

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-340
Issued: July 1990

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a Kentucky Attorney who is selected by an insurer to defend its insured comply with the insurer's demand that claims personnel or other representatives sit in on the attorney-client interview?

Answer: Qualified no.

References: Rules 1.7 Comment (10) and 1.8(f).

OPINION

The Rules take the view that the insured is the lawyer's client. It follows that the lawyer must (1) exercise his or her independent professional judgment on behalf of the insured and (2) guard against disclosure of information relating to the representation of the client (including the confidences and secrets of the client), which would be adverse to the interests of the client. Rules 1.8(f) (3) and 1.6.

An insurer may have every right to conduct such investigation as it sees fit, and may deal with its insured in a manner permitted by the terms of the insurance contract. On the other hand, it is not necessarily entitled to the assistance of the lawyer representing the insured. Defense counsel's relationship with the insured is not governed by the insured-insurer contract, but is instead governed by the Rules of Professional Conduct. Discussions with a client may reveal facts affecting coverage (may suggest coverage defenses). Counsel should resist any 'demand' that might put the insured at risk. It is also clear that any intrusion into the attorney/client sanctum should be permitted only with the informed consent of the client.

It should be remembered that defense counsel is employed to defend the insured, not to develop or assist claims personnel in developing coverage defenses. ABA Informal Op. 1476 (1981); R. Mallen & J. Smith, Legal Malpractice (3d ed. 1989), sections 23.1 et. seq. Counsel should avoid any appearance that he or she is participating in inquiries along these lines. Accordingly, while there are undoubtedly instances in which representatives of the insurer may be present during attorney-client discussions, and while it would overstate the case to suggest that claims personnel may never be present at client interviews and the like, we must emphasize that counsel has an obligation to resist "demands" that are incompatible with the interests of the insured client and inconsistent with Rule 1.8(f).

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.