



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.2, 2.1, 1.6, 1.7, and 5.4(c). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 89-17
May 25, 1990

Topic: Conflict of interest; Confidences and secrets; Influence by one other than client.

Digest: Where an insurance company provides counsel to its insureds, the retained attorney's primary obligation is to the insured/client. The attorney for insured/client may not allow the exercise of his independent professional judgment to be influenced by one other than his client.

Ref.: Illinois Code of Professional Responsibility Rules 4-101, 5-105, 5-107
Illinois Rules of Professional Conduct 1.2, 2.1, 1.6, 1.7, 5.4(c)
Ill.Rev.Stat., Ch. 32 ¶411 et seq.
Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill.2d 201, 407 N.E.2d 47 (1980)
People ex rel. Illinois State Bar Assn. v. Peoples Stock Yards Bank, 344 Ill. 462, 176 N.E.
901 (1931)

FACTS

A corporation engaged in the insurance business issues public liability insurance policies under the terms of which it is obligated to defend as well as to indemnify its insureds in exchange for its premiums. The company employs attorneys licensed to practice in Illinois upon a salaried basis. The attorneys' primary functions are to act as attorneys of record for insureds who are defendants in

litigated matters.

The attorneys are fully entrusted with the conduct of the litigation and all pleadings and other papers are filed in their name. The attorneys' immediate supervisor is a non-lawyer claims person. The non-lawyer is responsible for the administration of the company's "House Counsel" program. The non-lawyer determines the attorneys' salaries, decides when clerical or paralegal support is necessary or will be provided.

QUESTIONS

1. Under the foregoing circumstances, is the insurance company practicing law in violation of the Code of Professional Responsibility?
2. Is it ethically more appropriate for the lawyers to be supervised or managed by other senior lawyers who ultimately report to a lawyer in the home office?
3. May a lawyer at the insurance company's home office and housed in the General Claims Department (as opposed to the legal department) hired to coordinate a national "house counsel" program (a) review active lawsuit files with the attorneys described and (b) consult with the attorneys on ethical matters arising in their practice?

OPINION

1. The facts presented are insufficient for the Committee to express an opinion as to whether the insurance company may be engaging in the unauthorized practice of law. Generally, Illinois Revised Statutes, Chapter 32, paragraph 411, et seq., makes it unlawful for a corporation to practice law or to make it a business to practice as any attorney for any person. In People ex rel. Illinois State Bar Assn. v. People's Stock Yards Bank, 344 Ill. 462, 176 N.E. 901 (1931), the Illinois Supreme Court held that a corporation which hires attorneys and advertises their services for the use of others, receiving legal fees for its own use and paying the attorneys regular salaries is practicing law.

2. Rule 5-107 directs that attorneys avoid influence by others than the client. When the insured consents to have the insurance company defend him, he consents to, and even requests, that the company pay for the lawyer. Paragraph (c) of Rule 5-107 further provides, "A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." In taking a salary from the insurance company, the lawyer must take steps to avoid the company regulating or directing his professional judgment in representing the client. The lawyer must use his independent judgment in determining the level of clerical or paralegal support and all other aspects of representation must be determined by the attorney as is necessary to properly represent the insured.

The inquiry refers to this insurance company arrangement as a "house counsel" program. This may be misleading. In a typical house counsel arrangement, the lawyer works for the corporation and the corporation is his client. Where an insurance company hires an attorney to represent an insured, the attorney's client is the insured, not the company. The representation is limited by the terms of the policy, but the attorney's client is still the insured, not the company. If a conflict arises between the interests of the insurance company and the interests of the insured, the lawyer for the insured must continue to represent the insured under the policy and the company must get separate counsel to represent it. Indeed, Rule 5-105 may require separate outside counsel for both the insured and the

company. Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill.2d 201, 407 N.E. 2d 47 (1980).

3. A person who works as a lawyer in the General Claims Department for the insurance company has the company for a client. With consent of the client, he, as a representative of the company, can review files with the lawyers for the insureds and consult with such lawyers about relevant issues, including ethical matters if they are pertinent to the insurance company's role as insurer in the case. However, the insurance company lawyer does not represent the insured. And, where a conflict arises between the interests of the insured and the interest of the company, the insurance company lawyer is not entitled to confidential information from the lawyer for the insured and the lawyer for the insured must protect such information under Rule 4-101. Moreover, in any such consultations with the insurance company personnel, the lawyer for the insured must comply with Rule 5-107(c) and preclude the insurance company directing or regulating his professional judgment in representing his client.

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