

MINUTES

COMMITTEE: Ethics Committee

DATE: April 8, 1999

7. CHAPTERS 3, 5 & 6 & 12: INSURER LITIGATION HANDLING AND BILLING GUIDELINES

The Committee considered the propriety of lawyers following certain proposed conduct and billing guidelines developed by an insurance company for lawyers defending claims by third parties. The guidelines require lawyers to obtain the permission of the insurer before performing certain tasks in the litigation or before incurring certain expenses associated with the litigation. The guidelines also stipulate that the insurer will only pay for the performance of some tasks in litigation at the billing rate of a paralegal. A further provision requires lawyers to submit their accounts to external auditors engaged by the insurer to review the accounts.

The Committee had the following views on these issues:

Potential to interfere in counsel's professional judgement

The Committee was of the view that it is proper for a lawyer to follow instructions from an insurer regarding the conduct of litigation, provided those instructions do not preclude the lawyer from undertaking work or incurring expense that the lawyer reasonably believes is necessary to defend the claim against the insured. A lawyer should decline to accept a matter where the insurer's instructions do not permit the lawyer to provide adequate representation and should withdraw from matters already undertaken when such instructions are received.

Use of non-lawyers

A lawyer may accept instructions from an insurer regarding the use of non-lawyer staff in a matter provided the instructions are not contrary to the lawyer's professional obligations regarding the use of non-lawyer staff and do not compromise the lawyer's ability to provide adequate representation.

Direction to lawyer from insurer to forward account to third party auditor

The Committee agreed to adjourn discussion of this issue to the next meeting to enable further consideration to be given to it.

COMMITTEE: Ethics Committee

DATE: May 6, 1999

6. CHAPTER 6: WHETHER LAWYER MAY ACCEPT INSURER INSTRUCTIONS TO SEND CONFIDENTIAL INFORMATION TO THIRD PARTY AUDITOR

The Committee considered whether it is proper for lawyers defending a claim for damages pursuant to a policy of insurance, in the absence of the informed consent of the insured, to accept insurer instructions to submit their accounts to a third party auditor engaged by the insurer to review the reasonableness of the accounts. Lawyers in these circumstances act for both the insured and the insurer and, for the purposes of this opinion, the Committee assumed that the accounts that would be forwarded to the auditor would contain confidential information relevant to the matters on which the lawyers are acting.

It was the view of the Committee that a lawyer who receives such instructions in these circumstances may forward accounts to the auditor without the informed consent of the insured provided:

- (a) it would be proper for the lawyer to provide the information to the insurer itself, and
- (b) the insurer confirms to the lawyer in writing that:
 - i) the auditor's services are required in order to facilitate the provision of legal services in the litigation,
 - ii) the arrangements in place with the auditor protect the confidentiality of the information the lawyer provides, and
 - iii) the insurer will notify the lawyer if condition i or ii above ceases to be true.