THREE STRIKES, YOU'RE OUT: A SWING AND MISS AT CHALLENGES TO INSURANCE STAFF COUNSEL IN *BROWN V. KELTON*, 380 S.W.3D 361 (ARK. 2011)

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I. INTRODUCTION

ABC Insurance Company's policyholder has just been involved in a major car accident, tragically resulting in another motorist losing his life. The deceased driver's estate is claiming that the policyholder was negligent and now demands high-dollar damages. Bad luck strikes, and several similar accidents, involving different ABC policyholders, occur over the next few months. ABC now faces claims for millions of dollars in damages and a reputation for insuring reckless drivers. Wanting to ensure the best possible outcome, ABC assigns a majority of the lawsuits to its most experienced, successful staff attorney, John Doe, to represent the policyholders. There is a state statute that prohibits corporations from practicing law, but provides an exception to corporations "employing an attorney or attorneys in and about its own immediate affairs." Before trial, the judge disqualifies Mr. Doe on the grounds that the lawsuits do not involve ABC Insurance Company's "immediate affairs." Does this make sense?

To many, the field of insurance law will not prompt uncontrollable excitement or undivided attention. In fact, it is probably safe to say that few consumers ever take the time to open their policy and pick apart the dense language to determine rights, duties, or coverage. However, insurance is all around us and plays an integral role in modern society.[1] Insurance law may lack the suspense and drama traditionally associated with criminal cases, but there are still decisions in the insurance legal field that raise red flags and warrant a careful analysis. This Note will critique the decision in *Brown v. Kelton*, suggesting flaws in the holding and the impact that may result from this seemingly irreconcilable decision.

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1. JEFFREY W. STEMPEL ET AL., PRINCIPLES OF INSURANCE LAW 3 (4th ed. 2012).

Among other responsibilities under an insurance policy, an insurer normally has a "duty to defend" its policyholder in the event a third party brings a claim against that policyholder.[2] Providing a legal defense represents a significant operational cost, so insurers make careful decisions on how best to fulfill this duty.[3]

There are two primary methods an insurer uses to provide a legal defense to policyholders.[4] First, an insurer may retain a private law firm to represent its insureds.[5] Second, an insurer may use its own employee-attorney to represent its insureds.[6] The representation under each option is commonly labeled the tripartite relationship, referring to the attorney's fiduciary duty owed to the insurer as well as the insured.[7] In recent years, an increasing number of insurers are choosing the latter option for cost reasons, among several others.[8] While this decision seems intuitive, it has elicited much debate among legal scholars and attorneys.[9] The controversy centers on substantive and ethical challenges,[10] which will be discussed further in the next section.

Surprisingly, challenges to the use of insurance staff counsel are rarely voiced by insureds.[11] Instead, private defense attorneys most frequently advance these arguments.[12] Fearing increased competition and an inevitable loss of business, these critics question both the competence and client loyalty of staff attorneys.[13] However, these subjective arguments have diminished as modern-day staff counsel programs employ experienced, successful trial attorneys who recognize their duty to abide by the Model Rules of Professional Conduct (Model Rules).[14] As a

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2. *Insurance Law*, iLAWYER, http://www.ilawyer.com/iLawyer-com/Insurance%20Law/Insurance_Law_NY.cfm (last visited Oct. 3, 2012).
3. *Id.*
4. Jay Barry Harris, *To Use Staff Counsel or Not to Use Staff Counsel – That is the Ethical Question*, MARTINDALE.COM (Dec. 5, 2006), http://www.martindale.com/professional-liability-law/article__261322.htm.
5. *Id.*
6. *Id.*
7. Gafcon, Inc. v. Ponsor & Assocs., 120 Cal. Rptr. 2d 392, 404 (Cal. Ct. App. 2002).
8. Ronald E. Mallen, *Defense By Salaried Counsel: A Bane or a Blessing?*, 61 DEF. COUNS. J. 518, 518 (1994).
9. Brian Kerns & Patricia Kirschling, *The Case For and Against Staff Counsel*, LITIG. MGMT., Spring 2012, at 56, *available at* http://www.litigationmanagementmagazine.com/litigationmanagementmagazine/spring2012?pg=56#pg56.
10. *Id.*
11. *But see Gafcon, Inc.*, 120 Cal. Rptr. 2d at 396 (explaining how an insured sued a liability insurer seeking a declaration that the use of in-house counsel to represent insureds constitutes as the unauthorized practice of law).
12. Mallen, *supra* note 8, at 518.
13. *Id.*
14. Thomas M. McNally, *The Continuing Evolution of Insurance Company Staff Counsel Programs: Well Positioned to Thrive in Today's Competitive Legal Marketplace*, STAFF COUNS. COMMITTEE

consequence, staff counsel programs have experienced considerable growth over the years and are poised to continue this trend well into the future.[15] Still, the challenges remain, and *Brown* serves as a reminder that substantive and ethical arguments can resurrect after years of dormancy[16] and be given effect in a court of law.[17]

The court in *Brown* addressed familiar challenges to the use of staff counsel but ultimately came to an unfamiliar conclusion.[18] First, the court determined that an insurance company using an employee-attorney to represent policyholders violated the Arkansas statute that prohibits corporations from practicing law.[19] The court went to great lengths to interpret an exception to the statute—an exception that, on its face, seemed apparent to apply to the insurer—in a way to render it inapplicable.[20] The court then turned to the ethical consideration.[21] While not issuing an absolute rule on the issue, the court suggested that the representation arrangement created an inherent conflict of interest,[22] which is prohibited by the Arkansas Rules of Professional Conduct.[23]

The decision in *Brown* lends support to the popular legal belief that no outcome is certain. With its holding opposing the use of staff counsel by insurance corporations, Arkansas has joined only two other jurisdictions in the country with similar results.[24] In addition to the vast majority of states

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NEWSL., Winter 2012, at 1, 14, *available at* http://www.americanbar.org/content/dam/aba/uncategorized/tips/staff_counsel/staff_counsel_winter2012fl.authcheckdam.pdf.

15. *Id.* at 14.
16. The last successful court challenge to the use of staff counsel occurred in *American Insurance Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996).
17. McNally, *supra* note 14, at 13.
18. *See infra* Section III. After *Brown*, Arkansas became one of three states to oppose the use of insurance staff counsel. *See infra* Section II.A.3.
19. Brown v. Kelton, 380 S.W.3d 361, 365 (Ark. 2011) ("Therefore, [Farmer's Insurance Exchange] was prohibited by Ark. Code Ann. § 16-22-211 from assigning appellant Brown, one of its in-house counsel, to defend the insureds in the litigation.").
20. *Id.* ("Additionally, were we to hold that 'in and about its own immediate affairs' includes litigation to which it is not a party, but to which it is closely connected or has an interest in the outcome, the language following would be superfluous.").
21. *Id.* at 366.
22. *Id.* A staff attorney, the court argued, is incapable of "serv[ing] two masters," and representation of this type leads to a concurrent conflict of interest. *Id.*
23. ARK. RULES OF PROF'L CONDUCT R. 1.7. The rule states:

> A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another clients [sic]; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer . . . .

Id.

24. McNally, *supra* note 14, at 13 (explaining how Kentucky and North Carolina are the only other jurisdictions to interpret statutes to prohibit the use of staff counsel by insurance companies).

approving the use of insurance staff counsel,[25] the *Brown* decision runs counter to numerous ethics opinions supporting the use of staff counsel,[26] including those authored by the American Bar Association (ABA).[27] In short, the holding in *Brown* disrupts over fifteen years of consistent legal opinions from across the country that support the use of insurance staff counsel to represent policyholders.[28] What effect this decision will have on insurance legal operations and other jurisdictions remains to be seen, but the potential ramifications deserve thoughtful examination.

A decision that goes against a substantial majority is not wrong per se, but should be critiqued with a careful eye. This Note will argue that the Arkansas Supreme Court erred in its holding because other practical methods of statutory interpretation were available to arrive at a more rational outcome. Additionally, it was erroneous for the court to suggest that conflicts of interest exist between a staff attorney and an insured without explaining how the use of private attorneys represents a better alternative. Further, the *Brown* decision lacked precedential support,[29] and the court failed to provide persuasive reasoning for deviating from the majority of jurisdictions across the United States on this matter.[30]

Section II of this Note will explain the existing law and common challenges pertaining to the use of staff counsel by insurance companies in the United States, generally, and Arkansas. Next, Section III will provide a detailed review of *Brown*, including the relevant issues, the holding, and the reasoning. Section IV will be an analysis broken down into three parts.

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25. *See* KATHERINE E. GIDDINGS, INSURANCE DEFENSE STAFF COUNSEL STATE-BY-STATE ANALYSIS 1-3 (2012), *available at* http://litigationconferences.com/wp-content/uploads/2012/03/Fri1135_StaffCounselChart.pdf (listing all jurisdictions approving the use of insurance staff attorneys to defend insureds, including: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Maryland, Michigan, Missouri, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin).

26. *See, e.g.*, Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct, Op. 89-17 (1990) (finding insufficient facts to determine that an insurance corporation that hires attorneys to defend its insureds is engaging in the unauthorized practice of law); Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Op. 1987-91 (1987) (determining that in-house counsel for an insurance company, upon meeting certain prerequisites, can represent insureds in litigation without violating the prohibition on aiding the unauthorized practice of law); State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-338 (stating that insurance staff counsel can represent the company's policyholders as long as the insurance company's interests do not conflict with the insured's); *see also* GIDDINGS, *supra* note 25, at 1-3 (listing several state ethics committees allowing the use of insurance staff counsel).

27. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-430 (2003) (reaffirming prior opinions that insurance staff counsel may ethically undertake representation of insureds, provided the lawyers (1) inform the insureds whom they represent that they are employees of the insurance company and (2) exercise independent, professional judgment).

28. The last successful court challenge to the use of staff counsel occurred in *American Insurance Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568 (Ky. 1996).

29. The decision cites to prior state cases covering a corporation's inability to practice law, but there is no mention of case law dealing with insurance staff counsel.

30. GIDDINGS, *supra* note 25, at 1-3.

Subsection A will interpret the Arkansas statute prohibiting corporations from practicing law and determine whether an insurance company, using staff attorneys to represent insureds, should fall within the exception. Subsection B will explore the possibility of an inherent conflict of interest when insurance staff counsel represents insureds and consider whether using staff counsel is distinguishable from retaining private attorneys. The analysis will end with Subsection C addressing the various effects, including practical and economic, that may result from *Brown*. Finally, Section V will share the author's closing thoughts on *Brown* and look into the future of staff counsel operations.

II. LEGAL BACKGROUND

Generally, a corporation is prohibited from practicing law.[31] This prohibition is based on public policy grounds and the idea that corporations are incapable of acquiring certain fundamental skills necessary to practice law.[32] These skills include the ability to comply with standards of legal training, the ability to establish a trustworthy and confidential relationship with a client, and the ability to abide by professional standards of conduct in the legal profession.[33]

When a corporation employs an attorney, the attorney is generally forbidden from representing a third party.[34] The logic behind this rule is that the corporation would effectively be practicing law, through its attorney, in representing the third party.[35] Usually, this limitation is of no concern to either the corporation or the attorney.[36] The notable exception is insurance companies' employment of staff counsel to represent policyholders,[37] which is common practice throughout the country.[38]

Before the *Brown* decision, of the twenty-seven states to address the use of insurance staff counsel to represent insureds, twenty-five states approved the practice either through court or ethics opinions.[39] The representation arrangement creates two common challenges that have

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31. 6 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2524 (2012).
32. *Id.*
33. *Id.*
34. Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 151 (2000).
35. *Id.*
36. 2 RAYMOND D. FORTIN ET AL., SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 36:7 (2012).
37. *Id.*
38. Unauthorized Practice of Law Comm. v. Am. Home Assurance Co., 261 S.W.3d 24, 28-29 (Tex. 2008) ("While there appear to be no comprehensive industry studies on the matter, it is safe to say that [use of insurance staff counsel] is now, and has long been, widespread.").
39. GIDDINGS, *supra* note 25, at 1-3.

lingered for decades.[40] The first, a substantive argument, claims that the use of staff counsel constitutes the unauthorized practice of law by the insurer.[41] In essence, the argument is that the corporation, not the licensed attorney-employee, is practicing law by representing the client.[42] The second is based on the ethical concern that there is an inherent conflict of interest when an insurer uses its employee-attorney to represent policyholders.[43] The rationale behind the ethical argument is that the employment relationship between the insurer and staff attorney will somehow impair or negatively influence the representation the attorney provides to the insured.[44] This section will: (1) explore past court decisions, in states other than Arkansas, involving substantive and ethical challenges to the use of staff counsel; (2) discuss the two other states prohibiting the use of staff counsel and their reasoning for doing so; and (3) review the relevant court decisions in Arkansas leading up to the *Brown* opinion.

A. Use of Insurance Staff Counsel in States Other Than Arkansas

1. Substantive Challenges

The question of whether it is the unauthorized practice of law for an insurance company to use its employee-attorneys to represent insureds is the most common substantive challenge facing staff counsel operations.[45] Several states have addressed this issue, including Ohio, Illinois, and Georgia.

i. *Strother v. Ohio*

One of the earliest courts to address the substantive issue was *Strother v. Ohio Casualty Insurance Co*.[46] In *Strother*, the language in an insurance policy, obligating the insurer to provide a legal defense to the insured, was challenged on the grounds that it allowed the insurance company to practice law without a license.[47] Commenting that there was no state precedent to follow, the court held that the insurer had a "direct pecuniary, financial interest" arising from covered claims under the policy.[48] As a result, the

40. Kerns & Kirschling, *supra* note 9, at 56.
41. *Id.*
42. Giesel, *supra* note 34, at 151.
43. Kerns & Kirschling, *supra* note 9, at 56.
44. *See generally* Mallen, *supra* note 8, at 521-23; Harris, *supra* note 4.
45. Kerns & Kirschling, *supra* note 9, at 56.
46. 1939 Ohio Misc. LEXIS 1184 (Ct. Com. Pl. Jan. 3, 1939).
47. *Id.* at *2-3.
48. *Id.* at *8-9.

insurer "ha[d] a right to protect that pecuniary interest, and ha[d] a right to do so by attorneys of its own choosing; . . . such procedure is not the practice of law in any sense of the word."[49]

ii. *Kittay v. Allstate Insurance Co.*

Substantive challenges surfaced in Illinois a little over thirty years ago in *Kittay v. Allstate Insurance Co*.[50] In *Kittay*, policyholders alleged that insurers were engaged in the unauthorized practice of law by using staff attorneys to defend insureds.[51] The applicable Illinois statute prohibited corporations from practicing law, with the exception of allowing a corporation to employ an attorney "in and about its own immediate affairs or in any litigation to which it is or may be a party, [o]r in any litigation in which any corporation may be interested by reason of the issuance of any policy or undertaking of insurance."[52] Determining that insurers "surely have such an interest in the defense of their insureds since they have a monetary obligation under the policies," the court held that the statutory exception specifically allowed insurance companies to use employee-attorneys to defend insureds.[53] An Illinois Appellate Court recently affirmed this decision in 2010.[54]

iii. *Coscia v. Cunningham*

A Georgia court considered a similar exception to the statute prohibiting corporations from practicing law in *Coscia v. Cunningham*.[55] The issue to resolve in that case was whether the insurance company fell into the statutory exception allowing corporations to "employ[] an attorney or attorneys in and about their own immediate affairs or in any litigation to which they are or may be a party."[56] Acknowledging that the insurer was not a party to the suit, the court specifically focused on whether the use of staff counsel by an insurer to defend insureds qualified as activities "in and about [the insurance company's] immediate affairs."[57] The court determined that defense of the lawsuit clearly qualified as a matter within

49. *Id.* at *10.
50. 397 N.E.2d 200 (Ill. App. Ct. 1979).
51. *Id.* at 202.
52. *Id.*
53. *Id*.
54. Bowers v. State Farm Mut. Auto. Ins. Co., 932 N.E.2d 607, 610 (Ill. App. Ct. 2010). The Illinois Appellate Court, First District, stated that the statutory exception "plainly states that a corporation may employ an attorney in any litigation in which the corporation may be interested by reason of the issuance of any policy of insurance." *Id.*
55. 299 S.E.2d 880 (Ga. 1983).
56. *Id.* at 882.
57. *Id.*

the insurance company's immediate affairs.[58] The insurance company, the court reasoned, was "defending its own interest in eliminating or limiting any recovery under the policy."[59]

The above jurisdictions and many others have determined the use of staff counsel by an insurance company does not equate to the unauthorized practice of law.[60] The challenges have led some jurisdictions to specifically condone the representation via statute.[61] At least one state committee governing the unauthorized law practice has approved of staff counsel representing insureds in litigation.[62] The rationale behind these decisions is consistent: while a corporation is prohibited from practicing law, it does not engage in the practice of law when attorneys are employed to represent the corporation's own interests.[63] The corporation has a financial interest in defending a policyholder, and the fact that the policyholder may also have an interest in the outcome of the litigation does not lessen or diminish the corporation's interest.[64] Consideration of these dual interests has led to ethical challenges to the use of insurance staff counsel.

2. Ethical Challenges

Similar to the substantive challenges, jurisdictions reviewing the ethical challenges to the use of staff counsel have widely rejected the issue.[65] Rule 1.7 of the Model Rules, which governs legal conflicts of interest, is frequently involved in the analysis of ethical considerations in

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58. *Id.*
59. *Id.* at 883.
60. *See, e.g.*, Unauthorized Practice of Law Comm. v. Am. Home Assurance Co., 261 S.W.3d 24, 39 (Tex. 2008) ("[W]e conclude that a liability insurer does not engage in the practice of law by providing staff attorneys to defend claims against insureds . . . ."); Gafcon, Inc. v. Ponsor & Assocs., 120 Cal. Rptr. 2d 392, 404 (Cal. Ct. App. 2002) ("We reject the notion that an insurance company's mere employment of attorneys to represent its insureds constituted the practice of law by the insurance company itself."); Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 155 (Ind. 1999) ("[I]nsurance companies do not necessarily engage in the unauthorized practice of law when house counsel represent their insureds in claims litigation . . . .").
61. 705 ILL. COMP. STAT. 220/5 (2010); MINN. STAT. ANN. § 481.02 (2002); MD. CODE ANN. BUS. OCC. & PROF. § 10-206 (LexisNexis 2011).
62. N.J. Supreme Court Comm. on Unauthorized Practice, Op. No. 23, 114 N.J. L.J. 421 (1984) ("[I]nsurance companies conducting the defense of litigation in which they own indemnification to their insureds through house counsel does not constitute the practice of law.").
63. *See generally Am. Home Assurance Co.*, 261 S.W.3d at 34 ("[A] company does not engage in the practice of law by employing attorneys on its salaried staff to represent its own interests."); *Gafcon, Inc.*, 120 Cal. Rptr. 2d at 404-05 (explaining that insured and insurer have a common interest in the tripartite relationship, and a staff attorney may represent both).
64. *Coscia*, 299 S.E.2d at 883.
65. *See* GIDDINGS, *supra* note 25, at 1-3 (listing states that have issued ethics opinions approving the use of staff counsel by insurance companies).

the use of staff counsel to represent insureds.[66] Ethical challenges revolve around the possible negative effects the relationship between the employee-attorney and employer-insurer may have on the representation of the client-insured.[67] A common argument is that the interests of the insurer and insured may differ in resolving the lawsuit.[68] Some critics allege that an employee-attorney will be unable to exercise independent, professional judgment without being influenced by the desire to appease the insurer-employer.[69] Other critics even go so far as to allege that staff attorneys have less regard for, or competence in, the Model Rules than private insurance defense attorneys.[70] The judiciary, ABA, and state ethics committees have addressed these arguments.

i. Court Decisions

In California, ethical arguments over the use of staff counsel were explored in *Gafcon, Inc. v. Ponsor & Associates*.[71] Similar to other jurisdictions, the court held that an insurance company has an interest in the lawsuit and is entitled to have staff counsel protect that interest, as well as the interests of the insured.[72] The status of the attorney as an employee of the insurance company "does not inherently create a temptation to violate or disregard ethical rules."[73] Conflicts of interest may indeed arise, but the court determined that the same could be said by an insurer's use of private attorneys to defend insureds.[74]

Staff counsel ethical issues were first addressed by Florida's Supreme Court in 1969, when the Florida Bar unsuccessfully petitioned the court to approve a rule that essentially served the purpose of restricting insurance staff counsel representation of policyholders.[75] The Bar's claimed motive was public protection from deceitful or disloyal representation.[76] Further, the Bar asserted that there are certain situations where the interests of an

66. *See, e.g.*, *In re* Allstate Ins. Co., 722 S.W.2d 947, 951 (Mo. 1987); Brown v. Kelton, 380 S.W.3d 361, 366 (Ark. 2011).
67. Mallen, *supra* note 8, at 521-22.
68. *Brown*, 380 S.W.3d at 367-68 (Hannah, C.J., concurring). *But see In re Allstate Ins. Co.*, 722 S.W.2d at 952 (explaining the congruent interests of insurer and insured in disposing of a lawsuit); *Am. Home Assurance Co.*, 261 S.W.3d at 38-39 (explaining that in the vast majority of cases an insurer and insured will have similar interests).
69. *See In re* Petition of Youngblood, 895 S.W.2d 322, 327 (Tenn. 1995); *Am. Home Assurance Co.*, 261 S.W.3d at 39.
70. *See, e.g.*, Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 162 (Ind. 1999).
71. 120 Cal. Rptr. 2d 392 (Cal. Ct. App. 2002).
72. *Id.* at 404.
73. *Id.* at 411.
74. *Id.*
75. *In re* Rules Governing Conduct of Attorneys in Fla., 220 So. 2d 6 (Fla. 1969).
76. *Id.*

insured are better served by independent counsel representation.[77] The court declared that "the ethical problem might well arise regardless of the nature of the employment relationship between the lay agency and the lawyer."[78] The court had the opportunity to reexamine the opinion in 2003, but did not disturb its holding.[79]

One of the more recent courts to address the ethical and substantive challenges to the use of staff counsel was the Supreme Court of Texas in *Unauthorized Practice of Law Committee v. American Home Assurance Co.*[80] Noting the importance of interest alignment, the court stated that the majority of cases involve common interests of insurer and insured in successfully defending a liability claim.[81] Provided the interests of insurer and insured are congruent, the court condoned the use of staff attorneys to defend insureds.[82] There is no reason, the court explained, to presume a staff attorney is more susceptible to engage in disloyal behavior than a private attorney.[83] The court pointed out the complete lack of evidence regarding any injury suffered to a private or public interest as a result of staff counsel representation.[84]

ii. American Bar Association

In addition to approval from several courts across the country, the ABA has historically approved of the use of staff counsel and reaffirmed its acceptance in a 2003 opinion.[85] The ABA stated that, in situations where coverage is not disputed and within the limits of the policy, the financial interests of insurer and insured will align.[86] In responding to claims of undue influence the insurer may have over the staff attorney, the ABA

77. *Id.*
78. *Id.*
79. Amendment to Rules Regulating the Fla. Bar *ex rel.* Rules of Prof'l Conduct, 838 So. 2d 1140 (Fla. 2003). That year, pursuant to a petition by the Florida Bar, the court approved an addition to Rule 4-1.7 of the Rules Regulating the Florida Bar. *Id.* at 1141. The amendment required the employee-attorney to determine, at the beginning of the representation, whether he would be representing both the insurer and the insured, or only the insured, and to disclose the information to both parties. *Id.* at 1141-42. The comments related to the amendment explain how "[e]stablishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer." *Id.* at 1145.
80. 261 S.W.3d 24 (Tex. 2008).
81. *Id.* at 38-39.
82. *Id.* at 39.
83. *Id.* at 40.
84. *Id.* at 39.
85. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-430 (2003) (reaffirming prior opinions that insurance staff counsel may ethically undertake representation of insureds, provided the lawyers (1) inform the insured whom they represent that they are employees of the insurance company and (2) exercise independent, professional judgment in advising and representing insureds).
86. *Id.*

declared that the concern has no significance.[87] When there is full coverage on a loss under an insurance policy, there is an absence of temptation to favor the insurer's interests over the insured.[88]

iii. Ethics Committees

Ethics committees in various states have also weighed in on the propriety of using staff counsel to defend suits against insureds.[89] Recognizing the common interest between insurer and insured in defending against a third party's claim, the California Standing Committee on Professional Responsibility and Conduct determined that staff counsel may represent insureds in litigation.[90] Similarly, the Illinois State Bar Association issued an advisory opinion explaining that a staff attorney, compensated by an insurance company, must take steps to avoid allowing the insurer to direct or influence his independent, professional judgment.[91] Certain states have also successfully challenged ethics opinions declaring staff counsel representation improper.[92]

To summarize, ethical challenges to the use of insurance staff counsel have been largely unsuccessful. As long as the staff attorney is cognizant of the potential for conflicts of interest to arise and immediately addresses the concerns, he is more than capable of providing adequate representation to an insured. In addition, there are no discernible outside influences facing staff attorneys that are unique from those faced by private counsel. Both groups of attorneys are hired by, and report back to, the insurer corporation, abide by the Model Rules, and exercise all other duties to protect the sanctity of the attorney-client relationship.

3. Minority View: North Carolina and Kentucky

Until *Brown*, there were only two states in the country that prohibited the use of staff counsel by insurance companies to defend insureds. The first state to disallow the practice was North Carolina, when staff attorneys

87. *Id.*
88. *Id.*
89. GIDDINGS, *supra* note 25, at 1-3 (listing states to issue ethics opinions approving the use of staff counsel, including: Alabama, Alaska, Arizona, California, Illinois, Iowa, Maryland, Michigan, New York, Oklahoma, Oregon, Pennsylvania, Texas, and West Virginia).
90. Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Op. 1987-91 (1987). The determination was based on the limitation that staff attorneys do not allow insurers to interfere with the attorney exercising professional judgment in his representation of the insured. *Id.*
91. Ill. State Bar Ass'n Advisory Op. on Prof'l Conduct, Op. 89-17 (1990).
92. *In re* Petition of Youngblood, 895 S.W.2d 322, 324 (Tenn. 1995). Because the ethics opinion was based on "the potential for conflict in the relationship of employer-employee rather than particular facts which demonstrate there is, in fact, a conflict of interest," it was vacated by the Tennessee Supreme Court. *Id.* at 330.

challenged an ethics decision barring the use of insurance attorney-employees to represent policyholders.[93] The applicable statute in North Carolina prohibited corporations from "appear[ing] as an attorney for any person in any court in th[e] State."[94] The court reasoned that the appearance of the corporation, through a staff attorney, was an appearance to represent someone other than itself.[95] Any judgment would be rendered against the insured and the insured would be solely responsible for damages over the policy limit.[96] Based on the conclusion that the corporation's representation was on behalf of another person, the court declared it unlawful.[97] Acknowledging the great weight of authority against its decision, the court stated, "[W]e believe that our duty is to interpret our own state's law according to the policies expressed by our legislature and the best interests of our state."[98]

Kentucky was the second state to prohibit the use of insurance staff counsel.[99] Similar to *Gardener*, the case arose as a challenge—this time by insurers—to a state ethics opinion requiring insurers to hire a private attorney to represent their insureds.[100] The court responded to several convincing arguments offered by State Farm with the reply, "[I]f it ain't broke, don't fix it."[101] More specifically, the court stated that there was "no compelling reason to overrule the more than fifty years of legal precedent that recognize[d] the principles outlined in [the ethics] opinion."[102] Like North Carolina, the Kentucky Supreme Court was not moved by the many other jurisdictions approving the use of staff counsel, stating, "[T]he Kentucky Rules of Professional Conduct and the means by which this state oversees the conduct of its attorneys are personal to Kentucky."[103]

B. Use of Insurance Staff Counsel in Arkansas

1. Substantive Challenges

Prior to the decision in *Brown v. Kelton*, there was no Arkansas case law directly dealing with challenges to the use of insurance staff counsel. However, Arkansas does have a statute—Arkansas Code section 16-22-

93. Gardner v. N.C. State Bar, 341 S.E.2d 517, 518 (N.C. 1986).
94. *Id.* at 520.
95. *Id.*
96. *Id.* at 521.
97. *Id.*
98. *Id.* at 522.
99. Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d 568 (Ky. 1996).
100. *Id.* at 569.
101. *Id.* at 570-71.
102. *Id.* at 571.
103. *Id.*

211—barring corporations from practicing law. The statute allows for some exceptions, including permitting corporations to "employ[] an attorney or attorneys in and about its own immediate affairs."[104]

One of the earlier decisions interpreting section 16-22-211 is *Arkansas Bar Ass'n v. Union National Bank of Little Rock*.[105] In that case, trustee-attorneys of a bank were prohibited from performing certain probate law activities for the bank.[106] The trustees were operating under the theory that they were representing their employer-corporation's business affairs.[107] The reasoning for the court's holding went as follows: corporations are prohibited from practicing law, but a corporation may represent itself in connection with its own business or affairs as long as it does so through a licensed attorney.[108] A corporation acting, through a licensed attorney, as an administrator or executor is not looking after its own business affairs when it uses the court processes to settle or administer a trust.[109] Thus, this action of a corporation constitutes the unauthorized practice of law.[110]

Approximately five years later, the court faced similar issues in *Arkansas Bar Ass'n v. Block*.[111] The case involved a challenge by the Arkansas Bar, claiming that certain activities performed by non-lawyer real estate agents constituted the unauthorized practice of law.[112] The court laid

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104. ARK. CODE ANN. § 16-22-211(d) (2009). In its current form, the relevant part of the statute reads:

> (a) It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney at law for any person in any court in this state or before any judicial body, to make it a business to practice as an attorney at law for any person in any of the courts, to hold itself out to the public as being entitled to practice law, to tender or furnish legal services or advice, to furnish attorneys or counsel, to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume or advertise the title of lawyer or attorney, attorney at law, or equivalent terms in any language in such a manner as to convey the impression that it is entitled to practice law or to furnish legal advice, service, or counsel or to advertise that either alone or together with or by or through any person, whether a duly and regularly admitted attorney at law or not, it has, owns, conducts, or maintains a law office or any office for the practice of law or for furnishing legal advice, services, or counsel.
>
> . . .
>
> (d) This section shall not apply to a:
>
> (1) For-profit corporation or voluntary association lawfully engaged in:
>
> (A) The examination and insuring of titles to real property; or
>
> (B) Employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may become a party . . . .

ARK. CODE ANN. § 16-22-211 (2012).

105. 273 S.W.2d 408 (Ark. 1954).
106. *Id.* at 413.
107. *Id.* at 411.
108. *Id.* at 410.
109. *Id.*
110. *Id.* at 410-13.
111. 323 S.W.2d 912 (Ark. 1959).
112. *Id.* at 912-14.

out a list of activities[113] that it stated were only capable of performance through a human.[114] Because artificial creations, such as corporations, cannot meet these prerequisites, they are prohibited from practicing law.[115]

There is additional case law interpreting section 16-22-211, but the cases deal with conduct by non-lawyer representatives of a corporation and are not helpful for the present topic.[116] One principle is clear from Arkansas case law on this subject: while corporations are forbidden from "practicing law," they may be represented through licensed attorneys, provided the attorneys are representing the corporation's business affairs.[117]

2. Ethical Challenges

Most Arkansas precedent associated with corporations practicing law only involves conduct of an employer and its representative; there is scarce case law involving conflicts of interest that may arise in relation to a third party, such as an insured.[118] Rule 1.7 of the Arkansas Rules of Professional Conduct deals with conflicts of interest in the attorney-client relationship.[119] The first comment to Rule 1.7 explains how loyalty and independent judgment are "essential elements" in the attorney-client relationship.[120] This comment is significant because opponents of staff counsel often argue an attorney-employee's loyalty to his employer will improperly influence his ability to exercise professional judgment and make decisions in an insured's best interest.

Again, it is important to point out that case law prior to *Brown* mostly involved issues about what activities do and do not constitute "practicing

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113. *Id.* at 915. The court stated:

> The relation of an attorney to his client is pre-eminently confidential. It demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interest of his client.

Id. (quoting State Bar Ass'n of Conn. v. Conn. Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958)).

114. *Id.*

115. *Id.*

116. *See generally* Roma Leathers, Inc. v. Ramey, 2 S.W.3d 82, 85 (Ark. Ct. App. 1999) (holding that a non-attorney representative of a foreign corporation engaged in the unauthorized practice of law by filing a debt collection action in municipal court); All City Glass and Mirror, Inc. v. McGraw Hill Info. Sys. Co., 750 S.W.2d 395, 395-96 (Ark. 1988) (holding that a corporation could not be represented by its non-lawyer president).

117. Ark. Bar Ass'n v. Union Nat'l Bank of Little Rock, 273 S.W.2d 408, 410 (Ark. 1954) ("A corporation may also represent itself in connection with its own business or affairs in the courts of this state provided it does so through a licensed attorney.").

118. Although *Union National* involved third-party beneficiaries, by concluding that the corporation had no interest in the probating activities, the court never addressed possible ethical issues and potential conflicts of interest in the arrangement.

119. Brown v. Kelton, 380 S.W.3d 361, 366 (Ark. 2011).

120. ARK. RULES OF PROF'L CONDUCT R. 1.7 cmt. 1.

law." Indeed, most of the cases interpreting section 16-22-211 involve *non-lawyers* engaging in the questioned activities.[121] *Brown* is different in that there was no question that the licensed staff counsel attorney for the insurer was practicing law by representing policyholders. The focus in *Brown* was whose interests the lawyer was representing—as that would help determine whether the insurer was "practicing law"—and how much of a business interest the insurer needed to qualify for the exception to section 16-22-211. Additionally, there is no Arkansas precedent that involves an insurance company using employees to represent insureds. To determine how the Arkansas Supreme Court attempted to reconcile these differences, *Brown*'s facts, holding, and reasoning must be examined.

III. EXPOSITION

A. Facts and Procedural History

The issues in *Brown* arose as the result of a car accident.[122] The plaintiff, Brian Kelton, was driving his vehicle when it was struck by another vehicle owned by the defendant, Mid-Central Plumbing Company.[123] Kelton filed suit against Mid-Central and John Rogers (Mid-Central's sole shareholder), claiming damages from the accident.[124] Mid-Central had insurance with Truck Insurance Exchange (TIE) for $1,000,000, and TIE was reinsured[125] by Farmer's Insurance Exchange (FIE).[126]

Approximately three months after the defendants answered the complaint, their attorney filed a motion for substitution to replace himself for Stephen Brown, an attorney employed by FIE.[127] The Arkansas Circuit Court granted the substitution motion.[128] A short time later, Kelton filed a response in opposition to the motion for substitution, which was deemed a motion to disqualify.[129]

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121. *See generally Roma Leathers*, 2 S.W.3d at 85 (holding that a non-attorney representative of a foreign corporation engaged in the unauthorized practice of law by a filing debt collection action in municipal court); *All City Glass and Mirror, Inc.*, 750 S.W.2d at 395-96 (holding that a corporation could not be represented by its non-lawyer president).

122. *Brown*, 380 S.W.3d at 363.

123. *Id.*

124. *Id.*

125. BLACK'S LAW DICTIONARY (9th ed. 2009). A reinsurer is "an insurer that assumes all or part of a risk underwritten by another insurer, usu. in exchange for a percentage of the original premium." *Id.*

126. *Brown*, 380 S.W.3d at 363.

127. *Id.*

128. *Id.*

129. *Id.* Because the response was made after the order had been entered, both parties agreed the response would be treated as a motion to disqualify. *Id.*

The Arkansas Circuit Court conducted a hearing and disqualified Brown from representing Mid-Central and Rogers.[130] The court held that, pursuant to Arkansas Code section 16-22-211, the representation would have equated to the unauthorized practice of law by FIE.[131] Additionally, recognizing ethical considerations, the court stated, "[A] conflict of interest existed for Brown because his undivided duty of loyalty and confidentiality would have been owed to Mid-Central and Rogers, not to the insurance company that employed him; and . . . no effective waiver of the inherent conflict had or could have taken place."[132] This holding was the basis for the defendants' appeal.[133]

B. Majority Opinion

The two major issues for the Arkansas Supreme Court to address on appeal were: (1) whether the use of staff counsel by an insurance company constituted the unauthorized practice of law under section 16-22-121; and (2) whether a conflict of interest existed when Brown attempted to serve as the attorney for Mid-Central and Rogers.[134] While section 16-22-121 prohibits corporations from practicing law, an exception to the statute allows a corporation to "employ[] an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may become a party."[135] The defendants argued that the statute did not prevent an insurance company from using its employees (staff counsel) to represent insureds.[136] Specifically, they argued that FIE fell into the exception to the statute because the lawsuit was "in and about its own immediate affairs."[137] To address this argument, the court relied on tools of statutory construction, determining that the rule was to give effect to the intent of the legislature by giving words their ordinary and usual meaning when the language of a statute is clear and unambiguous.[138] Following this approach, the court determined that every word of the statute must be given meaning and effect.[139]

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130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* The court also determined that Arkansas Code § 16-22-121 was constitutional, the plaintiffs had standing, and the defendants' informed consent to their representation was futile because the law prohibited the representation. *Id.* at 366.
135. ARK. CODE ANN. § 16-22-121(d)(1)(B) (2012).
136. *Brown*, 380 S.W.3d at 363.
137. *Id.* at 364.
138. *Id.*
139. *Id.* The court stated:

> In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the

Insisting that the defendants were de-emphasizing the remaining language in the exception to the statute—"or in any litigation to which it is or may become a party"—the court held that the statute allowed a corporation to employ an attorney in two distinct situations.[140] Holding that the "in and about its own immediate affairs" exception applied to litigation in which the corporation was not a party, the court reasoned, would render the remaining statutory language superfluous.[141] Basically, the court made the determination that the "in and about its own immediate affairs" exception excludes litigation entirely and applies only to non-litigation corporate legal matters, such as those dealing with compliance, employment, investments, etc. Otherwise, the remaining language would have been included in the first exception, rather than creating a second, separate exception.[142] Because it was conceded that FIE was not a party and was not going to become a party to the suit, the court held that the insurer was prohibited from using its attorney, Brown, to represent insureds, Mid-Central and Rogers, under the statute.[143]

As a result of determining that the statute in question was constitutional and prohibited Brown from representing the defendants, the court stated that any decision on the remaining arguments, including an alleged conflict of interest, would be advisory.[144] Following well-settled law in the state, the court did not issue an advisory opinion on these issues.[145] Surprisingly, the court only devoted a couple sentences in the opinion to the ethical issue.[146] Citing Rule 1.7 of the Arkansas Rules of Professional Conduct, the court suggested an inherent conflict of interest exists in the staff counsel arrangement because no person has the ability to "faithfully serve two masters."[147] Fortunately, the concurring opinion sheds more insight to the possible ethical issues.

C. Concurring Opinion

The basis for Justice Hannah's agreement with the majority is the purported conflict of interest that he believes exists when an attorney attempts to serve two masters.[148] Particularly, he stated, there is an inherent

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> statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible.

Id. (quoting Dachs v. Hendrix, 354 S.W.3d 95, 100 (Ark. 2009)).

140. *Id.*
141. *Id.* at 365.
142. *Id.*
143. *Id.*
144. *Id.* at 366.
145. *Id.* ("It is well settled that we will not issue an advisory opinion.").
146. *Id.*
147. *Id.*
148. *Id.* at 367 (Hannah, C.J., concurring).

conflict when an attorney is an employee of an insurance company and undertakes to represent insureds.[149] Relying on a division of loyalties, Justice Hannah argued that the interests of the insured and insurance company vary greatly.[150] On one side, there is the insured, who is not paying the attorney; on the other side, there is the insurer, who is paying the attorney and concerned, as a business, with making a profit.[151] These dissimilar interests result in the attorney being subjected to the directions of the insurer, rather than the insured.[152] To illustrate, Justice Hannah suggested that there may be times when an insured wishes to forego settlement negotiations and proceed to trial in order to protect his business reputation, but an insurance company may push for settlement based on financial reasons.[153] Justice Hannah proceeded to explain how the duty an attorney owes to his employer may jeopardize the undivided allegiance due to the client.[154] As a result, Hannah agreed that Brown was properly disqualified from representing Mid-Central and Rogers in the case.[155]

IV. ANALYSIS

The decision in *Brown* prohibiting the use of insurance staff counsel to represent insureds was wrongly decided for several reasons. First, the litigation in the case concerned the insurance company's "immediate affairs," and therefore the company fell into the statutory exception and was not "practicing law." Rather, by having a staff attorney represent the company's policyholder, the insurance company was simply representing its own business affairs, which Arkansas precedent establishes as lawful.[156] Second, the Arkansas Supreme Court used statutory analysis to conclude that the representation arrangement was unlawful and avoided directly tackling the conflict of interest concerns. Instead, the court only commented on the likelihood of an inherent conflict of interest.[157] The court failed to confront the numerous court and ethics opinions that deny

149. *Id.*
150. *Id.* *But see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-430 (2003) ("Fortunately, in the great majority of liability cases, the interests of insureds and their insurance companies do not collide.").
151. *Brown*, 380 S.W.3d at 367 (Hannah, C.J., concurring).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 366.
156. Ark. Bar Ass'n v. Union Nat'l Bank of Little Rock, 273 S.W.2d 408, 410 (Ark. 1954) ("A corporation may also represent itself in connection with its own business or affairs in the courts of this state provided it does so through a licensed attorney.").
157. *Brown*, 380 S.W.3d at 366 ("Upon consideration of public policy and recognizing the inability of any person to faithfully serve two masters, we hold that the statute . . . is constitutional.").

such a conflict is present in the tripartite relationship. Finally, the court disregarded how the decision might impact the citizens of Arkansas.

A. Use of Staff Counsel by an Insurance Company to Represent Policyholders Does Not Constitute the Unauthorized Practice of Law

There were additional methods available to interpret the Arkansas statute that would have resulted in a more logical outcome. In *Brown*, the Arkansas Supreme Court noted, "Where the language of a statute is plain and unambiguous we determine legislative intent from the ordinary meaning of the language used."[158] The court appeared to properly adopt a method similar to the "Plain Meaning Rule";[159] however, the error occurred in the application. Ordinary meanings of words are commonly discovered by assistance from a dictionary.[160] The phrase "immediate affairs" seems clear on its face, but defining each word helps to break down the analysis and more fully apply the statute to the facts in *Brown*. *Black's Law Dictionary* defines "immediate" as "having a direct impact."[161] While *Black's* does not have a definition for "affair," *Merriam-Webster* defines the word as "commercial, professional, public, or personal business: matter, concern."[162]

At all times, both FIE[163] and TIE had an "immediate" interest in the litigation. The interest starts at the issuance of the insurance policy to the insured, or, in the case of FIE, to the insurer. From that point forward, the insurance company has a financial obligation to indemnify the insured for covered liability losses. The result of this monetary risk is a potential "direct impact" on the company's financial operations and, in extreme cases, solvency. The money paid out on covered losses comes out of the insurer's loss reserves and belongs to the insurer, not the insured. Additionally, insurance policies obligate the insurer to cover certain legal defense costs a policyholder incurs during litigation.[164]

Thus, at all times throughout the existence of the policy, the money the insurance company stands to lose as the result of a covered loss or legal decision against the company's policyholder is a "matter" or "concern"

158. *Id.* at 364 (quoting Dachs v. Hendrix, 354 S.W.3d 95, 100 (Ark. 2009)).
159. LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 63 (George W. Kuney ed., 2008). The Plain Meaning Rule makes a presumption that words in a statute have their "plain" or "ordinary" meaning. *Id.*
160. *Id.* at 64.
161. BLACK'S LAW DICTIONARY (9th ed. 2009).
162. *Definition of Affair*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/affair (last visited Oct. 3, 2012).
163. What effect, if any, FIE's status as a reinsurer had on its perceived interests in the litigation is one of many questions unanswered in *Brown*.
164. *Insurance Law*, *supra* note 2.

having a "direct impact" on the company's "professional . . . business." This reasoning is consistent with several other jurisdictions that have determined an insurance company undoubtedly has a direct, financial interest in the outcome of litigation as a result of the issuance of an insurance policy.[165] Further, *Union National* established the lawfulness in Arkansas of a staff attorney representing a corporation when it involves a matter related to handling the corporation's own business.[166] The court in *Brown*, however, avoided acknowledging the *Union National* decision in that regard, likely because of the difficulty in explaining how the representation of the policyholders did not involve the insurance company's business affairs.

In addition to financial concerns, an insurer has a strong interest in maintaining its reputation. While disclosure of a defendant's insurance carrier is generally prohibited at trial,[167] less than satisfactory legal representation, or adverse results, will cause certain parties, including a client, plaintiff, or opposing counsel, to question the ability of the insurer to defend claims. This reputation has the potential to spread in the legal community and cause plaintiff's attorneys to be less willing to settle claims and more eager to take chances in the courtroom at what they perceive to be a subpar defense. Again, the effect is a "direct impact" on the insurer's "professional . . . business."

Moreover, *Brown* did not mention any legislative history when analyzing section 16-22-211, so there is a lack of documentation to help discern legislative intent or goals in passing the statute.[168] Still, there are other tools of statutory interpretation the court failed to consider. Dynamic statutory interpretation allows judges flexibility in determining what the enacting legislature would have wanted given modern times and recognizes changed circumstances.[169] Arkansas precedent has recognized that one of the primary reasons for prohibiting the unauthorized practice of law is to "protect the public from relying upon the legal counsel of persons who are not bound by the professional standards of conduct that are imposed upon

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165. *See, e.g.*, Strother v. Ohio Cas. Ins. Co., 1939 Ohio Misc. LEXIS 1184, at *9 (Ct. Com. Pl. Jan. 3, 1939) ("Therefore, to the extent of the policy, the insurance company has a direct pecuniary, financial interest, in any accident that occurs involving a claim against any person covered by one of its policies."); Kittay v. Allstate Ins. Co., 397 N.E.2d 200, 202 (Ill. App. Ct. 1979) ("The defendant insurance companies surely have such an interest in the defense of their insureds since they have a monetary obligation under the polices."); Coscia v. Cunningham, 299 S.E.2d 880, 882 (Ga. 1983) ("Clearly, defense of the suit up to the policy limit of liability constitutes defense of the insurance company's 'own immediate affairs' . . . .").

166. Ark. Bar Ass'n v. Union Nat'l Bank of Little Rock, 273 S.W.2d 408, 410 (Ark. 1954).

167. *See* FED. R. EVID. 411.

168. Kathryn C. Fitzhugh, *Arkansas Legislative History Research Guide*, SWALL BULLETIN, http://www.aallnet.org/chapter/swall/bulletin/Fall01/arkleghistory.html (last visited Oct. 31, 2012) (explaining how Arkansas has not printed committee reports or floor debates since 1955).

169. JELLUM, *supra* note 159, at 32.

those practicing law in this state."[170] But, considering this reasoning in the context of modern-day use of staff counsel, the protected abuses no longer exist. Staff counsel attorneys, just like all attorneys, are bound by the Model Rules.[171] The use of insurance staff counsel is currently thriving in America, and staff counsel operations continue to grow.[172] The acceptance of insurance staff counsel by jurisdictions across the country, coupled with the lack of evidence of any harm to the public, is further justification and reassurance for the professionalism of staff attorneys. With safeguards in place to protect the public,[173] the underlying purpose in prohibiting corporations from practicing law is still being served, and the Arkansas Supreme Court failed to embrace a more modern, practical interpretation of section 16-22-211.

Another curious aspect of the *Brown* opinion is the absence of a discussion concerning other jurisdictions to address the lawfulness of the use of insurance staff counsel. Considering this was an issue of first impression in Arkansas, reasoning and holdings from other jurisdictions addressing the matter should have been of utmost importance. In fact, the Georgia Supreme Court interpreted the exact statutory exception analyzed in *Brown*.[174] Similar to the facts in *Brown*, the insurance company in *Coscia* was not a party to the lawsuit.[175] As explained in Section II.A.1.iii, supra, the Georgia Supreme Court thought it was clear that defending the lawsuit fell into the insurance company's "immediate affairs."[176] The court was not disturbed by the remaining language of the exception and used common sense to apply the exception to an insurance company.[177] Applying similar facts to an identical statutory exception and coming to a completely contradictory decision, the *Brown* court should have at least attempted to distinguish the two cases to provide better support for its decision.

There were a variety of avenues for the Arkansas Supreme Court to take in order to interpret the exception to section 16-22-211 in a way to allow FIE to use an employee-attorney to represent Mid-Central and Rogers. A troubling aspect of the decision is the lack of any discussion regarding the insurer's financial and reputation interests an employee-

170. Clarendon Am. Ins. Co. v. Hickok, 257 S.W.3d 43, 46 (Ark. 2007).
171. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-430 (2003).
172. Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 238-39 (1997).
173. Brief for The American Insurance Ass'n et al. as Amici Curiae Supporting Appellants at 12-13, Brown v. Kelton, 380 S.W.3d 361 (Ark. 2011) (No. 10-925) [hereinafter Brief for The American Insurance Ass'n].
174. Coscia v. Cunninham, 299 S.E.2d 880, 882 (Ga. 1983).
175. *Id.*
176. *Id.*
177. *Id.*

attorney is representing by defending a third-party claim against a policyholder. Likewise, considering the great weight of authority against *Brown*'s holding, it is equally as disturbing that the court avoided confronting contrary opinions.

B. Use of Insurance Staff Counsel Does Not Increase the Risk of a Conflict of Interest and Safeguards are in Place to Handle Such Conflicts

As mentioned above, the court in *Brown* relied on the unlawful representation by Brown to avoid addressing perceived conflict of interest concerns. However, the court tried to lend support to its holding by citing Rule 1.7 of the Arkansas Rules of Professional Conduct and "recognizing the inability of any person to faithfully serve two masters."[178] Although it failed to elaborate on this statement, the court indicated a belief that there is a conflict of interest in the tripartite relationship.

The court's unwillingness to perform a detailed analysis of Rule 1.7 may have been spurred by the contrary authority within one of the Rule's comments. The comment states, "[W]hen an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence."[179] This example can be read a few different ways and turns on the meaning of "special counsel"[180] and the types of attorneys included in that designation.

First and foremost, the comment confirms an insurer has an interest in matters arising out of liability insurance contracts, including litigation matters. An argument can be made that "special counsel" does not necessarily preclude staff counsel, leading to the requirement of assuring professional independence in the representation. Second, the example could be read to mean that, initially, staff counsel of the insurance company is designated to handle issues that arise under a liability insurance contract and represent the interests of both the insured and insurer. It is only *after* a perceived conflict of interest arises between the insurer and insured that the insurer is required to provide "special counsel," or outside counsel, and assure the attorney's professional independence. This interpretation would be consistent with the way a majority of insurance staff counsel operations handle third-party liability claims.[181] The narrowest reading of the example would lead to the conclusion that "special counsel" includes only outside counsel and that those are the only attorneys who may represent an

178. *Brown*, 380 S.W.3d at 366.
179. ARK. RULES OF PROF'L CONDUCT R. 1.7 cmt. 13.
180. "Special counsel" is not defined within the rule.
181. Brief for The American Insurance Ass'n, *supra* note 173, at 13-14.

insurance company's policyholders. This questionable conclusion begs the question: are there increased risks of a conflict of interest when staff counsel, rather than outside counsel, represents policyholders?

By prohibiting an employee-attorney from representing the policyholders in *Brown*, the court implicitly agrees that there is a difference between the use of staff and outside counsel. While the majority avoids providing examples of a perceived conflict of interest, the concurrence hypothesizes a scenario where an insured desires a trial to protect a business reputation, but the insurer is eager to make a cost-effective decision and settle the lawsuit.[182] The concern deals with attorney loyalty to an insurer to the detriment of an insured and a perceived ability of an insurer to influence the professional judgment of its attorney. But the problem posed by the concurrence is not solved by the use of outside counsel. How is a private attorney better able to "serve two masters" than a staff attorney?

The reality is that outside counsel is *more* likely than staff counsel to be improperly influenced by an insurer. Staff counsel attorneys have job security; they do not need to worry about receiving additional assignments or cases from the insurer. On the contrary, private insurance defense attorneys may be inclined to act as favorably as possible to the insurer, in hopes of retaining future employment. With no guarantee of future litigation handling for the insurer, a private attorney may be more deferential to an insurer's needs than his clients. The decision in *Brown* does nothing more than disqualify a staff attorney simply because of the attorney's employment status, and the opinion fails to provide any characteristics that would distinguish private attorneys from staff counsel. It should be assumed that all licensed attorneys conduct themselves in a manner consistent with professional legal standards and need only be addressed in the rare cases they do not.

In short, there is no recognizable difference between staff attorneys and outside counsel when it comes to representing policyholders. Both types of attorneys are paid (albeit in different ways) by, and work with, the insurer during litigation, and both types of attorneys are bound by the Model Rules. There are private insurance defense attorneys who work almost exclusively for one or two insurance companies, yet the court in *Brown* does not consider this analogy. Many jurisdictions have spoken out about the lack of any recognizable difference between a staff attorney and outside counsel,[183] but again, the Arkansas Supreme Court does not acknowledge these opinions or provide any evidence to the contrary.

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182. *Brown*, 380 S.W.3d at 367 (Hannah, C.J., concurring).

183. *See, e.g.*, Unauthorized Practice of Law Comm. v. Am. Home Assurance. Co., 261 S.W.3d 24, 41 (Tex. 2008) ("It is possible that counsel will fail to render that loyalty, but we cannot presume that a staff attorney is more likely [than private counsel] to do so, especially absent any evidence of a complaint ever having been made."); Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 161 (Ind.

It is also important to point out that the hypothetical posed by the concurrence in *Brown* is rarely a reality. In the vast majority of cases, an insurer and insured's interests will be aligned in that both desire to end the lawsuit as quickly and effectively as possible.[184] When a conflict of interest does occur between parties, there are safeguards in place to address and resolve the matter in ways that avoid harm to policyholders.[185] Importantly, policyholders are informed at the onset of the representation of the staff attorney's employment relationship with the insurer; there are no secrets.[186] When a material conflict does exist between insurer and insured in litigation, the case is outsourced by the insurer to a private attorney.[187] In the event a staff attorney has an opportunity to effectively settle a claim within policy limits and unreasonably refuses or a case is otherwise mishandled, the insured always has recourse through a malpractice suit. This last point provides even more reassurance to the public that an insurer, in attempts to limit its own liability, will seek to employ only competent, knowledgeable staff attorneys.

With the above safeguards in place and a heightened sense of awareness by insurers and staff attorneys to the ethical concerns of the tripartite relationship, it is of no surprise that the conflict of interest concerns appear to be more speculative than proven. In jurisdictions permitting the use of staff counsel, most note the complete lack of evidence provided by the opponent as to any public harm that has resulted from insurance staff counsel representation.[188] Special state bar committees studying staff counsel operations have actively solicited public comments on the issue and found no instances of harm.[189] These findings suggest that

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1999) ("Whatever issues joint representation raises appear to be wholly independent of the attorney's status as an employee of the insurer or a member of a law firm."); *In re* Allstate Ins. Co., 722 S.W.2d 947, 950 (Mo. 1987) ("If, however, the [insurer] practices law by assigning employee attorneys to the defense of claims, it would just as logically be said to practice law by retaining independent contractors as counsel for its insured.").

184. *See, e.g.*, *In re Allstate Ins. Co.*, 722 S.W.2d at 951-52. The court concluded that when coverage is not in question, both the insurer and the insured will be concerned with obtaining the best possible outcome and their interests are congruent. *Id.* at 952. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-430 (2003).

185. Brief for The American Insurance Ass'n, *supra* note 173, at 13-14.

186. *Id.*

187. *Id.*

188. *See, e.g.*, *Am. Home Assurance Co.*, 261 S.W.3d at 39-40; *In re Allstate Ins. Co.*, 722 S.W.2d at 950; *Cincinnati Ins. Co.*, 717 N.E.2d at 162.

189. Brief for The American Insurance Ass'n, *supra* note 173, at 23-24 (explaining how special bar committees in Ohio and Florida studied staff counsel operations and opened up to the public for comments; no instances of harm were found from the use of staff counsel, only benefits).

factors other than ethics are really driving the challenges to insurance staff counsel operations.[190]

C. Possible Effects of the *Brown* Decision

As discussed, most of the challenges related to the use of insurance staff counsel are claimed as attempts to protect the public. No concrete evidence has been brought to light to support these challenges. However, there is evidence suggesting that prohibiting the practice, as the court did in *Brown*, will indeed lead to adverse effects.

Other jurisdictions have recognized the cost-effectiveness of the use of staff counsel.[191] By using employee-attorneys to represent insureds, the profit margins charged by private defense attorneys are eliminated. Available evidence suggests that insurers saved a substantial amount of money by making the switch from using outside counsel to staff attorneys.[192] This cost reduction is ultimately passed on to policyholders through reduced insurance prices.

Insurers do not maintain staff counsel operations solely because it is a cheaper option. Cost-savings is also achieved as a result of the expertise staff attorneys develop by consistently handling the same type of cases. Contrary to arguments questioning the competence of staff counsel attorneys, studies have found that the average amount paid to an injured party by an insurer is notably less when staff counsel defends the case.[193] The expertise and know-how of staff counsel effectively reduces the likelihood of malpractice, thus limiting insurer liability and escalating the company's professional reputation. The bottom line is that an insurance company is a business; naturally, a business is going to be concerned with profits. If using staff counsel is not a cost-effective means to achieve profits, insurers would abandon the practice and gladly avoid the constant ethical challenges.

What the above economic considerations reflect is that forcing an insurer to use private attorneys will increase the costs of doing business for the insurer, particularly defense costs. These increased costs will inevitably be passed on to policyholders, who can expect to see gradual increases in

190. Private defense attorneys commonly raise staff counsel challenges based on fears of increased competition and loss of business, indicating that money—not ethics—is the primary motive for most staff counsel challenges. *See supra* note 13 and accompanying text.

191. *Cincinnati Ins. Co.*, 717 N.E.2d at 164 ("[T]he public may ultimately reap the benefits of better service at lower cost through the use of house counsel.").

192. Silver, *supra* note 172, at 241.

193. Brief for The American Insurance Ass'n, *supra* note 173, at 15 (noting how a 1997 AIA National Litigation Statistical Survey, consisting of over a quarter of the property casualty insurance market, found the average payment to an injured party in cases defended by outside counsel to be $34,044 per case, compared to $29,807 per case when defended by staff counsel).

premiums or fees for other insurance-related services. Not only are increased insurance costs a threat to policyholders, but they also stand to lose professional services and communications from highly skilled staff attorneys. These lawyers deal daily with the types of concerns policyholders experience when they are sued by a third party and the attorneys know how to respond effectively to the issues presented in such situations.

Another argument to make concerns the level of comfort a policyholder may experience knowing he is represented by an employee-attorney of his insurance company. The litigation process unquestionably brings worries and anxieties for all parties involved. As a policyholder and party to a lawsuit, there is arguably a stronger sense of comfort knowing that you are dealing directly with an employee of your insurance company as opposed to an intermediary of sorts in a private attorney. Staff counsel representation allows policyholder questions and concerns to travel directly to an actual full-time employee of the insurance company. While it is true that private attorneys represent an insurance company when they defend insureds of that company, there is still a mental sense of ease for the apprehensive policyholder who knows he has immediate access to, and communication with, an employee of his insurance company. Prohibiting the use of staff counsel eliminates this small, but important, bit of relief a policyholder may otherwise benefit from during the litigation process.

A final possible effect to keep in mind is the impact *Brown* may have on jurisdictions that have yet to address the issues relating to the tripartite relationship. As the most recent decision by a state court on the issue, undecided jurisdictions will certainly look to *Brown* for possible guidance on the issues the topic presents. However, it is doubtful that other jurisdictions will find the opinion of much assistance. The lack of persuasive reasoning for *Brown*'s holding, combined with the complete absence of a discussion of contrary authority, will likely leave undecided jurisdictions searching for more enlightening guidance.

V. CONCLUSION

In closing, the practice of law is regulated to protect the public from harm. Through laws and regulations, legislatures seek to ensure the public is provided with competent, loyal attorneys who will abide by legal standards expected of those in the profession. When an insurance company uses staff counsel to represent policyholders, the company is not "practicing law." Acknowledgment of an insurer's financial interest in claims against its policyholders dates back decades, and the interest directly impacts the insurer's business affairs. The competence of staff counsel is evident in the success rates of the attorneys and insurers persistence on using and

expanding staff counsel operations. Insurer and insured interests are almost always aligned in resolving litigation and, when interests do conflict, there are safeguards in place to effectively respond to the dilemma. There is nothing unique about a staff attorney that increases risks of conflicts of interest. The perceived risks are no different, and perhaps greater, when insurers use private attorneys to represent clients. Considering the cost benefits policyholders experience through the use of staff counsel, coupled with the lack of harm resulting from the representation, the use of staff counsel is a winning solution for insurer and insured alike.

North Carolina was the first state court to attempt to provide persuasive reasoning discouraging the use of staff counsel. The opinion failed to acknowledge safeguards in place to protect the public and put too much emphasis on the policyholder's interests without considering the greater interests the insurer has at stake in liability litigation. Strike one. The Kentucky opinion was closed-minded and refused to acknowledge the modern-day, wide array of benefits resulting from the use of insurance staff counsel. Strike two. The decision in *Brown* was the third endeavor to convince the public that their needs are better served without insurance staff counsel operations. For all the reasons discussed in this Note, the attempt was unimpressive. Strike three. Challenges against insurance staff counsel have been raised and, now, played out. Faced against the undeniable support, reasoning, and benefits of insurance staff counsel operations, the challenges are outmatched. The Arkansas Supreme Court took a swing at the use of insurance staff counsel and missed. Now, issues and challenges directed at insurance staff counsel ought to be put to rest.