OAJ Insurance Law Section Article August 2013

Is an Insurance Company Practicing Law When it Provides In-House Counsel to its Tortfeasor Insured?

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When an insurance company is both obligated to provide a defense to an alleged tortfeasor, and a defendant, the insurance company may use its own in-house counsel or a "captive" law firm to represent both defendants. The practice has gained traction over the past two decades, yielding some fundamental ethical concerns about this tripartite relationship. Who is the client? To whom does the lawyer owe confidentiality? Can the lawyer ethically represent both parties if there is a potential conflict? What constitutes a conflict? States have dealt with these issues in disciplinary decisions, legal malpractice cases, and disqualification hearings.

This article discusses two recent cases, *Brown v. Kelton* in Arkansas, and *Unauthorized Practice of Law Committee v. American Home Assurance Company, Inc*. in Texas, that went different ways on the issue. It then explores how Ohio courts have handled the issue, and whether this is a potential way to disqualify in-house counsel from representation. But first, a quick overview of the tripartite relationship between insurer, insured, and the defense counsel in the middle.

I. THE TRIPARTITE RELATIONSHIP

A. THE DUTY TO DEFEND AND DEFENSE COUNSEL

Because insurers have a duty to defend the insured from potentially covered claims, insurers provide the attorney to the insured. The defense attorney can be "in-house" attorneys (that is, attorneys working directly for the insurance company as an employee), "outside" counsel (attorneys who are not employees of the insurance company). Moreover, the outside

counsel can be selected by the insurer and range in independence from a truly independent attorney with no relationship to the insurer, to a "captive" attorney who works exclusively on cases sent from the insurance company. (Indeed, most insurers demand the right to select and, to some degree, monitor the attorney mounting the defense as part of the insurance contract.)

Nowhere else in the law does a third-party-payor relationship exist so frequently, with all of the attendant ethical risks of a situation where the lawyer works for one person, but is paid by another. This common relationship triangle is referred to as the "tripartite" relationship, and most plaintiff's attorneys are familiar with it in some form or another.

B. TRIPARTITE TRIANGLE: ETHICAL AND LEGAL CONSIDERATIONS INVOLVING IN-HOUSE COUNSEL

The tripartite relationship between insurer, insured, and insurance defense counsel raises common ethical and legal concerns that are by now quite common, if confounding. First, who is the client?[1] (The defense counsel clearly must serve the insured as their client, but does the insurer count as a client, or merely a source of funds?) Second, can the insured (and presumably, insurance company) waive the potential conflicts inherent in their counsel owing a duty to the very insurance company that might try to deny the claim? Plaintiff's attorneys might find these concerns esoteric and downright irrelevant for the most part—let the insurance company and defense counsel figure them out—until they find themselves wanting to pursue an insured's bad faith claim or disqualify defense counsel. Finally, and the focus of this article, does the use of in-house counsel to represent the insured violate the universal prohibition against a corporation practicing law?

Given that corporations can only hire, supervise, and direct attorneys as employees by virtue of their right to "represent themselves," once those same employee-attorneys represent a third party—the insured—they are surely practicing law by a literal interpretation. But the

majority of courts and ethics committees have held otherwise, perhaps to protect a long-standing tradition. As one commentator notes, though, the reasoning is at-best a weak attempt to avoid the obvious:

> [T]he use of staff attorneys of an insurer to defend lawsuits against insureds is a long standing practice, dating back at least several decades. However, liability insurers have recently expanded their reliance on such "in-house" counsel. Not surprisingly, the practice has come under increasing attack. Opponents cite two primary objections to the use of staff attorneys: 1) it constitutes the unauthorized practice of law by the insurer; and 2) it involves the impermissible representation of conflicting interests. As Professor Silver correctly notes, these objections have been rejected by the vast majority of courts and ethics committees that have considered the issue. However, the reasoning of these opinions is often weak, and there is considerable support for the argument that *absent some special consideration*, any straightforward application of professional responsibility rules would render the practice unethical.[2]

These considerations, while glossed over by some courts, have been core questions for some time, as expressed by the court's dismay in a 1914 case over the influence of business interests on the legal profession:

> The profession of the law, one of the oldest known to civilization, involving the most sacred confidence between man and man, with its past of high ideals and service to humanity, has in the last quarter of a century suffered much from the inroads of the new financial and business methods in this great land of ours. Whether by ill-advised attempts by corporate employers to dominate and direct attorneys and counsel in the conduct of litigation, whether by so-called title companies or casualty insurance corporations, the old ideals in the relation of attorney and client, which meant so much to mankind, have suffered and have been threatened with demoralization. This is wrong. The loss of the individual personal relation involved in the attempt by corporations to practice law is so serious to the community that it is against public policy, and I am inclined to think malum in se, but at any rate, there is no question that in this state it is unlawful by force of the statute.[3]

II. CORPORATIONS PRACTICING LAW: A GENERAL RULE LONG AVOIDED BY INSURANCE PRACTICES

There is no general dispute that corporations have long been precluded from practicing law as a basic tenant of English and (late) American law.[4] But neither is there any dispute that insurance companies—corporations—have been contracting for and providing a legal defense for their insureds. While the majority rule is clearly to allow insurance companies to hire and pay for *outside* counsel, absent a direct conflict (in some cases, including a reservation of rights letter, while in other cases, a more manifest conflict of interest), there are lingering questions about how *in-house* attorneys representing the insured is anything other than a corporation practicing law. Cases are split, however, in part because this is an old practice (providing an attorney) with a relatively new face premised on reducing costs (salaried, in-house counsel versus charge-by-hour outside firms). Ironically, the concerns raised about in-house counsel are precisely the same as those raised in support: the influence of business interests on the lawyer-client relationship: on one hand as an assault on the ethical requirement to serve the client, on the other as a way to reduce costs and cut back on non-essential attorney costs.[5]

This dilemma—independent professional judgment versus cost-cutting—is at the heart of the current debate, and decisions allowing for in-house counsel to represent third parties may open the door to expanded corporate entry into legal practice (and concaminant erosion of independent professional judgment and corporations exert control over what attorneys can do based on costs). For the Plaintiff's attorney, whether and how the insurance company might influence the decision of the insured—as effected through the middleman attorney—is probably case-specific. Clearly, though, an insured potentially facing an over-limits verdict does not have the same interests as the insurance company, and disqualification may be appropriate.

A. *BROWN V. KELTON*: ARKANSAS BARS INSURANCE EMPLOYEES FROM REPRESENTING INSUREDS

Brown v. Kelton was a standard-issue MVA case in which Brian Kelton was struck by a vehicle owned by Mid Central Plumbing Company and insured by Truck Insurance Exchange, which was reinsured by Farmer's Insurance Exchange ("FIE"). FIE sought to have its own employee-attorney, Stephen Brown, take over the defense a few months into the case. While the trial court granted the motion to substitute counsel, Kelton filed an opposition brief that the court treated as a motion to disqualify, which it granted on the bases that such representation would constitute the unauthorized practice of law, and that there was an inherent and non-waivable conflict between Brown's duties to his employer and to his clients, Mid-Central and John Rogers, the alleged tortfeasor.

The Arkansas Supreme Court upheld the decision to disqualify attorney Brown on the basis that in-house counsel representing the insured *where the insurer is not and cannot become a party* is the unauthorized practice of law.[6] (The court did not reach the issue of whether there was an inherent ethical conflict of interest.[7]) The Court relied on Arkansas Code § 16-22-211, which provides in pertinent part that:

> (a) It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney at law for any person in any court in this state or before any judicial body, to make it a business to practice as an attorney at law for any person in any of the courts, to hold itself out to the public as being entitled to practice law, to tender or furnish legal services or advice, to furnish attorneys or counsel, to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume or advertise the title of lawyer or attorney, attorney at law, or equivalent terms in any language in such a manner as to convey the impression that it is entitled to practice law or to furnish legal advice, service, or counsel or to advertise that either alone or together with or by or through any person, whether a duly and regularly admitted attorney at law or not, it has, owns, conducts, or maintains a law office or any office for the practice of law or for furnishing legal advice, services, or counsel.

* * *

> (d) This section shall not apply to a corporation or voluntary association lawfully engaged in the examination and insuring of titles to real property, nor shall it prohibit a corporation or a voluntary association from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may become a party.

Ark.Code Ann. § 16-22-211.

The defendants argued that subsection (d) permitted an FIE employee to represent them because the case was "in and about its own immediate affairs"—it was FIE that would be paying the judgment, after all. The court rejected this argument. Because the statute used the disjunctive "or," it provided two separate scenarios in which a corporation could use an employee-attorney: (1) "in and about its own immediate affairs"; or (2) "in any litigation to which it is or may become a party." Applying common principles of statutory construction, the court reasoned that "in and about its own immediate affairs" cannot include litigation where the corporation *is not* a party, because it would then necessarily include litigation where the corporation *is* a party (the latter obviously being just as much "in and about" the corporation's affairs as the former). But this would violate the maxim that each part of a statute should be given effect, because the "in and about its own immediate affairs" exception would swallow the "litigation to which it is or may become a party" exception. Thus, litigation could only fall under the second exception, and this exception does not include cases where a corporation is not, and cannot become, party to the litigation.

The Court went on to hold that the statute is not unconstitutional by imposing on the state judiciary's exclusive authority to regulate the practice of law, and that Kelton, as the plaintiff in the underlying lawsuit, "had standing to question their opponent's authority to practice law." As mentioned, the court did not reach the secondary issue of whether there was an irreconcilable

conflict in the duel representation in light of its initial finding.

What the *Brown* court's decision leaves open is whether an in-house counsel is disqualified from representing an insured where the insurance company *could* become a party to the litigation. The language suggests that such a situation would fall under subsection (d), as "litigation to which it is or may become a party," but the scope of that representation—i.e., whether it includes representing anyone else in that litigation, such as the insured—is unclear.

B. CONTRARY VIEW: TEXAS ALLOWS IN-HOUSE COUNSEL TO REPRESENT INSUREDS BECAUSE THEY ARE NOT PRACTICING LAW AT ALL

On the other side of the divide, the Texas supreme court in 2008 held that in-house counsel can represent an insured without violating prohibitions against corporate practice of law in *Unauthorized Practice of Law Committee v. American Home Assurance Company, Inc.* ("American Home").[8] There was intense focus on the case, with Amici submitting briefs in support of both sides: for the Unauthorized Practice of Law committee were the Committee are the Texas Ass'n of Defense Counsel, the Texas Medical Association, and the Texas Trial Lawyers Association, and for the insurers were Allstate Insurance Co., USAA, Zurich American Insurance Co., Liberty Mutual Insurance Co., Progressive Casualty Insurance Co., the American Insurance Ass'n, the National Association of Mutual Insurance Cos., the Property Casualty Insurers Association of America, the Association of Corporate Counsel, the Insurance Council of Texas, the Texas Association of Business, and an attorney. The State Bar of Texas submitted a neutral brief requesting that the court give guidance on the issues.

The *American Home* court seemed to take for granted that a corporation could provide *some* legal services through in-house attorneys without engaging in the unauthorized practice of law, and addressed the argument to determining where to draw the line. For example, the court recited a general overview of the legislative history barring unauthorized practice of law, starting

with a subsequently-repealed statute that "recognized that a corporation was not practicing law by using house counsel to provide legal advice regarding the corporation's own affairs or to appear in court on its behalf."[9] The court noted that this and subsequent enactments created a "general understanding of the practice of law" and that, "[i]mplicit in the definition is that the practice of law requires the rendering of legal services *for someone else.* Section 81.101(a) [defining the practice of law broadly] does not outlaw house counsel in Texas. This section does not mean that a corporation engages in the practice of law when its attorney-employees provide legal advice regarding the corporation's own affairs or represent others with identical interests in court. Only when a corporation employs attorneys to represent the unrelated interests of others does it engage in the practice of law."[10] Other than ethics opinions indicating that in-house counsel can represent officers and directors, as well as subsidiaries and parent companies of a corporation, nothing to which the court referred indicated that "identical interests" allowed corporations to represent other people. Moreover, even the cited ethics opinions in which in-house counsel represents parent or subsidiary companies did so because "[t]here is obviously a common interest and there is for all practical purposes only one client involved."[11]

The *American Family* court relied on a 1944 case, *Hexter Title & Abstract Co. v. Grievance Committee*,[12] in which it determined that a title insurance agency could not have its in-house attorneys cure title defects as a free service to lure potential insurance customers.[13] The *American Home* court found three principles in *Hexter Title* that served as guideposts for determining when a corporation could provide in-house legal services to outsiders: (1) whether "the company's interest being served by the rendition of legal services is existing or only prospective," that is, used to create business versus to serve already-obtained customers such as part of a contractual obligation under an insurance contract; (2) "whether the company has a

direct, substantial financial interest in the matter for which it provides legal services"; and most importantly (3) "whether the company's interest is aligned with that of the person to whom the company is providing legal services."

The court admitted that insurers can (and do) advertise the legal defense to attract business customers, and it fails to consider how providing a service pursuant to a contractual obligation has any bearing on the case (particularly since and business can make the services they provide "subject to a contractual obligation" by doing what insurers do: making it a part of a contract). The controlling factor was clearly the aligned-interests test, for which the court had not provided much, if any, support in its initial review of unauthorized practice case law. The court reached the somewhat counterintuitive conclusion that a corporation does not practice law at all when practicing law on behalf of someone else:

> Applying these factors, we conclude that a liability insurer does not engage in the practice of law by providing staff attorneys to defend claims against insureds, provided that the insurer's interests and the insured's interests in the defense in the particular case at bar are congruent. In such cases, a staff attorney's representation of the insured and insurer is indistinguishable.[14]

Under this reasoning, it is hard to see how other corporations could not combine legal defense as part of their contracts and then provide defense attorneys as long as their interests are aligned, eroding the independence of attorneys as professionals.

III. OHIO LAW AND GUIDANCE ON IN-HOUSE COUNSEL

Ohio law clearly allows for a two-party approach, absent conflict between the insured and the insurer.[15] As the Second District set out in 1971 in *Netzley v. Nationwide Mut. Ins. Co.*:

> We hold that both Nationwide as well as Mr. Netzley, its insured, were clients of the legal counsel retained by Nationwide. Further, we hold that both clients had a

> mutuality of interest in all of the affairs related to such cause of action, and both were equally entitled to any and all information, analysis, aid, or advice relating to such matter.[16]

(Interestingly from a conflicts perspective, this led to the outcome that *either* party was entitled to know the confidences of the other, and as such, to the admissibility of those communications in a subsequent action *between* the parties.[17] A 2005 Second District case reaffirmed these basic principles.[18])

Moreover, Ohio law clearly holds that an outside attorney can represent an insured absent an actual conflict.[19] Issuing a reservation-of-rights letter is alone insufficient to create an actual conflict barring joint representation, even when the insurer has an obvious contrary interest in the outcome of the litigation (such as when the plaintiff alleges both negligent and intentional tort theories, when the latter is excluded under the insurance agreement).[20] Clearly, an insurer cannot attempt to control litigation to its own advantage over the insured—a direct conflict. At least one Ohio court facing this situation held that the insurer was not—or perhaps no longer—a client of the attorney, essentially changing from a two-party to a one-party relationship in order to resolve the conflict (and defeat the insurer's attempt to glean otherwise confidential information from the attorney).[21] The Court held that:

> The record reflects that [the insurer,] Frontier was aware of the conflict that arose when [attorney] Treadon refused to place Frontier's interest in proceeding to trial in front of [defendant] Dr. Robinson's interest in settlement. Frontier evaluated its options and hired its own counsel because of the persistent conflict presented by Dr. Robinson's desire to settle. Accordingly, we find that the active conflict between the insured and the insurer prevents a finding that Frontier was Treadon's client.[22]

The Rules of Professional Conduct, adopted in 2007, directly addressed at least the question of *whether* an attorney can represent both the insured and the insurance company. Rule

1.8 describes a two-party relationship, with attorneys able to represent the insurer and the insured, absent conflict. Moreover, the Rules both identify the potential conflict of interest defense counsel faces, and provide a starting place—a form that outlines the client insured's rights when using insurer-provided counsel:

> RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES
>
> * * *
>
> (f) A lawyer shall not accept compensation for representing a client from someone other than the client unless divisions (f)(1) to (3) and, if applicable, division (f)(4) apply:
>
> > * * *
> >
> > (4) if the lawyer is compensated by an insurer to represent an insured, the lawyer delivers a copy of the following Statement of Insured Client's Rights to the client in person at the first meeting or by mail within ten days after the lawyer receives notice of retention by the insurer:
>
> **STATEMENT OF INSURED CLIENT'S RIGHTS**
>
> An insurance company has retained a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation.
>
> 1. Your Lawyer: Your lawyer has been retained by the insurance company under the terms of your policy. If you have questions about the selection of the lawyer, you should discuss the matter with the insurance company or the lawyer.
>
> 2. Directing the Lawyer: Your policy may provide that the insurance company can reasonably control the defense of the lawsuit. In addition, your insurance company may establish guidelines governing how lawyers are to proceed in defending you—guidelines that you are entitled to know. However, the lawyer cannot act on the insurance company's instructions when they are contrary to your

interest.

3. Communications: Your lawyer should keep you informed about your case and respond to your reasonable requests for information.

4. Confidentiality: Lawyers have a duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have duty to share with the insurance company information relating to the defense or settlement of the claim. Whenever a waiver of lawyer-client confidentiality is needed, your lawyer has a duty to consult with you and obtain your informed consent.

5. Release of Information for Audits: Some insurance companies retain auditing companies to review the billing and files of the lawyers they hire to represent policyholders. If the lawyer believes an audit, bill review, or other action initiated by the insurance company may release confidential information in a manner that may be contrary to your interest, the lawyer must advise you regarding the matter and provide an explanation of the purpose of the audit and the procedure involved. Your written consent must be given in order for an audit to be conducted. If you withhold your consent, the audit shall not be conducted.

6. Conflicts of Interest: The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you have a concern about a conflict of interest in your case, you should discuss your concern with the lawyer. If a conflict of interest exists that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. Settlement: Many insurance policies state that the insurance company alone may make a decision regarding settlement of a claim. Some policies, however, require your consent. You should discuss with your lawyer your rights under the policy regarding settlement. No settlement requiring you to pay money in excess of your policy limits can be reached without your agreement.

8. Fees and Costs: As provided in your insurance policy, the insurance company usually pays all of the fees and costs of defending the claim. If you are responsible for paying the lawyer any fees and costs, your lawyer must promptly inform you of that.

9. Hiring your own Lawyer: The lawyer hired by the insurance company is only representing you in defending the claim brought against you. If you desire to pursue a claim against someone, you will need to hire your own lawyer. You may

> also wish to hire your own lawyer if there is a risk that there might be a judgment entered against you for more than the amount of your insurance. Your lawyer has a duty to inform you of this risk and other reasonably foreseeable adverse results.

What this Rule does not identify is whether this attorney can be in-house counsel or not.

Two Ohio ethics opinions from the 1990s show how vexing this issue can be. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline found, in 1994, that in-house counsel employed by an insurance company could not represent the insured under Ohio ethics rules.[23] By December, 2005, the Board of Commissioners reversed themselves, finding instead that insurance company attorneys can pursue subrogation claims and include the insured's claim for deductible, provided that the attorney must "exercise independent judgment, must disclose to the insured the employment relationship, must disclose any differing interests, must inform the insured of options as to representation by outside counsel, and must discuss whether deductibility of expenses is applicable" in order to comply with their ethical obligations.[24]

Ohio case law lacks explicit direction on the question of whether outside counsel acting on behalf of the third-party insured creates a situation where the insurer is practicing law. In Ohio, unauthorized practice of law ("UPL") "is defined as 'the rendering of legal services for another person by any person not admitted to practice in Ohio.'"[25] UPL cases clearly indicate that a corporation cannot practice law, and that agency principles allow such UPL liability to flow through to the principle.[26] In the same case, the Ohio Supreme Court noted that extensive involvement of attorneys supervising non-attorneys, the mere fact that non-attorneys had firing power over the attorneys showed a UPL violation where a non-professional organization marketed and sold estate services:

> Even if the attorneys had been extensively involved in the transaction, they were incapable of acting solely in the interests of their ostensible clients because of their contractual relationship with TEP: review attorneys are subject to termination by TEP if they prepare non-TEP living-trust or estate-plan documents based on information received from an advisor.[27]

This analysis leads to the conclusion that attorneys subject to termination by an employer insurance company should not be ethically permitted to provide legal services (i.e., defend) third-party insureds precisely because they are "incapable of acting solely in the interests of their ostensible clients." Moreover, those attorneys are themselves assisting in the UPL violations.[28]

Other Ohio case law supports the concept that a corporation cannot "sell" its captive, in-house counsel's legal services (an issue that the *American Home* court agreed with, while simultaneously finding that the insurer's co-interest in the insured's case somehow transformed this into something other than a UPL violation).[29] In *Land Title*, a title company was billing a state commission for title opinions drafted by the title company's employee-attorneys. As soon as the legal work was subject to "barter," it constituted a violation:

> [A] salaried lawyer for a title company may render an opinion to his own corporate principal without being guilty of unauthorized practice of law; but when that corporate principal 'sells' that opinion, legal in nature, to an outsider, that corporate principal is guilty of illegally practicing law. We feel quite strongly that the corporate principal is still guilty of unauthorized practice of law by making such a 'sale' of a legal opinion to a third party even though that legal opinion was prepared for it by its salaried lawyer, directly in the course of the corporate principal's own legitimate business activities. The vice in the equation comes from the 'sale', for a consideration, to an outsider. It is, as we view it, a clear duty of the corporate principal to keep the legal opinions prepared by its salaried employees to itself. . . . It is only when the legal opinions of captive, salaried lawyers become, in effect, the subject of barter on the market place by the corporate principals of such captive lawyers that we have the type of illegal, unauthorized practice of law by the corporations which has been so consistently condemned by the Supreme Court of Ohio in the past.[30]

This is similar to how Ohio courts have treated other types of unauthorized practice. In

Dempsey v. Chicago Title Ins. Co. (1985), the Eighth District held that a title insurance company could provide *itself* surveying services in order to determine whether to provide title insurance to a particular parcel, as they were "incidental" activities to the insurance sale.[31] The court drew the line where those services were bartered to others, though, holding that, "to the extent that the defendant regularly undertakes those activities for others and charges for those services, it practices the profession of surveying."[32] Notably, this was not simply when they sold those services outright or alone but also , "if it offers or proposes to provide those services to others, *as part of a broader service* or for a separate fee. If the defendant does any of the listed activities which require licensing, it violates the licensing law without doing all those activities."[33]

The Tenth District later adopted this purposes-driven analysis in a case to determine whether an individual was practicing engineering.[34] That court found the distinction between incidental activities and services important for public policy reasons as well, because the purpose of licensing statutes (in this case, licensed engineers) is "to prevent persons lacking proper qualifications from performing tasks that might expose the public to safety, health, or property risks, if performed incompetently or unprofessionally."[35] Likewise, the purpose of avoiding corporate control of lawyers is to prevent the public from receiving compromised professional advice based on the influence of corporate concerns on the attorney's professional judgment.

Whether the Ohio Supreme Court would find, as did Arkansas, that insurance company attorney providing services to the insured constituted a UPL violation, or would find an exception for similar interests as in the Texas decision, is unclear. Surely, to the extent that insurance companies "barter" these services as part of the value of the insurance contract, in-house counsel could be credibly determined to be unauthorized under *Land Title* and earlier cases. But this would upset a system that has been in place for decades, and the Court might

craft an exception, or find the mutuality of interests opens the door to corporations providing captive-attorney legal services.

[1] Three approaches dominate: (1) the "one-party" states find that the attorney represents the insured only; (2) "two party" states, arguably the majority view, find that there is dual representation (limited to non-conflict situations and generally requiring separate counsel in the event of waiver); and (3) the "on-party, third-party-payor" system, where the attorney represents the insured, but the insurer has an interest as the third party payor in monitoring the defense. As discussed below, Ohio recognizes dual representation.

[2] Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259, 292-93 (1998) (footnotes omitted; emphasis *sic*).

[3] *United States Title Guar. Co. v. Brown*, 86 Misc. 287, 290-91, 149 N.Y.S. 186, 188 (N.Y. Sup. Ct. 1914) aff'd, 166 A.D. 688, 152 N.Y.S. 470 (N.Y. App. Div. 1915) (cited as authority in *United Mercantile Agency v. Lybarger*, 1930 WL 2846 (Ohio Mun. Dec. 10, 1930)).

[4] Michael D. Morrison & James R. Old, Jr., *Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice*, 53 BAYLOR L. REV. 349, 396 (2001) ("Under long-settled rules of Anglo-American law dating back more than seven hundred years, the practice of law has been limited to natural persons who meet certain qualifications.").

[5] Morrison, supra note 1 ("The intent of the rule is to avoid potential harm to the public by corporate business interests pervading the attorney-client relationship and a concomitant erosion of the independence of professional judgment.").

[6] *Brown*, 2011 Ark. 93, --- S.W.3d ---- ("In the instant case, it is undisputed that [Farmer's] is not a party and will not become a party to the underlying lawsuit. Therefore, it was prohibited by Ark.Code Ann. § 16-22-211 from assigning appellant Brown, one of its in-house counsel, to defend the insureds in the litigation.").

[7] *Id.* ("Because we hold that Ark.Code Ann. § 16-22-211 prohibited Brown from representing Mid-Central and Rogers, and in light of our decision to hold the statute constitutional, any decision on the remaining arguments presented on appeal-that there was not an inappropriate conflict and that no breach of duty to preserve Mid-Central and Roger's confidences had occurred-would be purely advisory. It is well-settled that we will not issue an advisory opinion.") (citation omitted).

[8] 261 S.W.3d 24, 51 Tex. Sup. Ct. J. 590 (2008).

[9] Unauthorized Practice of Law Comm. v. Am. Home Assur. Co., Inc., 261 S.W.3d 24, 34 (Tex. 2008) (emphasis added).

[10] Unauthorized Practice of Law Comm. v. Am. Home Assur. Co., Inc., 261 S.W.3d 24, 35-36 (Tex. 2008) (underlined emphasis added; italics in original).

[11] *Id.* at 35. The *American Home* court also noted that "[e]thics opinions and rules do not determine what constitutes the practice of law." *Id.*

[12] 142 Tex. 506, 179 S.W.2d 946 (1944).

[13] "Hexter, an agent for a title insurance company, received applications for insurance and prepared abstracts of title. When its salaried employee-attorneys discovered defects in title, they would prepare an opinion describing the defects and instruments to correct them, which Hexter would then offer to the customer free of charge. Hexter advertised these services to attract customers who would purchase title abstracts and title insurance, but not all applicants who received the services actually bought insurance." *Unauthorized Practice of Law Comm. v. Am. Home Assur. Co., Inc.*, 261 S.W.3d 24, 36 (Tex. 2008)

[14] *Unauthorized Practice of Law Comm. v. Am. Home Assur. Co., Inc.*, 261 S.W.3d 24, 39 (Tex. 2008).

[15] *Netzley v. Nationwide Mut. Ins. Co.*, 34 Ohio App. 2d 65, 77-79, 296 N.E.2d 550, 560-62 (2nd Dist. 1971).

[16] *Id.* at 561-62.

[17] *Id.* at 562 ("There being such a degree of common interest in any information or legal advice concerning such

negligence action, a demand for any such communications by one of the parties upon another in a subsequent action between the parties should have been supported and approved by the trial court.").

[18] *Mays v. Dunaway*, 2005-Ohio-1592, ¶15-17 (2nd Dist.).

[19] *See, e.g., Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 135 Ohio App. 3d 616, 633, 735 N.E.2d 48, 60 (9th Dist. 1999) (counsel selected by, and providing periodic case updates to, insurance company did not create a conflict of interest); *Pasco v. State Auto. Mut. Ins. Co.*, 10th Dist. No. 99AP-430, 1999 WL 1221633 (Dec. 21, 1999) (trial court did not err in failing to find inherent conflict of interest where insurer defends under reservation of rights).

[20] *Dietz-Britton v. Smythe, Cramer Co.*, 139 Ohio App. 3d 337, 344-45, 743 N.E.2d 960, 966 (8th Dist. 2000) ("An insurer's reservation of rights is important because insurers often find themselves in positions that might create a conflict of interest. In some circumstances, an insurer might believe that its insured's conduct constitutes excluded conduct under an insurance policy. Hence, it may be to the insurer's financial advantage to see that the conduct is excluded, thus precluding indemnification. This constitutes a potential (though not necessarily actual) conflict of interest.") (citing *Collins v. Grange Mut. Cas. Co.*, 124 Ohio App.3d at 577, 706 N.E.2d at 858).

[21] *Swiss Reinsurance Am. Corp., Inc. v. Roetzel & Andress*, 163 Ohio App. 3d 336, 2005-Ohio-4799, 837 N.E.2d 1215, ¶25.

[22] *Id.*

[23] Opinion 94-9, issued August 12, 1994, available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/display.asp (last accessed July 1, 2011). For a contemporaneous analysis of these conflicting opinions, *see* Robert J. Johnson, *In-House Counsel Employed by Insurance Companies: A Difficult Dilemma Confronting the Model Code of Professional Responsibility*, 57 OHIO ST. L.J. 945, 948-50 (1996).

[24] Opinion 95-14, issued December 1, 1995, available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/display.asp (last accessed July 1, 2011). These opinions are both non-binding and were rendered under the Ohio Code of Professional Responsibility, which was superseded by the Ohio Rules of Professional Conduct, effective 2/1/2007.

[25] *Cleveland Bar Assn. v. Sharp Estate Serv., Inc.*, 107 Ohio St. 3d 219, 2005-Ohio-6267, 837 N.E.2d 1183, ¶ 8 (quoting Gov.Bar R. VII(2)(A)).

[26] *Id.* at ¶ 12 ("Respondents TEP and Abts argue that Sharp and his associates were not their agents and that TEP had disclaimed any agency relationship in the contracts between TEP and Sharp. The record, however, reflects that Sharp was under contract with TEP, that TEP and Abts permitted the Sharp advisors to hold themselves out as agents of TEP, and that the Sharp advisors received extensive training from TEP on marketing and selling trust and estate plans to customers. We conclude that there was an agency relationship between TEP and Sharp.").

[27] *Id.* at ¶10.

[28] *Id.* at ¶11. ("In *Kathman*, we also found that an attorney who assists a nonattorney in the marketing and selling of living trusts violates DR 3-101(A), which prohibits such assistance. Id. at 96, 748 N.E.2d 1091. Consequently the hub attorneys involved with respondents knew that they themselves were violating DR 3-101(A).").

[29] *Steer v. Land Title Guarantee & Trust Co.*, 113 N.E.2d 763, 767-68 (Ohio Com. Pl. 1953) (

[30] *Id.*at 766-67.

[31] 20 Ohio App. 3d 90, 92, 484 N.E.2d 1064 (Ohio Ct. App. 1985) ("Some of those activities apparently involve measurement of land boundaries, recording those measurements, and plotting those measurements on scale diagrams which purportedly depict the land area. To the extent that the defendant undertakes those activities for its own benefit in determining whether to sell title insurance for the described property, its employees are not engaging in the profession of surveying. Those activities are then incidental to its lawful sale of title insurance.").

[32] *Id.* at 93.

[33] *Id.* (emphasis added).

[34] *Schroeder v. State Bd. of Registration for Prof. Engineers & Surveyors*, 2004-Ohio-5793, ¶ 15-17 (10th Dist.).

[35] *Id.* at ¶16.