

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 97-7

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: An attorney or law firm may enter into a contract with a liability insurer in which the attorney or law firm agrees to do all or a portion of the insurer's defense work for a fixed flat fee. However, the fee agreement must provide reasonable and adequate compensation; it must not be excessive or so inadequate that it compromises the attorney's professional obligations as a competent and zealous advocate. The fee agreement must not adversely affect the attorney's independent professional judgment; the attorney's representation must be competent, zealous, and diligent; and the expenses of litigation, in addition to the flat fee, must ultimately be borne by the insurer.

OPINION: This opinion addresses whether an attorney or law firm may, in accordance with the Ohio Code of Professional Responsibility, accept a fixed flat fee as compensation from a liability insurer for performing all or a portion of the insurer's defense work. The attorney or law firm would enter into the agreement and receive a flat fee from the liability insurer regardless of the amount of time or effort the attorney or law firm committed to representing the insureds. The question is set forth as follows:

Is it proper for an attorney or law firm to enter into a contract with a liability insurer in which the attorney or law firm agrees to do all or a portion of the insurer's defense work for a fixed flat fee?

DR 2-106 of the Ohio Code of Professional Responsibility sets forth the necessary requirements concerning all fee agreements for legal services.

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

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.

DR 2-106(B)(8) expressly recognizes fixed fees as one type of legal fee. Fixed flat fees are set in advance of representation. Fixed fees reflect the factors above, yet are independent of the actual amount of time or effort expended on the representation.

The use of fixed flat fees has been considered by the Board several times. Fixed flat fee agreements in criminal defense representation were addressed by the Board in Opinion 96-4. Fixed flat fee agreements between a law firm and an insurer/third party administrator of group health benefit plans for pursuing subrogation matters with compensation based upon the number of enrollees in a group health benefits plan were addressed in Opinion 95-2. In both contexts, the use of fixed flat fees was found ethically proper within the boundaries set forth. *See* Ohio SupCt., Bd of Comm'rs on Grievances and Discipline, Op. 96-4 (1996) and Op. 95-2 (1995).

At issue here, is the use of a fixed flat fee agreement wherein an insurer is paying an attorney or law firm for the defense of another, the insured. The Board begins by noting that other states have considered the use of flat fee agreements in insurance defense

representation. Some states allow attorneys to enter into agreements to represent insureds for a flat fee per case. *See e.g.*, New Hampshire Bar Ass'n, Formal Op. 1990-91/5 (1991); Oregon State Bar, Op. 1991-98 (1991); and State Bar of Wisconsin, Op. E-83-15 (1983). These states also added caveats. The New Hampshire committee suggested that the insurer may owe the insured a separate disclosure if the material possibility exists that the agreement may have a financial impact upon the insured. The New Hampshire committee also advised that the lawyer retains the obligation of keeping the client informed and of representing the client with promptness and diligence. The New Hampshire committee further stated that some circumstances would prevent the lawyer from withdrawing even where time spent was disproportionate to the fixed fee. The Oregon committee cautioned that the attorney owes the same duty to flat fee clients as to other clients and that the fee cannot be so low as to compel the conclusion that the insurer is seeking to shirk its duties to provide a competent defense. The Wisconsin committee cautioned that the fee must be reasonable and that the lawyer owes the primary duty to the insured. *Id.*

One state, Kentucky, does not allow attorneys to enter into agreements to do all of the insurer's defense work for a set fee. The Kentucky ethics committee objected to such arrangement between the lawyer and the insurer made without the consent of the insured because it gave rise to the following ethical concerns. The insurer promises the insured a defense in a contract with the insured, while limiting the extent of the undertaking in a side contract with the lawyer. The lawyer is placed by the insurer in a position of conflict vis-a-vis the insured. The lawyer, to some extent, becomes the insurer, and stands to gain by limiting the services rendered. Although similar conflicts are inherent in other lawyer-client relationships, the insured client has no control over the choices made. *See* Kentucky Bar Ass'n, Op. E-368 (1994). That advisory opinion was challenged in court but was approved and adopted by the Supreme Court of Kentucky. *American Insurance Ass'n v. Kentucky Bar Ass'n*, 917 S.W. 2d 568 (Ky. 1996).

In Ohio, fixed flat fees must comport with the requirements of the Code of Professional Responsibility. Under DR 2-106, legal fees must not be excessive regardless of the form. Herein, the main concern is not excessiveness. The risk that an attorney or law firm would collect an excessive fee from an insurer is slight because of the experience and bargaining power of insurance companies in this area. It is unlikely that an insurer would set or agree to a flat fee that was excessive. Presumably, insurance companies enter into flat fee agreements with legal counsel in order to control the costs involved in defending insureds.

The more pertinent concern is that the flat fee agreements between an attorney or law firm and a liability insurer will provide insufficient and inadequate compensation to the attorney or law firm. When a flat fee agreement between an attorney or law firm and a liability insurer provides insufficient compensation in regards to the time and effort spent on the representation, ethical problems emerge.

First, a fixed flat fee agreement between an attorney or law firm and a liability insurer must not provide compensation so inadequate as to affect an attorney's duties under DR 5-107(B). This rule governs an attorney's duty to exercise independent professional judgment.

DR 5-107(B) A lawyer shall not permit a person who recommends, employs, or pays him [her] to render legal services for another to direct or regulate his [her] professional judgment in rendering such services.

Attorneys must exercise independent professional judgment on behalf of the client and not be directed or regulated by the person who ultimately compensates the attorney for the legal services. When an insurance company hires an attorney or law firm to represent an insured, the attorney's primary duty is to the insured, not the insurance company. *See e.g., State Bar of Wisconsin, Op. E-83-15 (1983).*

If a liability insurer pays an attorney or law firm a fixed flat fee which is insufficient in regards to the time and effort spent on the defense work, there is a risk that the attorney's interest in the matter and his or her professional judgment on behalf of the insured may be compromised by the insufficient compensation paid by the liability insurer. An attorney or law firm cannot enter into such an agreement.

If an attorney or law firm and an insurer enter into a fixed flat fee agreement which provides insufficient compensation for representing an insured, the attorney may feel a sense of responsibility to the insurer and not the insured. Attorneys are warned of this risk in EC 5-22.

EC 5-22. Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he [she] is compensated directly by his [her] client and his [her] professional work is exclusively with his [her] client. On the other hand, if a lawyer is compensated from a source other than his [her] client, he [she] may feel a sense of responsibility to someone other than his [her] client.

In order to prevent an attorney's independent professional judgment and sense of responsibility from being compromised when a liability insurer pays the attorney or law firm a flat fee in return for doing the defense work, the flat fee must be reasonable and adequate, as opposed to insufficient. As this Board stated in Opinion 95-2, an attorney "should not enter into fee agreements that provided compensation so inadequate as to denigrate the profession and have a deterrent effect upon the quality of work that can be performed." Ohio SupCt, Bd Comm'rs Griev & Disc, Op. 95-2 (1995).

Second, under DR 5-101(A) a fixed flat fee agreement between an attorney or law firm and a liability insurer must not provide compensation so inadequate the attorney's

personal, business, and financial interests will affect the attorney's independent professional judgment on behalf of the client.

DR 5-101(A)(1) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests.

When a flat fee is so inadequate that the attorney cannot afford to devote his time, attention, and legal skill to the matter, the rule will be violated. If the attorney's need to make a living to support himself or herself, to support his or her family, and to meet the payroll necessary for his or her office staff is compromised by a fee contract that provides inadequate compensation, then the attorney's attention most certainly will be devoted to other representations that provide compensation commensurate with efforts. When the attorney's attention turns away from the flat fee representation, the attorney's professional judgment on behalf of that client has been compromised.

Third, a fixed flat fee agreement between an attorney or law firm and a liability insurer must not provide compensation so inadequate as to affect the attorney's obligations under DR 6-101 and DR 7-101. These rules govern an attorney's duty to represent every client competently, zealously, and diligently. Regardless of the type of fee contract, an attorney retains an obligation to represent the insured with reasonable promptness and diligence. When a fixed flat fee is insufficient in regards to the effort expended in providing the representation, then there is a risk that the attorney may not represent the client to his or her fullest ability. An attorney or law firm cannot enter into such an agreement under the disciplinary rules.

Finally, the flat fee agreement between the attorney or law firm and the liability insurer must not circumvent the client's obligations under DR 5-103(B), a rule that governs who is responsible for the 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 addition to paying the fixed flat fee, the insurer must remain ultimately liable for paying the actual expenses of litigation in all circumstances. This prevents an attorney from acquiring a personal financial interest in the result of the litigation which might adversely affect the attorney's exercise of independent professional judgment. *See* Ohio Sup.Ct, Bd of Comm'rs on Grievances & Discipline, Op. 95-2 (1995). As pointed out by the Kentucky advisory committee, if an attorney is ultimately responsible for the expenses

of litigation, then a situation is created where the attorney “stands to gain by limiting the services rendered to the client.” Kentucky Bar Ass’n, Op. E-368 (1994).

For further discussions of potential conflicts of interest in regards to flat fee agreements *see*, Ronald Arena & Dan L. Goldwasser, *Ethical Issues Raised By Litigation Cost-Cutting Strategies*, 550 PLI/Lit 147 (1996) and Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 Geo. J. Legal Ethics 475 (1996).

In conclusion, this Board advises that an attorney or law firm may enter into a contract with a liability insurer in which the attorney or law firm agrees to do all or a portion of the insurer’s defense work for a fixed flat fee. However, the fee agreement must provide reasonable and adequate compensation; it must not be excessive or so inadequate that it compromises the attorney’s professional obligations as a competent and zealous advocate. The fee agreement must not adversely affect the attorney’s independent professional judgment; the attorney’s representation must be competent, zealous, and diligent; and the expenses of litigation, in addition to the flat fee, must ultimately be borne by the insurer.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding 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.