ETHICS OPINION

RO-81-533

In-house counsel for insurance carrier may represent insureds, subject to certain conditions

QUESTION:

"The question presented is whether house counsel for an insurance carrier can ethically and legally accept salaries, employee benefits, payment of all office overhead and render for the carrier exclusive legal services that involve in-court representation of its insureds in the same fashion and to the same extent as if the case was referred to and handled by private, independent counsel?

We assume that there is no ethical impropriety in house counsel for the insurance carrier handling the following matters:

1. Prosecuting subrogation actions on behalf of the carrier and the insureds' deductible;

2. Handling workmen's compensation claims against the carrier's insureds; and

3. Actions wherein the carrier is made a direct party to the civil action, as in the instance of a declaratory judgment action on the issue of coverage vel non ...."

ANSWER:

There is no ethical impropriety in house counsel for an insurance carrier handling the matters delineated under subparagraphs 1,2 and 3 of your request for opinion.

House counsel as described in your request for opinion may ethically render for the insurance carrier exclusive legal services that involve in-court representations of the carrier's insureds in the same fashion and to the same extent as if the case were referred to and handled by private, independent counsel,

if extreme caution is exercised to advise the insured and take the necessary steps to protect the interests of the insured when conflicts of interest, or potential conflicts of interest between the insured and the insurer arise.

DISCUSSION:

Pertinent provisions of the Code of Professional Responsibility of the Alabama State Bar are the following:

Ethical Consideration 5-17 provides:

> **"EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely."**

Ethical Consideration 5-22 provides:

> **"EC 5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client."**

Disciplinary Rule 5-105(A), (B), and (C) provides:

> **"DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer**
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> **(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).**
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> **(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).**
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> **(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if he reasonably determines that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."**

Our research reveals no opinions of ethics committees or courts of last resort holding that the practice you describe in your request for opinion is unethical.

The case of *In Re Proposed Addition to the Additional Rules Governing the Conduct of Attorneys in Florida* (Fla. 1969), 220 So.2d 6 is significant. The Florida Bar proposed the following rule:

> **"An attorney employed in a master-servant or employer-employee relationship by a lay agency, such as a bank, savings and loan association, trust company or insurer, shall not render in the scope of his employment legal services on behalf of or in the name of customers, patrons or insureds of the lay agency unless it shall clearly appear that the sole financial interest and risk involved is that of the lay agency."**

In the opinion, the Supreme Court of Florida stated:

> **"The problem occurs when a conflict develops between insurer and insured, such as when a claim exceeds policy coverage or when a compromise settlement is in the making. In such situations the Bar insists that the best interests of an insured require the service of independent counsel. They claim that the compulsive economic pressure of retaining one's full time means of likelihood precludes the possibility that a lawyer under such circumstances can give unadulterated devotion to divergent interests.**
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> **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. It appears to use that the ethical problem might well arise regardless of the nature of the employment relationship between the lay agency and the lawyer. That is to say, in resolving an ethical conflict between a lay agency and one of its customers it would not be material whether the lawyer is employed as the attorney for the lay agency on a full-time master-servant basis, or merely on an**

> **isolated attorney-client basis. The ultimate problem is the same. There may come a time when the lawyer must decide which of two 'masters' he will continue to serve because the presence of a conflict makes it ethically impossible to serve both. 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.**
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> **We understand, of course, that there is a difference between lay agency and lawyer *inter se* when the employment is full time and salaried as contrasted to a particular case, special fee arrangement. The point we make merely is that when a conflict does arise the ethical decision which the lawyer faces is the same in both relationships - *if he is employed to represent two clients*. He simply cannot serve two maters in either situation.**
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> *** * ***
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> **There is, of course, in addition the obligation of the insurance contract which delineates the rights and duties of insurer and insured between themselves. When their interests collide, the lawyer, regardless of the quantum of his employment, must make the ethical decision.**
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> **The moral considerations should not be exploited so as to develop a double standard of ethics for salaried and non-salaried lawyers."**

We agree with the following comments contained in a brief filed with the Supreme Court of Florida in the case of *In Re Proposed Addition to the Additional Rules Governing the Conduct of Attorneys in Florida,* supra:

"Any conflict of interest between the insurer and the insured is irrelevant to the insurer's right to select counsel to defend its interest, and cannot be resolved by altering the method whereby counsel is compensated.

*** * ***

Ofttimes a potential, if not an actual conflict, arises between the insurance company and its insured in the former's defense of the latter under the policy of insurance. One such occasion arises when the injured party is seeking damages in an amount in excess of the insured's policy limits. Another situation arises when the defense of the case is being undertaken by the insurance company under a reservation of rights because of some doubt as to the coverage of the policy. The possibility of such conflict of interest does not in any way lessen the insurance company's direct interest in the defense of its insured. As in all cases of conflict or potential conflict, the insurance company is required to call to the attention of its insured this potential or actual conflict and to suggest to its insured the advisability of the insured's obtaining independent counsel to advise it thereon.

*** * ***

It should be readily apparent that a potential or actual conflict of interest can occur between the insurer and the insured whether inside or outside counsel are employed. Outside counsel can no more become improperly involved in conflicting interests than inside counsel, and such conflicts must be met in the same way regardless of the identity of counsel. The solution to the problem of possible conflict of interests is not retention of outside counsel by the insurer, but an invitation to the insured to retain his own counsel, as mentioned earlier herein. The course of action which must be followed when a potential or actual conflict arises is the same whether counsel for the insurer is salaried counsel, or outside counsel.

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> **The net effect of the proposal is to divide lawyers into two groups, one group made up of salaried employees of casualty insurance companies, and the other group made up of lawyers who are paid either on a fee, or per case, basis, or on a retainer, either monthly or annual, basis. Under the proposed rule, the first group is precluded from representing the interests of their employer, the insurance company, in litigation involving the company's insureds, but the other group is free to do so."**

We also subscribe to the following comments contained in an amicus curiae brief filed in the case of *In Re Proposed Addition to the Additional Rules Governing the Conduct of Attorneys in Florida*, supra:

> **"Nor is it reasonable to say that conflict of interest is generated in the case of the salaried lawyer, but not in the case of the fee lawyer even though the latter's compensation per annum from a particular insurance company may well exceed that of his salaried brother. Both are under a solemn duty whenever the possibility of a conflict of interest arises between the insurer insured in the prosecution of a case to inform the insured and request him to secure his own counsel."**

In Opinion Number 282, dated May 27, 1950, the American Bar Association Committee on Professional Ethics addressed itself to several questions appropo to this opinion. The ABA Committee first addressed the question of whether an insurance company could employ exclusively, upon a salaried basis, an attorney to defend lawsuits against insureds on behalf of the insurance company, within the limits of the policy, without making any charge to the insured, and without acquiring the request or approval of the insured. The committee answered this

question affirmatively. The committee noted the commonality of interest between the insured and the insurance company in lawsuits which involve claims which are completely covered by the insurance policy. It further noted that the insurance contract expressly requires the insurance company to defend such actions and it noted that the consent and approval of the insured were implicitly consumed in this contract a well.

In answer to related inquiries, the ABA Committee also opined that a lawyer, employed on a salaried basis by an insurance company, may simultaneously prosecute the company's subrogation claims against a third party and the claim recoverable by the insured under a deductible policy. The committee added that any fees paid by the insured for such representation should be made directly to the lawyer and not the insurance company. In reaching these opinions, the ABA Committee specifically considered Canons 6, 27, 34, 35, and 47 of the Code of Professional Responsibility.

See also Opinion 109 (June 10, 1969) New York State Bar Association Professional Ethics Committee and *Dowling v. Insurance Company of North America* (Ct. App. Ohio, 8th District, November 16, 1973) Case Number 32527.

In summary, there is nothing unethical in the arrangement which you propose in your request for opinion. Although, in theory, counsel employed by

an insurer on a fee basis and counsel employed by an insurer on a salary basis, are subject to the identical provisions of the Code of Professional Responsibility and should take the necessary steps to protect the interests of an insured when a conflict of interest between insured and insurer arises, because of the intimate relationship between house counsel and the insured special vigilance should be exercised in this regard.

WHM/cf