
Wisconsin Formal Ethics Opinion E-99-1: Ethical Risks Inherent in Representing Both Insurers and Insureds

Professional ethics opinion E-99-1 considers outside auditors review of attorneys bills for services and restrictive guidelines by an insurer on providing a legal defense to an insured.

When a lawyer is retained by an insurer to represent an insured, what must the lawyer do when instructed by the insurer to submit detailed bills for services to an outside audit firm for review? How must a lawyer respond to restrictive guidelines imposed by an insurer on the manner in which the lawyer may provide a defense for an insured?

Lawyers Who Represent Insurers and Insureds

Wisconsin lawyers retained by insurers under a policy of insurance typically represent both the insurer and insured in the defense of claims. Counsel are typically selected by the insurer and regularly report to the insurers on the progress of cases and may, but do not always, report to the insured. These counsel regularly consult with the insurers regarding settlement and obtain settlement authority from insurers. Practices vary regarding consultation with insureds, unless insureds have liability exposure beyond the coverage of their insurance policies.

Counsel who regularly represent insureds usually have ongoing attorney-client relationships and economic ties to those insurers. Counsel fees are paid by the insurer. Many such counsel represent insurers in multiple matters and depend upon those insurers for selection and assignment to cases on an ongoing basis.

In cases in which they represent both insurers and insureds, counsel must be alert to ethical risks that are inherent in such circumstances.

First, conflicts may arise between the interests of insurers and insureds. In such cases, it is unlikely a lawyer can continue to represent both without an informed mutual written waiver of the conflict.

Second, some confidential information relating to one party may not be information that counsel can share with the other represented party. One example would be information a lawyer learns from or about the insured indicating the prospect of a defense to coverage. As valuable as this information may be to the insurer, a lawyer cannot reveal it and, in fact, must, as the lawyer for the insured, prevent the insurer from uncovering this knowledge to the extent permitted by law.

Third, when representing two clients in the same matter, either client may suggest or demand that the lawyer act or refrain from acting in a way that is inimical to the interests of the other client. In such a circumstance, the lawyer must persuade that client to withdraw the suggestion or demand to the extent consistent with that client's interests, or the lawyer must withdraw from the

representation. A lawyer cannot represent two clients when the representation of one client requires the lawyer to act averse to the interests of the other client. When a lawyer withdraws from representing one client, whether the lawyer may continue to represent the remaining client is governed by [SCR 20:1.9](#).

The Use of Outside Auditors by Insurers

The Professional Ethics Committee has received several inquiries from lawyers regarding the insurers who require them to submit their detailed bills for services to outside auditors.

These outside auditors are private contractors, hired by the management of insurance companies to review and act on the detail of defense lawyers' bills. The audits are intended to identify ways to reduce defense costs of cases. The auditors have no apparent expertise in rendering professional legal services or in assuring compliance with the Rules of Professional Conduct. Depending upon the particular contract between the outside audit firm and the insurer, the audit company may be authorized to direct how the defense should be conducted to reduce costs, and these directions to defense counsel may relate to decisions about the nature of the professional services that are to be provided to insureds. The auditors also may have authority to disallow charges for legal services that the auditor deems to be inappropriate.

The information in a lawyer's bill for services may contain confidential information. *See* [SCR 20:1.6\(a\)](#). Each client represented in a joint representation is entitled to review the lawyer's bill. However, lawyers representing joint clients must always weigh the consequences of providing one or both of their clients with confidential information. A lawyer may not use confidential information in a way that may be detrimental to the interests of a client without the client's informed consent. *See* [SCR 20:1.8\(b\)](#). One client who receives confidential information may communicate it to a third person, may use it for his or her own benefit, or may cause it to be used to the detriment of the other client. Lawyers must protect the confidentiality interests of each of their clients. This requires them to consider a range of strategies including joint client agreements to limit the release of certain information to certain clients, consulting with the joint clients about the use and distribution of confidential information, joint client agreements regarding the use and/or outside distribution of confidential information, redacting portions of a document distributed to particular clients, or, in some instances withdrawing from representation when the lawyer cannot meet conflicting obligations to the joint clients. *See* [SCR 20:1.7\(b\)](#) and [SCR 20:1.16\(a\)\(1\)](#).

A lawyer should not submit a bill for services that contains confidential information to an outside audit firm at the request of the insurer without the consent of the insured. Information in the lawyer's bill for services could be used to the detriment of the insured. Release of such confidential information requires each client's consent, after consultation. Practically, it may be difficult, if not impossible, to keep such bills from auditors. Counsel must send their bills to the insurer, who may send the bills to an auditor themselves. Counsel who, in particular instances, are concerned that the transmission of their bills to others may breach client confidences should consider using drafting protocols that assure their billing narratives do not reveal confidential information.

The ability of the outside audit firm, acting on behalf of the insurer, to unilaterally disallow or reduce fees incurred in the defense of the insured presents a risk of interference with the lawyer's independent professional judgment on behalf of the client. When such a risk is present, the client should be informed. *See* [SCR 20:1.4](#). A lawyer may not permit a person paying the lawyer's fee on behalf of the client to directly regulate the lawyer's professional judgment on behalf of the client. *See* [SCR 20:1.8\(f\)\(2\)](#) and [SCR 20:5.4\(c\)](#). Lawyers who find themselves in circumstances in which such monetary or other influences interfere with the exercise of their independent professional judgment or advice to the client, cannot represent those clients in conformity with requirements of the Rules of Professional Conduct. The rules prohibit lawyers from entering into such a representation and require a lawyer to immediately withdraw if such interference cannot be abated. *See* [SCR 20:1.16\(a\)\(1\)](#).

Generally, lawyers may look to their insured clients to waive obligations of confidentiality. However, in seeking such consent, a lawyer should not rely on the client's implied authorization to disclose "in order to carry out the representation." Such consent must be express and only after consultation with the client. *See* [SCR 20:1.6\(a\)](#). While not required, it is generally advisable that such consent be in writing. Likewise, lawyers should exercise caution that such waivers by the client not constitute a waiver of the attorney-client privilege or the protections afforded work product doctrine.

The committee's opinion relating to the release of client bills to outside auditors is consistent with opinions of 21 other state bar ethics committee opinions issued on this topic as of the date of this opinion.

Insurer Restrictions and Limitations on the Representation of Insureds

Insurers may manage the defense of claims. They usually have contracted for this right in the insurance policies issued to their insureds. But not every limitation or restriction imposed by an insurer on the defense of a case is consistent with a lawyer's duty under the Rules of Professional Conduct. Lawyers, however, cannot accept restrictions or limitations on the defense of claims that are so financially or otherwise onerous that they would prevent lawyers from satisfying their ethical obligations to their clients. *See* [SCR 20:1.1](#), [SCR 20:1.3](#), [SCR 20:1.4](#), [SCR 20:1.7](#). Lawyers may not accept restrictions that interfere with their independent professional judgment on behalf of the insured/client. *See* [SCR 20:2.1](#). A lawyer may not enter into or continue in a contract with an insurer that would be so restrictive. *See* [SCR 20:1.8\(f\)\(2\)](#), [SCR 20:5.4\(c\)](#) and [SCR 20:1.16\(a\)\(1\)](#). Each lawyer must make an independent professional judgment about whether restrictions or limitations imposed by such a contract raise such ethical limitations.