

LEGAL ETHICS OPINION 1641

MEDICAL PAYMENTS; FEE  
AGREEMENTS; INCLUSION OF  
CLAUSE IN FEE AGREEMENT  
PROVIDING FOR LEGAL FEE IN MED  
PAY.

You have presented a hypothetical proposed fee agreement for Med Pay cases and wish to know which of three forms of payment, if inserted in the proposed fee agreement, is ethically acceptable. The three forms of payment, only one of which will be adopted by the law firm for inclusion in its retainer agreements are:

- (a) a Ten Percent (10%) Administrative fee charged to the client consisting of Ten Percent of any medical expense proceeds collected by the firm on the client's behalf;
- (b) a flat fee based on the estimated actual cost of having a paralegal assist the client;  
or
- (c) an hourly fee based on the paralegal's standard hourly rate of \$65.00.

You propose to insert one of these three payment provisions into the following paragraph of the retainer agreement:

"Med Pay: In addition to your personal injury claim, you may be entitled to reimbursement of your medical expenses under a medical expense reimbursement provision of your automobile insurance policy, or any other applicable policy. Very often, the application process for this reimbursement is ministerial and payment automatic. You are encouraged to apply for and receive those funds without the assistance of this office. In the event you desire the firm to collect for you those funds: [INSERT EITHER A, B OR C AS LISTED ABOVE]

In the event it becomes necessary to appeal any denial or partial denial of benefits under a med pay provision, then the firm will charge a total amount of 33 1/3% of any monies collected on your behalf after an appeal is initiated, whether collected by settlement, compromise or litigation."

As stated above, you wish to know which, if any, of the three proposed insertions is acceptable under the Code of Professional Responsibility. The Committee understands that only one of the proposed forms of payment will be offered to the client and the client will not have the option of selecting which of the three forms of payment he or she desires.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:2-105(A) & (C) which state respectively that "A lawyer's fees shall be reasonable and adequately explained to the client" and "A fee may be contingent on the outcome of the matter for which the service is rendered, except in criminal cases or other matters in which a contingent fee is prohibited by law. A contingent fee arrangement shall state the

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method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, the expenses to be deducted from the recovery and whether expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a closing statement showing the fee and the method of its determination."

In LE Op. 1461 the committee considered the propriety of charging a contingency fee in the collection of medical payments under standard medical reimbursement provisions of insurance policies like the ones to which the above fee agreement would apply. The committee opined that it is improper to charge a contingency fee in purely ministerial cases, and ordinarily Med Pay cases are purely ministerial. The committee believes that while the facts presented in your hypothetical situation are somewhat different from those presented in LE Op. 1461, that opinion is dispositive of your inquiry concerning the ten percent administrative fee.

Though denoted an administrative fee, the fee of 10% of all med pay funds recovered is still a contingent fee raising the same issues and concerns addressed in LE Op. 1461. In some instances, such a fee may well exceed any reasonable overhead incurred by the law firm in collecting med pay proceeds.

The committee is concerned that an attorney charging a contingent fee may fail to consider the elements necessary to determine a proper fee and the reasonableness of a fee listed in Ethical Considerations 2-19 [ EC:2-19] and 2-20 [ EC:2-20]. The primary justification for a contingent fee is that it allows a client an opportunity to seek justice without having to spend substantial amounts of his own resources to cover legal fees. A second factor justifying a contingent fee arrangement is that the attorney assumes some risk of loss in earning no fee at all. If there is no risk of loss in a proceeding, it would ordinarily be improper to charge a percentage fee on a contingency of recovery basis. Therefore, the committee opines that the ten percent administrative fee as described in insertion (a) of the above proposed fee agreement would clearly be improper. However, a fee calculated pursuant to an hourly rate or a flat fee similar to examples (b) and (c) would not be per se improper provided that these payment provisions include appropriate language indicating that all paralegal activity will be under the supervision of an attorney in the law firm. See DR:3-104(D) (The lawyer shall examine and be responsible for all work delegated to nonlawyer personnel).

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