

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 95-2

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments to DR 5-103(B), eff. Jun. 14, 1999.]

SYLLABUS: A law firm representing an insurer/third party administrator of group health benefit plans may enter a fixed flat fee agreement with the insurer/third party administrator whereby the law firm would identify and pursue subrogation matters and receive compensation for its services at a fixed flat fee based upon the number of enrollees in a group health benefits plan. However, the fixed flat fee must be reasonable, the expenses of litigation must be borne by the client in addition to the fixed flat fee, and the attorney's performance must be competent and diligent.

OPINION: This opinion addresses fixed flat fees as a method of attorney compensation. A law firm provides legal representation to a company that is both a third party administrator for employer groups that self-fund employee health benefit plans and an insurer for employer groups that purchase insurance for employee health care coverage. The law firm identifies subrogation claims and litigates subrogation matters on behalf of the insurer/third party administrator. The question is set forth below.

Is it proper for a law firm representing an insurer/third party administrator of group health benefit plans to enter a fixed flat fee agreement with the insurer/third party administrator whereby the law firm would identify and pursue subrogation matters and receive compensation for its services at a fixed flat fee based upon the number of enrollees in a group health benefits plan?

The Ohio Code of Professional Responsibility governs fees for legal services through DR 2-106. The basic requirement of the rule is that a lawyer's fee may not be illegal or clearly excessive.

DR 2-106 (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

The Code sets "reasonableness" as a standard in determining when fees are excessive and provides factors to consider in determining reasonableness.

DR 2-106 (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

Since the Code refers to fixed fees as a factor to consider in determining reasonableness, it can be assumed that the Code does not prohibit fixed fees. The most common type of fixed fee is the fixed hourly fee, based upon the hours of work performed. Increasingly, fixed flat fees, not adjusted to the time involved, are emerging as an alternative type of billing. See e.g., ABA/BNA Lawyers' Manual on Professional Conduct, 41:304-318 (2/23/94). Nevertheless, fixed flat fees, not adjusted to the time involved, are not a novel concept. As early as 1939, an ABA committee advised that it is proper for a lawyer "[t]o permit a client, or a prospective or potential

client, such as a bank, insurance company, loan association, or any other concern or individual, to decide the amount of compensation to be charged by the lawyer for legal services rendered, or to be rendered, by fixing a rate of fees which the lawyer must adhere to, and which is not adjusted according to the amount of time and effort involved, and the other factors referred to in 'Canon 12'." ABA, Formal Op. 190 (1939). In 1972, an ABA committee advised that "[n]o reasonable method of fixing fees which takes into account the factors enumerated in DR 2-106 (B) is proscribed by the Code of Professional Responsibility." ABA, Formal Op. 329 (1972). In 1977, an ABA committee advised "[t]here is nothing improper in a lawyer charging and being paid a fixed fee in advance for legal work on tax matters or litigation before the Tax Court if the client and the lawyer choose to do so and it is fully understood that the fixed fee embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted." ABA, Informal Op. 1389 (1977))

One type of fixed flat fee agreement is a fixed flat fee per case. Several states have opined that it is ethical for an attorney to enter this type of fee arrangement. In Oregon, an attorney may enter an agreement with an insurer to provide legal services to insureds to be compensated at a flat rate per case regardless of the amount of work required. Oregon State Bar Ass'n, Formal Op. 1991-98. In Iowa, the negotiation of a fixed fee agreement is not per se improper, if the professional services are specifically stated and circumscribed as to quantity in general and legal services required, provided the expenses of litigation are the responsibility of the client over and above the fixed fee. Iowa State Bar Association, Op.93-2 (1993). In Wisconsin, an attorney may enter agreement with an insurance company to act as defense counsel in personal injury claim matters for a set fee in each case up to the time of trial. State Bar of Wisconsin, Op. E-83-15 (1983). In New Hampshire, it is not per se improper for an attorney to enter into an agreement with an insurance company to undertake the defense of a number of insureds with payment of a fixed fee per case. New Hampshire Bar Ass'n, Formal Op. 1990-91/5 (1991).

Another type of fixed fee is a fixed flat fee set on a per capita basis. This is the type of fixed fee sometimes used by prepaid group legal services plans. For example, a lawyer or law firm is paid a flat fixed fee per month or year based upon the number of potential clients in a union or consumer group that may make a claim or need other legal services.

Certain fixed flat fees do not receive the approval of all ethics committees. In Kentucky, a lawyer may not enter into a contract with a liability insurer in which the lawyer or law firm agrees to do all of the insurer's defense work of an insured for a set fee, regardless of whether the fee is a fixed sum for taking all of the cases in a geographic area, or whether the fixed fee is a maximum amount payable for each case referred to the lawyer by the insurer. Kentucky Bar Ass'n, E-368 (1994). The Kentucky committee identified several concerns: the insurer promises the insured a defense in a contract of insurance, but limits its undertaking in a side contract with the insured's lawyer—a contract to which the insured is not a party; the lawyer stands to gain by limiting services. *Id.* This Board does not have before it the question of a fixed flat fee agreement when a third party is paying for the defense of another, and thus it is not addressed at this time.

In the present inquiry, the proposed fixed flat fee is paid by the client to the attorney, based upon the number of enrollees in a health benefits group administered or insured by the client. It is a fixed flat fee set upon a per capita basis. Another approach would have been to base the fixed flat fee upon the number of subrogation claims identified or the number of subrogation matters pursued. Nevertheless, whatever approach is chosen, the determination of the propriety of the fixed flat fee agreement would be based upon the factors described below.

First, a fixed flat fee is subject to the restriction in DR 2-106 (A) that it not be excessive. Although a fixed flat fee is not directly adjusted to the amount of time and effort involved, it would not be per se excessive. In fact, it is unlikely, that an insurer/third party administrator would agree to an excessive fixed fee. Thus, within the context of this opinion, the Board explores the concern of excessive fees no further.

Second, a fixed fee for legal services cannot be used to circumvent DR 5-103 (B), the rule that requires clients to remain liable for expenses of litigation.

DR 5-103 (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his [her] client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

In compliance with DR 5-103(B), a client who pays a fixed flat fee for legal services, must also pay the actual expenses of litigation. The ethical basis of this rule has been described in prior opinions -to prevent an attorney from acquiring an interest in litigation that might interfere with the exercise of independent professional judgment, such as an attorney's settlement of a case prematurely to guarantee the recovery of expenses. See Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 87-001 (1987), Op. 94-5 (1994).

Third, a fixed flat fee agreement must not limit an attorney's duties of competent and zealous representation to each and every client under DR 6-101 and 7-101. Attorneys who enter fixed fee agreements, must remain mindful of their duty to represent clients competently and zealously. They should not enter fee agreements that provide compensation so inadequate as to denigrate the profession and have a deterrent effect upon the quality of work that can be performed.

In conclusion, this Board advises that a law firm representing an insurer/third party administrator of group health benefit plans may enter a fixed flat fee agreement with the insurer/third party administrator whereby the law firm would identify and pursue subrogation matters and receive compensation for its services at a fixed flat fee based upon the number of enrollees in a group health benefits plan. However, the fixed flat fee must be reasonable, the expenses of litigation must be borne by the client in addition to the fixed flat fee, and the attorney's performance must be competent and diligent.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, non-binding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.