

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 668**

November 2017

QUESTION PRESENTED

May a staff attorney employed by an insurance company continue to represent a defendant in a lawsuit brought by a plaintiff when both the plaintiff and the defendant are insured by the insurance company and when, during the course of the representation, the staff attorney learns the insurance company took a recorded statement from the plaintiff without advising the plaintiff that the statement might be used against her in a legal proceeding?

STATEMENT OF FACTS

Plaintiff sued Defendant for personal injury damages sustained in an automobile accident. Both Plaintiff and Defendant are insured by the same insurance company (the “Company”). The Company assigned Defendant’s defense to a staff attorney, who filed an answer for Defendant and served a Request for Disclosure on Plaintiff. In her response to the Request for Disclosure, Plaintiff revealed that the Company had taken a recorded statement from Plaintiff before she filed suit. The statement was taken without the staff attorney’s knowledge or involvement. The statement was favorable to Defendant.

Plaintiff’s attorney acknowledged that the insurance adjuster who took the statement told Plaintiff that it was being recorded and might be shared with other insurance adjusters, but Plaintiff’s attorney contends that the staff attorney cannot use the statement against Plaintiff because the Company allegedly violated its duty of good faith and fair dealing by taking the statement without warning Plaintiff that it might be used against her in any personal injury lawsuit she might file. In view of this contention, the staff attorney wants to know whether there is any ethical prohibition against him continuing to represent Defendant.

DISCUSSION

It is not the role of this Committee to opine whether the Company or its employees owed or violated duties of good faith and fair dealing. This opinion only addresses the obligations of the staff attorney under the Texas Disciplinary Rules of Professional Conduct (the “Rules”).

In *Unauthorized Practice of Law Committee v. American Home Assurance Co., Inc.*, 261 S.W.3d 24, 39 (Tex. 2008), the Texas Supreme Court held that “a liability insurer does not engage in the practice of law by providing staff attorneys to defend claims against insureds, provided that the insurer’s interests and the insured’s interests in the defense in the particular case at bar are congruent.” But the Court also held: “If an insurer’s interest conflicts with an insured’s, or the

insurer acquires confidential information that it cannot be permitted to use against the insured, or an insurer attempts to compromise a staff attorney's independent, professional judgment, or in some other way the insurer's and insured's interests do not have the congruence they have in the many cases in which they are united in simple opposition to the claim, then the insurer cannot use a staff attorney to defend the claim without engaging in the practice of law." *Id.* at 42-43.

Here, the relevant insured is Defendant, who is being represented by the staff attorney. When the staff attorney commenced representation of Defendant, the interests of Defendant and the Company appeared to be congruent in that the Company would likely be interested in a successful defense of its insured, Defendant. The ethical concerns arose during the course of the representation when the staff attorney learned that Plaintiff's attorney claimed: (1) the Company acted improperly in taking a pre-suit statement from his client, (2) the Company violated its duty of good faith and fair dealing, and (3) the staff attorney could not use the statement to defend his client, Defendant.

An attorney-client relationship is established when a private attorney or a staff attorney is assigned to represent an insured; the attorney's conduct is governed by the applicable ethical rules. The seminal Texas case on this issue is *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552, 558 (Tex. 1973), which held that an attorney-client relationship exists between an insured and a private lawyer retained by the insurance company to represent him and that the insured's lawyer was required to comply with the Ethical Canons of the Code of Professional Responsibility then in effect.

Many years later, the Texas Supreme Court reached a similar conclusion in *American Home Assurance* cited above. The Court's opinion clearly indicates that there is an attorney-client relationship between a staff attorney and the insured who he is assigned to represent. *American Home Assurance*, 261 S.W.3d at 42 ("But we have never held that an insurance defense lawyer *cannot* represent both the insurer and the insured, only that the lawyer *must* represent the insured and protect his interests from compromise by the insurer."). The opinion also recognizes that a staff attorney's conduct is governed by the Rules. *Id.* at 40-43.

"In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law." Rules, Preamble, paragraph 3. One of the duties of a staff attorney under the Rules is the duty of loyalty to his client. *American Home Assurance*, 261 S.W.3d at 41 ("As we have noted, defense counsel, whether private or on staff, owes the insured unqualified loyalty"). "Loyalty is an essential element in the lawyer's relationship to a client." Comment 1 to Rule 1.06. *See also* Professional Ethics Committee Opinion 533 (September 2000). Another duty the staff attorney owes his client is the duty to exercise independent professional judgment on behalf of his client, regardless of who pays his fees or salary. Rule 5.04(c); Opinion 533.

The staff attorney owes his client, Defendant, a duty of loyalty and zealous representation and a duty to exercise independent professional judgment. A staff attorney does not owe those duties to Plaintiff, who is not his client.

It is within the bounds of the law and perfectly permissible for the staff attorney to send a Request for Disclosure to Plaintiff's attorney, asking for production of witness statements. It is

also perfectly proper for the staff attorney to use Plaintiff's statement in connection with Defendant's defense. Indeed, it is incumbent on Defendant's attorney to zealously represent the interests of Defendant by requesting the statement and using it if it is helpful.

But, when Plaintiff's attorney alleged that the staff attorney's employer, the Company, acted improperly in obtaining the statement and argued that, as a consequence, the staff attorney could not use the statement to defend Defendant and that the use of the statement might result in a lawsuit against the Company, it was incumbent upon the staff attorney to determine whether the Rules prohibited his continued representation of Defendant.

Several rules are implicated. Rule 1.06(b) provides in pertinent part that, absent an exception permitted by paragraph (c) of the Rule, "a lawyer shall not represent a person if the representation of that person . . . (2) 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." Comment 4 to Rule 1.06 states: "Loyalty to a client is impaired not only by the representation of opposing parties . . . but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others." The potential conflict here is the possibility that the staff attorney will be reluctant to use Plaintiff's statement and to zealously represent Defendant because of concerns that use of the statement might subject the Company to liability or concerns that staff attorney's employer, the Company, might not approve of him using the statement under these circumstances. Whether there is a conflict will depend on the specific facts of each case.

If the staff attorney's representation of Defendant reasonably appears to be or become adversely limited as provided in Rule 1.06(b), under the provisions of Rule 1.06(e), the staff attorney should withdraw from representing Defendant unless the provisions of Rule 1.06(c) are applicable and consent from each affected or potentially affected client is obtained in accordance with the provisions of Rule 1.06(c). In order to consider the application of Rule 1.06(c) in this situation, the staff attorney must first determine whether the Company is also his client. If so, the provisions of Rule 1.06(c) will involve both Defendant and the Company. If not, the provisions of Rule 1.06(c) will involve only Defendant. For a more detailed discussion concerning the two-steps required to obtain informed consent under Rule 1.06(c), see Opinion 666 (December 2016) and Opinion 667 (December 2016).

Rule 5.04(c) provides: "A lawyer shall not permit 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." Ethical considerations also arise if the Company attempts to direct the handling of Defendant's case to protect its own interests related to the taking of the statement and the allegations of a violation of the duty of good faith and fair dealing owed to its insured, Plaintiff, rather than to protect and zealously defend the interests of its insured, Defendant. If, because of Plaintiff's allegations against the Company, the staff attorney cannot exercise independent professional judgment on behalf of Defendant as required by Rule 5.04(c), then the staff attorney must withdraw from the representation of Defendant. *See* Rule 1.15(a)(1).

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, when an insurance company staff attorney undertakes the representation of a client who is insured by the staff attorney's employer, his duty is to that client and not to any other person insured by his employer. Like all lawyers, a staff attorney must zealously represent his client. Also, like all lawyers, a staff attorney has a duty of loyalty to his client and a duty to exercise independent judgment on behalf of his client, regardless of the fact that his employer is the client's insurance company. If, during the representation, a staff attorney's representation of the insured client becomes adversely limited by his own interests or the interests of his employer, the insurance company, the staff attorney must not continue the representation unless he is able to obtain consent from each affected or potentially affected client in accordance with the requirements of the Texas Disciplinary Rules of Professional Conduct. If, during the representation, a staff attorney cannot exercise independent professional judgment on behalf of his client, he must withdraw from the representation.