

AMENDED ¹
L.E.I. 98-01

**FIXED OR "FLAT" FEE ARRANGEMENTS
FOR INSURANCE DEFENSE WORK**

The question has arisen whether, in accordance with the West Virginia Rules of Professional Conduct, an attorney or law firm may arrange with a liability insurance company to defend the company's insureds on a fixed or "flat" fee basis. The amount of the fee is arranged in advance between the lawyer and the insurer, and the lawyer will receive a fixed amount for handling future cases on behalf of insureds.² Current practice apparently involves a blanket arrangement, with the same fee used for each case. The fee arrangement does not take into account the complexity of an individual case or the amount of legal work performed on an individual case.

In response to request for comment, including a request published in The West Virginia Lawyer, the Board has received information that, in practice, the amount paid by the insurer may be insufficient to cover the cost of the representation in some cases, thus possibly hampering a lawyer's ability to adequately defend a claim or, at least, giving rise to an appearance or concern that the ability to defend is or will be compromised. However, the Board has also received public comment that the arrangement is satisfactory to some of the lawyers who are using it.

¹This Amended L.E.I. 98-01 replaces and supersedes the L.E.I. 98-01 which was issued by the Lawyer Disciplinary Board on March 26, 1998.

²These fee arrangements might also be based on handling different portions of a case, for example, a fixed amount would be paid for discovery and a fixed amount would be paid for attending the trial.

The Board has concluded that the use of fixed or "flat" fee arrangements does not constitute a *per se* violation of the Rules of Professional Conduct.³ However, the use of such arrangements does create the potential for a violation and, as a result, lawyers are cautioned to be careful in this regard as the arrangements, in a particular case, *could* violate the Rules.⁴ As discussed below, lawyers are advised to analyze, on a case by case basis, the propriety of the fixed or flat fee arrangement, in light of the matter at issue, pursuant to the Rules of Professional Conduct.⁵

ETHICAL ANALYSIS IN EACH CASE

In insurance defense matters, while the insurer may pay for the representation, the lawyer's primary duty is to the insured client. A lawyer is required to provide a competent defense. To guard against harm to the insured client, lawyers must insure that the fixed fee is sufficient to allow them to provide a competent defense.

³By contrast, pursuant to the Kentucky Rules of Professional Conduct, the Supreme Court of Kentucky banned the use of flat fee arrangements in insurance defense work. American Insurance Association v. Kentucky Bar Association, 917 S.E.2d 568 (Ky. 1996). However, the disciplinary authorities of other states have decided that under their versions of the ethics rules, these arrangements are not *per se* banned. Wisconsin Ethics Opinion E-83-15; New Hampshire Opinion, PO 1990-91/5; Oregon Formal Opinion No. 1991-98, Iowa Formal Opinion, 86-13; Ohio Opinion 97-7.

⁴This opinion is not intended to suggest that flat fee arrangements do or do not breach the insurer's duty to defend and/or indemnify. Rather, this opinion deals solely with the lawyer's obligations under the Rules of Professional Conduct.

⁵The Board's opinion is based upon the general idea behind a fixed or "flat" fee arrangement. However, as discussed *infra*, it is not intended to imply that all fixed or flat fee arrangements are acceptable. The Board recognizes that the issue may need to be reexamined if the evolution of these arrangements between insurance companies and defense counsel leads to additional and/or unanticipated issues.

Rules to be considered when performing this ethical analysis include, but are not limited to, Rules 1.5(a), 1.7(b) and 1.8(f)(2). For example, the comment to Rule 1.5 specifically notes that “[a]n agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client’s interest”. Rule 1.5 requires that fees be reasonable. If a fee is so low that it forces the lawyer to perform less than competently, the fee would not be reasonable and would be insufficient. Additionally, if the fee is so low that the lawyer must put his own personal and financial interests ahead of the interests of the insured client, a conflict of interest as addressed in Rule 1.7(b) would result. Furthermore, if a fee is so low as to impair the lawyer’s independent professional judgment, Rule 1.8(f)(2) would be violated.

As with all cases, other rules obviously also apply, such as Rule 1.1, which requires that the lawyer provide competent representation, and Rule 1.3, which requires that the lawyer act diligently. To the extent that a fixed fee is so low that it impairs an attorney’s ability and/or incentive to provide competent representation or to act diligently, acceptance of a fixed fee in the insurance defense context violates an attorney’s duties to his clients under the Rules of Professional Conduct.

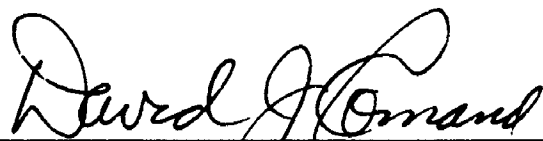
In conclusion, an attorney agreeing to accept insurance defense work on a fixed fee basis is, at a minimum, responsible for carefully evaluating the fixed fee offered by the insurance company and ensuring that, in each particular case, the fee is sufficient for the attorney to provide a competent defense consistent with the ethical rules cited above. To the extent that the fixed fee is not sufficient to satisfy these concerns, the arrangement will violate the Rules.

DISCLOSURE OF THE FEE ARRANGEMENT TO THE INSURED

An attorney who enters into an agreement with an insurance company to represent an insured for a fixed fee has a duty to disclose the arrangement, in full, to the insured client. This follows from Rule 1.8(f) which provides that “[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation ...”. In order to comply with Rule 1.8(f), and in light of the concerns articulated above, the insured client must receive a complete and full disclosure of the attorney’s arrangement with the insurance company.

In order for the insured client to understand, and thus consent to the representation, the client must be told the terms of payment, including specific dollar amounts and payment limits; what activities the lawyer is hired to do; and limits imposed on the lawyer. The Board believes that this disclosure must be made in such a way that is understandable to the average client. Further, the lawyer must provide an affirmation to the insured client that he can competently defend the insured’s case under the applicable, and disclosed, fee arrangement.

APPROVED AS AMENDED on February 19, 1999.



David J. Romano, Chair
Lawyer Disciplinary Board

Superseded by

L.E.I. 98-01

Amended L.E.I.
98-01

**FIXED OR "FLAT" FEE ARRANGEMENTS
FOR INSURANCE DEFENSE WORK**

The question has arisen whether, in accordance with the West Virginia Rules of Professional Conduct, an attorney or law firm may arrange with the liability insurance company to defend the company's insureds on a fixed or "flat" fee basis. The amount of the fee is arranged in advance between the lawyer and the insurer, and the lawyer will receive a fixed amount for handling future cases on behalf of insureds.¹ Current practice apparently involves a blanket arrangement, with the same fee used for each case. The fee arrangement does not take into account the complexity of an individual case or the amount of legal work performed on an individual case.

In response to request for comment, including a request published in The West Virginia Lawyer, the Board has received information that, in practice, the amount paid by the insurer may be insufficient to cover the cost of the representation in some cases, thus possibly hampering a lawyer's ability to adequately defend a claim or, at least, give rise to an appearance or concern that the ability to defend is or will be compromised. However, the Board has also received public comment that the arrangement is satisfactory to some of the lawyers who are using it.

The Board is still considering the use of fixed or "flat" fee arrangements in light of the West Virginia Rules of Professional Conduct, and a decision has not been made on whether these arrangements constitute a per se violation of the Rules of Professional

¹These fee arrangements might also be based on handling different portions of a case, for example, a fixed amount would be paid for discovery and a fixed amount would be paid for attending the trial.

Conduct.² The Board continues to study and consider the issue of flat or fixed fee agreements and, in the interim, lawyers are cautioned to be careful in this regard as the arrangements could violate the rules.³ As discussed below, lawyers are advised to analyze, on a case by case basis, the propriety of the fixed or flat fee arrangement, in light of the matter at issue, pursuant to the Rules of Professional Conduct.

ETHICAL ANALYSIS IN EACH CASE

In insurance defense matters, while the insurer may pay for the representation, the lawyer's primary duty is to the insured client. A lawyer is required to provide a competent defense. To guard against harm to the insured client, lawyers must insure that the fixed fee is sufficient to allow them to provide a competent defense.

Rules to be considered when performing this ethical analysis include, but are not limited to, Rules 1.5(a), 1.7(b) and 1.8(f)(2). For example, the comment to Rule 1.5 specifically notes that "[a]n agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest". Rule 1.5 requires that fees be reasonable. If a fee is so low that it forces

²For example, pursuant to the Kentucky Rules of Professional Conduct, the Supreme Court of Kentucky has banned the use of flat fee arrangements in insurance defense work. American Insurance Association v. Kentucky Bar Association, 917 S.E.2d 568 (Ky. 1996). However, the disciplinary authorities of other states have decided that under their versions of the ethical rules, these arrangements are not per se banned. Wisconsin Ethics Opinion E-83-15; New Hampshire Opinion, PO 1990-91/5; Oregon Formal Opinion No. 1991-98; Iowa Formal Opinion, 86-13. The Ohio Board of Commissioners on Grievances and Discipline did not find a per se ban, but stressed that the fee paid must be sufficient so that a lawyer's obligation and ability to provide a competent defense are not compromised. Ohio Opinion 97-7.

³This opinion is not intended to suggest that flat fee arrangements do or do not breach the insurer's duty to defend and/or indemnify. Rather, this opinion deals solely with the lawyer's obligations under the Rules of Professional Conduct.

the lawyer to perform less than competently, the fee would not be reasonable and would be insufficient. Additionally, if the fee is so low that the lawyer must put his own personal and financial interests ahead of the interests of the insured client, a conflict of interest as addressed in Rule 1.7(b) would result. Furthermore, if a fee is so low as to impair the lawyer's independent professional judgment, Rule 1.8(f)(2) would be violated.

As with all cases, other rules obviously also apply, such as Rule 1.1, which requires that the lawyer provide competent representation, and Rule 1.3, which requires that the lawyer act diligently. To the extent that a fixed fee is so low that it impairs an attorney's ability and/or incentive to provide competent representation or to act diligently, acceptance of a fixed fee in the insurance defense context violates an attorney's duties to his clients under the Rules of Professional Conduct.

In conclusion, an attorney agreeing to accept insurance defense work on a fixed fee basis is, at a minimum, responsible for carefully evaluating the fixed fee offered by the insurance company and ensuring that, in each particular case, the fee is sufficient for the attorney to provide a competent defense consistent with the ethical rules cited above. To the extent that the fixed fee is not sufficient to satisfy these concerns, the arrangement will violate the Rules.

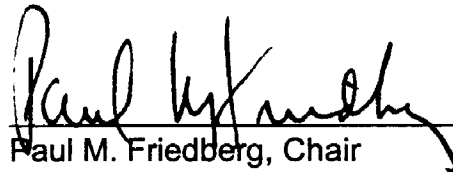
DISCLOSURE OF THE FEE ARRANGEMENT TO THE INSURED

An attorney who enters into an agreement with an insurance company to represent an insured for a fixed fee has a duty to disclose the arrangement, in full, to the insured client. This follows from Rule 1.8(f) which provides that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client

consents after consultation ...". In order to comply with Rule 1.8(f), and in light of the concerns articulated above, the insured client must receive a complete and full disclosure of the attorney's arrangement with the insurance company.

In order for the insured client to understand, and thus consent to the representation, the client must be told the terms of payment, including specific dollar amounts and payment limits; what activities the lawyer is hired to do; and limits imposed on the lawyer. The Board believes that this disclosure must be made in such a way that is understandable to the average client. Further, the lawyer must provide an affirmation to the insured client that he can competently defend the insured's case under the applicable, and disclosed, fee arrangement.

APPROVED this the 26th day of March, 1998.


Paul M. Friedberg, Chair
Lawyer Disciplinary Board