

The Supreme Court of Texas appoints the nine members of the Professional Ethics Committee from the bar and the judiciary and designates one of the members as chair. According to section 81.092(c) of the Texas Government Code, "Committee opinions are not binding on the Supreme Court." The Committee posts drafts of its proposed opinions online at texasbar.com/pec for public comment before the opinions are finalized and printed in the Texas Bar Journal.

Opinion No. 687, April 2020

QUESTIONS PRESENTED

1. Under the Texas Disciplinary Rules of Professional Conduct, must a staff lawyer employed by an insurance company to defend its insureds comply with the company's guidelines regarding the defense of such cases?
2. What are a lawyer's obligations if an insurance company cuts a staff lawyer's support staff?

STATEMENT OF FACTS

An insurance company employs staff lawyers and support staff to defend its insureds in personal injury cases. The insurance company requires staff lawyers to follow the company's guidelines in defending lawsuits against its insureds. One guideline requires that staff lawyers obtain permission before retaining expert witnesses and notifies staff lawyers that the company requires 30 days to decide whether to approve the hiring of experts. The staff lawyers are concerned because, for example, when plaintiffs' counsel file medical billing affidavits, the expenses identified in those affidavits are deemed reasonable and necessary unless a defendant files a controverting affidavit within a certain period of time, usually 30 days. This means the staff lawyers must find, retain, provide medical records to, and obtain controverting affidavits from an expert within 30 days after a billing affidavit is filed. If staff lawyers must wait up to 30 days to obtain permission to hire an expert to contest the billing affidavit, the deadline for filing a controverting affidavit may have already passed.

In addition, the insurance company cut support staff to reduce costs. The staff lawyers believe the existing support staff cannot keep up with the lawyers' workload. This will require the lawyers to spend considerably more time performing administrative tasks, which will take time away from performing lawyer-specific tasks.

DISCUSSION

In Professional Ethics Committee Opinion 533 (September 2000), this Committee addressed the question of an outside lawyer's compliance with an insurance company's litigation/billing guidelines, which placed certain restrictions on how the lawyer should conduct the defense of the insured. The Committee concluded that a lawyer may not agree to restrictions that interfere with the lawyer's

exercise of independent professional judgment in rendering legal services to the insured client. This conclusion applies equally in this situation involving staff counsel employed by an insurance company to represent the company's insureds.

The Texas Supreme Court has held that an insurer may use staff lawyers to defend a claim against an insured if the insurer's interest and the insured's interest are congruent, provided that the staff lawyer's affiliation with the insurer is fully disclosed. *Unauthorized Practice of Law Comm. v. American Home Assur. Co.*, 261 S.W.3d 24, 26-27 (Tex. 2008). The Court further held that "their interests are congruent when they are aligned in defeating the claim and there is no conflict of interest between the insurer and the insured." *Id.* at 27.

The Supreme Court noted that insurance policies obligating the insurer to defend claims against the insured typically give the insurer "complete and exclusive control" of that defense. *Id.* The Court then identified three types of lawyers typically hired by insurers: (1) lawyers in private practice, (2) "captive" firms of lawyers, who are not the insurer's employees but have no other clients, and (3) staff lawyers employed as "salaried corporate staff to represent insureds." *Id.* The Court held that, in each instance, the insured's lawyer "owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured" and "must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions." *Id.* quoting *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973) and *State Farm Mut. Auto. Ins. Co., v. Traver*, 980 S.W.2d 625, 628 (Tex. 1998). "Whether defense counsel also represents the insurer is a matter of contract between them." *American Home*, 261 S.W.3d at 42.

The Supreme Court warned that using

staff attorneys comes with risks:

"If an insurer's interest conflicts with an insured's, or the insurer acquires confidential information that it cannot be permitted to use against the insured, or an insurer attempts to compromise a staff attorney's independent, professional judgment, or in some other way the insurer's and insured's interests do not have the congruence they have in the many cases in which they are united in simple opposition to the claim, then the insurer cannot use a staff attorney to defend the claim without engaging in the practice of law. But there are a great many cases that can be defended by staff attorneys without conflict and to the benefit of mutual interests. The use of staff attorneys in those cases does not constitute the unauthorized practice of law."

Id. at 42-43.

Litigation guidelines imposed by an insurance company employing staff lawyers implicate several Rules. First, Texas Disciplinary Rule of Professional Conduct 1.08(e) provides:

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

- (1) the client consents;
- (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 1.05."

In addition, Rule 5.04(c) prohibits a

lawyer from “permit[ting] a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”

Comment 5 to Rule 5.04 explains that a lawyer should constantly guard against the erosion of the lawyer’s professional judgment by third parties who pay the lawyer:

“Because a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed or paid by one to represent another should guard constantly against erosion of the lawyer’s professional judgment. The lawyer should recognize that a person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of the lawyer. The lawyer should be watchful that such persons or organizations are not seeking to further their own economic, political, or social goals without regard to the lawyer’s responsibility to the client.”

Finally, Rule 1.06(b)(2) provides that “a lawyer shall not represent a person if the representation of that person . . . reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.”

Opinion 533 clarified that lawyers cannot follow an insurance company’s litigation guidelines or directives that interfere with the lawyer’s exercise of independent professional judgment. *Id.* (“Litigation/billing guidelines which interfere with the lawyer’s professional judgment not only violate the above mentioned Rules [Rules 1.06, 2.01, 5.04, and 1.08] but also violate Rule 1.01(b) which prohibits a lawyer from frequently failing to ‘carry out completely the obligations that the lawyer owes to a client or clients’”). *Accord*, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 01-421 (2001) (“Ethical Obligations of a Lawyer Working under Insurance Company Guidelines and Other Restrictions”). The ABA Committee observed that material impairment would likely occur only in

“rare instances” and that in the “vast majority of cases,” litigation management guidelines do not raise ethics concerns.

Under section 134(2) of the *Restatement (Third) of the Law Governing Lawyers* (2000), lawyers may comply with insurers’ instructions if the direction does not interfere with the lawyer’s independence of professional judgment, the direction is “reasonable in scope and character,” and the client gives informed consent. Comment d to section 134 explains that directions are reasonable in scope and character if, for example, “the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome.” The third party’s directions must allow for effective representation. *Id.*

In one illustration, the Restatement states that an insurer may limit the number of depositions taken in defense of the insured if the insurance contract authorizes the insurer to make decisions about the expense of defense and the lawyer reasonably believes that additional depositions can be forgone without violating the duty of competent representation. *Id.* § 134, cmt. f, illus. 5.

In sum, a lawyer may not blindly comply with an insurance company’s litigation guidelines. Instead, a lawyer must determine in each case and in each applicable situation whether a given directive is reasonable and consistent with the client’s interests. As applied to the facts presented here, a staff lawyer should not allow the 30-day approval deadline for experts to materially compromise the insured client’s position. A lawyer who believes that a particular guideline interferes with her independent professional judgment in a case should try to persuade the insurer to withdraw or modify the limitation in that case. *See* ABA Formal Op. 01-421 (“A lawyer must not permit compliance with ‘guidelines’ and other directives of an insurer relating to the lawyer’s services to impair materially the lawyer’s independent professional judgment in representing an insured.”). If the conflict becomes irreconcilable, the lawyer must withdraw. *Id.*

The analysis is the same for the insurance company’s decision to cut support staff to save costs. Although the staff lawyers believe the existing support

staff cannot keep up with the lawyers’ workload and will require the lawyers to spend considerably more time performing administrative tasks, the ultimate issue is whether the lawyers’ ability to adequately represent the insureds will be materially compromised. If the answer is no, then the staffing decision creates no conflict between the insurance company and the insureds. Although the lawyers may not enjoy performing administrative tasks, the restriction on support staff often will not rise to the level of a conflict prohibiting continued representation of the insured. If, on the other hand, the limited support staff is impinging on competent representation of the insureds, the staff lawyer should try to persuade the insurer to remove the limitation by providing more staffing. If this is unsuccessful, and the staff lawyer cannot adequately discharge the duties owed to the insured clients, then the lawyer must withdraw from the representation.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a staff lawyer employed by an insurance company to defend its insureds may comply with the insurer’s guidelines only if the staff lawyer’s affiliation with the insurance company is fully disclosed to the client, the guideline does not interfere with the lawyer’s independent professional judgment, and the guideline is reasonable in scope and character and consistent with the client’s interests. A lawyer who believes that a particular guideline as applied in a specific situation interferes with her ability to discharge duties to the represented client should try to persuade the insurer to withdraw or modify the limitation. If the conflict cannot be cured, the lawyer must withdraw from the representation.

The insurance company’s decision regarding support staffing raises issues under the Texas Disciplinary Rules of Professional Conduct only if it materially compromises a staff lawyer’s ability to adequately discharge the lawyer’s duties to the insured clients. If a lawyer believes that inadequate staffing is materially compromising the lawyer’s ability to adequately represent the insured clients, then the lawyer should try to persuade the insurer to increase staffing. If the conflict cannot be cured, the lawyer must withdraw. **TBJ**