DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

American Corporate Counsel Association
National Committee: Insurance Staff Counsel

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Insurance Staff Counsel; A Brief History

The provision of legal services has taken many forms over the years. From the lonely sole practitioner and the small partnership, to the current multi-state and multi-national mega-firms, the business model evolved over decades, even centuries. Few realize, that what we know today as Insurance Staff Counsel pre-dates many of those traditional models. And, because it is not a traditional model, staff counsel has been a subject of challenges. Today, we'll talk about specific challenges and strategies to avoid controversy. First, how did we arrive at this point?

Evidence of insurance staff counsel dates back at least to 1892 when the Travelers began its staff counsel program in Metropolitan New York. There is a rumor that Liberty Mutual also employed staff attorneys in the eighteen hundreds. Allstate opened its first staff counsel office in Manhattan in 1947. We currently have 98 offices in 31 states. The belief is that most of the major carriers have some form of staff counsel operation and there has been what can almost be described as an explosion of growth over the past twenty years. With that growth has come renewed interest, not all of it favorable, but at least predictable given the history of challenges.

The early twentieth century was quiet but the seeds of controversy were planted. The automobile was invented, followed shortly thereafter by the invention of the duty to defend clause in the standard automobile liability policy. That duty to defend clause also granted rights to the carrier, among them, the right to choose the defense attorney and, the right to control the defense. Controversy was just around the corner.

The first notable activity was an Ohio Common Pleas Court decision in Strother v. Ohio Casualty 28 Ohio L.Abs. 550, 14 Ohio Op. 139 (Com. Pleas 1939). (All case references and cites hereafter are contained on the State by State chart included). There the Court addressed one of the major issues directly and decided that the carrier's use of salaried attorneys to defend lawsuits filed against its insureds did not constitute the

unauthorized practice of law by a corporation.

Although no other jurisdictions actively pursued the issue over the next decade, there was one development that would significantly impact the growth of staff counsel over the next half century: the shift from a stated amount, "Fee for Services Rendered" method of billing to the hourly rate.

Ohio entered the picture again when the Toledo Bar Association asked the American Bar Association for its opinion. In 1950, the ABA Committee on Professional Ethics and Grievances approved the use of staff counsel in Formal Opinion 282.

Another period of silence ensued. But as the economy improved and the post World War II consumer generation learned the joys of prosperity everyone needed or, at least wanted a car. That meant more insureds, more lawsuits and a greater need for quality cost-effective representation. Staff counsel was about to enter a golden age of growth. Reactions reflected some external concern about that growth.

It started rather slowly. In 1958, the Committee on Canons of Ethics of the State Bar of Texas determined that staff counsel was a proper method of defending insureds. During the next decade, New York weighed in favorably on the subject. Then, in 1969, the Florida Supreme Court refused to approve a new rule prohibiting a carrier's use of salaried counsel. For the first time, new reasoning supported the proposed rule. The challengers argued that, since defense counsel might represent a policyholder when the value of the claim exceeded the policy limits or, with a demand in excess of the policy limits, the attorney had an inherent conflict of interest. The debate was about to reach a whole new level.

It is said the events of the '60s and '70s changed American society forever. During that same era there were legal events unfolding that, in retrospect, changed the field of tort law forever. The immunities, parental and familial were eroding. Uninsured and underinsured motorist coverage became common. Mandatory insurance became fashionable. The concept of no-fault was developed. Finally, in what may have been the most drastic change, gradually, then almost universally, comparative rather than contributory negligence came to be viewed as a fairer measure of fault in tort cases. These factors combined with a few others led to a virtual explosion in litigation. Insurance carriers searched for ways to control costs. Staff counsel was once again a growth industry.

The unsuccessful Florida effort fueled a wave of new challenges in the "70s and '80s. While including the Unauthorized Practice of Law approach, most concentrated on the "Inherent Conflict of Interest" issue. Over time, the argument became more sophisticated. The duty to defend clause with its concurrent right to control the litigation was used to support the theory that there was always an inherent conflict when salaried attorneys represented insureds since the attorney was required to balance the allegedly conflicting goals of "serving two masters". This theory ignored the fact that the same issue applied to representation by retained counsel. Only two of the challenges were successful, North Carolina and Kentucky. The North Carolina Supreme Court used an unauthorized practice of law statute to preclude the use of staff counsel. Kentucky also declared the use of staff counsel to be the unauthorized practice of law. However, eleven other states (Arizona, Illinois, Alabama, Georgia, New Jersey, Virginia, Michigan, Pennsylvania, Missouri, California, Iowa), and the American Bar Association found no impropriety in the use of staff counsel.

As we entered the '90s, staff counsel continued to grow. Unsuccessful challenges were mounted in Colorado, Connecticut, Tennessee, Oklahoma, West Virginia and Indiana. One emerging trend was the origin of the challenges. As juries became more conservative and carriers became more successful at trial, The Plaintiff's Bar took aim on staff counsel. The form was usually a Motion to Disqualify staff counsel for a number of reasons that included both the unauthorized practice issue and conflict of interest. Ad hoc committees of State or local Bar Associations also entered the picture.

Staff counsel as a form of practice has been with us now for over a century. It has withstood numerous

challenges. The issues addressed in Ohio in 1939 are the same issues existing today. Given the conflicting economic interests of the participants, those issues will remain with us indefinitely. It is to our benefit to understand the history of staff counsel in order to place the issues in the proper context. We can then take proactive steps to assure continued success against the challengers. That is our focus today.