



Lowenstein Sandler's "In the Know" Series Video 41

Who Controls the Defense? The Case for Independent Counsel

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Heather Weaver:

Hi. I'm Heather Weaver, partner in Lowenstein Sandler's [Insurance Recovery Group](#). Welcome to "[In the Know](#)."

Policyholders often ask me, "Can I choose my own counsel to defend me? And will the insurer pay for it?" If defense strategy today has the potential to shape coverage outcomes tomorrow through how conduct is characterized, how damages are framed, or how facts are developed, then independent counsel becomes an important issue to evaluate.

There is also a broader principle at play: when an insurer funds a defense while preserving the ability to later dispute coverage, the defense cannot be controlled in a way that prejudices the insured's interests without the insured's consent. Where a genuine conflict exists, continuing to control the defense while reserving coverage rights raises real fairness and loyalty concerns. In those situations, the more appropriate course is often for the insurer to select counsel with the insurer reimbursing reasonable defense costs.

Fees are often where these discussions become most challenging. Rates negotiated for efficiency and predictability don't always align with market rates for complex or high stakes litigation. Addressing expectations early during underwriting or renewal, and considering tools like blended rates, staffing plans, or agreed budgets can help avoid disputes later on.

Billing guidelines raise similar considerations. They can be useful for transparency and cost management, but concerns arise when they begin to influence litigation strategy, such as limiting discovery, motion practice, or staffing in ways that affect how the case is actually defended. From a policyholder's perspective, the key question is whether guidelines are supporting an effective defense or quietly steering it toward coverage outcomes. Raising those concerns early and framing them around professional judgment and case needs tends to be the most constructive approach.

Information flow is another key piece of the puzzle. Once independent counsel is involved, insurers appropriately expect insight into how the case is progressing. At the same time, policyholders need to be thoughtful about sharing coverage-sensitive analysis, candid assessments or strategic discussions that could later take on a different significance in a coverage dispute. Clear expectations around reporting help manage those risks on both sides.

The bottom line is this: independent counsel is not about mistrust; it's about preserving the integrity of the defense when coverage is uncertain, and ensuring that control over the defense aligns with loyalty to the insured. Thinking about these issues early and addressing them collaboratively can preserve flexibility and avoid surprises later.

Thank you for joining us, and we look forward to seeing you next time on ["In the Know."](#)