

Utah Ethics Opinions

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151. USB EAOE Opinion No. 151

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 151

Approved October 28, 1994

Issue: Do the Rules of Professional Conduct apply to the conduct of a lawyer who has been appointed by an insurance company as an "independent" appraiser of the property of an insured of the company, where the lawyer also provides legal services for the insurance company on unrelated matters? (fn1)

Opinion: The Rules of Professional Conduct apply to the provision of legal services and do not apply to the provision of non-legal services. If the lawyer makes a written disclosure to the insurance company and to the insured (1) that the lawyer represents the insurance company on unrelated matters; (2) that the lawyer's retention by the insurance company as an "independent" appraiser is not a retention to perform legal services; and (3) that the retention does not create a client-lawyer relationship governed by the Rules of Professional Conduct and is not protected by the attorney-client privilege, the Rules of Professional Conduct do not apply to the engagement as an appraiser unless the lawyer also performs legal services. If the lawyer fails to make this disclosure, the Rules of Professional Conduct will apply to the extent the insurance company client or the insured are reasonably misled into believing that a lawyer-client relationship had been established between the insurance company and the lawyer for the provision of the appraisal services.

Analysis: The Preamble to the Rules of Professional Conduct provides that the Rules are intended to apply to the lawyer-client relationship. Whether this relationship exists is a matter of the substantive law external to the Rules of Professional Conduct. Ordinarily the Rules of Professional Conduct apply only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. The Preamble states in part:

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the

client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.

The appraisal of the value of property is a discipline not normally associated with the practice of law. Therefore, if the lawyer makes a written disclosure to the insurance company and to the insured that: (1) the lawyer represents the insurance company as a lawyer on unrelated matters; (2) that the retention of the lawyer as an "independent" appraiser is not a request that the lawyer perform legal services; and (3) that the engagement does not create a client-lawyer relationship governed by the Rules of Professional Conduct or protected by the attorney-client privilege, the Rules of Professional Conduct do not apply to the engagement of the lawyer by the insurance company as an appraiser. (fn2) The relationship would be governed by the law of principal and agent, by the duties imposed by the substantive law upon property appraisers, and by the terms of the insurance policy. (fn3)

If the lawyer does not make clear to all parties who may be otherwise misled that the appraisal services are not legal services and that a client-lawyer relationship is not being established, the lawyer will be governed by the Rules of Professional Conduct in the provision of the appraisal services to the extent the insurance company client or the insured might reasonably believe that a client-lawyer relationship exists between the lawyer and the insurance company for the performance of the appraisal services. (fn4) Even with the written disclosure, the lawyer will be subject to the Rules of Professional Conduct for the engagement as an appraiser if the lawyer commences also to perform legal services in connection with the matter on behalf of the insurance company.

Footnotes

1. The question originally posed to the Committee described the more specific fact situation where the insurance company appoints one "independent" appraiser, the insured selects another "independent" appraiser and the two party-selected appraisers select an "umpire" to ascertain the value of loss suffered by the insured. This opinion does not turn on the existence of a three-person appraisal panel; it applies generally to situations where the attorney is called upon to perform appraisal services of the type described in the opinion.

2. The Rules of Professional Conduct would apply to the lawyer's performance of legal services for the insurance company on the unrelated matters. The lawyer should consider whether the lawyer's responsibilities as an "independent" appraiser under the insurance policy would

materially limit the representation of the insurance company on the unrelated matters. *See* Utah Rules of Professional Conduct 1.7(b).

3. The lawyer might not qualify as an "independent" appraiser, as this term is used in the specific insurance policy that accompanied the original request to the Committee, due to the lawyer's client-lawyer relationship with the insurance company on the unrelated matters. This issue would be governed by substantive law and is beyond the scope of this opinion.

4. It is beyond the scope of this opinion to identify the particular Rules of Professional Conduct that may be at issue under these circumstances. However, as an example of how the Rules may be implicated, if the insured might reasonably believe that a client-lawyer relationship exists between the insurance company and the lawyer for the appraisal services, any of Rules 4.1, 4.2, 4.3 or 4.4 may govern the lawyer's transactions with the insured.

Rule Cited: