

PO 2023-3

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS

Opinion No. _____

Posted for Comment February 15, 2023

QUESTIONS PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct prohibit staff counsel employed by an insurance company from representing insured clients if the insurance company considers the results of performance surveys in deciding the lawyer's compensation or continued employment?

STATEMENT OF FACTS

Insurance companies often employ in-house defense counsel to represent the company's insureds in litigation (sometimes called "captive" counsel or "staff" counsel). Some insurance companies use post-representation surveys to monitor the performance of staff counsel. In these performance surveys, both the insurance claims adjuster to whom the lawyer reported and the insured whom the lawyer represented "grade" the lawyer subjectively after a matter is concluded. At some companies, the results of these performance surveys can directly impact a lawyer's eligibility for a promotion or raise, and unsatisfactory performance ratings can result in internal discipline and even termination.

This survey system potentially places the lawyer in a quandary: a lawyer's candid advice can lead to friction and disagreement with the insured client or the claims adjuster. For example, the client or adjuster may disagree with a lawyer's negative evaluation of the case or the insured's performance as a witness. As a result, exercising independent professional judgment and being honest with the insured client and adjuster may lead to unfavorable performance surveys for the lawyer, jeopardizing the lawyer's chances for a raise or continued employment.

DISCUSSION

Duties of staff counsel faced with restrictions on the exercise of independent professional judgment. In considering the duties owed by a staff lawyer employed by an insurance company, the Texas Supreme Court has held that the lawyer owes the insured the same unqualified loyalty as if he or she had been originally employed by the insured. *Employer's Cas. Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973). Since *Tilley*, the Court has also been unequivocal in holding that an attorney-client relationship exists between an insured and the lawyer retained on that insured's behalf by an insurer. *Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 484 (Tex. 1992). More recently, the Supreme Court permitted the practice of allowing staff counsel to defend a company's insureds in litigation, but it reiterated that the in-house counsel's duty of

loyalty is to the insured. *Unauthorized Practice of Law Comm. v. Am. Home Assur. Co.*, 261 S.W.3d 24, 27 (Tex. 2008).

In *American Home Assurance*, the Supreme Court acknowledged that both in-house and outside defense counsel may be subject to certain litigation guidelines and other restrictions requiring approval from a carrier to take certain actions in the defense of an insured, such as conducting investigations or retaining expert witnesses. However, the Court observed that Rule 5.04(c) prohibits a lawyer from “permitting 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.” *Id.* at 41.

This Committee also relied on Rule 5.04(c) in Professional Ethics Committee Opinion 687 (April 2020), which examined restrictions in litigation guidelines for in-house defense counsel and the extent to which those guidelines may seek to direct and control legal services rendered by the lawyer. The Committee also cited Rule 1.08(e)(2), which provides that a lawyer shall not accept compensation for representing the client from someone other than the client “unless there is no interference of professional judgment or with the attorney-client relationship.” Ultimately, this Committee concluded in Opinion 687 that it is impermissible under the Rules for a lawyer to agree with an insurance company’s restrictions that interfere with the lawyer’s exercise of independent professional judgment in rendering legal services to the insured/client.

Performance surveys do not necessarily prevent a lawyer from rendering independent professional judgment. Here, in contrast, the in-house defense counsel is not facing direct restrictions on his or her ability to exercise independent professional judgment and render candid legal advice. Instead, the lawyer is facing potential employment consequences as an indirect consequence of rendering such advice (because it may result in negative survey responses). To one degree or another, this is a reality faced by every lawyer who tells a client something the client may not wish to hear. Like the staff counsel whose performance may be measured by metrics such as client or adjuster surveys, any lawyer who conveys candid but unwelcome advice faces the risk that the client may terminate the attorney-client relationship or form an unfavorable opinion of the lawyer. It is a reality of practicing in a service profession. But this reality does not diminish every lawyer’s obligation to “exercise independent professional judgment and render candid advice” under Rule 2.01—even when the client’s disagreement leads to adverse consequences for the lawyer’s employment. *See also* Comment 5 to Rule 5.04 (lawyer “should guard constantly against erosion of the lawyer’s professional judgment” when non-client pays or furnishes lawyers to represent others).

Staff counsel must also be mindful of Rule 1.06(b)(2), which 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.” Thus, staff counsel—like all other lawyers—must prioritize the exercise of independent professional judgment and the rendering of candid advice over the lawyer’s own interest in avoiding negative feedback and its ramifications. If a lawyer cannot do so, the lawyer must withdraw from the representation and, perhaps, from the job altogether.

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not prohibit staff counsel employed by an insurance company from representing insured clients merely because the insurance company considers the results of performance surveys in deciding the lawyer's compensation or continued employment. Lawyers may not allow performance surveys to interfere with their exercise of independent professional judgment and the rendering of candid advice during the representation of a client.