DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

The Appointment of Salaried Counsel to Defend Insureds Does Not Constitute the Unauthorized Practice of Law

An analysis prepared for the Unauthorized Practice of Law Committee of the Ohio State Bar Association by:

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and the role of an individual attorney's ethical duties.

Q. So why has this issue arisen again?
A. Market forces and the efficiencies of a salaried attorney program have led to increased use of the program and resuscitated an issue settled over 60 years ago in Ohio.

Q. Does Ohio represent the prevailing view?
A. Yes. The vast majority of jurisdictions have approved the use of salaried counsel, as have ethics opinions from the American Bar Association and elsewhere.

Q. Are the authorities unanimous?
A. Almost. Two states (out of 23) have issued contrary opinions for reasons unique to those states.

Q. Are there any other considerations for the OSBA's UPL Committee?
A. Yes. The Committee should consider both the constitutional implications and potential unintended consequences of a broad attack on one class of licensed attorneys.

M E M O R A N D U M

September 20, 2000

TO: Ohio State Bar Association

Committee on the Unauthorized Practice of Law

FROM: Irene C. Keyse-Walker

RE: Is an Insurance Company that Appoints Salaried Lawyers to Defend Its Insureds Engaged in the Unauthorized Practice of Law?

The Unauthorized Practice of Law ("UPL") Committee of the Ohio State Bar Association has been asked to join in an to attempt to turn back the clock of Ohio law by challenging a practice that has served hundreds of thousands of Ohioans, with the express approval of courts and disciplinary authorities, from 1939 to May of this year. The following series of questions and answers are offered to ensure a complete understanding by the Committee of the nature of the insurance defense practice, the history of salaried counsel in this State, and the lack of validity in any allegation that the appointment of salaried attorneys to defend insureds, as opposed to outside counsel, constitutes the unauthorized practice of law by an insurer.

Q. What is the insurance defense practice?

A. An area of legal practice that developed as a result of liability insurers' contractual obligation to investigate, defend and indemnify third-party claims against insureds.

To understand the nature of the insurance defense practice, it is critical to understand the nature of the insurance contract. The insurance defense practice developed as a result a specific type of insurance policy — a policy designed to protect individuals against legal liability. In exchange for a specified premium, the insurer agrees to: 1) defend an insured against a claim made by an injured party; and 2) pay any judgment resulting from that lawsuit, up to the limits of liability in the policy.

The insurer does not simply hand the insured a sum of money and say "hire a lawyer." Rather, the insured has assigned, and the insurer has assumed, the defense of the claim. The insurer investigates the claim, appoints the attorney, determines whether to compromise or litigate the claim, and pays the attorney's fees and costs, whether the case lasts one week or several years. Concomitant with this duty and financial interest in the litigation, the insurer decides: 1) which attorney it will appoint to defend the insured; and 2) how much to pay the attorney.

Q. What is the "tripartite relationship"?

A. It is the common economic interest of the insured and insurer that is represented by the insurance defense attorney.

A tremendous amount of ink has been spilled analyzing the "tripartite" relationship that describes the interlocking obligations and interests of an insured, insurer and insurance defense attorney, in the context of a lawsuit filed against the insured. The insured and insurer have a common interest in litigating to a defense verdict or lowest possible settlement. The insured owes the insurer the duty to cooperate and the insurer owes the insured the duties of defense and indemnity. Both expect a competent defense from the insurance defense attorney.

There are two potential scenarios in which conflicts can arise in the tripartite relationship. The first occurs when an insurer sends out a "reservation of rights" letter, explaining that it will defend the claim against the insured, but the company reserves its right to deny any liability for a resulting judgment. *Motorist Mut. v. Trainor* (1973), 33 Ohio St.2d 41, ¶ 1 of the syllabus. The insurer may reserve its rights based upon a specific exclusion of coverage in the policy, because only one of two or more mutually exclusive claims is covered under the policy, because the policy was not in force at the time of the incident that gave rise to liability, or for other reasons. Such defenses to coverage, however, are distinct from the duty to defend. The reservation of rights letter maintains that distinction by permitting coverage issues to be determined at a later time, or in a separate declaratory judgment proceeding.

Maintaining that distinction, in turn, permits the insurance defense attorney to carry out her professional obligation to the insured without consideration of whether the liability is ultimately covered. The insurance defense attorney maintains all confidences of the insured which might relate to the coverage issues, and defends both covered and potentially uncovered claims. *Preferred Mutual Ins. Co. v. Thompson* (1986), 23 Ohio St.3d 78.

The second potential for conflict arises when the prayer of a complaint exceeds policy limits. Under those circumstances, the insurer must inform its insured of the possibility of uncovered damages, so that the insured has an opportunity to retain personal counsel to represent the uninsured interest. The insurance defense attorney must: 1) use her professional judgment and training to determine if the claim has a value close to or in excess of policy limits; and 2) determine whether the matter may be settled within policy limits. Should the insurer refuse "abundant" opportunities to settle within policy limits, it may be liable for jury verdict amounts in excess of policy limits. *Carter v. Pioneer Mut. Cas. Co.* (1981), 67 Ohio St. 2d 146.

Neither of these issues is before this Committee. Neither affects an insurer's contractual right to decide who to appoint to defend the insured, or how to pay the insurance defense attorney. Neither is analyzed differently depending upon whether the insurance defense attorney is paid by the hour, by a salary, or by a retainer. Neither is relevant to the question of whether appointing salaried attorneys, as opposed to outside counsel, constitutes the unauthorized practice of law by an insurer.

Q. What is the difference between "salaried" insurance defense counsel and "outside" insurance defense counsel?

A. The manner in which they are paid to defend insureds.

Over the years, insurers and insurance defense attorneys have experimented with various ways of compensating the attorney for services rendered. Such variations include payment per case, payment by the hour, payment through a retainer, or payment through an annual salary.

The term "salaried" counsel generally refers to licensed, duly registered attorneys who are employees of the insurer, and therefore receive an annual salary, and who limit their practice to the defense of their employer's insureds. "Outside" counsel are independent contractor private practitioners. They may charge by the case, or by the hour, or they may be on a retainer with the particular insurer. Defending a particular insurer's insureds may occupy 2%, 50%, or 100% of the outside attorney's practice.

Both types of attorneys pass the same bar exam, receive the same license, take the same oath, and are subject to all the same statutes, rules, and regulations, including Ohio's Code of Professional Conduct. Both are skilled in civil litigation and specifically in the type of high volume, personal injury defense work most frequently associated with automobile liability insurance.

Q. Have Ohio Courts or Disciplinary Counsel addressed the issue of whether the appointment of salaried counsel to defend insured constitutes UPL?

A. Yes. The practice has been definitively and consistently approved from 1939 to date.

Ohio was among the first jurisdictions to recognize that there is "no difference" between salaried and outside counsel in the insurance defense practice. *See Strother v. Ohio Casualty Ins. Co.* (C.P. 1939), 28 Ohio L. Abs. 550, 553, 14 Ohio Op. 139, 142:

The company is simply protecting its own rights in that litigation by having counsel of its own choosing to represent it; it makes no difference whether the attorneys are hired by the case, whether they are hired by the year or whether they are the same attorneys in each and every case, or whether the company changes attorneys with each and every case, so long as the company does not employ laymen to do any of these acts, it is not engaged in the practice of law.

See App., Tab 2, p. 4.

Strother was filed by attorneys alleging that "by virtue of" insurance policy obligations to defend and indemnify, the insurer defendant appeared in court, drafted pleadings, etc., "by and through its duly authorized agents and [employee] attorneys." *Id.*, p. 2. The attorneys alleged that the insurer had:

… no legal right or authority to practice law either directly or indirectly, by employing regularly licensed attorneys to practice law for it ….

Id., p. 2.

Addressing these claims, the *Strother* court observed that the insurance defense practice had "become quite controversial in the last few years." Several courts had issued decisions prohibiting corporations from entering into contracts to defend actions on behalf of others "where the insurer has no financial interest in the outcome of the litigation." *Id.*, p. 3.

The case was quite different however, where the duty to indemnify gave the insurer a direct pecuniary interest to defend in the litigation. Under those circumstances, the insurer had the right "to furnish counsel of its own choosing" (a right now explicitly included in the insurance contract). *Id.*, p. 4. Further, "such a procedure is not the practice of law in any sense of the word." *Id.* This fundamental proposition established, the Court went on to note that it then followed that "it makes no difference" whether the company chooses salaried or outside counsel to protect that interest.

Strother was followed by the Cuyahoga County Court of Appeals in *Dowling v. Insurance Company of North America*, *unpub.*, Cuy. App. No. 32527 (Nov. 16, 1973). App., Tab 4, p. 5. Ohio's Office of Disciplinary Counsel has confirmed that the use of salaried counsel does not constitute the unauthorized practice of law, most recently in May of this year. App., Tab 5, p. 2.

Q. Don't insurers exert more "control" over salaried counsel, to the detriment of insureds?

A. No. Such allegations are based on a fundamental misconception of the nature of the insurance contract, and the role of an individual attorney's ethical duties.

The legal theory that an "employer," as opposed to "an independent contractor," has the right to control the means and method of work, has led to a great deal of misunderstanding and unwarranted objections that salaried counsel must be subject to additional, deleterious "control" by insurers that is not imposed upon "outside" counsel. A brief analysis of the three contracts involved — the insurance contract under which an insurer assumes a duty to defend, the employment contract with salaried counsel, and the retention contract through which an insurer appoints counsel to defend the insured — shows the flaw in this assumption.

By paying a premium and entering into an insurance contract, an insured agrees to give the insurer control over the defense of litigation against him. Such control is entirely appropriate, since the insurer is not only more experienced in claims investigation, claims resolution, and coordination of a defense, but also has an interest in resolving the matter for the lowest amount possible. Indeed, the insured may prefer to blur the distinction between the insurer and appointed defense counsel. *See, e.g., Carter v. Pioneer Mut. Cas. Co.* (1981), *supra,* 67 Ohio St.2d at 147, n. 1:

[Plaintiffs] asserted in their complaint that [insurer] did not act in good faith in defending the estate … because of the following: insurer, who undertook defense of the estate, made no attempt to negotiate a settlement although fully informed about the liability and nature and extent of the injuries; insurer failed to attend and participate in the taking of depositions of seven witnesses; insurer failed to initiate any discovery; insurer failed to offer or agree to pay the face amount of its policy to settle; insurer failed to present any evidence at trial on behalf of the defense; insurer failed to make any effort to pay proceeds of its policy even after adverse judgment had been entered; insurer paid [plaintiffs] the policy limits only after executions were issued.

Thus, the insurance policy places the duty to defend, and concomitant control of the defense, in the insurer. Neither law nor public policy prohibits or limits an insured's right to enter into a contract that cedes control over the defense of litigation against him to the insurer.

The contracts between the insurer and its salaried counsel are quite different. Implied in every such contract — whether it sets forth the terms of employment or appoints the attorney to defend an insured — is the insurer's acknowledgment of the attorney's ethical obligations under Ohio's Code of Professional Conduct.

These duties include undivided loyalty to the insured and the duty to exercise independent professional judgment on behalf of the insured. The insurer and attorney reach a mutually agreeable method of compensation — whether by the hour, by the case, through an annual retainer, through salary, or otherwise — and the insurer retains the control ceded to it by the insured, including the right to settle or go to trial. Neither the employment nor the appointment contract can include any agreement whereby the attorney will forfeit her obligation to exercise independent professional judgment on behalf of any insured she is appointed to defend. That ethical obligation applies to all insurance defense attorneys, salaried and outside. Every attorney must refuse to enter into any contract that seeks to interfere with that obligation, and decline to carry out any instruction from the insurer that would violate that ethical duty.

There is no support for any suggestion that attorneys' fulfillment of their obligation to exercise independent professional judgment varies according to how they are compensated. The fulfillment of that duty is a matter which must be determined according to the facts of an individual case. In *Dowling v. Insurance Company of North American* (*supra*, Tab 4), for example, the plaintiff alleged that INA engaged in the unauthorized practice of law by "directing" its salaried counsel to file pleadings on behalf of the insured. Tab 4, p. 1. The individual attorney attested that he exercised independent professional judgment on behalf of the insured in the specific litigation at issue, and the plaintiff offered no fact to the contrary. There were therefore no disputed facts and the Cuyahoga County Court of Appeals affirmed the insurer's summary judgment. *Id.*

Nor is any threat to independent professional judgment more or less likely to arise in the salaried attorney scenario. Indeed, a persuasive argument could be made that an insurer would be more vigilant in ensuring that it does not encroach on the ethical obligations of its salaried counsel, since to do so could expose the insurer to a wrongful termination suit. If anything, it is outside counsel, who may be just as economically dependent upon the insurer, but may be without recourse should her services be terminated after exercising independent legal judgment, who is more exposed to the temptation of favoring the insurer's interest. *See, e.g. King v. Guiliani*, 1993 Conn. Super. LEXIS 1889 (July 27, 1993) (App., Tab 6, p. 5):

[Outside] attorneys who depend on an insurance carrier's referrals for a significant portion of their income could be said to be at risk of favoring the company over the client in a conflict situation in order to keep the carrier's business. Yet there is no presumption that such attorneys will violate the rules.

Accord Cincinnati Ins. Co. v. Wills (Ind. 1999), 717 N.E.2d 151, 163 (App., Tab 12, pp. 9-10 (it is "unrealistic to suggest that an outside lawyer is immune from the blandishments of a client, particularly a high volume client that may be the source of a significant portion of the firm's revenue").

In sum, there is nothing in the system of using salaried counsel, as opposed to outside counsel, that is antithetical to the public interest. An attorney's ethical obligation to exercise independent legal judgment on behalf of an insured raises issues to be addressed with individual attorneys, not by attacking a system that is unrelated to that individual obligation. *See In re Proposed Addition to the Rules Governing the Conduct of Attorneys in Florida* (Fla. 1969), 220 So. 2d 6,7 (App. at Tab 7, p.2):

The rule, as suggested, seems to emphasize the employer-employee relationship as the element which would distinguish the lawyer's responsibility to one of two clients whose interests might develop conflicts. … [I]n resolving the ethical conflict … it would not be material whether the lawyer is employed … on a full-time master-servant basis or merely on an isolated attorney-client basis. The ultimate problem is the same. … Consequently, the proposed rule does not completely solve the problem which the Bar seeks to remedy. It merely discriminates against a class with no reasonable basis for the distinction.

Q. So why has this issue arisen again?

A. Market forces and the efficiencies of a salaried attorney program have led to increased use of the program and resuscitated an issue settled over 60 years ago in Ohio.

Strother was a landmark decision that was followed by the ABA:

After *Strother*, the Toledo Bar Association requested an opinion on the propriety of salaried counsel by the ABA. The ABA issued a formal opinion clearly authorizing an insurer to use staff counsel to defend lawsuits against insureds. Contrary to the position taken by the Toledo Bar, the ABA found that the insurer does not engage in the practice of law by using salaried lawyers to defend third-party lawsuits. The ABA opinion noted that the insured contractually bargains away the defense of a liability claim pursuant to the terms of the insurance policy. The selection of counsel is thus an incident to the insurance contract.

See Jeffrey W. Jackson, Roy Alan Cohen, "Defending the Insured with Salaried Counsel: Legal and Ethical Considerations," *The Brief* (ABA 1998) (App., Tab 8, p. 2). The referenced ABA opinion, issued in 1950, is attached at Tab 1 of the Appendix. A 1977 ABA opinion, reconfirming its stance, is attached at Tab 9.

Over the years, the salaried counsel debate has been revisited upon occasion. In May of this year, for example, Ohio's Disciplinary Counsel dismissed a challenge to the use of salaried counsel, for the same reasons the *Strother* court enumerated in 1939:

The first issue we evaluated was whether in using salaried lawyers to represent its insureds, Nationwide was engaging in the unauthorized practice of law. … Because the insurance company is obligated by its policies to defend its insured *and* to pay damages to the extent of coverage, it makes no difference whether the insurer pays the defense lawyer by the hour, by the case, or by a salary.

Letter (May 2, 2000) from the Office of Disciplinary Counsel of the Supreme Court of Ohio, re Nationwide Mut. Ins. Co., App., Tab 5, p. 1 (emphasis in original).

The debate is not revisited because of any change in the UPL statute or UPL jurisprudence. Rather, as with many issues, UPL challenges to salaried counsel closely track economics and market forces in the legal arena. In the last decade, technological innovations have enabled the development of standardized procedures in areas of litigation, such as auto accident defense work, that have a large number of cases with recurring issues. At the same time, the legal profession has experimented with alternative billing methods that permit lower and more predictable costs. Many insurers expanded, revamped, or started salaried counsel programs in an effort to increase the efficiency and effectiveness of their defense obligation.

There is no question but that legal markets will continue to evolve, and the profession must accept evolution. But those developments do not change the basic insurance contract or the principles enunciated in *Strother*. Whether every innovation tried over the past decade is kept or abandoned, insurers will have the right to choose the attorney who will defend the insured, and determine the form of payment for services rendered.

And to the extent any of these market forces might create tension with traditional rules of ethics, the tension applies equally to "outside" and "salaried" counsel. Bar associations serve lawyers and the legal profession best by focusing on the core values to be protected for the profession as a whole, and not singling out a particular group of attorneys for disparate treatment. *See, e.g.,* Morgan, "Toward a New Perspective on Legal Ethics," *supra*, Tab 10, p. 7 ("We must open our eyes to changes in the world lawyers and clients face and develop ways in which the profession can be responsive to the needs of each").

Q. Does Ohio represent the prevailing view?

A. Yes. The vast majority of jurisdictions have approved the use of salaried counsel, as have ethics opinions from the American Bar Association and elsewhere.

As noted above, Ohio was among the first jurisdictions to recognize the lack of any logic in a UPL attack on the use of salaried counsel when *Strother* was issued in 1939. As of 1998:

… 21 jurisdictions and the American Bar Association have addressed the legal and ethical propriety of salaried lawyers in the insurance defense context. Eleven states have approved the practice by court decision, while 8 other states and the ABA have approved it with ethics opinions. In contrast, only 2 states forbid the use of salaried lawyers to represent insureds.

J. Jackson and P. Cohen, *supra*, Tab 8, p.1.

Since 1998, Alaska and West Virginia have issued opinions rejecting UPL challenges to salaried counsel, and Indiana reconfirmed its approval of the practice in *Cincinnati Ins. Co. v. Wills, supra,* 717 N.E.2d 151. These most recent authorities thoroughly examine the numerous opinions and decisions of the past five decades, and systematically dismantle and discredit recycled objections to the use of salaried counsel. Thus, a long line of authorities from 1939 to the present have followed the precedent Ohio set in 1939.

The Indiana Supreme Court focused on the proper UPL issue — was the individual providing the legal services a licensed attorney — and held that the manner of compensating the attorney was irrelevant:

Regardless of whether a partnership, a professional corporation, an insurance company, or any other legal entity may be said to be practicing law in some sense, we believe the proper focus of the unauthorized practice inquiry is whether the challenged activity results in the "unauthorized" practice by the individuals involved. Rather than turning on a syllogism based on a series of propositions of dubious general validity, the unauthorized practice issue boils down to whether a non-lawyer is performing tasks requiring a lawyer, or lawyer not admitted in this State is practicing in Indiana.

Cincinnati Ins. Co. v. Wills, supra, 717 N.E.2d at 160 (footnote and citation omitted), App., Tab 12, p. 7. The Missouri Supreme Court similarly found "astonishing" the lengths some opponents would go to try to circumscribe a liability insurer's selection of attorneys:

The informants append to their briefs statistics compiled by the respondent intending to show that defense of claims through employed attorneys is more economical than retention of private practitioners. From this showing they make the astonishing argument that the respondent derives financial advantage by employing lawyers and therefore is engaged in the "law business" for valuable consideration. The legislature, in enacting the governing statutes, surely had no purpose of dissuading insurance companies from pursuing economies in the defense of claims.

In re Allstate Ins. Co., *supra*, 722 S.W.2d at 951, App., Tab 11, p. 3.

And the Tennessee Supreme Court rejected arguments based upon vague leaps of logic, and reversed a bar association opinion which had ignored facts, in favor of broad assumptions, regarding salaried counsel. *See In re Youngblood* (Tenn. 1995), 895 S.W.2d 322, 330-31, App., Tab 16, p. 7:

…. [T]he specific facts of each situation must be examined to determine if the attorney is aiding a non-attorney in the practice of law. The mere showing of the relationship of employer-employee, without a definition of the duties, loyalties, prerogatives, and interests of the parties, is not a sufficient basis on which to conclude that the attorney-employee is aiding a non-attorney in the practice of law.

The issue in Ohio is the same. Only an individual analysis of any particular attorney's action in a specific situation can determine whether, under the facts of the case, the attorney has violated her obligation to exercise independent professional judgment. No logic or facts support the proposition that an employment relationship has any more adverse effect on an attorney's obligation to exercise independent judgment than any other relationship. As the New Jersey Supreme Court has noted:

These are not second-class lawyers; they are first class lawyers who are delivering legal services in an evolving format. If this form of practice results in lower legal costs, the public has an interest in seeing that able attorneys continue to be attracted to it.

In re Weiss, Healy & Re (N.J. 1988), 536 A.2d 266, 269-70 (App., Tab 17, p. 4). *See also, Cincinnati Ins. Co. v. Wills, supra,* Tab 12, p. 9 (the mere potential for conflict "does not require the abandonment of a mode of doing business that the insurer finds efficient and cost effective").

This Committee should be guided by this large body of authority, and Ohio's place as one of the first jurisdictions to recognize its logic and fairness, in deciding whether to invest considerable resources into a purposeless prosecution. The only realistic purpose of such a prosecution is to pit lawyer against lawyer in a turf war involving the economics of the practice of law.

Q. Are the authorities unanimous?

A. Almost. Two states (out of 23) have issued contrary opinions for reasons unique to those states.

North Carolina and Kentucky have prohibited the use of salaried counsel to defend insured in decisions that were aberrations when issued, and remain so today.

North Carolina prohibited the practice of appointing salaried counsel in 1986, based upon its conclusion that since employees are "agents" of a corporation, a "salaried" attorney who appears on behalf of an insured in a civil action constitutes the corporation appearing on behalf of the insured, and the corporation is thereby engaging in the unauthorized practice of law. *See Gardner v. North Carolina State Bar* (N.C. 1986), 341 S.E.2d 517 (App., Tab 18). There are at least three flaws to this reasoning.

First, the North Carolina "agency" theory derived from the language of that state's UPL statute, which provides that it is unlawful "for any corporation" to practice law or appear as an attorney. *Gardner*, Tab 18, p. 3. Indeed, the court declined to follow the universal authority permitting the use of salaried attorneys based solely on its perceived obligation to interpret the unique North Carolina statute before it. *Id.*, pp. 5-6. *Strother,* for example, was distinguished on the grounds that Ohio's UPL statute did not have a prohibition directed specifically at corporations. *Id.*, p. 5.

Ohio's public policy, like its UPL statute, differs from North Carolina's. The purpose of Ohio's UPL statute is to protect the public from unlicensed or lay persons practicing law; not to single out corporations. *See Heinize v. Giles* (1986), 22 Ohio St.3d 213, 217 (the Supreme Court has the "responsibility to protect the public" by defining and preventing the unauthorized practice of law, "while at the same time not exercising this authority so rigidly that the public good suffers"); *Sharon Village Ltd. v. Licking County Bd. of Revisions* (1997), 78 Ohio St.3d 479, 481 (Ohio's UPL statute protects the public from "the very real possibility" of being "left with no recourse" if a nonattorney commits malpractice); *Union Sav. Ass'n v. Home Owners Aid, Inc.* (1970), 23 Ohio St.2d 60, 64 (UPL statutes protect the public from nonlawyers "who are not amenable to the general discipline of the court"). None of these concerns is implicated in the appointment of salaried counsel to defend insureds.

Second, *Gardner's* "agency" theory misinterprets the doctrine of *respondeat superior*. That doctrine holds that a corporation is responsible for the acts of its employees, including specially licensed employees. *Gardner* expands the concept, concluding that the corporation is not only *responsible* for the employee's acts, but is also *performing* them. As the Supreme Court of Indiana held in *Cincinnati Ins. Co. v. Wills, supra,* 717 N.E.2d at 159 (App., Tab 12, p. 7):

It is of course true that a legal entity can be responsible for the professional actions of its partners, employees and agents under standard doctrines of *respondeat superior*, and in that sense is viewed as engaged in the

activity. But that does not mean the entity unlawfully practices law any more than Federal Express unlawfully pilots airplanes.

Nor does Ohio ascribe to North Carolina's interpretation of *respondeat superior*. The Ohio Supreme Court, for example, distinguishes between a hospital's *respondeat superior* liability for the negligence of doctors practicing in their emergency room, and liability for "malpractice." Malpractice can be committed only by trained professionals exercising "independent judgment" in the practice of medicine. *Lombard v. Good Samaritan Med. Ctr.* (1982), 69 Ohio St.2d 471, 473. In Ohio, corporations act *through* agents, not *as* agents. *See, e.g., Sharon Village, supra,* 78 Ohio St.3d at 483 (a corporation party may not appear *pro se* in litigation; corporations may appoint an attorney "agent" — in-house or outside — to represent them in litigation). Ohio law therefore focuses on whether the employees or agents appearing before the tribunal are licensed attorneys; not whether they are employed by a corporation.

Third, *Gardner's* "agency" argument does not justify singling out salaried counsel. If valid, the theory would apply equally to prohibit insurers' use of outside counsel to defend insureds. As the Supreme Court of Missouri noted in *In re Allstate Insurance Co., supra*, 722 S.W.2d at 950 (App., Tab 11, p. 2):

The weak point in the informant's argument is that they quite agree that the services in question may properly be rendered by outside counsel hired and paid by the insurance company. They indeed seek to obtain the business for private practitioners, by denying it to employed attorneys. If, however, the respondent practices law by assigning employee attorneys to the defense of claims, it would just as logically be said to practice law by retaining independent contractors as counsel for its insured.

. . .

Counsel for the informants could not cite us to a single instance in the law in which a person may lawfully do something through an independent contractor which could not be done through an employee.

The footnote to this discussion includes the lengthy list of authorities rejecting such tenuous arguments, with the sole exception being *Gardner*.

The only other state to have prohibited the use of salaried counsel did so based upon what can only be described as an ill-informed assumption that salaried attorneys are less capable of carrying out their ethical obligations under the Code of Professional Conduct. *See American Insurance Assoc. v. Kentucky Bar Assoc.* (Ky. 1996), 917 S.W.2d 568 (App., Tab 19). Law professor Charles Silver nominated the Kentucky decision as "my candidate for the title of 'Worst Opinion on a Professional Responsibility Topic in 1996'" and described the opinion as "appalling" as to its analysis of both unauthorized practice of law and ethics issues. C. Silver, "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L.J. 205, 207-210 (1996) (App., Tab 20).

The Kentucky decision may perhaps be explained by its origins. The suit was brought to overturn an advisory ethics opinion issued by the Board of Governors of the Kentucky Bar Association in 1994. To do so, plaintiffs had to first convince the court that it should reverse an Unauthorized Practice of Law Opinion, issued in 1981, that "proscribes the use, by insurance companies of salaried attorneys to provide defense services under the insurers' policies of insurance." (App., Tab 19, p. 1). The Kentucky Court simply held that "[n]otwithstanding the trends of other jurisdictions," it was not inclined to revisit an opinion that had issued 15 years before and as to which "the 30-day window of review [by the Kentucky Supreme Court] upon publication … has long been closed …." *Id.* at pp. 1, 4. Applying that logic here, there is no compelling reason to revisit the principles of *Strother* that have governed the insurance defense practice in Ohio for more than 50 years.

Q. Are there any other considerations for the OSBA's UPL Committee?

A. Yes. The Committee should consider both the constitutional implications and potential unintended consequences of a broad attack on one class of licensed attorneys.

As noted, the vast majority of jurisdictions — including Ohio — that have considered the issue have refused to endorse the position that insurers cannot appoint salaried attorneys to defend insureds. Any such attempt at regulation raises constitutional issues as well, relating both to an insurer's right to carry out its contract obligation to defend an insured without interference, and an attorney's right to pursue her profession on a salaried basis.

The United States Supreme Court has held that corporations with *no* financial interest in litigation, but with certain objectives which can be carried out only through litigation, have a constitutional right to hire salaried attorneys to represent third parties in litigation. *See United Mine Workers of America v. Illinois State Bar Ass'n* (1967), 389 U.S. 217 (reversing a state supreme court injunction based on the allegation that the union had engaged in the unauthorized practice of law by employing salaried attorneys to represent its members):

Freedom of speech, assembly, and petition guaranteed by the first and fourteenth amendments includes the rights to hire attorneys on a salaried basis where the goal is to improve legal services, reduction in costs, provision of specialized legal services or similar goals.

Id. at 222. *See also, Brotherhood of Railroad Trainmen v. Virginia ex re Virginia State Bar* (1964), 377 U.S. 1 (vacating an injunction which sought to prohibit the union from advising injured workers to obtain legal advice and recommending specific lawyers).

Moreover, it is clear that salaried attorneys themselves have a protected right to practice their profession:

A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.

Schware v. Bd. of Bar Examiners (1964), 353 U.S. 232, 238-39. *See also, Baird v. Arizona Bar* (1971), 401 U.S. 1, 14 ("The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character"); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* (1964), 377 U.S. 1, 6 ("[I]n regulating the practice of law a State cannot ignore the rights of individuals secured by the constitution").

An investigation or prosecution aimed at insurance defense attorneys compensated on a salaried basis, would raise serious due process and equal protection concerns. *See, e.g. In re Proposed Addition,* etc., 220 So. 2d at 7 (App., Tab 7, p. 1) (a proposed rule to prohibit the use of salaried counsel to defend insureds "discriminates against a class with no reasonable basis for the distinction"). Similarly, an investigation and prosecution that seeks to interfere with an insurer's contract with its insured raises constitutional issues.

Nor would Ohio public policy support any such distinctions. In *Azzarello v. Legal Aid Soc. of Cleveland* (1962), 117 Ohio App. 471 (App., Tab 3), the court concluded that a legal aid society does not engage in the unauthorized practice of law by employing criminal defense attorneys on a salaried basis to defend third parties. The *Azzarello* ruling is in full accord with similar U.S. Supreme Court rulings and counsels against the creation of artificial distinction among licensed attorneys for purposes of UPL.

Further, as *Azzarello* suggests, a ruling that the use of salaried counsel constitutes the unauthorized practice of law could have far reaching, unintended effects. If Ohio were to establish a principle of law that the use of "employee" or "salaried" attorneys constitutes the unauthorized practice of law, that principle of law must apply to all corporations utilizing salaried counsel to provide legal services to third parties. This diverse group could include legal aid societies, legal defenders, unions, child advocacy groups, civil rights organizations, the ACLU, and business and civic groups that offer *amici* briefs on behalf of third parties in litigation. *See* the

amici filing in *Cincinnati Ins. Co. v. Will, supra* (App., Tab 12, p. 1), for a sampling of the potentially affected corporations and associations. Many of these organizations have long enjoyed the support of the OSBA.

conclusion

Ohio law approving the use of salaried counsel has been consistent - and correct - since 1939. Twenty-two jurisdictions agree with Ohio's position. The two that disagree do so for reasons that do not apply in Ohio.

Counsel hopes that the foregoing is helpful to the Committee in determining how its resources may be best utilized in carrying out its important directives — protecting the public from potential injury inflicted by unlicensed practitioners, and ensuring that only qualified, licensed attorneys practice before courts and judicial tribunals. The insurance defense practice promotes those interests with skilled civil litigators. The fact that they may be compensated by a salary or by an hourly fee cannot be a basis for distinction in terms of qualification, license or skill.

Just as there is no legitimate basis for classifying attorneys based on their mode of compensation, there is no legitimate basis for classifying insurers based on their mode of compensating the attorneys they appoint to defend insured. Compensation is a factor of market forces; it does not affect ethics, discipline or the unauthorized practice of law.

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