
**E-84-19 Conflict of interest: Representing
insurance company and insured
defendant**

Question

May a lawyer retained by an insurance carrier simultaneously represent the insurance carrier and an insured defendant in a cause of action for bodily injuries sustained in an automobile accident where a claim for punitive damages is asserted?

Opinion

Generally, a lawyer retained by an insurance carrier may simultaneously represent the insurer and an insured. *See* Wisconsin Supreme Court Rule 20.23(3)(d); SCR 20.28(3). However, when representing such multiple interests, it is important that the lawyer fully disclose to the insured the lawyer's relationship to the insurer. ABA Informal Opinion 1402 (November 1977). Although a "community of interest" exists between the insurer and the insured to the point that they are "virtually one in their common interest" (ABA Formal Opinion 282 (May 1950)), the lawyer's primary duty is to the named insured. Michigan State Bar Opinion CI-876, 63 Mich. Bar J. Special Supp. 88 (May 1984); Michigan State Bar Opinion 866, *Id.* at 87. The lawyer should remain sensitive to any divergence of interests between the insured and the insurer, and at all times act in such a fashion that the insured has no basis to believe his or her interests are not fully and fairly represented. ABA Informal Opinion 1402 (November 1977); *see* ABA Informal Opinion 1370 (July 1976).

It should be noted that whether a lawyer can fairly and adequately protect the interests of the insurer and the insured depends on an analysis of each case. SCR 20.23(3)(d). In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the change of adverse effect upon his or her judgment is not unlikely. *Id.* Finally, the Ninth Circuit recently held that the mere presence of a punitive damage claim against an insured does not create as a matter of law a conflict of interest between the

insured and his or her insurer. *Zieman Mfg. Co. v. St. Paul Fire & Marine Ins. Co.*, 724 F.2d 1343 (9th Cir. 1983).