

**DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion 2008-1
February 7, 2008

This opinion is merely advisory and is not binding on
the inquiring attorney or the Courts or any other tribunal

Background Facts

The inquirer is a Delaware attorney (hereinafter “Attorney”) who seeks to represent individuals or entities in negotiations or litigation, against insurance carriers for insurance coverage claims. The law firm would utilize non-attorney “experts” to determine the value of claims on behalf of the insured, and paralegals to assist with litigation. Attorney would be the supervising attorney in this practice. Non-Delaware attorneys would possibly be involved in this practice. Attorney wishes to charge a fee of 50% of any amount obtained on behalf of an insured (the client), in excess of the amount previously offered to the insured (the client) by the insurance company and prior to the retention of Attorney. Attorney seeks guidance as to whether this fee arrangement would be reasonable under the circumstances, and in light of the Delaware Lawyers’ Rule of Professional Conduct (hereinafter “DLRPC”).

Conclusion

This Committee is not in a position to determine whether the proposed fee agreement would be reasonable and within the requirements of DLRPC 1.5. To the extent the Attorney seeks guidance in determining whether attorneys, who are also public adjusters, are bound by the fee limitations imposed upon a “public adjuster,” as set forth in 18 Del. C. Chapter 17A, providing such an opinion is beyond the authorization of this Committee. The purpose of the Committee is to interpret the DLRPC, and not to opine on the application of other Delaware laws. To the extent any member or staff of Attorney would be considered a “public adjuster” subjected to 18 Del. C. §1757(e), then Attorney would be in violation of DLRPC 1.5, if the proposal fee was charged. However, this Committee provides no opinion regarding whether a Delaware attorney acting as a “public adjuster” is bound by the fee limitation in 18 Del. C. §1756(e).

Discussion

PART 1.

DLRPC 1.5 (a) prohibits a lawyer from charging an unreasonable fee or an unreasonable

amount for expense. The factors to be considered in determining the reasonableness of a fee are set forth in the Rule as follows:

“Rule 1.5 Fees.

...

- (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 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; and
- (8) whether the fee is fixed or contingent.”

In accordance with DLRPC 1.5(c), a fee may be contingent upon the outcome of a matter, except in certain areas discussed in Rule 1.5 (d) that are not applicable to the instant inquiry. Other limitations with respect to a contingency fee agreement are set forth in DLRPC 1.5 (c), as follows:

“(c)... A contingent fee agreement shall be in writing signed by the client and shall state the 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; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.”

Nothing contained in the above provisions prohibit the contemplated fee structure, suggested by Attorney.

Attorney does not provide, and this Committee has not been able to locate, any guiding decisional law, to indicate the proposed arrangement would or would not be unreasonable. Attorneys will frequently charge 33 1/3% to 40% for contingent fee matters. Here it is proposed the fee would be 50% of the amount over that previously offered to the insured. 18 Del. C. §6865 does provide a limitation of fees for medical malpractice matters, but that limitation arises from particular concerns in that area, and relate to the total recovery. Hence, the Committee can only suggest that, in the facts of a given case, after considering the factors set forth in DLRPC 1.5 (a), the proposed charge may or may not be reasonable in a given

set of circumstances. This Committee cannot say the proposed fee schedule would be reasonable and within Rule DLRPC 1.5 (a), in every set of circumstances.

PART 2.

The reasonableness of fees may be governed by applicable laws, other than in the Delaware Lawyer’s Rules of Professional Conduct.¹ Chapter 17A of Title 18 of the Delaware Code may provide such a limitation or guidance with regard to a degree of reasonableness. 18 Del. C. §1750 defines “public adjuster” and §1756(e) describes the fee limitations that can be charged by “public adjusters.” The applicable portions of these laws are as follows:

- (4) “Public adjuster” shall include any person who, for compensation or any other thing of value:
 - a. Acts or aids, solely in relation to first party claims arising under insurance contracts that insure the real or personal property of the insured, on behalf of an insured individual in negotiating for, or effecting the settlement of, a claim for loss or damages covered by an insurance contract;
 - b. Advertises for employment as an adjuster of insurance claims or solicits business or represents oneself to the public as an adjuster of first party insurance claims for losses or damages arising out of policies of insurance that insure real or personal property; or
 - c. Directly or indirectly solicits business, investigates or adjusts losses or advises an insured about 1st-party claims for losses or damages arising out of policies of insurance that insure real or personal property for another person engaged in the business of adjusting losses or damages covered by an insurance company.

...
(e) A licensee shall not charge the client a fee that exceeds 2.5% of the first \$25,000 of the total insurance recovery of the client. A licensee may charge the client a fee of up to 12% of the amount of the total insurance recovery of the client that exceeds \$25,000.”

However, at least to some degree, it appears that attorneys may be excluded from the requirements. This is suggested by 18 Del. C. §1759(b)(3) . It states:

“§1759. Regulations and scope.

...

¹ DLRCP 1.5, Comment 3 states “...Applicable law may impose limitations on contingent fees, such as ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.”

(b) This chapter shall not apply to:

...

(3) An attorney at law who does not:

a. Regularly act as a public insurance adjuster; or

b. Represent to the public by sign, advertisement or other

written or oral communications indicating that the attorney at law acts as a public insurance adjuster,”

Per its By-Laws, this Committee is limited to issuance of opinions with respect to whether conduct is within the DLRPC. It is not the function of this Committee to provide advisory opinions with respect to the application of other laws of the State of Delaware, or any other state, with respect to a set of given factual and legal circumstances. The Committee should not provide an opinion on whether an attorney, or staff, that does, or does not, register as a “public adjuster,” or regularly acts as one, is subject to the fee limits in 18 Del. C. §1759(b)(3).

There appears to be a number of unanswered questions that could lead to different results. At a minimum, a few of them would be: 1) whether the attorney is a licensed “public adjuster;” 2) whether any employee, paralegal, “expert,” or other staff, is a licensed “public adjuster;” and 3) whether there are circumstances in which an attorney acts more frequently as a “public adjuster” than as an attorney.

This Committee can say that, to the extent 18 Del. C. Chapter 17A is determined to be applicable to attorneys or their employees or other staff, then DLRPC 1.5 would appear to prohibit the proposed fee structure. (See Comment 3 to DLRC 1.5.) If 18 Del. C. Chapter 17A is determined not to be applicable to a given set of circumstances, then the Committee is only in a position to opine that the proscribed fee structure is not *per se* unreasonable, but must still be judged by the guidelines set forth in Rule 1.5(a).