

KENTUCKY BAR ASSOCIATION
Unauthorized Practice of Law Opinion KBA U-36
Issued: November 1981

Question 1: May an insurance company employ in-house counsel (salaried employees) to represent their insured after a lawsuit has been filed?

Answer 1: No.

Question 2: May an employee of an insurance company negotiate a settlement with the plaintiff's attorney after suit has been filed?

Answer 2: Qualified yes.

References: DR 3-101(A), 7-104(A); EC 3-5; SCR 3.130, 3.020; Kendall v. Beiling, 175 S.W.2d 489 (Ky. 1943); Hobson v. Kentucky Trust Co of Louisville, 197 S.W.2d 454 (Ky. 1946); Carter v. Brien, 309 S.W.2d 748 (Ky. 1956); Hargett v. Lake, 305 S.W.2d 523 (Ky. 1956); Kentucky State Bar Assn v. First Federal Savings & Loan Assn, 342 S.W.2d 397 (Ky. 1961); Kentucky State Bar Assn v. Lakes, 443 S.W.2d 248 (Ky. 1969); Frazer v. Citizens Fidelity Bank & Trust Co, 393 S.W.2d 778 (Ky. 1965); Manchester Insurance & Indemnity Co v. Grundy, 531 S.W.2d 493 (Ky. 1976); KBA E-67, E-251

OPINION

Question 1

Canon 3 of the ABA Code of Professional Responsibility governs the areas of unauthorized practice of law. Specifically DR 3-101(A) provides that: "A lawyer shall not aid a nonlawyer in the Unauthorized Practice of Law." EC 3-5 states that it is neither necessary nor desirable to attempt to formulate a single specific definition of what constitutes the practice of law.

The Supreme Court of Kentucky in adopting SCR 3.130 recognized and accepted the principles embodied in the American Bar Association's Code of Professional Responsibility. However in addition the Court provided specifically under SCR 3.020 what constitutes the practice of law. That definition in part is as follows:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor...

As early as 1943, the Kentucky Court recognized the fact that a corporation cannot be licensed to practice a learned profession. See Kendall v. Beiling, 175 S.W.2d 489 (Ky. 1943). In Hobson v. Kentucky Trust Co of Louisville, 197 S.W.2d 454 (Ky. 1946), the Court held that a corporation cannot qualify so as to obtain a license to practice law.

As to what constitutes the practice of law the Court has held that the following constitutes the unauthorized practice of law: drawing probate papers, Carter v. Brien, 309 S.W.2d 748 (Ky. 1956), preparing deeds, Hargett v. Lake, 305 S.W.2d 523 (Ky. 1956), title examinations, Kentucky State Bar Assn v. First Federal Savings & Loan Assn, 342 S.W.2d 397 (Ky. 1961).

In the case of Kentucky State Bar Assn v. Lakes, 443 S.W.2d 248 (Ky. 1969) the Court sustained a finding by the Special Commissioner that in part held that Lakes on five separate occasions had sought to or did settle two claims for personal injuries and had advised in a divorce proceeding. The Court enjoined the conduct since it was the unauthorized practice of law.

In Frazer v. Citizens Fidelity Bank & Trust Co. 393 S.W.2d 778 (Ky. 1965) while the Court reviewed the basic consideration involving the unauthorized practice of law that being public interest. The Court stated,

Public interest dictates that the judiciary protect the public from the incompetent, the untrained, and the unscrupulous in the practice of law. Only persons who meet the educational character requirement of this Court and who, by virtue of admission to the Bar are officers of the Court and subject to discipline thereby may practice law. The sole exception is the person acting in his own behalf. (p. 782)

Later the Court went on to hold,

Of course, a corporation may not engage in the practice of law through salaried attorneys even as an incident to its commercial business. See Kentucky State Bar Assn v. First Federal Savings & Loan Assn, 342 S.W.2d 397, 85 A.L.R.2d 178 (Ky. 1961). and cases cited therein. (p. 782)

There can be no doubt, that prior to the filing of any legal action, the insurance company may investigate the case with either lawyers and/or non-lawyers employed by them or use independent contractors. However, once the Plaintiff files the lawsuit it is directed only at the Defendant. The Defendant is the insured. In the Commonwealth of Kentucky the insurance company in a typical law suit involving their insurance contract is not a party to the action as a Defendant. It is at this point that the insurance company must hire members of the private bar to undertake representation of their insured. It should be noted that the client in this pending lawsuit of the lawyer is the insured. Clearly the representation is one in which the attorney has dual representations. See Manchester Insurance & Indemnity Co v. Grundy, 531 S.W.2d 493 (Ky. 1976)

In conclusion the insured is the primary client and therefore salaried employees of the insurance company may not represent their insured in pending litigation.

Question 2

With respect to Question 2, DR 1-104(A) provides:

During the course of his representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has prior consent of the lawyer representing such other party or is authorized by law to do so.

DR 7-1 04(A)(I) clearly provides that there may be consent in this regard that could allow the lawyer to deal directly with an insurance adjuster during a pending case. Accordingly, the attorney who represents the insured and the insurance company may allow the insurance adjuster to deal directly with the Plaintiff's lawyer after legal action has been brought. Since a lawyer owes a continuing fiduciary relationship to his client, the insured, the lawyer should not lightly give permission in this regard. Defense counsel should note that this may not be in the best interest of the insured. (See KBA E-251 and KJ3A E-67)

It is the Unauthorized Practice of Law Committee's interpretation that the words "prior consent" to mean written consent of the lawyer to the Plaintiff's counsel. This written consent may merely be a letter outlining the depth and length of the allowable limits on the communications.

Note to Reader

This unauthorized practice opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides in part: "Both informal and formal opinions shall be advisory only."