

Ethics Advisory Opinion

20-02

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY.

S.C.R. Prof. Conduct: Rules 1.4; 1.8; 5.4(c)

Factual Background: Attorney is retained by Insurance Company to provide a defense on behalf of Client pursuant to Client's insurance policy issued by Insurance Company. As payment to Attorney for representation of Client, Insurance Company pays Attorney a flat fee exclusive of costs, and regardless of the amount of time involved in the case. The fee covers all phases of the case from filing an answer until the beginning of trial. The flat fee is paid to Attorney in 2 parts: 60% at the beginning of the assignment, and 40% at the conclusion of the case. Because of the nature of a flat fee arrangement, Attorney receives a higher net per hour fee if he is able to resolve the matter quickly. Often, Attorney is able to negotiate a settlement amount that is reasonable, but that Insurance Company is unwilling to pay. The Client/defendant is not expected to contribute in any way to the settlement. In certain circumstances, it would be financially advantageous, based on the posture of the case, for Attorney A to contribute his own money towards settlement on behalf of Client Z rather than expend more time on the case.

Question Presented:

May Attorney contribute money towards a settlement on behalf of his defendant Client in order for the case to resolve more quickly? If so, must attorney disclose what he is doing to either Insurance Company or Client?

Summary: Attorney may not contribute a portion of the attorney's fee directly to a settlement, as to do so would violate the Rules of Professional Conduct. The attorney may, however, inform the insurance company of his desire to reduce his fee in order to allow the insurance company to have more money to put toward the settlement, thus allowing for an outcome that benefits the client, and also is cost-effective for the attorney and the insurance company. Attorney must disclose his actions to both insurance company and to client, in order to satisfy Rules 1.4. and 5.4(c).

Response:

In the facts presented, an attorney would like to "close the gap" in a settlement negotiation where the plaintiff and his client, the defendant who is indemnified by Insurance Company,

are close to a monetary settlement. The lawyer's purpose is both to achieve a good outcome for his client, and to receive the higher net per-hour fee resulting from a timely settlement.

The Rules of Professional Conduct do not address this issue directly. Instead, the Committee considered the issue in the context of several separate rules to reach its conclusion.

Most importantly, the lawyer's actions must serve his client (See *Sentry Select Insurance Company v. Maybank Law Firm, LLC, and Roy P. Maybank*, 2016-001351). In this case, his client receives the benefit of a fast resolution, and avoids the typical economical and emotional strains of an ongoing legal matter. The Committee notes that, among plaintiff's lawyers, reducing attorney's fees in order to effectuate a settlement is a common practice.

The benefit to the lawyer, which is the secondary consideration, must be viewed through the lens of Rule 1.8(a) to analyze the potential conflict of interest that the transaction might create, and whether the conflict is waivable. Pursuant to the Rule, the lawyer could not pay the plaintiff directly, as that would create a pecuniary interest (although somewhat counter-intuitive) in his client's case. Specifically, if this matter is analyzed using Rule 1.8(e), the distinction is that the lawyer is not giving money to the client, but instead is reducing his fee in order for the insurance company to increase the settlement offer to the plaintiff.

Although the facts here do not give any indication appearing as such, Bar members are cautioned to avoid circumstances that could appear to be an "unfair or fraudulent dealing" *In re Edwards* (1994). (where lawyer failed to disclose lawyer's financial interest in the buyer, which resold property at twice original purchase price).

As Rule 1.4, Communication, indicates, the lawyer must inform his client of his decision, and should seek his client's permission to contact the Insurance Company. Then, the lawyer may inform the insurance company of his wish to reduce his fee so that the difference may be included in the amount offered to settle with the plaintiff.

Finally, the lawyer should be cognizant of Rule 5.4(c), and should disallow any direction or regulation of the lawyer's professional judgment by the person who is paying the lawyer to render legal services for another, here the Insurance Company.