DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

To: The Ohio State Bar Association
Unauthorized Practice of Law Committee

From: Steven F. Stuhlbarg

Date: August 25, 2000

Re: UPL Implications of an Insurance Company's
Direct Representation of Its Insureds

The Unauthorized Practice of Law Committee of the Ohio State Bar Association has asked me to submit a brief memorandum explaining why an insurance company's direct representation of its insureds constitutes the unauthorized practice of law.

When I refer to "an insurance company's direct representation of a client," I make the following assumptions. First, I assume that the insurance company is not a "legal professional association, corporation, or legal clinic" within the meaning of Rule III of the Ohio Supreme Court's Rules for the Government of the Bar. Rather, this memorandum takes as a given the premise that an insurance company is owned, at least in part, by one or more non-lawyers, or that one or more non-lawyers serve as directors or officers of the insurance company, within the meaning of DR 5-107(C) of the Ohio Code of Professional Responsibility. Second, I assume that the insurance company employs one or more attorneys-at-law, licensed to practice law in the State of Ohio, such that each employee/attorney is, either directly or indirectly, answerable or accountable to the non-lawyer owners or officers or directors of the insurance company, and such that the employee/attorney is subject to all of the usual and familiar duties of good faith and fair dealing, loyalty, and candor that any employee owes to his or her employer under the common law. Third, I assume that the insurance company routinely assigns one or more of its employees/attorneys to represent the company's insureds, such that an attorney-client relationship comes to exist between the employee/attorney, (acting within the scope of his or her employment with the insurance company), and the insured.

THE ACTS OF AN EMPLOYEE ARE

IMPUTED TO THE EMPLOYER

It is elementary that "[t]he doing of work that a servant is employed to do under the control of and in the mode and in the manner directed by the master will be considered as something being done by the master and, if it relates to the business of the master, as part of the business of the master rather than as any business of the servant." *Van Meter v. Public Utilities Commission of Ohio* (1956), 165 Ohio St. 391, 135 N.E. 2d, 848. In other words, where an employee is acting within the scope of his employment, his conduct will be imputed to the employer. *Id.,* 165 Ohio St. at 396.

Accordingly, where an employee/attorney of an insurance company is, as directed by his or her employer, representing the insurance company's clients, the conduct of the employee/attorney is directly imputed to the

employer. Thus, it is the insurance company that practices law whenever its employee engages in the practice of law. Because the insurance company is not duly licensed to practice law in the State of Ohio, such practice is unauthorized.

THE OHIO SUPREME COURT HAS DEFINITIVELY RULED

THAT A CORPORATION MAY NOT PRACTICE LAW THROUGH

THE EMPLOYMENT OF QUALIFIED LAWYERS

It is well settled that "a corporation cannot lawfully engage in the practice of law; nor can it do so indirectly through the employment of qualified lawyers." *Judd v. City Trust & Savings Bank* (1937), 133 Ohio St. 81, 12 N.E.2d 288 (syllabus ¶ 2); *See also Land Title Abstract & Trust Co. v. Dworken* (1934), 129 Ohio St. 23, 29-30, 193 N.E. 650, 653 ("It seems too obvious to permit any discussion that a corporation may not be authorized to practice law …. As it cannot practice law directly, it cannot do so indirectly, by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.").

The Ohio Supreme Court's *Judd* case is almost directly on point. The question presented in *Judd* was whether state banks in Ohio engage in the unauthorized practice of law when, through regularly employed and salaried officers and employees who are generally attorneys of law and admitted to practice in Ohio, they prepare and draft wills, trust agreements and contracts for their customers and patrons. 133 Ohio St. at 86, 12 N.E.2d at 290. The Court pointed out that "when an attorney/employee of a trust company prepares legal documents … for the patron or customer of the corporation … patently the allegiance of the attorney-employee is to his employer." *Id.* at 87, 12 N.E.2d at 291. The Court further explained that an attorney-client relationship "cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not the directions of the client." *Id.* (quoting *In re Co-operative Law Co.,* 198 N.Y. 479, 483, 92 N.E. 15, 16). The conclusion is inescapable — a state bank engages in the unauthorized practice of law where it provides legal services to its patrons, notwithstanding the fact that the legal work is performed by employees who are licensed attorneys. *Id.* at 81, 12 N.E.2d at 288 (syllabus ¶ 3); *id.* at 88, 12 N.E.2d at 292.

The Court's conclusion in *Judd* can hardly be deemed surprising in light of the strong language the Court used only three years earlier in the case of *Dworken*, where the Court emphatically condemned the evils of allowing an attorney employed by a corporation to represent a client of the corporation:

[The attorney's] master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors or officers. Its members might be without character, learning or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state.

Dworken, 129 Ohio St. 30-31, 193 N.E. at 753 (quoting *In re Co-operative Law Co., supra).*

The ideals regarding the legal profession that were enunciated in *Judd* and *Dworken* remain alive and well in Ohio. The Ohio Supreme Court still cites *Dworken* in virtually every new UPL case it considers. Further, just this year, the Ohio State and the Cincinnati Bar Associations declared their unequivocal opposition to any proposal that would permit multi-disciplinary practice ("MDP") where an MDP business would be owned or

controlled by one or more non-lawyers. Significantly, the American Bar Association agreed. The core values that were at stake in the controversy over MDP are the very same values at issue here — protecting the independence of employee-attorneys, and to protect the attorney-client formed between employee-attorneys and clients of the employer from possible subversion by an employer who is not bound by the Code of Professional Responsibility, and who is more concerned with generating profits than with advancing the best interests of the client, the administration of justice, and the higher ideals of our profession.

Accordingly, an insurance company's direct representation of its insureds constitutes the unauthorized practice of law.

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