
**E-91-4 Contact with opposing party's expert
witness, E-83-13 modified**

You have requested that the Committee on Professional Ethics reconsider its Formal Opinion E-83-13. The committee's opinion follows.

Opinion

With caveats, the committee reaffirms its Formal Opinion E-83-13, relating to communications with an opposing party's expert witnesses. The issue in *Klieger v. Alby*, 125 Wis. 2d 468, 373 N.W.2d 57 (1985), was whether the trial court properly ordered that a medical authorization be amended to delete language "restricting respondents' counsel's right to confer informally with the treating neonatologists outside of the presence of the [appellant's] counsel." 125 Wis. 2d 468, 471. The court found that "'discovery' nowhere includes informal, ex parte conferences" and that, accordingly, the trial court did not have the authority under section 804.01 of the Wisconsin Statutes to order the above-quoted language deleted from the medical authorization. The court's holding, however, is more expansive: "The sole issue on this appeal is whether Wisconsin law prohibits a defendant's attorney from conducting private pretrial interviews with a plaintiff's treating physician. We hold that it does...." 125 Wis. 2d 468, 469.

Therefore, Formal Opinion E-83-13 is modified by *Klieger v. Alby's* holding regarding communications "with a plaintiff's treating physician." 125 Wis. 2d 468, 469. However, regarding ex parte communications with expert witnesses whose communications with a party or a party's counsel would not be protected by a similar legal privilege, the committee reaffirms E-83-13 but cautions lawyers making these communications to "first explain his or her role in the matter and then exercise reasonable care to refrain from seeking privileged information," if any privilege applies. Committee on Professional Ethics, Formal Opinion E-91-1. 64 Wis. Law. 60 (June 1991). *See also* SCR 20:4.3.