

Illinois Coverage Basics

HOW TO NEGOTIATE REASONABLE RATES WITH CONFLICT COUNSEL

When a conflict of interest prohibits a liability insurer from selecting defense counsel, it still retains the right to insist upon reasonable rates from the defense attorneys chosen by the insured. Regardless of who selects the defense attorneys, the insurer is obligated to pay only the *reasonable* attorney fees and costs actually incurred for the defense. This is a substantive limitation both on the rates that conflict counsel can charge and on the rates that the insurer may be required to pay. Insurers are not entirely without negotiating power when determining the appropriate rate to be paid to attorneys selected by an insured in a conflict of interest situation.

Step One. As soon as the insured makes its selection of conflict counsel known, the insurer should make prompt inquiry into the proposed rate to be charged by the defense attorney. If the proposed rate seems suspect in light of the nature of the case and qualifications of defense counsel, the insurer should immediately advise the insured that the rate is being questioned. The insurer should remind the insured that under the terms of the insurance policy, the jurisdiction's insurance law and applicable rules of professional responsibility, the insurer has no obligation to pay more than a reasonable fee.

Step Two. The next step is to ask the insured and defense counsel for information supporting the objective reasonableness of the proposed rate. The insured has the initial burden of showing the reasonableness of the rate and can be required to answer appropriate questions concerning the foundation for the rates to be charged to the insurer. A general inquiry will most likely elicit a general response, which will be of little assistance in the insurer's efforts to secure a reasonable rate. The better practice is for the insurer to request the insured to justify the proposed rate in terms of specific criteria, including the following factors:

- a. The particular defense attorney's experience, reputation and ability. Requests may be made for the attorney's resume, jury verdict reports and a description of the attorney's experience in handling the particular type of case at issue;
- b. The rates charged by the attorney to other clients for similar work and the rates of other attorneys for similar work;
- c. The rates paid to the attorney by that client in the past;
- d. The level of skill required by the attorney to adequately perform the requested legal services;
- e. The amount in controversy;

- f. The time and labor that will be required time, including any limitations imposed by the circumstances; and
- g. The amount of time the proposed rate will remain in effect.

Step Three. The third step for obtaining a reasonable rate depends upon the response that the insurer receives to its rate information request. If the insured responds to the information request, the insurer should evaluate the response to determine whether it objectively supports the proposed rate. If the response supports the proposed rate, the insurer should advise the insured that there is agreement on the proposed rate.

If the insured's response to the rate information request fails to justify the proposed rate, the insurer should propose an alternative rate and provide its rationale. This process is best started by informing the insured of the rate that the insurer typically pays to attorneys in the ordinary course of business to defend similar actions in the same venue.

In addition to citing the market rate, the insurer should respond to the information provided by the insured in response to the information request in the course of negotiating an acceptable rate. In rate negotiations, the insurer's position should focus on the factual basis for the rate. For every factual contention offered by the insured in support of a proposed rate, the insurer should explore the counterpoint.

If the insured fails to respond to the insurer's information request, the insurer should inform the insured that its failure to provide a response will be considered to be a waiver of any right to reimbursement for defense expense. Having done this, the insurer has two options: (1) to abandon efforts to secure a reasonable rate and simply pay the proposed rate; or (2) to file a declaratory judgment action to resolve the rate question as a component of the broader duty to defend issue. (Under Illinois law, the insurer cannot pay the proposed rate under a reservation of rights and later seek a refund from the insured for the amount of fees paid in excess of the reasonable rate.) How an insurer should proceed depends upon a number of case-specific variables, including the disparity between the proposed rate and a reasonable rate, the anticipated amount of defense counsel's time and labor, and the other grounds on which the insurer has reserved its rights.

Conclusion. It is the right of a liability insurer to pay no more than a reasonable fee for the defense of its insureds. While the insurer's assertion of a reservation of rights may create a conflict of interest that deprives an insurer of the right to select defense counsel, it does not destroy the insurer's right to demand a reasonable rate.

However, the right to pay only a reasonable rate is not self-executing. An insurer's right to pay only a reasonable rate can be lost unless the insurer acts promptly to enforce its rights.

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If you have questions or would like to discuss the implications of this report further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.