

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 726 (2/2/00)

Topic: Staff counsel; law firm.

Digest: A group of lawyers who are salaried employees of an insurance company and whose practice is exclusively in defense of the company's policy holders may hold themselves out as a law firm only if (a) they undertake to act consistently with the professional responsibilities of a law firm and (b) they disclose that they are employees of the insurance company.

Code: DR 1-102, 1-104(A), (B), 2-102(A)(4), (B), (C), 5-105(D), (E), 5-107(A), (B); EC 2-13.

QUESTION

May staff counsel of an insurance company hold themselves out as a law firm when they are salaried employees working exclusively on behalf of the company's policy holders?

OPINION

Whether a group of lawyers employed by an insurance company to represent policy holders¹ may refer to themselves on their letterhead, business

¹ The general rule in New York is that corporations may not practice law and accordingly their lawyer-employees may represent only the corporation and not third parties. Nonetheless, it is not impermissible *per se* for lawyers employed by an insurance company to represent policy holders in litigation in which the insurance company has a duty to defend and indemnify the policyholder. See Nassau Co. 95-5 (1995); N.Y. State 109 (1969) (attorneys may be employed as house counsel for insurance company on salary basis); see also N.Y. State 519 (1980). Although in individual cases (*e.g.*, where

cards, and elsewhere as a law firm (*e.g.*, as “Law Firm of A, B, and C,” “Law Offices of A, B & C,” “A, B & C, Attorneys at Law”), depends on whether doing so would be misleading. See DR 2-101(A) (“A lawyer ... shall not use or disseminate or participate in the preparation or dissemination of any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading”); DR 2-102(B) (“A lawyer in private practice shall not practice under ... a name that is misleading as to the identity of the lawyer or lawyers practicing under such name”); *see also* DR 2-102(C) (“A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners.”); *see generally* DR 1-102(A)(4) (“A lawyer or law firm shall not ... [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation”).

Clearly, it would be misleading and, therefore, impermissible for lawyers to hold themselves out to the public as a law firm if they do not function as a “law firm” for purposes of the Code of Professional Responsibility, which imposes certain ethical responsibilities on law firms. Under the Code, for example, the law firm as an entity, as well as individual attorneys with management responsibility in the firm, must make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules. DR 1-104(A), (B). Certain of the lawyers’ conflicts of interest will be imputed to each other, DR 5-105(D), and records of the lawyers’ prior and current engagements must be checked to ensure individual and collective compliance with the conflict rules. DR 5-105(E); *see generally* N.Y. State 720 (1999). Within a law firm, lawyers may assist each other in cases, discuss strategy, share confidences, and otherwise pool their resources of intellect and labor. *Cf.* EC 4-2. If lawyers do not acknowledge the professional responsibilities that come with being in a law firm, but act exclusively as individual attorneys or individual attorney-employees, it would be misleading for them to represent themselves to the public as a law firm.

Even if the insurance company’s lawyers undertake to work together on behalf of policy holders and consistently with the above-described disciplinary rules regulating law firms, however, there is at least a risk that lawyers may mislead clients and others if they refer to themselves as a law firm by using a style of name that traditionally designates a law partnership. First, clients and others may be misled to believe that the law firm is a partnership, rather than a group of individual employees.² Second, clients and others may be misled to believe that the lawyers are independent, rather than employed by the insurance

the insurance company disclaims its obligation to indemnify) the representation may give rise to an impermissible conflict of interest, we recognized in N.Y. State 109 (1969) that such a conflict is not inevitable. Where the representation is permissible, however, the lawyer employed by the insurance company, like a private lawyer whose fee is paid by the insurance company, must secure the policy holder’s consent to the representation after disclosure of this relationship and, thereafter, must represent that client with undivided loyalty. DR 5-107(A), (B); *see generally* N.Y. State 721 (1999); N.Y. State 716 (1999).

² See *In re Weiss, Healey & Rea*, 536 A.2d 266, 268-69 (N.J. 1988); N.J. Op. 593 (1986).

company.³ Finally, clients and others may be misled to believe that the lawyers' practice includes representing clients in addition to the insurance company's policy holders. In light of these risks, some authorities appear to close the door to any name other than "Law Division of [Insurance Company]" or the equivalent. *Cincinnati Insurance Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999) (noting that "it is difficult to come up with a proper reason for this designation"); California Op. 1987-91.

While cognizant of the risks, some other courts and ethics committees have acknowledged legitimate reasons why staff counsel who share professional responsibility for representing policy holders might seek to use a firm name. Doing so may denote that the lawyers are independent from their employer in the sense that their clients are the policy holders, not the company. Kentucky Op. 99-1. The firm name may also "reflect the nature of their association" (that is, that they practice collectively, not individually). *In re Weiss, Healey & Rea*, 536 A.2d 266, 269 (N.J. 1988).

In New Jersey, the state Supreme Court remanded the matter to a special committee. *See In re Weiss, Healey & Rea, supra*. That committee's report recommended that insurance company lawyers be permitted to practice under a firm name without any explanation or disclaimer when the lawyers share professional and financial responsibility for representing policy holders. Report of the Ad Hoc Supreme Court Committee on Law Firm Names, 125 N.J.L.J. 316 (Feb. 8, 1990). That state thereafter amended its disciplinary rules to implement this recommendation. *See* N.J. Comm. On the Unauthorized Practice of Law, Supplement to Op. 23 (1994).

We concur with those authorities that permit the use of a law firm name as long as it is accompanied by an explanation that the lawyers are employees of the particular law firm. *See* Oregon Op. 1998-153 ("[T]he letterhead used must indicate the relationship between the firm and the Law Division. For example, the letterhead could contain an asterisk identifying the firm as the Law Division for the Insurance Company."); West Virginia Op. 99-01 ("captive law firms" must "disclose their affiliation with the insurance company on their letterhead, business cards, phone book identification, phone answering method, office entrances and pleadings and ... explain this relationship to each client," except possibly "in pleadings or other communications that might be submitted to a jury").

³ *See* West Virginia State Bar Lawyer Disciplinary Board, Op. 99-01, pp. 12-13; *In re Youngblood*, 895 S.W.2d at 331-332 (representation that attorney-employee is separate and independent from insurer employer "is, at least, false, misleading and deceptive. It may be fraudulent depending upon the circumstances under which it was made"); *In re Weiss, Healey & Rea*, 536 A.2d at 269-70; Virginia State Bar Op. 775 (1986); Ohio Board of Commissioners on Grievances and Discipline Op. 95-14 (1995); *but see* Nassau Co. Op. 95-5 (1995) (insurance company's attorneys, who are employed on a salary basis as house counsel to represent and defend insureds, need not identify themselves as insurance company employees; however, it is not ethically improper for them to do so).

Our conclusion is that where insurance company lawyers undertake to act consistently with the professional responsibilities of a law firm (see DR 1-102, 1-104, 5-105 [E]), they may hold themselves out to the public as a law firm as long as they take adequate measures to avoid creating any misunderstandings about the nature of their practice, their relationships with each other, or their relationship with the insurance company that employs and pays them. In the very least, this will ordinarily mean that, in their letterhead and other public communications with those who might otherwise misunderstand, the lawyers must clearly explain that they are employees of the particular insurance company. Such an explanation is required in New York to comply with Code provisions that are intended to prevent lawyers from misleading clients, prospective clients, and third parties concerning the nature of the lawyers' practice. To the extent that a court rule or other legal obligation makes it inappropriate or impermissible to disclose an affiliation with the insurance company employer to a jury or other adjudicative body, such rule or obligation supercedes the disclosure otherwise required by the Code.

CONCLUSION

A group of lawyers who are salaried employees of an insurance company and whose practice is exclusively in defense of the company's policy holders may hold themselves out as a law firm only if (a) they undertake to act consistently with the professional responsibilities of a law firm, including the responsibilities imposed on law firms as entities by DR 1-102, DR 1-104, and DR 5-105(E), and (b) they provide a clear explanation in their public communications that they are employees of the insurance company. The Code does not require such an explanation in communications with juries or other adjudicating bodies if other legal obligations are inconsistent with such disclosure in that context.

(13-99)
