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Supreme Court of Texas.
Unauthorized Practice of Law Committee, Petitioner,
v.
American Home Assurance Company, Inc. and The Travelers Indemnity
Company,
Respondents.
No. 04-0138.

September 28, 2005.

Appearances:

David E. Keltner (argued), Kelly Hart & Hallman LLP, Fort Worth, TX for Unauthorized Practice of Law Committee, for petitioner.

William V. Dorsaneo III (argued), for The Travelers Indemnity Company, for respondent.

Thomas C. Wright (argued), for American Home Assurance Company Inc., for respondent.

Before:

Wallace B. Jefferson, Chief Justice, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Hathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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JUSTICE: The Court is ready to hear argument now and number 040138 Unauthorized Practice of Law Committee versus American Home Assurance Company and Travelers Indemnity Company.

CHIEF JUSTICE: May it please the Court. Mr. David Keltner ready to hear an argument for the petitioner.

ORAL ARGUMENT OF DAVID E. KELTNER ON BEHALF OF THE PETITIONER

MR. KELTNER: If you please the Court I'm here today to Mark Tyser who is a member of this Dallas Subcommittee of the unauthorized practice of law committee. Mark trials the case in Court below is also have been responsible for the fact to presentation ordeal. Your Honors I want to start from telling you what I think this case is about that the committee thinks this case is about. It's not about protection of lawyers it is for the protection of the public against the corporate practice of law by lawyers, by nature of their employment have divided loyalties. The parties pretty much agree what the issues are in this case and the relatively [inaudible], first whenever the insurance

company refuse of the employee lawyers to render legal services not to the corporation but to third parties is the unauthorized practice of law. Second whether an insurance defense lawyer, whether outside counsel or staff counsel represents one client, the policyholder, or represents two clients for policyholder and the insurance company as well. There some collateral issues to this is, well, one I think is important to know that [inaudible] and it is the issue of whether the U.P.L.C. is a government remedy and I-- a committee of this Court has immunity from legal fees that were says by the Court of Appeal not the Traver. That issue has been conceded by the insurance companies but would required change in the Eastland Court of Appeals' opinion. The file issue is whether the use of firm names did in no way give rise to the idea that a lawyer won't practicing for the insurance company who are employees of the insurance company or misleading and violate 7.01 of the professional code. Let me address the first issue because I think it is the most compelling issue before the and that is were this statutory framework in Texas permits the use by a corporation of lawyer employees to render legal services is in, again to third parties not to the corporation itself but to third parties. In our brief you'll see that we rely on three separate statutes, the most important one thing the Texas Business Corporation Act Section 2.01B that provides that a company cannot be authorized to do business as [inaudible] in the state statutes if, if one-- anyone of its purposes not the main purpose. Anyone of its purposes is, is to provide any kind of service that requires a license not a preamble to corporation. We know under Chapter 81 of the Texas Government Code what is been known by this State Bar Act that only a member of the State Bar of Texas can pro-- proceed by a license to practice law and only a person who has a license to practice law can render legal services again on behalf of the client, in fact 81.101 which both parties rely on it's very specific that the practice of providing legal services begin to a third party. On behalf of the client is what is prohibit to be known by the corporation for anyone who doesn't have low lines.

JUSTICE: Court of Appeals says that the-- to the company is not organized and insur-- an insurance company is not organized by this law. And what's your responds to that?

MR. KELTNER: Your Honor two [inaudible], first of all and I think most importantly I think the Court misread the statute. Remember what it's-- the, the statute says "Anyone of the purposes for, for, for ..."

JUSTICE: What's the company is that then?

MR. KELTNER: He plays important-- we know as a matter of law that they do provide an illegal services, we always have know that. This Court and the, the department case that we said to you is held that Business of Insurance in Texas with those standard policy is [inaudible] duty to indemnify in duty to provide a legal defense. Actually we also know this because the standardized policies which are insurance went rely on or very specific that they have a duty to indemnify and provide a legal representation. What our position is important we think the Eastland Court of Appeals [inaudible] if they duty to defend is not collateral and think about this in Texas where we have minimal liability policy in automobile cases which is a requirement, by the way to drive a car legally you only have to have this 25 thousand dollars in coverage. The duty to, to defend may [inaudible] to exceed the duty the insurance company pleading to indemnify so I just don't think that if she works. The other thing he said your Honor if, if, if, if you, you bring up the point the other thing is he says listen outside counsel and staff counsel are both

agents of the insurance company and as such they're the same and there is no meaningful distinction between the two in the statutory framework not true and I think it's legally not true by this Court's decision. In *Traver*, *State Farm versus Traver* the insurance industry particularly State Farm to-- well, let me just say the insurance industry lie before an exception for liability or outside lawyer's combat in other words the insurance company wouldn't be liable for what the insurance company's outside law ordeal in a particular issue. This Court agreed with them and correct themselves noting that an outside lawyer is independent contract or to owes a duty solely to the insurer and as a result an insurance company could not be held vicariously liable.

JUSTICE: Well, the, the possibility of conflict is but drives a lot of the analysis.

MR. KELTNER: Yeah.

JUSTICE: And so what if you have a situation with there really is any possibility of the real conflict, the reservation of rights letter has been issued and the insurer agrees to defend unqualifiedly no reservation. Where is a conflict of interest there, where's the harm?

MR. KELTNER: Your Honor two, two things and, and in first let me say you are right there could be issues in which no conflict arises. In those issues the insurance companies would have to handle their business differently then they do in this case under the ethics code, excuse me, Code Professional Responsibility 1.06 because they're not even informing the, the, the costumer or their client.

JUSTICE: Putting that issue aside ...

MR. KELTNER: Putting that aside I would think that there would be, there is less of a problem in the unauthorized practice of law. I have to admit that because in other state you would say they limit in terms of unauthorized practice of law on an ethical behavior in to issues which there can be no excess liability, in which there can be no reservations-of-rights in the line, so in that case we have a less, a less problematic situation but all of those Court your Honor, I think this is terribly important to the Court to look at this, every state that is [inaudible], every ethics opinion that is the appendix that you got from the insurance company earlier this week say one thing this is a situation that is right with conflict, right is a use word that is use to [inaudible] or to-- another one [inaudible] detention conflicts. In conflicts they are not on the surface of the situation.

JUSTICE: But about the same [inaudible] it almost this opinion say that it is allowed to some extent.

MR. KELTNER: It is allowed to some extent base on the member things sometimes its statute sometimes on the basis that declares any conflict whatsoever. It is not the authorized practice of law and this is unethical.

JUSTICE: So you be comfortable with the role that said as long as there's the reservation-of-rights letter issued then state counsel would not be the unauthorized practice.

MR. KELTNER: I don't think you can draw the line that been-- in here's one let me tell you that we would be more comfortable that what the present law is in the Eastland Court of Appeals' opinion if there were no conflict whatsoever, then the reservation-of-rights letter doesn't determine this issue because conflicts come later on in the representation, additionally the control the insurance company exercises is terribly important. In this case there are some disputed fact I have to admit but I will tell you this one thing is not disputed is about the *Stowers'* issue and how the captain would reform handle such those are not in any of the guidelines those are indeed by which

we have in which Ms. Woodruff in-- informs everybody in her operations that we are going to follow this procedures and here's what they are remember when you are in a Stowers' situation.

JUSTICE: Let's mesmerize it first.

MR. KELTNER: It can't but usually arises deep in the litigation, here's what they have to do.

JUSTICE: Mr. Keltner before you go into that, who establishes, who has established the procedure you're about to tell us about?

MR. KELTNER: This were established by the insurance company American Home.

JUSTICE: And who, who, who, who has the right to establish those procedures and the final analysis, lawyers or non lawyers?

MR. KELTNER: I think it must be the lawyer.

JUSTICE: In the, in the company, who in the company?

MR. KELTNER: In the company this was the company itself.

JUSTICE: I know but is it the Board of Directors -

MR. KELTNER: No.

JUSTICE: - legal counsel, who, who finally controls the process to the procedures that the company employ lawyers for years?

MR. KELTNER: There is no real evidence in this record of who does that.

JUSTICE: In a corporation, in a corporation?

MR. KELTNER: But in a corporation it's going to be the corporate body and anybody who can report to the framework is acting on behalf of the corporation. The reason we're so upseted with the committee about this is remember when Stowers arises when you have that right what occurs is you're in conflict already, the-- and the policyholder is going to be a potential conflict with the insurance company.

JUSTICE: How suddenly different if you have a law firm that's-- [inaudible] law firm in city of Houston that does primarily insurance defense lawyer they're not a captive company owned by the insurance company but there out their own-- been on their own forever they do primarily insurance form for-- let say reducely because I get such a big volume of work. At the end of the day that insurance carrier that still calls a shot that insurance carrier that is approve all the invoices is has come up with the litigation plan and that law firm can work outside the litigation plan without the approval of the insurance company. That's inherently the same type of conflict that you have with the captive insurance. That set aside the issue is whether or not captive insurance procurer law firm can work because it's a business corporation. Isn't it at the type of conflict?

MR. KELTNER: Your Honor I don't believe that it is for two reasons the first let me, let me answers directly to your question in two ways first of all that's not the fact as it is. The Katherine Woodruff [inaudible] on this would solely announce counsel not for the outside counsel and it's very specific about what they might do, it's very quickly of what they are and they got even notify the insurer or the insurance company that Stowers' demand is about the [inaudible] before they can write the letter, they can even tell the insured, the insured policyholder in writing about the Stowers' right. Real quickly the answer for that about the other side, you know, get the sentence for requesting, the answer to you from the insurance company says well only a plaintiff can establish Stowers right never defendant. Well, this Court's opinion in [inaudible] says that's not right and obviously it is a tool in the [inaudible]. Justice Medina can answer to the second part of your question and here's what I think the answer is I think there is a significant difference between the state counsel and outside

counsel when the ordealing with the issue of whether they've been to the will of the insurance company problems. First the insurance company submit, they admitted because when they say it with the testimony in this case is if something comes up and if there is a conflict if there is a reservation-of-rights letter and they think the serious-- nothing in that company, do you know what they do? They report it in the outside lawyer, not of the policyholder's choice.

JUSTICE: Mr. Keltner can you [inaudible].

MR. KELTNER: Thank you [inaudible] one last answer you see is here's a difference to agree in closure and there's also we cannot disappoint-- we can disappoint a law firm of what or quit a lawyer works on [inaudible], we cannot disappoint the insurance company and it plays important, the insurance company is not controlling that practice they're looking at this Court to do that that's why it's so important to see unauthorized practices.

JUSTICE: Thank you Counsel. The Court is now ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court Mr. William Dorsaneo and Tom Wright represent argument for the respondents. Mr. [inaudible] will open to present this.

ORAL ARGUMENT OF WILLIAM V. DORSANEO III ON BEHALF OF THE RESPONDENT

MR. DORSANEO: May it please the Court. I'm going to start by talking about fact that there's no error in the Court of Appeals' judgment in this case. The procedure that bolster the case is important there wasn't a trial this was a case that was litigated of the basis of doing some regardless motions. But the U.P.L.C. arguing the legal point that the use of staff counsel to represent policyholders as the unauthorized practice of law period under all circumstances and under all conditions. The insurers as saw on a summary judgment reaching the opposite conclusion nobody argue that there were fact issues that would need to be determined or anything that would be need to be trial. In the trial Court the U.P.L.C. prevails as it happens on occasion illusing summary judgment moving in the trial Court [inaudible] in the Court of Appeals it's nothing wrong with that judgment because I think as even has been conceded here perhaps not completely it's not per se the unauthorized practice of law for insurers to use staff counsel represent policyholders. Now with respect to why the Court of Appeals opinion should be, should be affirmed and why the ruling by the Court of Appeals that there is no unauthorized practice of law and no ethical violations committed. There are several points that we wish to make here today, first point is that none of the statutes expressly or implyably support the conclusion that the use of staff counsel represent policyholders as an unauthorized practice of law, there is no statutory language to that affect and come back to that in a, in a moment.

JUSTICE: So you agree with the Court must deals analysis of 201B?

MR. DORSANEO: Your Honor I-- we agree with the Court of appeals analysis but the more simple point is that policyholders are entitled to have a defense provided by liability insurance companies but the liability insurance companies provide that defense of the selection of counsel of their truancy a lawyer conduct the defense, the lawyers of practice in law. The insurance company run the insurance business stays

out liability insurance policies, the policies give them the right and the responsibility to provide the defense with providing lawyers inside counsel or outside counsel that the suggestion that the insurance companies are practicing law because their employees are practicing law is a-- is not something that, that statute requires -

JUSTICE: On how was ...

MR. DORSANEO: - it doesn't make any sense.

JUSTICE: But how is it that the phrase anyone or more but the purposes would not apply to the practice of both that ...

MR. DORSANEO: The purpose, the purpose of a liability insurance company is, is to provide insurance benefits under the policy. The primary benefit it the indemnity obligation, it is the case that the defense obligation is collateral to the probation of that indemnity obligation that doesn't mean that it's an important and that's not of the Court of Appeal said and also does not, and also does not mean that when the insurers of providing the defense and fulfillment of the policy obligation by having lawyers, by having lawyers conduct the defense that the insurers are practicing law without a lollies.

JUSTICE: It's just as, it's just as important party insured that to have, that to have a policy that says a [inaudible] suit whether there's liability or not then I want to be independent why is it that a primary purpose of the policy is well?

MR. DORSANEO: Well, I would say your Honor that that isn't a, a primary purpose but it's still collateral to the defense obligation.

JUSTICE: But isn't the most significant purpose because of there-- there's no indemnity hazards, there's no defense lesser that obligation for indemnity.

MR. DORSANEO: Post obligations are significant but if there's no indemnity obligation there's no defense obligation on it.

JUSTICE: And then who, who, who this, this lawyer servant can have two masters can -

MR. DORSANEO: Well ...

JUSTICE: - serve the client and then it be expected of protect the shares -

MR. DORSANEO: Your Honor ...

JUSTICE: Excuse me, - the protect-- being expected to protect the shares for this corporation that she work for, and there's a, there's a dual obligation there.

MR. DORSANEO: This Court precedent for Tilley forward that makes the clear point that the insurance defense counsel's obligation is to owe and to fulfil a duty of unqualified loyalty to the insurance and it comes through from Tilley through Traver and through Davalos.

JUSTICE: An employee has duties to it's employer doesn't it?

MR. DORSANEO: Yes your Honor, the employer has duties to-- an employee has duties to it's employer.

JUSTICE: Are you saying that is [inaudible] ...

MR. DORSANEO: I'm just to confess.

JUSTICE: I'm saying that it goes away when there's employers of the employee.

MR. DORSANEO: I'm saying your Honor, our brief say this, well I think the U.P.L.C. concedes this point and their [inaudible]. I'm saying that the duty of the employee goes to an employer when were talking about a professional employee does not allow the employer to interfere with the exercise of the employee's independent professional judgment. This Court-- several Court of Appeals' opinion and more importantly this Court's opinion in a Johnson versus Brorer and Preacher make it claim that the responsibility to the client transfers

responsibility to the client transfers responsibility to an employer even in the case were that means of the employer law firm with lose [inaudible] illegal business that was sent elsewhere in the interest of the client.

JUSTICE: So it sounds, it sounds like you're acknowledging that in staff counsel does have responsibilities to the employer but also responsibilities to the client. You're just saying the latter trumps the former.

MR. DORSANEO: Yes in this course opinion -

JUSTICE: And that saying they are of responsibility in both direction?

MR. DORSANEO: - this course opinion say that, now when, when it gets down to Traver this Court said the insurance company has a right to control the defense as long as there's no conflict. Davalos talks about what a conflict is it, and Mr. [inaudible] going in to that in were detail but the main point here is that the principle obligation is owe to the insurer that the case on Court of Appeals said that, that, that client is the primary client you want to think of their being to client which is not [inaudible] and in-- virtually all of the cases that are involved in our record and the circumstances in our record there, there is not a problem in serving two masters because there's is not, there isn't [inaudible].

JUSTICE O'NEILL: Well, and that's the, that's the whole point as it seems to me is at what point does that conflict disallow the sort of control that a corporation would appear to the service and we can argue of the degree of control that happens outside counsel versus staff counsel and I think there's, there's some appearance that when someone is an employee there is more of an aspect of control specially with the guidelines or some of the, the things that have been mentioned here today but if we were to try the draft a rule that said it's okay in this circumstances as long as there's no possibility of conflict but if there's a possibility of conflict it's the unauthorized practice of law. Where would you draw that line?

MR. DORSANEO: Well, [inaudible] to a question your Honor I think the possibility of, of a conflict is the reality of litigation were multiple clients are represented or were multiple interest represented. So it's not a possibility of a conflict that needs to be the standard. The standard needs to be whether there is a conflict of the difficulty isn't deciding with that needs. This Court's opinion in, in Davalos does a pretty good job saying that there's a conflict when what would be litigate than the underlying case would, would have the possibility of of affecting or appearing the indemnity obligation that's the primary point when there's-- when the cases defended under a reservation-of-rights there's not automatically a conflict there's a conflict under those circumstances when the litigation of the first case would affect the outcome of the second case in corporate case.

JUSTICE O'NEILL: So you, you would agree then that was the improper use of staff counsel?

MR. DORSANEO: Yes.

JUSTICE O'NEILL: Okay because there was some indication in the briefs that would've sometimes it might be sometimes it might not. Do you agree that if there underlying facts to determine coverage or the same that there would be a coverage.

MR. DORSANEO: Yes all I think there are more details about that I think under Texas case of all the first ruling would not have not preclusive effect in the second case for those of you take it, the main point is, the main point is if there's a coverage issue this litigated

in the underlying case then, then there would be a conflict and the -
JUSTICE: [inaudible].

MR. DORSANEO: [inaudible] some of the resolution.

JUSTICE: Even if there's a conflict is that make it the
unauthorized practice of law?

MR. DORSANEO: Yes your Honor. Thank you for asking me that. It
wouldn't make the unauthorized practice of law where acting here is
this the unauthorized practice of law standard is identical to the
difficult or complicated at least ethical questions and this Court
holding one of the title.

JUSTICE: Let me ask, let me ask you that this, one of the
standards it seems to me for trying to get an unauthorized practices
supposed the only example problem is control. Do you think there's any
more control when over staff attorneys then there's over outside
counsel, whatever that level is, whatever Traver means and whatever
professional judgment the lawyer supposed to use and wherever they owes
its duties is it different, outside, inside?

MR. DORSANEO: No your Honor so many [inaudible] to this record.

JUSTICE: It looks different.

MR. DORSANEO: Well, the U.P.L.C. says were on the basis of common
sense is different. They say that because they don't have any evidence
that is different. And there's any different standard that this Court
has announced for professional employees who work on the payroll and in
that sense and lawyers who are independent and responsible exercise
legal judgment in behalf of their clients.

JUSTICE O'NEILL: Stowers' situation is different I mean if that
outside counsel I don't think they have to get corporate permission to
send the Stowers letter to the insurer.

JUSTICE: There's also a different [inaudible] for those who
practice insurance to test I mean you can-- you have a number of
clients in the number of the insurance you represent, you're not
dependent they made in some firm that, that are really dependent on one
insurer for their livelihood but the, but the, the lawyer with a, a
good variety of insurance policy, they're not dependent on that one
employer, that one insurer for their financial business, did not, it's
some kind of different [inaudible].

MR. DORSANEO: There's some kind of difference but I, I think
they're substantially dependent and again in this record none of that's
part of it.

JUSTICE: In this [inaudible]

MR. DORSANEO: May I ans-- may I answer Justice Hecht's question
about the-- whether the the U.P.L.C. issue is completely connected with
this so called issue divide loyalty. It is not.

JUSTICE: And professor let, let me broaden that a little bit
[inaudible] December issue. Who wants put the corporation the entity to
decide for now it is talking about the lawyers once a person is license
and he's practicing attorney with good standing in Texas, is U.P.L.C.
concerned about conflicts of interest, breaches of judiciary duty any
of those matters once the lawyer is a practicing lawyer In Texas.

MR. DORSANEO: Excuse me your Honor. Our record in this case
doesn't contain all the information that are, that's contains the
record on another case but it should [inaudible] and it should not be.
But the main point with the respect to one symbol case authority that
is most significant in this jurisdiction the Hexter Title case needs to
be made. The pre existing financial interest that the liability insurer
has a conduct to the defense primarily the indemnity obligation, the
primary obligation to which the defense obligation is collateral

precludes the application of Hexter to liability insurers, insurers in this context. That, that matter resistance -

JUSTICE: Recite that professor.

MR. DORSANEO: - the fact of the collateral liability insurer have a pre existing financial interest in the outcome of the litigation base on their indemnity obligation primarily makes the use of staff counsel or any counsel conduct the defense not the unauthorized practice of law. Insurer like any corporation can use lawyers inside or outside to protect their own financial interest. Hexter and his progeny says that the Court of Appeals opinion explain that well and that's a completely independent reason and as passive reason why the-- this Court should affirm the judgment of the Eastland Court of Appeals. That the course permission of ...

JUSTICE: Let me ask you a question.

MR. DORSANEO: All right.

JUSTICE: And that's a good point how's, how is an insure-- insurance company Travers for example, that hires-- has his own internal law department, has a different for me corporation [inaudible] that is self insured for 10 billion dollars from his own lawyers, they're depending its litigation. Is there any significant different, sir?

MR. DORSANEO: Well, assuming your Honor that the lawyers working for [inaudible] reason in it's own interest and, and it support the, the client and, and the legal interest that [inaudible] has.

JUSTICE: All right. Depending its subsidiaries, but how's that any different from the unauthorized ...

MR. DORSANEO: This is fully a little bit different because you're looking after the interest of non illegal liability insurer but the policyholder, but ethics opinion at least make it plain and you don't have to be looking up for just your-- just the interest that counts as a financial interest to eliminate the unauthorized practice of law, you can be-- you could be looking after the interest of, of, of, of one party and also of someone else with a common interest again to get down to a conflict than the rules of change and that my [inaudible] counsel ...

JUSTICE O'NEILL: But, but your, your analysis would be-- it's never the unauthorized practice of law it might get in to ethical issues that can be dealt with through the ethical guidelines on a case by case basis but just fundamentally it's never unauthorized practice of law.

MR. DORSANEO: That's-- we think this Court should hold. But the ethical, the ethical question is a always, always come up in an ...

JUSTICE O'NEILL: But they would not drive the question of unauthorized practice?

MR. DORSANEO: They shouldn't, they should not but essentially our main point is that the trial court is wrong in ruling that the use of staff counsel represent policyholder is perse the unauthorized practice of law and the court, court of appeals is right and correct in that statement.

MR. WRIGHT: May it please the Court.

JUSTICE: Mr. Wright.

MR. WRIGHT: Yes.

JUSTICE: Petitioner claims citing Matthew 6:24 in the new testament that man cannot serve two masters and that's what we're asking staff counsel to be here. Do you agree ...

MR. WRIGHT: Well, when one takes scriptures at context when sometimes to be mislead. Our Lord said "You cannot serve God in

manner." Which we know that we need money, those interest are always opposing charge. The scripture says money is a root of all evil.

JUSTICE: It's just money versus money.

MR. WRIGHT: That's what this is about.

JUSTICE: [inaudible] insurer from a client for money, so I do not think that the scriptures answers his question.

MR. WRIGHT: I like to talk about three terms ...

JUSTICE: Let me ask you first ...

MR. WRIGHT: It's all right.

JUSTICE: The professor Dorsaneo says that there really is an any difference, it might look that way but that's misperception but there is a difference or we wouldn't be here after told last ground comments and that is that the insurers believe that it is sufficient [inaudible] to employ statutory at least in self context. How is that efficiency obtained if not through control?

MR. WRIGHT: Well, the efficiency is obtained by paying a lawyer on Missouri basis rather that on an hourly basis.

JUSTICE: Why is that?

MR. WRIGHT: Why is that is more efficient?

JUSTICE: Yeah.

MR. WRIGHT: Because you're taking the profit that a law firms make on charging the under lawyers [inaudible], for example, you know, 125 dollar an hour 200 what very good charge, there's a, there's a profit holder for the law firm to be able to charge more for their associates [inaudible] and what the, what employer does, the employee's lawyer whether it's a [inaudible] or an insurance company. Is they bring that in house they pay the lawyer for [inaudible] hour is, agree to about the parties but the profit on that service, there is no problem in service basically you take out the protocol law firm would've made by paying an associate a salary which is obviously lessen what you're collecting on an associates [inaudible].

JUSTICE: But it seems to me that all-- and just to take very simple to think about [inaudible] but all the profit goes to the lawyers and the salary goes to the lawyer so if that's the way of work somebody not-- somebody else that can give profit, and it seems to me that the only way in, in a pure sense to get more or more efficient work out of the lawyer is to put constraint on in that he doesn't have an another setting.

MR. WRIGHT: Well, I think our record demonstrates to the contrary that aren't a constraint in that the efficiency is obtained because the staff lawyers specialize many times in a certain kind of case and have a lot of experience and go to trial probably more frequently even [inaudible] on the outside but that's why I wanted to talk about control in Stowers on reservation-to-rights anytime [inaudible]. This record is a very strong for as about control and that's important because the U.P.L.C. convinced the trial judge to order this in junction base on the attorney being an employee of the company not base on the actual control but just over the right of control. U.P.L.C. has conceded that paid month and the [inaudible] that the law does not support that, so now they go to the facts but we got them on the facts as well, the undisputed testimony, and nobody said to the trial court there was a fact issue. Katherine Woodruff who was the American Home staff lawyer in Dallas without my tenure I was able to exercise independent judgment. The American International Company is never [inaudible] judgment. Traveler even has it's people sign a statement that says signed by [inaudible] and staff lawyer I will not permit the company to interfere in my professional judgment to my client. I'd like

to say something about the Stowers if I got more time. This is a [inaudible] issue, it was not raised in the trial court, the document is in the record of court but not raised until the court of appeals [inaudible] case in make it clear that it's very dangerous for the insurer to send the Stowers' letter, so called Stowers letter. I think we all know [inaudible] to that she have to have the plaintiff make it [inaudible] policy [inaudible] to trigger the Stowers' obligation in the first place [inaudible] says U.S.C. insured make a Stowers demand I-- please settle this case you're risking having the [inaudible] come back and collect reimbursement that you won't be able to argue that the settlement was unreasonable.

JUSTICE O'NEILL: But putting the decision on whether to Stowerize in the corporation's hands would seem to create a conflict of interest.

MR. WRIGHT: It was but again justice Dorseneo, you Stowerize when the plaintiff makes the proper demand the defense lawyer let me had to say anything.

JUSTICE O'NEILL: [inaudible] the rule on the first place.

MR. WRIGHT: Well.

JUSTICE O'NEILL: And what is the corporation require come to us before you Stowers on?

MR. WRIGHT: Well, they're talking about in the circumstance if you read the memo [inaudible] mediation and there's no written letter from complainant. It made that the man orally in mediation has been make [inaudible] would have to write the letter, they send it up to [inaudible] important to do that now in line of the [inaudible] so you don't prejudice the insured right, but this case should not turn on a statement varied in an e-mail that no witness was ask to file and no point was made about in a trial court. There-- they move for summary judgment as, as that we ...

JUSTICE O'NEILL: But just the outside-- I mean the in principally if the corporation did require corporate permission for [inaudible] before Stowers letter could be written. You would agree that would be a conflict of interest.

MR. WRIGHT: That, that would be [inaudible] case in the point out, this is not a corporate permission this is permission from a man who's a head of [inaudible] operation [inaudible] staff lawyer and done by the same oath of fidelity to be insured, so this not going up to some, you know, executive in New York this is going up to the head of the staff counsel that's do his reference to-- in this e-mail. I see my time is expire ...

JUSTICE: Just one-- just be sure no way she left all attorney fees.

MR. WRIGHT: No and I'm glad you raise it, he's smooth it's not that [inaudible] they're immune I don't know about anything [inaudible] so that's move.

JUSTICE: Thank you, Counsel.

REBUTTAL ARGUMENT OF DAVID E. KELTNER ON BEHALF OF PETITIONER

MR. KELTNER: If you please the Court let me [inaudible] Hexter, because I think Hexter answers several questions that he can raise Justice O'Neill discretion by you Justice Wainwright [inaudible] and in the issue in Hexter it leads their reading of Hexter is that if there is a shared connectoral interest the insurance company is really not

necessarily client. They say that one time the Eastland Court of Appeal [inaudible] has to pay then it says of course that, that the insurance company should be decline, but the real issue is the share connectoral interest plus the attorney form of Hexter, never was. If you look at 952 of the opinion and I must [inaudible] look at all this carefully but in 952 of the opinion the East-- the Supreme Court look at what the defense is who raise by the type of company there, remember the [inaudible] company what [inaudible] was preparing title to the costumers all of them were going to be costumers for the purchase of plan insurance. Hours it maybe days [inaudible] that close and the usual-- what we have [inaudible] letters that's really not what it was, under the statute the existing at that time 430a there was a defense that it was an affirmative defense and the court reflects that referring to the statutory defense that was saying that if he work in the corporations at rest then that would not be the unauthorized practice of law in what the heck of the court did was go and Hexter quote the advantage was go through that and say factually don't meet that in any of it because the interest that she might have in insuring good title is perceptive and also use the word contingent not by words, this Court ...

JUSTICE: And that's true she was decided in 1944?

MR. KELTNER: Yes.

JUSTICE: Two years after the committee was created and the middle of the war in the bar over whether she [inaudible] committee and and if should be directed it [inaudible] and I wonder how much we have to read [inaudible].

MR. KELTNER: Your Honor [inaudible] and it was during the, the [inaudible] of the issues regarding to unauthorized practice of law. Then it really begun in the thirties and if you look I think continue thirty, thirty [inaudible] fifties and that's an actual point but the issue was and, and, and, and I think that we do gain some [inaudible] remember Hexter is the basis of the Eastland Court of Appeals opinion, there reading of Hexter is the basis of the nationwide opinion that is also [inaudible] and the, federal court of appeals, the assertively court of appeals in the nationwide case as well.

JUSTICE: But the -

MR. KELTNER: I think the-- I'm sorry.

JUSTICE: - the insurance company does have an interest to protect here, I mean that's clear. Let me ask you the same question I ask Mr. Wright or Mr. Dorseneo, what, what would be wrong of saying it's not the unauthorized practice in just by definition it's not but to the extent [inaudible] or complex they can be dealt with through normal procedures at the state bar but it seems to me your position is always when you have an employee it is always unauthorized practice of law.

MR. KELTNER: Yes your Honor we take that position.

JUSTICE: And no other state is taken out that position, always.

MR. KELTNER: Not true Kentucky and, and [inaudible].

JUSTICE: Under [inaudible]?

MR. KELTNER: Yes, but your Honor my point to use this ...

JUSTICE: North Carolina.

MR. KELTNER: North Carolina you're actually [inaudible]. [inaudible], you bring an actual point because one of the problems with Hexter for all of us is this, Hexter really turns and if you look at 954b [inaudible] the retrieval part of the opinion turns on the issue of divided loyalties in context if what Hexter said I think and I do think just to said that Hexter does gives us a lesson on of that point now which still very well and here's what it said the whole mark of the

legal profession is absolute loyalty to a client this undivided. The United States Supreme Court is recognized that in the nine the account plan privilege and saying the difference is ...

JUSTICE: That-- and that's true as a broad statement but even outside counsel face this in this in conflict questions.

MR. KELTNER: To in extent but not to the same extent, it's Hexter said when you have a divided loyalty when you're employed by one and operate under their control and you render legal services to a third person you are dealing it on behalf of the corporation that's 954 and the ending has it's of Hexter on the basis for the agreement.

JUSTICE: So you fall back on Matthew 6:24?

MR. KELTNER: Yes, that's our Matthew [inaudible] Matthew 6:24. Listen corporate is not saying here he is the, the divided loyalties or a danger for the public, I think a concept all of us would agree with that when we get to slicing it down of our [inaudible] divided loyalties go and how much insured in Texas [inaudible] we get to two different issue which also deals with in, in-- I could sense of question so [inaudible].

JUSTICE: Again, fundamentally as I asked the closing counsel explain the, the authority that U.P.L.C. has two get involved in conflicts of interest, breaches of judiciary duty and even lawyer advertising has been briefed. Once a lawyer is licensed and had good standing it's the U.P.L.C. job over.

MR. KELTNER: Your Honor it is preventing unauthorized practice of law, and let me also say the [inaudible] bank farm here the insurance company said the brief we or task without the committee not again I'm not a member this representing committee with prevent the unauthorized practice of law but in direct answer to your question Hexter made sure, Hexter is an unauthorized practice of law it's no [inaudible] unauthorized practice of law.

JUSTICE: But, but, but the entity to the side-- the corporate entity about the lawyer.

MR. KELTNER: I'm sorry.

JUSTICE: But the entity to the side just talking about the lawyers.

MR. KELTNER: And it in act-- in terms of a lawyer if a lawyer is [inaudible] or practicing that in the situation that [inaudible] the unauthorized practice of law of a statute that is also first specifically prohibit. Justice Medina, you-- you've raised an issue to rise it from your [inaudible] and the question is it any different, yes, there's a world of difference and in fact Hexter recognize that. Somebody working inside the corporation, serving the corporation [inaudible] is not dealing in the unauthorized practice of law because they are the corporation representing the corporation. U.P.L.C. does never positive in that, set aside there're thousands of lawyer [inaudible] not thousand of lawyers in Texas not licensed they are practicing for in thousand of corporations but not [inaudible] after the public doing only work for the corporation [inaudible] that there's no official rule on that compare to the other the board or board of law examiners also doesn't question that because their [inaudible].

JUSTICE: Are you referring to the form legal consultants?

MR. KELTNER: No, I'm not, I'm not referring to that, that is a different issue [inaudible].

JUSTICE: What hundreds of lawyers practicing in the boundaries of Texas for corporation of practicing about license.

MR. KELTNER: And in in-counsel for example-- I guess they view forms by clients by [inaudible], but the-- there he is a company for

work they deploys a number of people there are [inaudible] specialist, they deal with regulatory issues.

JUSTICE: And only federal issues or you're talking about something different [inaudible]?

MR. KELTNER: [inaudible] but they're only representing corporation [inaudible], but only representing the corporation and they are because they're employees they are the corporation-- representing the corporation that's what in all [inaudible] stage [inaudible] for that practice.

JUSTICE: Thank you counsel. The cause is submitted and the Court announces the [inaudible].

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