1977 S.C. Op. Atty. Gen. 308 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-384, 1977 WL 24721

Office of the Attorney General

State of South Carolina
Opinion No. 77-384
December 7, 1977

***1** TO: Honorable Joyce C. Hearn
Member
South Carolina House of Representatives
District No. 76

QUESTIONS:

1. Does a public adjuster, not licensed as an attorney, engage in activities which constitute the unauthorized practice of law?

2. Can the General Assembly constitutionally pass legislation regulating a profession that engages in the unauthorized practice of law?

AUTHORITIES:

In Re Duncan, 83 S.C. 186, 65 S.E. 210 (1909);

State v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939);

Dauphin County Bar Association v. Mazzacaro, 351 A.2d 229 (Pa. 1976);

In Re Bodkin, 173 N.E.2d 440 (Ill. 1961);

Meunier v. Bernich, 170 So. 567 (La. App. 1936);

Fitchette v. Taylor, 254 N.W. 910 (Minn. 1934);

Wilkey v. State, 14 So.2d 536, 151 A.L.R. 765 (Ala. 1943);

State ex rel Junior Association of Milwaukee Bar, et al. v. Rice, 294 N.W. 550 (Wisc. 1940);

Liberty Mutual Insurance Company v. Jones, 130 S.W.2d 945, 125 A.L.R. 1149 (Mo. 1939);

Rhode Island Bar Association v. Lesser, 26 A.2d 6 (R.I. 1942);

Lucas v. Bar Association of Montgomery County, Maryland, Inc., 371 A.2d 669 (Md. App. 1977);

Darby v. Mississippi State Board of Admissions, et al., 185 So.2d 684 (Miss. 1966);

Grievance Committee of State Bar of Texas v. Dean, 190 S.W.2d 126 (Tex. 1945);

People ex rel Chicago Bar Association v. Goodman, 8 N.E.2d 941, 111 A.L.R. 1 (Ill. 1937).

DISCUSSION:

This Office has been asked for an Opinion concerning a proposed bill which would regulate public adjusters in South Carolina. This inquiry involves a consideration of the functions of public adjusters and whether those activities constitute the unauthorized practice of law. If public adjusters are found to be engaging in the unauthorized practice of law, then the ability of the General Assembly to pass constitutional legislation in this regard must also be analyzed.

The proposed bill defines a public adjuster as '. . . an adjuster, who is not an attorney, employed by an insured and representing solely the financial interest of the insured named in the policy.' Public adjusters therefore represent insureds in their claims for damages or losses against their own insurance companies. They solicit cases from the public based on their ability to appraise the damages or losses sustained by an insured and to negotiate settlements with insurance companies in satisfaction of claims under a policy. The payment for the services of the adjuster is normally a percentage of the settlement negotiated with the insurance company. No unauthorized practice of law question is presented by the adjuster's appraisal activities. The problem concerns the adjuster's advice to the insured and negotiations with the insurance company, which of necessity involve contract analysis and a weighing of various legal principles.

***2** The practice of law is not limited to an appearance in court or to the preparation of legal documents. As the South Carolina Supreme Court declared a number of years ago:
It is too obvious for discussion that the practice of law is not limited to the conduct of cases in Court. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law. The following is the concise definition given by the Supreme Court of the United States: 'Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as employed in this country. In Re Duncan, 83 S.C. 186, 189, 65 S.E. 210 (1909).

The crucial factor is the type of services rendered, not the name which is given to those services nor the place in which they are performed. State v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939).

Insurance adjusters have been involved in a number of unauthorized practice of law decisions in this country. The Courts have invariably found that lay adjusters representing third-party claimants (i.e., representing individuals with claims against others who are covered under insurance policies) engage in the unauthorized practice of law. E.g., Dauphin County Bar Association v. Mazzacaro, 351 A.2d 229 (Pa. 1976); In Re Bodkin, 173 N.E.2d 440 (Ill. 1961); Meunier v. Bernich, 170 So. 567 (La. App. 1936); Fitchette v. Taylor, 254 N.W. 910 (Minn. 1934). On the other hand, the courts have permitted lay adjusters to represent insurance companies in negotiating settlements with third-party claimants. E.g., Wilkey v. State, 14 So.2d 536, 151 A.L.R. 765 (Ala. 1943); State ex rel Junior Association of Milwaukee Bar, et al. v. Rice, 294 N.W. 550 (Wisc. 1940); Liberty Mutual Insurance Company v. Jones, 130 S.W.2d 945, 125 A.L.R. 1149 (Mo. 1939). However, these decisions are limited to instances where the adjuster is working on behalf of the insurance company.

The decisions permitting lay adjusters to negotiate and settle certain cases for insurance companies are at least partially based on an economic appraisal of the contractual responsibilities of insurance companies. As the Wisconsin court said:
We are of the opinion that lay persons, lay adjusters, regularly employed, or lay independent adjusters employed by an insurance company to adjust losses may properly ascertain the facts and negotiate settlements or adjustments on behalf of insurance companies. We perceive no impropriety in an insurance company authorizing its lay adjuster to settle small claims or claims generally regarded by insurance companies as uneconomical to contest, such as 'nuisance claims,' without the specific

approval of the company's counsel or its local attorney. If an insurance company, in the interest of economical management or administration, sees fit to inaugurate and maintain such a policy with respect to small claims we do not consider that the practice of law is involved in such settlements. State v. Rice, supra at 557.

***3** Thus, a distinction must be drawn between adjusters for insurers, who are in the business of contracting with the public to protect them from financial responsibility for claims, and those for the public, who seek such protection on an individual basis.

A distinction must also be drawn between public adjusters and adjusters for insurance companies based on the public representations made by the former. The Supreme Court of Missouri observed that:
The reason why laymen are forbidden to engage in the law business is that it is detrimental to the public interest for them to represent themselves to the public as being qualified to do that business when they are not, thereby ensnaring the public and spreading error broadcast . . ..

On the other hand, appellants' lay claim adjusters work only for their several employers, who hire and retain them with their eyes open. When they deal with claimants it is on an adversary basis, not a representative basis implying a fiduciary relation. Liberty Mutual Insurance Company v. Jones, supra at 960.

This same distinction was observed in a footnote to a Pennsylvania decision last year. Dauphin County Bar Association v. Mazzacaro, supra at 234–235. The reason for the importance of this distinction is found in the purpose behind the prohibition against laymen engaging in the practice of law. The practice of law is restricted, not to create a monoply for the legal profession but to '. . . assure the public adequate protection in the pursuit, of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law.' State v. Wells, supra at 186.

At least one state court has already found that public adjusters, representing insureds in claims against their own insurance companies, engage in the unauthorized practice of law. Rhode Island Bar Association v. Lesser, 26 A.2d 6 (R.I. 1942). This court impliedly found the actions taken by the defendant as an appraiser to be permissible. However, the court found that the adjusters' solicitations, negotiations, and settlements for insureds' losses covered under policies of fire insurance constituted the unauthorized practice of law.

This office is of the opinion that public adjusters would engage in the unauthorized practice of law. The rationale for this decision is based upon the legal analysis that must be incorporated into any advice given to the insureds and settlement discussions with insurance companies. For instance, the contract itself must be analyzed for the extent of its coverage. Negotiations are also influenced by each side's determination of the probable results of a judicial resolution of any disputed issue, the evidence needed in support of their positions, and the willingness of each side to seek such a determination by a court. As the Pennsylvania court observed:
While the objective valuation of damages may in uncomplicated cases be accomplished by a skilled lay judgment, an assessment of the extent to which that valuation should be compromised in settlement negotiations cannot. Even when liability is not technically 'contested', an assessment of the likelihood that liability can be established in a court of law is a crucial factor in weighing the strength of one's bargaining position. A negotiator cannot possibly know how large a settlement he can exact unless he can probe the degree of unwillingness of the other side to go to court. Such an assessment, however, involves an understanding of the applicable tort principles (including the elements of negligence and contributory negligence) a grasp of the rules of evidence, and an ability to evaluate the strengths and weaknesses of the client's case vis a vis that of the adversary. The acquisition of such knowledge is not within the ability of lay persons, but rather involves the application of abstract legal principles to the concrete facts of the given claim. Dauphin County Bar Association v. Mazzacaro, supra at 233–234.

***4** While that case admittedly dealt with third party adjusters, the analysis applies just as well to other types of public adjusters. However, it should be noted that the Pennsylvania court determined that the actions of the adjuster had exceeded the limits

permitted under that state's public adjuster statute, and the court never addressed the propriety of the activities covered by the statute itself.

The second question presented by your inquiry is whether the General Assembly can pass legislation permitting individuals to engage in activities that would otherwise constitute the unauthorized practice of law. I am enclosing a 1975 Opinion from this Office which demonstrates that the General Assembly could not pass such legislation even when the proposed bill considered the practice of law before administrative bodies. As the Court of Special Appeals of Maryland observed earlier this year, '[t]he power to regulate and define what constitutes the practice of law is vested solely in the judicial branch of government and not the executive nor the legislative.' Lucas v. Bar Association of Montgomery County, Maryland, Inc., 371 A.2d 669, 672 (Md. App. 1977). This is in accordance with the position taken by numerous courts in this nation that the courts have inherent authority to define the practice of law E.g., Darby v. Mississippi State Board of Bar Admissions, et al., 185 So.2d 684 (Miss. 1966); Grievance Committee of State Bar of Texas v. Dean, 190 S.W.2d 126 (Tex. 1945); People ex rel Chicago Bar Association v. Goodman, 8 N.E.2d 941, 111 A.L.R. 1 (Ill. 1937).

Most cases which consider this issue do not involve legislation permitting activities by laymen which are deemed to be the practice of law. However, if such legislation is passed, it can be struck down by the courts as unconstitutional. E.g., Meunier v. Bernich, 170 So. 567 (La. 1936). In Meunier, a claims adjuster who settled and adjusted personal injury claims was found to be engaging in the practice of law even though a statute defining the practice of law specifically exempted the settling or adjusting of disputed accounts or claims. The court observed that:
If the courts have the inherent power to prescribe rules and regulations for those seeking admission to the bar and if the court has the authority to discipline or disbar members of the legal profession, it follows that the scope of power residing in the judiciary embraces the right to define, by court rules, or by adjudication as cases may arise, the acts constituting the practice of law; for, if it were otherwise, the Legislature could, as it has attempted to do in this case, nullify and render ineffective the inherent judicial authority, by providing that a certain course of conduct by laymen is not the practice of law, in the face of previous adjudications by the court describing and defining the functions of the lawyer in the pursuit of his profession. Meunier v. Bernich, supra at 575.

***5** The Court found the exemption provided by the legislature to be unconstitutional as not only an infringement on the inherent powers of the judiciary but also a violation of that state's constitutional provision concerning the State Supreme Court's ability to adopt rules regulating the conduct of attorneys.

In South Carolina, the inherent powers of the judiciary are found in the creation of the Judicial Department as a separate branch of state government by Article V of the South Carolina Constitution. Furthermore, Section 4 of Article V specifically grants to the Supreme Court jurisdiction over admissions to the bar and discipline of those persons admitted. Applying the rationale of the Meunier court to this State, any legislation permitting laymen to engage in the practice of law would be subject to a constitutional attack as an infringement on the judicial branch.

CONCLUSION:

It is the opinion of this office that public adjusters, not licensed as attorneys, engage in the unauthorized practice of law in their activities which go beyond the mere appraisal of the actual losses or damages an insured has sustained. Furthermore, an activity which is found to constitute the unauthorized practice of law cannot constitutionally be sanctioned by the General Assembly without infringing on the judicial branch of this state's government.

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