

**STATE OF TENNESSEE**  
**OFFICE OF THE**  
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May 10, 2005

Opinion No. 05-076

Conduct of proposed legislation's "public adjuster" may constitute unauthorized practice of law

**QUESTIONS**

1. Does it constitute the unauthorized practice of law for a "public adjuster"<sup>1</sup> (who is not licensed to practice law in Tennessee) to negotiate settlements and give advice about insurance claims involving real or personal property on behalf of insureds?
2. If so, would this "public adjuster" be subject to claims for treble damages under Tennessee's Unauthorized Practice and Improper Conduct Act, Tenn. Code Ann. § 23-3-101 *et seq.*?

**OPINIONS**

1. Yes, if the nonlawyer "public adjuster" is acting independently and his or her conduct such as advising clients as to their rights and negotiating settlements for consideration requires the professional judgment of a lawyer.
2. Yes.

**ANALYSIS**

1. Generally, insurance adjusters are agents or employees of insurance companies who are "appointed to ascertain, arrange or settle a matter; esp., . . . claims against the insurer." BLACK'S LAW DICTIONARY 45 (8th ed. 2004). Independent adjusters typically are adjusters who solicit business from more than one insurance company to adjust and settle claims against, and on behalf of, insurance companies. *Id.* Public adjusters, on the other hand, generally settle claims on behalf

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<sup>1</sup>According to the Request, the definition of "public adjuster" comes from proposed legislation and means "any person who for compensation or other thing of value (1) Acts or aids, solely in the relation to first party claims arising under insurance contracts that insure the real or personal property of the insured, on behalf of an insured individual or business entity in negotiating for, or effecting the settlement of, a claim for loss or damage by an insurance contract; (2) Advertises for employment as an adjuster of insurance claims or solicits business or represents himself or herself to the public as an adjuster of first party insurance claims for losses or damages arising out of the policies of insurance that insure real or personal property; or (3) Directly or indirectly solicits business, investigates or adjusts losses, or advises insured about first party claims or damages arising out of policies of insurance that insure real or personal property for another person engaged in the business of adjusting losses or damages covered by an insurance policy."

of insureds. 3 COUCH ON INSURANCE § 48:65 (3d ed. 2004); *see also Larson v. Lesser*, 106 So.2d 188, 192 (Fla. 1958).

This opinion examines the permissible role of “public adjusters” who negotiate first-party claims<sup>2</sup> relating to real or personal property in light of Tennessee’s long-standing prohibition against the unauthorized practice of law.<sup>3</sup> Proposed legislation would define a “public adjuster” as one who “negotiat[es] for, or effect[s] the settlement” of first-party property claims “on behalf of an insured individual.” Similarly, under the proposed definition, a public adjuster may advertise or directly or indirectly solicit business to investigate or adjust losses and give advice about first-party property claims for insureds.

Advising or counseling an insured on first-party property claims raises significant issues regarding the unauthorized practice of law. The Tennessee Supreme Court has stated that “[n]o person shall engage in . . . the ‘law business’ in Tennessee, except pursuant to the authority of this Court, as evidence by a license issued in accordance with this rule. . . .” Tenn.Sup.Ct.Rules, Rule 7, § 1.01. The Tennessee Legislature has long defined “law business” to mean:

the advising or counseling for a valuable consideration of any person, firm, association, or corporation, as to any secular law, or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights, or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to secure for any person, firm, association or corporation any property or property rights whatsoever, or the soliciting of clients directly or indirectly to provide such services.

Tenn. Code Ann. § 23-3-101(1). The Supreme Court is the final arbiter regarding the practice of law by nonlawyers and has held that actions enumerated in the definition of “law business,” “if performed by a non-attorney constitute the unauthorized practice of law only if the doing of those acts requires the ‘professional judgment of a lawyer.’”<sup>4</sup> *In re Petition of Burson*, 909 S.W.2d 768, 771 (Tenn. 1995). Conduct by public adjusters who are not supervised by a licensed attorney,

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<sup>2</sup>First party insurance, or indemnity insurance, is “[a] policy that applies to an insured or the insured’s own property, such as life insurance, health insurance, disability insurance, and fire insurance.” BLACK’S LAW DICTIONARY 817 (8th ed. 2004).

<sup>3</sup>*See* Tenn. Code Ann. § 23-3-101 *et seq.*; Tenn.Sup.Ct.Rules, Rule 7, § 1.01. The Tennessee Code had “carried for many years various provisions requiring lawyers to be licensed . . . but in 1935 for the first time, in order to settle disputes which were frequently arising, the legislature passed this carefully and explicitly worded act defining the ‘practice of law’ and ‘law business.’” *Haverty Furniture Co. v. Foust*, 124 S.W.2d 694, 696 (Tenn. 1939).

<sup>4</sup>The phrase “professional judgment of a lawyer” adopted by the Supreme Court in *Burson* in 1995 originated from Ethical Consideration 3-5 of the Tennessee Supreme Court Rule 8. *Burson*, 909 S.W.2d at 776. As of the date of this Opinion, no Tennessee court has addressed the impact the adoption of the model Rules of Professional Conduct in 2003 may have on the “professional judgment of a lawyer” standard. *See* Tenn. Op. Att’y Gen. No. 04-160 (Nov. 10, 2004).

including the advising of clients for consideration of their legal rights under a contract of insurance and negotiating settlements of claims under such contracts, on a case-by-case basis, may amount to the practice of law if professional legal judgment is required to effectuate these actions in a representative capacity for insureds.

Other states have held that certain conduct by a nonattorney public adjuster requiring legal knowledge or skill is the unauthorized practice of law. Generally, “courts have not permitted adjusters to represent clients in filing claims against insurers, even where authorized by statute.” Derek A. Denckla, *Conference on the Delivery of Legal Services to Low Income Persons: Professional and Ethical Issues*, 67 *FORDHAM L. REV.* 2581, 2590 (1999). The South Carolina Supreme Court specifically declared that public adjusters shall not:

- A. Advise clients of their rights, duties, or privileges under an insurance policy regarding matters requiring legal skill or knowledge, i.e., interpret the policy for clients.
- B. Advise clients on whether to accept a settlement offer from an insurance company.
- C. Become involved, in any way, with a coverage dispute between the client and the insurance company.
- D. Utilize advertising that would lead clients to believe that public adjusters provide services which require legal skill.

*Linder v. Insurance Claims Consultants, Inc.*, 560 S.E.2d 612, 621 (S.C. 2002). In this case, a couple suffered property loss due to a fire and hired a company to act as a public adjuster on their behalf. *Id.* at 616. The South Carolina Supreme Court determined that this company engaged in the unauthorized practice of law because it interpreted and advised the insured on the extent of coverage on an insurance policy for a gun collection and became involved in a known coverage dispute when negotiating this claim with the insurance adjuster. *Id.* at 622.

The proposed definition of “public adjuster” cited above contemplates that public adjusters would engage in behavior similar to that prohibited in South Carolina. Based on Tennessee’s prohibition against the unauthorized practice of law, it follows that:

An adjuster who represents himself or herself to the public as able to compromise, adjust, or settle claims generally, is engaged in the practice of law, at least where he or she advises or suggests a settlement, or analyzes the facts, or makes any representation as to the merit of his or her client’s cause, while an adjuster in the regular employ of an insurance or casualty company is obviously in a different category.

3 *COUCH ON INSURANCE* § 48:65 (3d ed. 2004). The Tennessee Supreme Court has stated in another context that “[t]he obligation to defend the insured under a contract of insurance contemplates representation by counsel who can exercise professional judgment and devote complete loyalty to the insured regardless of the circumstances.” *In re Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995).

Certification or licensing of public adjusters cannot be utilized as a means to avoid the restrictions of Tennessee's Unauthorized Practice and Improper Conduct Act, Tenn. Code Ann. § 23-3-101 *et seq.*, if the representative conduct by public adjusters falls under the definition of "law business" and requires professional legal judgment. This is especially true given that separation of powers principles dictate that the Tennessee Supreme Court, not the Tennessee General Assembly, has the inherent and ultimate power to determine what amounts to the unauthorized practice of law in this state.<sup>5</sup> *Burson*, 909 S.W.2d at 773-74. The Indiana Supreme Court declared that a statute providing for licensing of certified public adjusters who could then undertake to negotiate settlements between insureds and insurers was an unconstitutional violation of the separation of powers in that it permitted practice of law by persons not required to be admitted to bar and not subject to disciplinary rules of the state supreme court. *Professional Adjusters, Inc. v. Tandon*, 433 N.E.2d 779, 783 (Ind. 1982). Whether or not similar conduct by a public adjuster will be prohibited in Tennessee may be heavily fact-dependent; therefore, a public adjuster engaged in this conduct in Tennessee does so at his or her own risk. In this context, it should be noted that, although a public adjuster might be able to point to discrete acts that may not necessarily require the professional judgment of a lawyer (such as obtaining a police report), a court would not just examine specific or isolated conduct, but would consider the totality of the circumstances and the entire undertaking.<sup>6</sup> See *Linder*, 560 S.E.2d at 620, 622 (holding defendants had engaged in unauthorized practice of law, although business of public insurance adjusting did not *per se* constitute practice of law).

2. If a public adjuster, acting in a representative capacity on behalf of a policyholder, engages in behavior that a trier of fact determines to be "law business," the public adjuster may be liable for treble damages under the Unauthorized Practice and Improper Conduct Act, Tenn. Code Ann. § 23-3-101 *et seq.* Any person who violates the prohibition against engaging in "law business" in Tenn. Code Ann. § 23-3-103(a) "shall be subject to be sued for treble the amount which shall have been paid to such person . . . for any service rendered in violation hereof by the person . . . paying the same within two (2) years from the date the same shall have been paid. . . ." Tenn. Code Ann. § 23-3-103(b). A private action, therefore, may be brought by an insured, and if a trier of fact determines that the public adjuster engaged in "law business," he or she may be liable, in the Court's discretion, for treble damages.

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<sup>5</sup>By the same token, the General Assembly could not exempt paralegals from Tennessee's prohibition against the unauthorized practice of law by passing a statute regulating "public paralegals." *Burson*, 909 S.W.2d at 773-74; Tenn. Op. Att'y Gen. No. 92-02 (Jan. 9, 1992).

<sup>6</sup>The Tennessee Supreme Court adopted a statement of policy by the Board of Law Examiners which states, "Decisions as to whether a person is engaged in the unauthorized practice will have to be made on a case-by-case basis in the particular context in which the issue may arise." Tennessee Board of Law Examiners' Statement of Policy concerning the meaning of "Practice of Law" and related Opinion, Sept. 25, 1984, *adopted* at 267 Tenn. XXXI (Dec. 19, 1984).

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