

The Supreme Court of Texas  
Professional Ethics Committee

\*1 Opinion Number 542

February 2002

QUESTION PRESENTED

May a lawyer enter into a fee arrangement with a liability insurer under which the lawyer will be paid fixed fees for the defense of the insured?

STATEMENT OF FACTS

Lawyers and law firms are invited by an insurance company to submit fixed fee rate proposals for the representation of insureds at various stages of liability defense cases. The stated purpose of the fixed fee request is to allow the insurance company to make case assignments to the lawyers and law firms whose fixed fee proposals are the most competitive and to improve communication with those lawyers. The fee arrangement will not limit or direct the legal services rendered by the lawyer at any stage of the case; however, it will limit the fee that the lawyer will be paid for each stage of representation. The fee arrangement is not for a contingent fee, applicable only to the fees to be paid for professional services and not for the costs and expenses of litigation.

DISCUSSION

Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct requires that the fee arrangement between a lawyer and his client must be for a reasonable fee. Comment 3 to Rule 1.04 recognizes that a flat fee arrangement has historically been acceptable when that fee is determined to be reasonable, as defined in this Rule. Lawyers are free to charge a reasonable fee, provided the parameters of "reasonableness" are met in the fee arrangement, although a lesser fee or no fee at all may be charged by the lawyer.

Rule 1.08(e) permits the payment of the lawyer's fees from one other than the client, in this instance, the insurance company, provided: (1) the client consents; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.05. Comment 5 to Rule 1.08 recognizes that when an insurance company pays the lawyer's fee for representing the insured, normally the insured has consented to the arrangement by the terms of the insurance contract.

This Committee has recently addressed arrangements between lawyers and insurance companies in Opinions 532 and 533, September 2000. In those opinions, the arrangements at issue were impermissible as a result of interference with lawyer-client confidentiality as defined in Rule 1.05 and the improper limitation on the professional and ethical responsibility of the lawyer required by Rule 5.04. This Committee stated in its Opinion 533, "In other words, regardless of such agreement with the insurer, the lawyer must at all times be free to exercise his or her independent professional judgment in rendering legal services to the client."

The fixed fee arrangement at issue in this Opinion clearly is an economic means by the insurance company to control and/or limit the amount of legal expenses. However, while the lawyer is free to enter into an agreement with the insurer regarding fees, it remains the lawyer's ethical responsibility to provide the necessary professional representation to the client as held in *Employer's Casualty Co. v. Tilley*, 496 S.W. 2d 552 (Tex. 1973).

\*2 A fixed fee arrangement, as is the case with other types of fee arrangements, may result in inadequate compensation to the lawyer for the necessary professional representation. Regardless of those economic pressures, the lawyer providing services under a fixed fee arrangement must provide the necessary legal services that the lawyer determines in the lawyer's professional judgment are required.

A fee arrangement with an insurance company under which the lawyer is required to pay the costs and expenses of litigation, regardless of the outcome of the litigation, would constitute a violation of Rule 1.08(d), which provides that a lawyer shall not provide financial assistance to a client in connection with a pending or contemplated litigation, with exceptions which are not here applicable.

#### CONCLUSION

A lawyer is free to enter into a fee arrangement with an insurance company wherein the lawyer is compensated on a fixed fee basis for defined stages of representation in liability defense cases. It is the lawyer's responsibility, notwithstanding the agreement with the insurance company, to professionally and ethically render representation to the client insured as required by the Texas Disciplinary Rules of Professional Conduct. The fee arrangement may not provide that the lawyer is to pay the costs and expenses of such litigation.