

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-331
Issued: September 1988

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: A liability insurance carrier instructs defense counsel to conduct or limit a defense so as to minimize the insurer's costs. Can such carrier imposed limitations give rise to an ethical problem?

Answer: Yes.

References: DRs 5-101, 5-105, 5-107, 6-101 and 7-101; Bevevino v. Saydjari, 76 F.R.D. 88 (S.D.N.Y. 1977), *aff'd*, 574 F.2d 676 (2d Cir. 1978).

OPINION

Liability insurers have always been concerned about expenses and attorney fees for which they are responsible pursuant to the terms of the standard liability policy. It is apparent that the insurer has a legitimate interest in keeping such costs down. Indeed, some commentators have advanced the generalization that carrier imposed limitations are not a problem so long as the claims do not exceed the policy limits. *Cf. Hutcheson*, Recurring Conflict Problems Facing Insurance Defense Lawyers, in *Conflicts of Interest in Insurance Practice* 41 (DRI Monograph No. 5, 1971). On the other hand, several insurance defense counsel have sought guidance from the Committee because of the imposition of extraordinary limitations that certain liability insurers have sought to impose upon them. We must take issue with the above mentioned generalization, or any generalization, to the following extent.

A restricted budget for the defense can pose an ethical dilemma for defense counsel. This is so because the insured is defense counsel's client. The insured is entitled to competent and zealous representation, and a defense that is not adversely affected by prohibited conflicts of interest. At some point, carrier imposed restrictions may threaten counsel's ability to provide such representation and impact on the lawyer's ability to bring to bear his independent professional judgment on behalf of the insured. Occasions may arise in which the insurer's budgetary restrictions will justify, or require, withdrawal.

The case of Bevevino v. Saydjari, 76 F.R.D. 88 (S.D.N.Y. 1977) presents an example of the consequences of overly restrictive defense strategies imposed by an insurance carrier. In that case defense counsel were full time employees of the carrier (a

practice prohibited in Kentucky not only because of inherent conflicts of interest, but also because of our rules against “corporate” and unauthorized practice of law). The insured have been devastated at trial because of inadequate pretrial preparation, because he had not been prepared for his deposition, and because certain testimony was not presented because of cost considerations.

The trial judge observed:

Since the carrier is in the business of defending lawsuits, it must be presumed to know the necessary ingredients of a proper defense. We therefore can only conclude that the above described neglect was a function of the carrier’s deliberate decision not to spend enough money to have the lawsuit properly defended Presumably it has concluded that by taking all its assumed risks as a package it saves money in the end by skimping on preparation costs and hoping for settlements.

Although these observations were made in passing on a motion for judgment n.o.v., the court could not resist giving its opinion on the propriety of legal action against the carrier and counsel. *Id.* at 94 n.11.

We issue this opinion only to advise of ethical considerations that may arise in this context. We are not suggesting that counsel has carte blanche to needlessly run up a bill. Such conduct would be just as reprehensible as yielding professional control of his or her work to an adjuster or claims manager. Nor are we suggesting that costs and expenses are not a legitimate concern of the insurer. Conflicts are not inevitable, or irreconcilable. Presumably these matters can be resolved amicably and responsibly in the great majority of cases.

We only wish to emphasize that the insured is defense counsel’s client, and that counsel owes professional obligations to his or her client that flow from the attorney-client relationship and are not bounded by the “hardboiled commercial” relationship between the insured and the insurer. *Cf. Moritz v. Medical Protective Co.*, 428 F.Supp. 865, 872 (W.D. Wis. 1977).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.