of any evidence that the employee-attorneys' professional judgment is adversely affected by this arrangement staff counsel should be allowed to represent third parties who share a community of interest with their corporate employers. Accordingly, this Court should reverse the trial court and declare that in-house counsel may represent third parties who share a community of interest with their employers.

ARGUMENT

THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT A COMPANY ENGAGES IN THE UNAUTHORIZED PRACTICE OF LAW WHEN ONE OF ITS EMPLOYEES PRACTICES LAW.

The trial court found that a corporation which assigns its employee-attorneys to represent third parties who share a community of interest with the corporation engages in the unauthorized practice of law. The trial court based this conclusion on "principles" of agency law and on its belief that the professional corporation act and Ind. Rules of Admission and Discipline Rule 27 implicitly prohibit such assignments. The trial court erroneously applied agency principles and incorrectly interpreted the professional corporation act and Rule 27 to reach this conclusion. Therefore, its decision should be reversed.

.A corporation is not engaged in the practice of law when its agent-employee practices law.

The trial court looked to principles of agency law to reach its conclusion that staff counsel arrangements should be outlawed in the State of Indiana. The court found that:

> Celina does in fact engage in the practice of law when its salaried attorneys represent its insured. A corporation acts through its agents and the acts of the agent are the acts of the corporation. Soft Water Utilities, Inc. v. LeFevre, 293 N.E.2d 788 (Ind.App. 1973), [1] citing Johnson v. Baker, 445 F.2d 424 (3d Cir. 1971); Pierson [sic] v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir. 1964); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952). Because Celina's attorneys are its agents, and the acts of those attorneys are therefore those of Celina, Celina is engaged in the corporate practice of law when it assigns its salaried attorneys to represent its insureds.

R.1209. To reach this conclusion, the trial court had to assume that a principal "practices" law whenever its agents practice law. This assumption is erroneous.

The trial court relied on conspiracy cases to support its conclusion that a corporation practices law when its employees practice law. See Soft Water Utilities, Inc. v. LeFevre, 308 N.E.2d 395, 399 (Ind. Ct. App. 1974); Johnson, 445 F.2d at 426; Pearson, 332 F.2d at 442; Nelson Radio, 200 F.2d at 914. Courts have adopted the "acts of the agent are the acts of the corporation" principle so that a plaintiff cannot assert a conspiracy claim against a corporation each time an agent of the corporation commits a wrongful act. Consequently, the agent and principal are deemed to be a single entity under conspiracy law. Tilbury v. City of Fort Wayne, 471 N.E.2d 1183, 1186 (Ind. Ct. App. 1984). This rule of law is commonly referred to as the "intra-corporate conspiracy doctrine." See e.g., Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)(corporations are incapable of conspiring with their own subsidiaries, officers, or employees for the purposes of Section 1 of the Sherman Act, 15 U.S.C. §1).

Although the "intra-corporate conspiracy doctrine" is an established tenet of conspiracy law, the principle should not be, and has not been, blindly extended to other areas of law. For example, Indiana has rejected this corporate fiction in the context of defamation claims. Bals v. Verduzco, 600 N.E.2d 1353, 1354-1356 (Ind. 1992)(intra-company communication between officers or employees regarding an employee's evaluation may constitute "publication" for purposes of defamation claims; rejecting view that corporation was "simply communicating with itself"). As discussed infra, mutating this conspiracy principle to apply to in-house or staff counsel arrangements leads to absurd results. Accordingly, the trial court erroneously relied on conspiracy cases to find that a corporation is engaged in the practice of law whenever its employee-attorneys practice law.

The trial court's conclusion that a corporation "practices" law whenever its agent-employees practice law logically applies in all cases where a corporation employs attorneys to represent itself or the shared interests of a third party. After all, if the acts of the agent are always the acts of the corporation, any corporation employing staff counsel would be engaged in the practice of law regardless of whether the agent was representing his employer or a third party. The court's "reasoning" would also bar a non-profit organization from employing staff counsel to represent the interests which the organization may share in common with third parties. Therefore, a court applying the trial court's logic would be forced to conclude that corporations are practicing law when they employ agents who practice law. A court would further be forced to conclude that a non-profit organization such as the Legal Services Organization is practicing law when it utilizes its own staff attorneys. Such absurd results cannot be countenanced.

The trial court's logic extends beyond the employer-employee relationship. The trial court found that a corporation practices law whenever its *agents* practice law. The Indiana Court of Appeals has held that outside counsel is an *agent* of the insurer. See Farm Bureau Ins. Co. v. Groen, 486 N.E.2d 571, 573-574 (Ind. Ct. App. 1985). Consequently, a corporation which retains outside counsel would be engaged in the practice of law under the analysis adopted by the trial court because its agent is practicing law. See Id. at 573-574. The trial court, of course, did not intend for its opinion to have such a far reaching result. Nevertheless, the logic adopted by the trial court that the acts of the agent are the acts of the corporation would apply whenever an attorney is deemed to be an agent. Accordingly, the trial court's logic must be rejected.

.The professional corporation act and Rule 27 do not prohibit corporations from utilizing staff counsel.

After applying its faulty logic to find that a corporation engages in the practice of law when it employs staff counsel to represent the interests of third parties, the trial court then concluded that such practice was "unauthorized." Specifically, the trial court found that the professional corporation act and Rule 27 *implicitly* prohibit this type of practice. Neither the statute nor the disciplinary rule expressly outlaw the use of staff counsel. Rather, the trial court gleaned this prohibition from its belief that the act and the rule limit attorneys from practicing in any corporation other than one formed as a professional corporation. This interpretation of the act and the disciplinary rule violates basic tenets of construction.

The professional corporation act provides that "one (1) or more attorneys may form a professional corporation to render services that may legally be performed only by an attorney." Ind. Code § 23-1.5-2-3(a)(3) (1993). Elementary rules of statutory construction require courts to determine and implement the legislative intent underlying a statute and to construe the statute in such a way as to prevent absurdity and hardship and to favor public convenience. Family & Soc. Services Admin. v. Calvert, 672 N.E.2d 488, 492 (Ind. Ct. App. 1996). The trial court failed to consider the intent of the professional corporation act when it

declared that the use of staff counsel was implicitly prohibited.

The professional corporation act was enacted for the purpose of allowing attorneys and other professionals to enjoy certain tax benefits which were available to corporations. [2] Paul J. Galanti, 17 Indiana Practice § 8.2 (1991). The purpose has been summarized as follows:

> Indiana, like all jurisdictions, has statutorily authorized professionals to incorporate. The Professional Corporations Act was enacted in 1983 to supplant four separate professional corporation acts. The purpose of such acts is to permit professionals to incorporate their practices, primarily for tax purposes, while preserving the established professional relationship with patients and clients.

Id. at 463-464. Consequently, the professional corporation act "was devised to give . . . attorneys . . . certain benefits and advantages of corporate taxation . . . ." Id. at 32.

The trial court ignored the intent of the act when it reached its conclusion. The trial court also failed to consider the reason why Rule 27 was promulgated. This rule allows attorneys to form professional corporations, limited liability companies and limited liability partnerships. Admis. Disc. R. 27 (1998). The rule, however, says nothing about the propriety of a corporation employing attorneys to represent third parties. The Supreme Court first recognized the ability of attorneys to form professional corporations soon after the legislature passed the first edition of the professional corporations act. Appendix to Ind.Code § 23-1-13 (1971). Rule 27 is a direct descendant of this order. As noted above, the act was passed to provide certain tax benefits to attorneys. The incorporation of the Indiana Supreme Court's order as an appendix to the act clearly indicates that the order was promulgated for the same reason the act was passed: to provide attorneys with certain tax benefits available to corporate entities. Consequently, there is nothing in the text or history of the rule to support the trial court's determination that the Indiana Supreme Court intended to prohibit the use of staff counsel when it promulgated Rule 27.

References to other rules promulgated by the Indiana Supreme Court further support the conclusion that it did not intend to *implicitly* outlaw staff counsel when it enacted Rule 27. Like statutes, rules must be read in harmony so as to not conflict with one another. MacLeod v. Guardianship of Hunter, 671 N.E.2d 177, 179 (Ind. Ct. App. 1996). The Indiana Supreme Court has enacted rules which allow corporations to employ staff attorneys and allow corporations to pay an attorney to represent third parties. Read together, these rules do not indicate that the Indiana Supreme Court is adverse to staff counsel relationships; indeed the rules indicate that the Indiana Supreme Court favors such relationships as long as counsel adhere to the rules and maintain their professional judgment

> The comment to the Ind. Professional Conduct Rule 1.10 defines "firm" to include: . . . lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. . . . [w]ith respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.

The clear impact of this comment is that the Indiana Supreme Court expressly contemplated the use of in-house counsel. Accordingly, a corporation may utilize in-house counsel without violating the prohibition on the "unauthorized practice of law."

A corporation may also pay an attorney to represent a third party. Ind. Professional Conduct

Rule 1.8(f) states:

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

1. the client consents after consultation;
2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
3. information relating to representation of a client is protected as required by Rule 1.6.

This rule does not restrict who may become a third party payor. See generally Anthony, Vicarious Liability Concerns For Insurers Using In-House Insurance Defense Counsel, 27 S.W. U. L. Rev. 125, 125 (1997). Consequently, a corporation may become a third-party payor so long as the corporation does not affect the attorney's independent professional judgment.

The aforementioned comment and rule establish that an attorney can work for a corporation and that a corporation can pay for an attorney to represent a third party. Given these policies, it is unlikely that the Indiana Supreme Court meant to *implicitly* prohibit an attorney working for a corporation from representing a third party who shares a community of interest with the corporation by enacting Rule 27. Indeed, the Indiana Supreme Court's promulgation of this comment and rule indicates its approval of such arrangements as long as the corporation does not interfere with the attorney's professional judgment. Therefore, the trial court erred in finding that the Indiana Supreme Court intended to outlaw staff counsel when it promulgated Rule 27.

THE UNAUTHORIZED PRACTICE OF LAW RULE WAS PROMULGATED TO PROTECT THE PUBLIC AGAINST UNSCRUPULOUS PROFESSIONALS AND TO PROTECT AN ATTORNEY'S INDEPENDENT PROFESSIONAL JUDGMENT.

The trial court's sole basis for outlawing the use of in-house counsel in the State of Indiana was its belief that a corporation engages in the "unauthorized practice of law" when it utilizes its own employee-attorneys to perform legal services. Because neither principles of agency law, the professional corporations act, nor Rule 27 justify this conclusion, this Court must reverse the trial court's decision unless some other principle supports the proposition that a corporation is "practicing law" when it assigns employee-attorneys to represent third parties who share a community of interest with the corporation. The Indiana Supreme Court has never held that a corporation engages in the practice of law simply because it employs attorneys to perform legal work on behalf of individuals who share a community of interest with the corporation. To the contrary, the Indiana Supreme Court has held that a corporation which allows its employee- attorneys to perform certain legal tasks is *not* engaged in the practice of law. See Groninger v. Fletcher Trust Co., 220 Ind. 202, 41 N.E.2d 140, 141-142 (1942) (holding that a corporation is not practicing law when it employs attorneys to amend wills and trust instruments, provided that it does not charge fees to its customers). Consequently, the trial court's conclusion that an insurance company is engaged in the practice of law when it assigns an employee-attorney to represent its insureds finds no support in Indiana case law.

.An attorney's competence and independent professional judgment is not affected by his relationship with his

corporate employer.

The trial court's decision cannot be supported by Indiana case law. It also cannot be supported by the policy reasons underlying the prohibition against the unauthorized practice of law. The Indiana Supreme Court's authority to prohibit the unauthorized practice of law "emanates from the need to protect the public from those not properly licensed or otherwise qualified to act as attorneys." State ex. rel. Disciplinary Comm'n v. Owen, 486 N.E.2d 1012, 1014 (Ind. 1986). Stated differently, the Court's primary goal in preventing unauthorized persons from practicing law is "to protect the public against incompetent and unscrupulous professionals." Matter of Fletcher, 655 N.E.2d 58, 60 (Ind. 1995). See also National Treasury Union v. U.S. Dep't of Treasury, 656 F.2d 848, 852 (D.C. Cir. 1981) (court should safeguard against the imposition of incompetent and irresponsible law practice on the public). Salaried counsel, like their independently retained counterparts, are licensed attorneys who are governed by the same ethical rules. Consequently, there is no reason to believe that salaried counsel are any more "incompetent, irresponsible or unscrupulous" than outside counsel. More importantly, no *evidence* has been presented that salaried counsel as a class are more "unscrupulous or incompetent" than outside counsel.[3] Accordingly, the policy behind the prohibition against the unauthorized practice of law does not support the trial court's decision.

The trial court not only held that a corporation which assigns its employee-attorneys to represent third parties who share a community of financial or other interests with the corporation is engaged in the unauthorized practice of law but also that the attorneys so employed are assisting in the unauthorized practice of law in violation of the Indiana Rules of Professional Conduct. The prohibition against attorneys assisting in the unauthorized practice of law is based on the need to protect the public against the rendition of legal services by unqualified persons. Comment to Ind. Professional Conduct Rule 5.5. Moreover, the prohibition is necessary to ensure that an attorney's independent professional judgment is maintained:

It is essential to the integrity of any legal practice that lawyers maintain independent professional judgment and not fully abdicate the responsibility of providing legal advice, guidance and expertise to non-lawyers. For the protection of the public and the profession, the privilege of providing legal services to others is entrusted only to those who are duly licensed to practice law.

Matter of Thrasher, 661 N.E.2d 546, 549 (Ind. Ct. App. 1996). Consequently, the dispositive question which must be answered in determining whether the use of in-house counsel should be outlawed is whether corporate employers impermissibly interfere with the professional judgment of their employee-attorneys.[4]

The Indiana Supreme Court has indicated that it would be improper to find that employee-attorneys as a class cannot exercise independent professional judgment. See Siebert Oxidermo, Inc. v. Shields, 446 N.E.2d 332, 341 (Ind. 1983). In Siebert, Oxidermo argued that a default judgment should be set aside on appeal because its attorney failed to exercise independent professional judgment in the trial court. Id. To support this claim, Oxidermo theorized that because its attorney was employed by an insurance carrier which would not be responsible for paying the default judgment, the attorney had no incentive to get the default set aside. Id. The Indiana Supreme Court rejected such a speculative argument.

> [W]e point out that on a daily basis defense attorneys employed by insurance carriers on behalf of policyholders are called upon to deal with matters in litigation where the interests of the policyholder and the carrier do not fully coincide. Under such circumstances the attorney's duty is, of course, to the insured whom he has been employed to represent. In response the defense bar has exhibited no inability to fully comply with both the letter and spirit of Canon 5 of the Code of Professional Responsibility.[5] If it were otherwise we suspect the desirability of requiring carriers to supply defense counsel would have long since disappeared as a term of the policy.

Id. Accordingly, the Indiana Supreme Court refused to set aside the default judgment on the ground that the professional judgment of Oxidermo's attorney was somehow threatened by his employment relationship with an insurance carrier. Id.

The trial court properly adopted the reasoning of the Siebert court in finding that the professional judgment of an employee-attorney is not impermissibly affected by his relationship with his employer. The trial court held that as long as the interests of the third party and the employer are "aligned," there is no reason to fear that an employer will impermissibly affect the professional judgment of its employee-attorneys. R. 1214-1216. Consequently, the trial court found that the employment relationship *per se* does not materially interfere with an attorney's independent professional judgment. R. 1216. Moreover, the trial court found that the plaintiffs presented no evidence that Mr. Farber's independent professional judgment was affected by his relationship with his employer in this case. R. 1218, 1221. Accordingly, the trial court held that it could justify neither Mr. Farber's disqualification in this case nor a prophylactic ban on the use of in-house counsel on the ground that such actions were necessary to protect the independent judgment of counsel.

The trial court was absolutely correct in this conclusion. Unfortunately, it did not understand the import of its finding that an in-house counsel's independent judgment is not compromised by his relationship with his employer. The *raison d'etre* of the trial court's ban on the use of staff counsel was its belief that such use constitutes the unauthorized practice of law. The policy behind the prohibition on the unauthorized practice of law, however, is to protect the independent judgment of attorneys. Therefore, the trial court outlawed a practice which the court itself acknowledges does not threaten the evil which the unauthorized practice rule seeks to prevent. Accordingly, this Court should reverse the trial court's judgment and declare that the longstanding practice of using in-house counsel does not constitute the unauthorized practice of law.

.The overwhelming majority of case law and ethics opinions from other jurisdictions find that an attorney's professional judgment is not affected by his relationship with his corporate employer.

The trial court's conclusion that the use of in-house counsel violates the prohibition against the unauthorized practice of law not only disregards the policy behind the rule, but also ignores the vast majority of case law, ethics opinions and academic literature dealing with this subject.[6] See, e.g., In re Youngblood, 895 S.W.2d 322 (Tenn. 1995); In re Allstate Ins. Co., 722 S.W.2d 947, 949 (Mo. 1987); Coscia v. Cunningham, 299 S.E.2d 880 (Ga. 1983); Strother v. Ohio Casualty Co., 14 Ohio Op.139 (C. P. 1939); King v. Guiliani, 1993 WL 284462 (Conn. Super. Ct. 1993); ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950); ABA Comm. on

Professional Ethics and Grievances, Informal Op. 1402 (1977); Cal. St. Bar Comm. on Professional Responsibility., Formal Op. 1987-91 (1987); N.J. Comm. on the Unauthorized Practice of Law, Op. 23 (1984); William Kursland Edward, The Unauthorized Practice of Law by Corporations: North Carolina Holds The Line, 52 N.C. L. Rev. 1422, 1431- 1440 (1987); Grace M. Giesel, The Kentucky Ban on Insurers' In-House Attorneys Representing Insureds, 25 N. Ky. L. Rev. 365 (1998); Leo J. Jordan and Hilde E. Kahn, Ethical Issues Relating to Staff Counsel Representation of Insureds, 30 Tort & Ins. L.J. 25 (1998).

Since 1939, courts and ethics panels have been declaring that the use of staff counsel to represent the common interests of their employer and third parties "is not the practice of law in any sense of the word." Strother, 14 Ohio Op. at 142; ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (lawyer employed by corporation to represent the community of interest which may exist between the company and a third party is not being "exploited" by his employer and is not "lending his services to the 'unauthorized practice of law'"). This conclusion has been reached by several jurisdictions even though those states had an *explicit* prohibition against the "corporate practice of law." See, e.g., Allstate, 722 S.W.2d at 949-951; King, 1993 WL 284462 at *3-8; Cal. St. Bar Comm. on Professional Resp., Formal Op. 1987-91, 1987 WL 109707 at *2-4. But cf. Gardner v. North Carolina St. Bar, 341 S.E.2d 517 (N.C. 1986). The reason for this near unanimity of opinion is simple: these courts and ethics panels agree that an employee-attorney's professional judgment is not compromised merely because of the employer/employee relationship. See, e.g., Cal. St. Bar Comm. on Professional Resp., Formal Op. 1987-91, 1987 WL 109707 at *3 ("the mere fact that the lawyers are employees of Insurance Company does not necessarily compromise the attorney's independent professional judgment"); King, 1993 WL 284462 at *6 (citing case which rejected contention that employee-attorney of a company would be controlled by his employer); Youngblood, 895 S.W.2d at 329 ("employment relationship does not, in and of itself, constitute a violation of the professional duties of attorneys"). Consequently, the evils sought to be prevented by unauthorized practice of law rules are not implicated by the use of licensed in-house counsel to represent third parties where the employer and third party share a "community of interest". King, 1993 WL 284462 at *11 ("the policy reasons why attorneys must be licensed in Connecticut, protection of the public, clients and courts, have all been met" when an employee-attorney represents third parties who share a community of interest with the attorney's employer).

This Court should adopt the majority view and declare that the use of staff counsel to represent the common interests of their employer and third parties "is not the practice of law in any sense of the word." The prohibition against the unauthorized practice of law was created to protect the public from incompetent and unscrupulous professionals and to ensure that attorneys are able to independently exercise their professional judgment. These evils are not implicated when a licensed employee-attorney represents a third party who shares a community of financial or other interest with his employer. Therefore, this Court should reverse the decision of the trial court and find that there is nothing unlawful or unethical in the use by a corporation of staff counsel to represent the interests it might share with third parties.

.THE TRIAL COURT'S DECISION TO OUTLAW THE USE OF STAFF COUNSEL DEPRIVES CORPORATIONS AND CONSUMERS OF THE BENEFITS OF STAFF COUNSEL WITHOUT PROVIDING ANY CORRESPONDING BENEFITS TO THE PUBLIC.

The use by a corporation of employee-attorneys to represent third parties who share a community of interest with the corporation is free of the evils sought to be eradicated by the prohibition on the unauthorized practice of law. Thus, there is no sound reason to preclude the use of staff counsel. Moreover, the corporations and clients served by such counsel derive great benefit from using staff counsel. If this were not so, the practice would die out. The use of staff counsel, however, has not dwindled. To the contrary, there has been dramatic growth in the number of companies using staff counsel over the past several years.[7] This growth is undoubtedly a by-product of staff counsel's ability to provide efficient, high quality legal services. This increased efficiency is attributable to staff counsel's familiarity with their companies and the recurrent legal issues facing those companies. As a result of this familiarity, staff counsel can provide better service at a lower cost which, in turn, results in lower costs for consumers who patronize companies who use staff counsel. Consequently, the public has also benefitted from the use of in-house counsel. Accordingly, this Court should be reluctant to prohibit a practice which provides so much benefit to the public.

The ability of in-house counsel to provide efficient, high quality legal services has been recognized by numerous legal commentators and courts. In-house counsel can provide "qualitatively better advice" because of their "opportunity to know the client, its culture and needs better than any outside lawyer." Mary Daly, The Role of General Counsel: Perspective: The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of General Counsel, 46 Emory L.J. 1057, 1059 n. 6 (1997). Stated differently, "[i]n-house counsel gives its corporations a competitive advantage with its expertise and accessibility as well as its intimate knowledge of its clients - both of their managers and their businesses." Michael E. Neben, And Here's to You Inside Counsel for Your Competitive Edge, Chi. Daily Bull., June 17, 1992, at 5. Consequently, the inside lawyer is in a position to gain superior knowledge of the business and the facts of a particular situation and to readily respond to client concerns. Harold A. Segall, Then and Now: The Commercial Practice Of Law For Over Fifty Years, 24 Fordham Urb. L.J. 567, 569 (1997). This superior knowledge and accessability increases the efficiency and the productivity of staff counsel.

This increased efficiency applies regardless of whether the client the in-house counsel represents is his employer or a third party. In a properly structured environment, staff counsel do not face many of the economic pressures that can tempt outside counsel - there are no bills to send out, justify or collect. Moreover, staff counsel are not as concerned as outside counsel in obtaining future assignments or increasing the volume of their business. Since the attorney's income is unaffected by the hours billed to a file, there is no financial incentive to maximize time. Thus, efficiency, rather than billable hours, is a quality more likely to further counsel's legal career. Ronald E. Mallen, A New Definition of Insurance Defense Counsel, 53 Ins. Couns. J. 108, 111 (1986); Having Criticisms of In-House Counsel Put Outside Counsel in the Dog House? Litigation Reporter, 512, 513 (Nov. 1995).

There is no evidence that staff counsel sacrifice quality for the sake of efficiency. Consequently, the increase in efficiency and productivity is not offset by any corresponding increase in incompetent advice or unethical practice. Because high quality legal services reduce costs, corporate employers have incentives to demand quality from their employee-attorneys.[8] Accordingly, third parties represented by in-house counsel benefit from the corporation's insistence on high quality legal work. See 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, 237 (1998). This incentive for a company to demand quality legal services from its staff derives not only from the savings that will be incurred as a result of quality work but also from the fact that the company will be held liable for any misconduct or incompetence on the part of its employees. See Sloan v. Metropolitan Health Council, 516 N.E.2d 1104, 1108-1109 (Ind. Ct. App. 1987)(company employing attorney can be held liable for the negligent acts of its employee-attorneys); United Farm Bureau Mut. Ins. Co. v. Groen, 486 N.E.2d 571, 574 (Ind. Ct. App. 1985)(insurer can be held liable for the acts of its attorney).

The corporation can also be held liable by the employee-attorney if it interferes with his professional judgment. King v. Guiliani, 1993 WL 284462 (Conn. Super. Ct. July 27, 1993). In King, the court rejected the contention that in-house counsel provide inferior legal services because their employer would adversely affect their professional judgment. In doing so, the court observed that:

> the salaried employee attorney . . . has protection against losing his or her job for refusing to violate the Rules of Professional Conduct. [Connecticut law] allows an employee to sue for damages when terminated by an employer for refusing to violate a law designed to protect the public welfare. This rationale is broad enough to give a discharged or disciplined attorney a strong damage case against an insurer employer who attempts to force the attorney to violate the rules, as such violations would clearly be contrary to the public's strong interest in ethical conduct by attorneys. If a company stops referring cases to an [outside] attorney as a punishment for refusing to violate the rules, [however,] that attorney does not have [the same right of] recourse as there is no employer-employee relationship. That attorney may have no remedy at all.

King, 1993 WL 284462 at *7. Indiana law provides the same protection to Indiana employees. Frampton v. Central Ind. Gas, 260 Ind. 249, 297 N.E.2d 425, 428 (1973). Thus, it is unlikely that a corporation will be tempted to try to compromise the professional judgment of its employee-attorneys.

Given the legal mechanisms in place which punish corporations that allow their attorney-employees to perform substandard work and punish attorneys who violate Indiana's ethical rules, there is little reason to believe that staff counsel are any less competent than outside counsel or are any more prone to ethical violations. Accordingly, there is no increased "cost" associated with the use of in-house counsel. Therefore, it would be unconscionable to find an arrangement which provides so much benefit unlawful.

The benefits obtained from the use of in-house counsel are not merely theoretical. Although there has not been a systematic study on how much money has been saved by corporations who utilize staff counsel, the available data indicates that it is substantial. According to a Price Waterhouse survey, corporate America cut spending on outside counsel by a median of 24% in 1991. Edward Adams, 24% Less for Outside Lawyers, N.Y. L.J., Dec. 11, 1992, at 1. This resulted in significant cost savings. See Jeff Barge, For In-house Counsel, Safety in Numbers: Survey Shows Ernst & Young's Legal Department Cutback Not Typical, 81 A.B.A.J. 28 (1995) (the median cost of an in-house attorney hour, including all overhead and expenses, was $130/hour, compared to $182/hour for outside counsel); Anne B. Fisher, How to Cut Your Legal Costs, Fortune, Apr. 23, 1990, at 185 (corporate staff lawyers can cost 40% less than outside attorneys); Managing the Corporate Legal Function: The Law Department,

Outside Counsel, and Legal Costs, 13 Bus. Law Monographs 1, 1-4 (1991) (in-house lawyers tend to cost 30% to 50% less per hour than outside counsel); William Kursland Edwards, Professional Responsibility: The Unauthorized Practice Of Law By Corporations: North Carolina Holds The Line, 65 N.C.L. Rev. 1422, 1422 n. 7 (1987) (the use of house counsel can result in an estimated savings of up to 50%); Silver, supra at 242 (insurers who maintain staff counsel offices "can secure legal services at significant cost savings, somewhere approaching 40% - 50% . . . by lowering overhead and removing profits")[9]. One study found that cases handled by outside defense lawyers settled for 32% more money, took 45% longer to close, consumed 144% more attorney time, and cost 156% more in fees than similar cases handled by staff attorneys. Silver, supra at 241.

The *amici curiae* do not contend that these economic benefits justify a finding that staff counsel should be allowed to practice law in the State of Indiana. Rather, the *amici* assert that in the absence of *evidence* that such arrangements compromise the professional judgment of the employee-attorneys or otherwise result in the provision of inferior legal work, these economic facts support the conclusion that such arrangements are beneficial and should continue. See Silver, supra at 240 (the size of staff counsel operations, the length of time they have been around, and their recent growth lead to the conclusion that insurance companies and premium-paying policyholders derive great value from them). Consequently, the *amici* ask this Court to follow the lead of the New Jersey Supreme Court and find that in-house counsel "are not second-class lawyers; they are first-class lawyers who are delivering legal services in an evolving format. If this form of practice results in lower legal costs, the public has an interest in seeing that able attorneys continue to be attracted to it." In re Weiss, Healey & Rea, 109 N.J. 246, 269-270 (1988).

CONCLUSION

For the foregoing reasons, *amici curiae*, Indiana Chamber of Commerce, Indiana Legal Education Foundation, Inc., American Corporate Counsel Association, Cinergy Services, Inc., Indiana Manufacturers Association, Insurance Institute of Indiana, Inc. and Association of Indiana Life Insurance Companies, by counsel, respectfully request that this Court reverse the trial court's order and declare that corporations may utilize in-house counsel to represent third parties who share a community of interest with those corporations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing pleading was served upon the following by hand delivery this 17th day of August, 1998:

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