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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
RE: ADVISORY OPINION
SCHARRER v. FUNDAMENTAL
ADMINSTRATIVE SERVICES

CASE NO. SC14-1730

BRIEF OF INTERESTED PARTY THE DOCTORS COMPANY IN RESPONSE AND OPPOSITION TO THE PROPOSED ADVISORY OPINION

M. Stephen Turner
Florida Bar Number 095691
stumer@broadandcassel.com
BROAD AND CASSEL
215 South Monroe Street
Suite 400
Tallahassee FL 32301
(850) 681-6810
(850) 681-9782 (fax)
Attorney for The Doctors Company

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RECEIVED, 9/26/2014 17:54:13, John A. Tomasino, Clerk, Supreme Court

TABLE OF CONTENTS

Filing # 18738272 Electronically Filed 09/26/2014 05:52:38 PM

RECEIVED, 9/26/2014 17:54:13, John A. Tomasino, Clerk, Supreme Court

TABLE OF CITATIONS

Cases

Statutes and Rules

Other Authorities

Filing # 18738272 Electronically Filed 09/26/2014 05:52:38 PM

RECEIVED, 9/26/2014 17:54:13, John A. Tomasino, Clerk, Supreme Court

STATEMENT OF THE CASE AND FACTS

Petitioners are plaintiffs in a civil action for damages in the United States District Court, Middle District of Florida. Plaintiffs' Complaint alleged that Defendants (a non-lawyer corporation and certain of its employees) engaged in the unauthorized practice of law resulting in damages to Plaintiff as the adverse party in litigation. [1] The action was an outgrowth of protracted litigation related to numerous wrongful death actions against Florida nursing homes. The record before the Court contains voluminous documents detailing the lengths taken by Plaintiffs (Petitioners) to recover. This case appears to be another attempt to find a means to prevail.

The federal trial court judge dismissed the Complaint without prejudice pursuant to *Goldberg v. Merrill Lynch Credit Corp.,* 35 So. 3d 905, 907 (Fla. 2010). In order to state a cause of action for the unauthorized practice of law, *Goldberg* requires that the Florida Supreme Court must have ruled the specific conduct alleged constitutes the unauthorized practice of law. The federal trial court found that the Florida Supreme Court had not previously held that the conduct at issue in the Complaint, *i.e.* Defendants making "[t]he strategic decision

[1] The unlicensed practice of law is a foundational prerequisite for bringing any tort arising from those facts. *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 907 (Fla. 2010). Whether a plaintiff can sue a person who advised the defendant with respect to litigation, based on that person not being a licensed attorney, is highly questionable, but is collateral to issues presented by the PAO and therefore not addressed herein.

and defense strategy to cease all defense of the Nursing Home Cases," and directing Florida litigation counsel to withdrawal on their behalf, constituted the unauthorized practice of law.[2] As explained below, The Doctors Company ("TDC"), as interested party, believes that a managing agent for litigation may establish the objectives for and generally control litigation, including discharging counsel or not engaging counsel, the same as the party of the litigation could do.

Pursuant to Rule 10-9.1 of Rules Regulating the Florida Bar, Petitioners sought an advisory opinion from the Florida Bar Standing Committee for the Unlicensed Practice of Law as to whether the Respondents' activities amounted to the unauthorized practice of law. The Standing Committee accepted the request. After a public hearing at which it received testimony and documents into the record, the Committee issued its Proposed Advisory Opinion ("PAO"). The issue presented in the PAO is:

> Whether a nonlawyer company engages in the unlicensed practice of law in Florida when the nonlawyer company or its in-house counsel, who is not licensed to practice law in Florida, controls, directs, and manages Florida litigation on behalf of the nonlawyer company's third-party customers when the control, direction and management is

[2] To clarify the true underlying facts, the court appointed receiver of the nursing home defendants made the decision to cease defense of the Nursing Home Cases, not the Defendants. *See Trans Health Mgmt., Inc. v. Webb*, 132 So. 3d 1152, 1153 (Fla. 1st DCA 2013).

> directed to a member of The Florida Bar who is representing the customer in the litigation?

The Standing Committee voted to answer the question in the negative, finding that a nonlawyer company or its in house-counsel does not engage in unlicensed practice of law when control, direction and management of the case is directed to the duly licensed Florida attorney representing the customer in litigation. TDC does not oppose this aspect of the PAO.

Unfortunately, however, the PAO did not stop there. It stated "[w]hile generally the answer is that the conduct is not the unlicensed practice of law, there are circumstances where the opposite is true and the activity of the nonlawyer company or its in-house counsel could constitute the unlicensed practice of law." (PAO, p. 9). The PAO went on to state that whether there is the unlicensed practice of law "depends on the facts and circumstances of each case." *(Id.).*

TDC objects to this part of the PAO because it may adversely affect or interfere with the proper performance of TDC's duties and responsibilities as a medical malpractice insurer operating in Florida. It may also adversely affect the duties and responsibilities of anyone acting to manage litigation for a party, including the general control of the litigation for the insured or principal and whether to continue representation or withdraw counsel.

Filing # 18738272 Electronically Filed 09/26/2014 05:52:38 PM

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STATEMENT OF INTEREST

TDC is the nation's largest physician-owned medical professional liability msurer. TDC operates as a liability insurer of medical malpractice risk in exchange for payment of premiums by its customers. It is the leading direct writer of the medical professional liability line of business in Florida. Beyond simply handling claims, TDC has an affirmative mission to advance, protect and reward the practice of good medicine. TDC works to improve the delivery of health care. TDC's insureds rely on its expertise to handle the claims process. TDC is desirous to ensure that nothing in the PAO thwarts its ability to deliver premium service to its insureds.

As an insurer of medical malpractice risk, TDC is governed by the Medical Malpractice Act and must comply with the pre-suit screening requirements in section 766.106, Florida Statutes. TDC employs qualified, Florida licensed, insurance adjusters to investigate alleged claims, to evaluate and determine the existence of liability exposure of its insureds.[3] *See* § 766.106 (3)(a), Florida Statutes. The pre-suit investigation involves "informal discovery" in the form of unswom statements, physical and mental examinations, exchange of medical records, interviews with treating health care providers and written questions.

[3] Under Florida law, licensed insurance adjusters are authorized to ascertain the amount of any damages payable under an insurance policy and to effect settlement of any claim and to subscribe to a code of ethics presented by agency rule. *See* §§ 626.877, 626.878, Florida Statutes, and F.A.C. 690-142.011(10)(a)(4).

See § 766.106(6), Florida Statutes. The information gathered through the pre-suit discovery process forms the basis for determining whether TDC rejects the claim, makes a settlement offer, or admits liability and offers to conduct arbitration on the issue of damages. *See* § 766.106(3)(b), Florida Statutes. Failure of TDC to proceed in accordance with the statute may be grounds for a court to strike defenses should litigation ensue.

In the event of litigation, TDC (like other liability insurers) has a pre-existing contractual duty to defend the lawsuit on behalf of the insured. In tum, the insured is obligated by the policy duty to delegate control and authority over the litigation to the insurer.[4] In fulfillment of the duty to defend TDC hires licensed Florida attorneys to represent insureds in litigation. *See Doe on Behalf of Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 373 (Fla. 1995) (in fulfilling duty to defend, "the insurer employs counsel for the insured, performs the pretrial investigation, and controls the insured's defense after a suit is filed on a claim. . . [and] also makes decisions as to when and when not to offer or accept settlement of the claim"). Likewise, TDC maintains its right to manage and control litigation in order to effectively protect its insureds and its own economic interests (the underwritten risk). *See Travelers Indem. Co. of Ill. v. Royal Oak Enters., Inc.*, 344 F. Supp. 2d

[4] A settlement for amounts in excess of policy limits must be consented to by the insured, and pursuant to Fla. Stat. § 627.4147(1)(b), TDC has chosen to include in its standard policy a provision requiring the insured's consent before TDC settles a claim within the policy limits.

1358, 1374 (M.D. Fla. 2004) (the insurer's "right to control the defense is 'a valuable one in that it reserves to the insurer the right to protect itself against unwarranted liability claims and is essential in protecting its financial interest in the outcome of litigation.'"); *Doe,* 653 So. 2d at 374 (the insured "has the reciprocal obligation to allow the insurer to control the defense and to cooperate with the insurer.").

TDC has a distinct interest in the PAO submitted by the Standing Committee because the ambiguous "positions" proposed by the Committee may well interfere with and undermine TDC's statutory duty to conduct a pre-suit investigation and its contractual duty and economic interest to defend claims and manage litigation against its insureds, and the ambiguous positions may well interfere with the insured's corresponding duty to surrender control over handling the claim.

TDC's responsibilities as an insurer are more extensive than the Respondents' (Defendants in the U.S. District Court case) duty to its nursing home clients per management agreement. TDC has contracted to both defend and indemnify loss, in return for policy premiums, whereas Respondents (Defendants) simply manage their clients' affairs in return for a management fee.

Nevertheless, the PAO vaguely warns that services provided by an insurer through its employee-adjusters, risk managers, etc. may equate to the unlicensed practice of law when an insurer hires a duly licensed Florida attorney to represent

the insured in a lawsuit or fires that attorney. (PAO, pp. 16-17). This is clearly incorrect and should be rejected out of hand by the Court.

Although TDC is a non-lawyer corporation that may not directly provide legal advice to an insured/defendant, TDC must deal with the Florida attorney it hires to represent the insured, to discuss litigation strategy and generally control the litigation as its insured would, to act for its insured and protect financial interests involved, and otherwise proceed consistent with its obligations.

To this end, TDC opposes the PAO because it seeks to, or may unintentionally impose limitations on what a managing agent can do in controlling its principal's litigation. A case by case determination has to be made whether such agent has complied with its duty. Imposition of liability upon the agent based on a nebulous concept of unauthorized practice of law is not proper; it is nothing other than an improper short-cut to avoid the question of whether an agent sufficiently complied with its duties and responsibilities in managing litigation. The Court should exercise caution to restrict the breadth of its holding so that it does not erode or impair the existing rights and obligations of TDC and its adjusters and claims managers, or those of any other medical malpractice or liability insurer, or of any agent/manager empowered to manage or control litigation for another.

SUMMARY OF THE ARGUMENT

The Court should deny the PAO or at least delineate what specific conduct, if any, constitutes the unlicensed practice of law. The PAO is vague, ambiguous and contrary to this Court's ruling in *Goldberg. Goldberg* mandates that in order to state a private cause of action based on unauthorized practice of law, this Court must have already ruled in a prior opinion that the *specific* ***conduct*** alleged in the complaint constitutes the unlicensed practice of law. Here, the PAO states that litigation management directed to a licensed Florida attorney is, per se, not the unlicensed practice of law, *but then again it could be* if the management of litigation by a non-lawyer company (or its agents/employees) involves "too much control." This pronouncement does not provide any guidance as to what specific conduct is prohibited. The trial court is effectively left with a case of first impression on whether the underlying facts constitute the unlicensed practice of law, in violation of *Goldberg.*

The conduct described in the PAO is not the unauthorized practice of law. This Court's prior rulings show that the unlicensed practice of law necessarily involves the unlicensed person (or entity) interfacing directly with the public. There can be no unauthorized practice of law when general management and control of litigation is by agreement with an insured or principal and is directed to a licensed Florida attorney representing the client.

TDC's concern and objection relates to the immeasurable standard the PAO asks this Court to adopt for the unlicensed practice of law. Such a broad amorphous holding will likely subvert an insurance company's traditional rights to manage and control litigation on behalf of the insured as necessary to protect mutual interests. TDC is especially affected by the potential breadth of this holding as it has additional duties imposed by the medical malpractice pre-suit investigation process.

The PAO's seeming recognition of a cause of action based on an ambiguous standard for the unlicensed practice of law is unnecessary and undesirable. The principal is already protected under the substantive law governing the rights and obligations of the litigation manager. In the insurance context, this Court's past opinions recognize the legal protections afforded to an insured, vis-a-vis a claim for bad faith in the event the insurance company improperly manages litigation on the insured's behalf. Moreover, the PAO will likely cause extraneous litigation by sanctioning a cause of action for the unlicensed practice of law by plaintiffs in the initial case. Because the PAO provides no clarity or instruction as to what constitutes the unlicensed practice of law by claims managers, adjusters, or other litigation managers, disgruntled parties can attempt to recast their claim as one for unlicensed practice of law against the insurer or litigation manager. This consequence is undesirable in serving to create opportunity for abusive litigation

during or after the underlying litigation to influence, disqualify or seek retribution against a litigation manager.

This Court should reject the PAO or limit its holding and clarify that it will not affect statutory and contractual rights and duties to manage and control litigation.

ARGUMENT

I. THE PROPOSED ADVISORY OPINION CONFLICTS WITH THE *GOLBERG* STANDARD REQUIRING SPECIFIC FACTUAL FINDINGS AS TO WHETHER THE CONDUCT AT ISSUE IS THE UNLICENSED PRACTICE OF LAW.

The *Goldberg v. Merrill Lynch* opinion unquestionably and unequivocally instructs that this Court, pursuant to the Florida Constitution, is the exclusive legal authority to determine whether *specified conduct* amounts to the unauthorized practice of law. *Goldberg,* 35 So. 3d at 907 ("To state a cause of action for damages under any legal theory that arises from the unauthorized practice of law, we hold that the pleading must state that the specified conduct at issue constitutes the unauthorized practice of law.") Explicit in this Court's ruling is the requirement that the PAO directly address the specified conduct at issue in the underlying litigation. *Id.* at 908 (if the Supreme Court has not already ruled on the conduct in the underlying litigation an individual or organization can utilize the

procedures of Rule 10-9.1 for the Court to issue an advisory opinion on whether the conduct constitutes the unauthorized practice of law).

Goldberg reiterates the Court's desire to address unlicensed practice of law issues based on specific facts, and avoid sweeping generalizations on the law. This Court's prior unauthorized practice of law advisory opinions illustrate the Court's attention to the specific fact pattern at issue and its desire to limit each opinion to a very specific course of conduct. For example, in *The Florida Bar Re Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178, 1179 (Fla. 1997), the question presented to the Standing Committee addressed the acts of nonlawyers representing persons in securities arbitration. The Court specifically held that nonlawyer representatives in securities arbitration who accept compensation for their services are engaged in the unauthorized practice of law. *Id.* at 1184. *See also The Florida Bar Re Advisory Opinion-Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1992) (gathering necessary information to draft a living trust, assembling the document, reviewing the document with the client, and funding the trust document were the unauthorized practice of law when not performed by a licensed attorney).

If a proposed advisory opinion is vague and indefinite (i.e., contains ambiguous statements such as the conduct "could" constitute the unlicensed practice of law), the Court should narrow the holding and specifically delineate

what conduct is considered the unlicensed practice of law. For example, in *The Florida Bar Re Advisory Opinion-Activities of Cmty. Ass 'n. Managers,* 681 So. 2d 1119 (Fla. 1996), the proposed advisory opinion contained a vague finding that certain community association manager actions *could* constitute the unauthorized practice of law. In reviewing the proposed advisory opinion, the Court specifically delineated what a community association manager could and could not do, going through each act specifically alleged and eliminating the grey area. *Id.* at 1124.

In the instant case, the PAO does not present a specific set of facts for the Court's consideration as to what would be the unauthorized practice of law. The generalized question presented to the Court is subject to innumerable fact patterns. The PAO answers the question presented in the negative as it should. However, it then qualifies the conclusion by stating there may be circumstances where it *could* constitute the unauthorized practice of law, such as where the third party exercises "too much control" over the attorney's independent judgment. The PAO fails to define what constitutes "too much control" or what circumstances would constitute the unauthorized practice oflaw.

In light of *Goldberg,* "may" or "could" does not state what does constitute the unlicensed practice of law. Further, the PAO creates a paradox under *Goldberg*. The trial court still has no guidance as to whether the specified conduct "is" or "is not" prohibited. Thus, the trial court is once again left with a case of

first impression on whether the operative facts that may be addressed constitute the unlicensed practice of law. Accordingly, this Court should approve the PAO only as to the described conduct delineated as not constituting the unauthorized practice of law and refrain from ruling on any nebulous or unspecified conduct that cannot be clearly delineated as the unauthorized practice of law.

II. THE CONDUCT DESCRIBED IN THE PROPOSED ADVISORY OPINION IS NOT THE UNAUTHORIZED PRACTICE OF LAW.

Long ago, this Court rejected any attempt to create a bright line definition of the practice of law, in favor of examining the nature and context of the advice or performance of service given. In *The Florida Bar v. Sperry* 140 So. 2d 587, 591 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963), this Court explained the test:

> [I]f the givmg of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the person giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

Self-evident in this analysis is the requirement of direct interface between the offending person and the public. The important concern for the Court in

defining and regulating the practice of law is to protect the public from incompetent, unethical, or irresponsible representation. *See The Florida Bar v. Brumbaugh,* 355 So. 2d 1186, 1192 (Fla. 1978) (". . . our primary goal is the protection of the public"). Otherwise stated by *Sperry,* the public must be protected from "being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." 140 So. 2d at 595.

This Court's prior rulings illustrate that the unlicensed practice of law necessarily involves the unlicensed person (or entity) interfacing directly with the public. In every case that found the unlicensed practice of law, the unlicensed subject either holds itself out as an attorney or offers services to the Florida public that this Court considers the practice of law. *See State v. Foster,* 674 So. 2d 747 (Fla. 1996) (questioning witness in deposition); *The Florida Bar v. Kaufmann,* 452 So. 2d 526 (Fla. 1984) (appearing in court or in proceedings which are part of a judicial process); *The Florida Bar v. King,* 468 So. 2d 982 (Fla. 1985) (having direct contact with clients in the nature of consultation, explanation, recommendations, advice, and assistance in the provision, selection and completion of forms); *Advisory Opinion-Nonlawyer Preparation of Living Trusts,* 613 So. 2d 426 (the drafting, assembly, execution and funding of a living trust

document). Absent from these cases is the present situation where a third party manages or controls litigation conducted through a duly licensed Florida attorney. General management and control on behalf of a party in litigation that has the same rights is so universally recognized that to characterize them as the unauthorized practice of law would undermine fundamental legal precepts.

The PAO presents no salient or operative circumstances to support a finding of unauthorized practice of law. There can be no unauthorized practice of law when the management of litigation is directed to a licensed Florida attorney representing the client, or involves the general direction and control of the litigation as the party itself could do.

The Standing Committee was seemingly influenced by *The Florida Bar v. Neiman,* 816 So. 2d 587 (Fla. 2002) (discussed at PAO, pp. 13-14). But that case involved a paralegal in a law firm actually practicing law in routinely providing legal services to clients of the firm. These circumstances are not similar to a party's right (through an agent or insurer acting on its behalf) to exercise general control of litigation being handled by a Florida attorney (or deciding not to have that attorney or any attorney provide representation).

A. **The control of litigation on behalf of a third party is authorized under the legal relationship between principal and agent.**

The client generally has the right to control the objectives of the legal representation in a lawful manner while the attorney controls the means by which they are achieved. Rule 4-1.2, Rules Regulating the Florida Bar. These roles do not change when a client delegates to an agent the authority to handle its legal affairs. *See* Restatement of the Law Governing Lawyers 3d, s. 96, comment (d):

> Persons authorized to act for the organization make decisions about retaining or discharging a lawyer for the organization, determine the scope of the representation, and create an obligation for the organization to compensate the lawyer. . . . [s]uch persons also direct the activities of the lawyer during the course of the representation . . . unless the lawyer withdraws, the lawyer must follow the instructions and implement decisions of those persons, as the lawyer would follow instructions of an individual client. . . .

See also Jaylene, Inc. v. Moots, 995 So. 2d 566, 569 (Fla. 2d DCA 2008) (power of attorney included the authority to manage and conduct all legal affairs and exercise all legal rights and powers).

Inherent in such management authority is the duty to act in good faith. *See* § 709.2114(1)(a), Fla. Stat. Ann. (in power of attorney context, the agent has a fiduciary duty to act in good faith and not act in manner that is contrary to principal's best interest). In managing litigation on behalf of another party, there is

inevitable control over representation. This does not mean the agent engages in the unauthorized practice of law. It simply means the agent is fulfilling its management responsibilities to the principal.

B. The rights and duties between an insurer and insured are even stronger than those of principal/agent.

It is undisputed under Florida law that the insurer is the agent of the insured and has the same fundamental legal rights and duties as those between an agent and principal. This legal relationship and the accompanying rights and duties spring from the insurance contract. In a standard liability contract the insured pays premiums to the insurer, and the insurer indemnifies the insured on claims covered under the insurance policy. Additionally, the insurer has the duty to defend the insured against claims filed by third parties. More specifically, this Court previously described the pre-existing contractual rights between an insurer and insured:

> In fulfilling its promissory obligation to defend, the insurer employs counsel for the insured, performs the pretrial investigation, and controls the insured's defense after a suit is filed on a claim. The insurer also makes decisions as to when and when not to offer or accept settlement of the claim.

Doe, 653 So. 2d at 373 – 74.

TDC's insurance contract requires that it undertake the duty to defend the insured against claims, and requires the insured to delegate to TDC the right to

control and manage the claim, whether it be in pre-suit investigation, or defense of a lawsuit. Per its contractual duty, TDC must hire independent counsel to represent the insured in the event of a lawsuit.

Especially pertinent to this case is the insured's duty to surrender all control of the litigation to the insurer. The PAO appears to question the propriety of this long recognized relationship, and the attendant duties and rights. Pursuant to this Court's prior rulings, it is undisputed that by assuming control of the litigation for the insured, the insurer effectively assumes the status of a co-client with the right to control litigation in order to protect its own financial interests as well as those of the insured. *See In re Proposed Addition to the Additional Rules Governing the Conduct of Attorneys in Florida,* 220 So. 2d 6, 8 (Fla. 1969) (insurer's defense of liability suits confers upon it the right to primarily and ultimately protect is own interests); *Doe,* 653 So. 3d at 374 (recognizing substantial duties on part of both insurer and insured). *See also Travelers lndem., Co. of Ill.,* 344 F. Supp. 2d at 1374 (the insurer's legal duty not only includes the obligation to manage litigation on behalf of an insured but also includes the insurer's right to manage its risk and protect its interest in the outcome of the litigation).

The PAO directly conflicts with this Court's ruling in *Doe* and many other cases that confirm an insurance company's right to manage, control and supervise litigation to protect its own and the insured's financial interest. Courts are

particularly cautious not to characterize an insurance company's responsibilities as the unauthorized practice of law and rejecting such notion. *See The Florida Bar Re Amendments to Rules Regulating the Florida Bar*, 593 So. 2d 1035 (Fla. 1991) (rejecting Florida Bar proposed rule change making use of out-of-state house counsel by corporations operating in Florida the unlicensed practice of law). *See also The Florida Bar Re Amendments to Rules Regulating the Florida Bar*, 635 So. 2d 968 (Fla. 1994) (adopting proposed rule to allow unlicensed in-house counsel special admission to provide advice in Florida to the company).

As a medical malpractice liability insurer, TDC has even greater responsibility to its insureds than a typical liability insurer because TDC must comply with statutory obligations during the pre-suit investigation process. Per § 766.106, Florida Statutes, TDC's licensed adjusters must investigate all claims in good faith, including the use of "informal discovery" to gather facts on the substance of the claim, evaluate whether the insured was negligent, and caused injury to the claimant, and either reject the claim, make an offer of settlement, or admit liability and offer to arbitrate the issue of damages.

These obligations are in addition to the pre-existing contractual obligations for TDC to indemnify the insured, and provide a defense to lawsuits filed against the insured. *See Kenneth Cole Productions, Inc. v. Mid-Continent Cas. Co.*, 763 F. Supp. 2d 1331, 1334 (S.D. Fla. 2010) (Florida liability insurer has a duty to defend

and a duty to indemnify). The PAO obviously conflicts with TDC's statutory duties under the Medical Malpractice Act to conduct a pre-suit investigation and settlement evaluation without defense counsel.

TDCs greatest concern and objection to the PAO relates to the utterly indefinable and immeasurable standard the PAO asks this Court to adopt for unauthorized practice of law. A broad, amorphous holding may adversely affect or limit the beneficial exercise of an insurance company's traditional right to manage and control litigation on behalf of the insured as it must do to protect their shared interests.

This Court should observe, as it has in prior cases, that in most instances the insurer and insured have a mutuality of interest. The insurer desires to protect its own financial interests, and to protect the insured from liability exposure exceeding the policy coverage limits. The insurer must have the ability to direct the litigation and manage litigation costs and objectives. This does not mean that the insurer effectively operates as the litigation attorney. As discussed above, it means the insurer generally controls the litigation in further of its co-existent interest with the insured.

Correspondingly, the litigation attorney must exercise independent judgment in representation to conduct the litigation. It is wholly impractical even to intimate by opinion of the highest court in this State that a litigation manager or liability

msurer will commit unauthorized practice of law in managing or controlling litigation. Ultimately, the "buck stops" with the Florida licensed litigation attorney. The licensed attorney is responsible to judge whether his or her independent judgment is being compromised, and to proceed in accordance with his ethical obligations if that occurs. The situation is the same whether the managing agent or the party to the litigation itself directs the attorney to do something that the attorney should not do, or does not believe should be done.

III. FASHIONING A CAUSE OF ACTION BASED ON THE UNAUTHORIZED PRACTICE OF LAW IS UNNECESSARY WITH RESPECT TO THE MANAGEMENT OF LITIGATION AND WOULD FOSTER THE POTENTIAL FOR ABUSIVE EXTRANEOUS LITIGATION.

Once a licensed Florida attorney is involved, and is taking full responsibility as attorney of record in the litigation, all the policy requirements for prohibiting the unauthorized practice of law are met. In the insurance context, the insurer owes a duty of good faith to the insured in the management and control of litigation. *See Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980) (insurers have a duty to make decisions with respect to the litigation in good faith with due regard for the interests of the insured).

If the manager/nonlawyer agent directs the attorney to take a course of action that ultimately injures the client, or fails to provide adequate direction, or to not engage an attorney or a replacement attorney, that managing agent has

potential liability for breach of fiduciary duty. Conversely, if the attorney IS engaging in a course of conduct that the manager/nonlawyer agent knows IS improper or unwise, and has the possibility of injuring the client, the managing agent cannot simply sit back and watch. Instead, it must take responsible action as the party itself would, or likewise face responsibility for breach of fiduciary duty.

Whether an agent/manager successfully carries out its duty to protect the principal does not involve whether the agent/manager has engaged in the unauthorized practice of law. If the agent/manager fails to protect its client's interest, or if the principal is unhappy with a particular course of conduct, the proper recourse is to sue for a breach of fiduciary duty or negligence, not to sue for the unauthorized practice of law.

The very potential for automatic liability for unauthorized practice of law would unduly restrict an agent's ability to effectively direct, manage, and generally control the litigation and fulfill the duty of good faith to the principal (insured).

In effect, the PAO could impose a form of strict liability on managing agents through creation of an action based on unauthorized practice of law. The PAO would thus eliminate the need to determine whether there has been bad faith breach or negligence on the part of the managing agent. The point of hiring a manager is having someone else that can exercise authority over the litigation on behalf of the principal. A blanket prohibition that litigation mangers are conducting or could be

conducting unlicensed practice of law will impair a manager's ability to use its best judgment in handling the affairs of its principals.

Moreover, the potential for an action based on the unauthorized practice of law is undesirable from another policy perspective. The PAO would open the door for plaintiffs who are unsuccessful on the merits of the case to take "another bite of the apple" by suing claims managers under an unlicensed practice of law theory. As discussed previously, Petitioners in the underlying case are an example of such plaintiffs that may be encouraged to use the unlicensed practice of law as a weapon when all other avenues have failed, or even during litigation to influence its management. This will ultimately contribute to duplicative litigation and an abuse of the judicial system.

The negative effects of such extraneous litigation are especially pertinent in the insurance context. Insurance companies are bound by contractual and statutory duties to defend its insureds and exercise general control of the litigation. The primary purpose behind these duties is to *decrease* litigation and settle claims without a lawsuit. *See Dean* v. *Vazquez,* 786 So. 2d 637, 639 (Fla. 4th DCA 2001) (stating that the intention of the legislature in enacting the medical malpractice pre-suit process was to curtail frivolous claims, promote settlement and reduce the high cost of medical malpractice insurance). The PAO would potentially allow both unsuccessful plaintiffs and dissatisfied insureds to engage in abusive litigation

under an unlicensed practice of law theory. Insurance compames would be exposed to unlicensed practice of law liability because they conscientiously exercised their statutory and contractual management obligations.

Once a court determines that a plaintiff s claim fails on the merits, or that an insured cannot support a cause of action for bad faith, that should end the litigation. Allowing some type of action based on the unlicensed practice of law is unnecessary and undesirable, and opens the door to extraneous and abusive litigation.

CONCLUSION

TDC recogmzes and respects the need to protect the public from the unlicensed practice of law. However, the vagueness of the PAO will most certainly interfere and interrupt TDC's statutory and pre-existing contractual obligations to manage, and control litigation for its insured.

The Court does not safeguard the public against the unlicensed practice of law in a vacuum. It considers legitimate business needs in a modern day economy and seeks an outcome that will protect the public with the least burdensome impact on business. *See The Florida Bar Re Amendments to Rules Regulating the Florida Bar,* 593 So. 2d at 1036. The PAO does not provide safeguards different from those already existing under substantive law or this Court's regulation of the unlicensed practice of law. To the contrary, it will disrupt TDC and liability insurers generally, from fulfilling in good faith the duties owed to insureds, and interfere with legitimate business needs and expectations in the general control and management of litigation for insureds and others.

Respectfully submitted,

s/ M Stephen Turner
M. Stephen Turner
Florida Bar Number 095691
sturner@broadandcassel.com
BROAD AND CASSEL
215 South Monroe Street, Suite 400
Tallahassee FL 32301
(850) 681-6810; (850) 681-9782 (fax)
Attorney for The Doctors Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served electronically via E-service through the Court's E-Portal System upon Carsandra D. Buie, upl@flabar.org, Chair Standing Committee on Unlicensed Practice of Law, Jeffrey T. Picker, jpicker@flabar.org, and Lori S. Holcomb, upl@flabar.org, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, this 26th day of September, 2014

s/ M Stephen Turner
M. Stephen Turner

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14 – point font.

s/ M Stephen Turner