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ATTORNEYS

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December 17, 2019

Workers' Compensation Board  
2601 25th St. SE, Suite 150  
Salem, OR 97302-1282

**Re: December 17, 2019 Meeting on Attorney Fee Proposals**

Dear Sir/Madam:

Several of the proposed attorney fee rules to be discussed include a submission of a defense statement of services. Oregon Rules of Profession Conduct (ORPC) 1.6 (a) mandates an attorney cannot reveal information relating to the representation of a client unless the client provides informed consent. ORPC 1.6 (b) (5) allows disclosure of this information to comply with another law.

ORS 656.388(4) states the Workers Compensation Board should take into consideration the fees earned by defense counsel. The 2015 Staff Measure Summary of HB 2764 states one of the purposes of the bills was to ensure "attorney fees awarded to be equitable *in aggregate* in relation to fees earned by attorneys for insurers or self-insurers." (emphasis added). The statute appears focused on the aggregate defense fees opposed to fees on any particular case.

We would request the Board seek clarification from the Oregon State Bar or Department of Justice of whether the Board's authority to consider aggregate fees is broad enough to require these disclosures without violating any ethical rules and attorney-client privilege.

In 2017, fees awarded to claimants at hearing averaged over \$9,000 for prevailing over a denial and a little over \$4,000 for non-compensability issues. (Ex. 20-7). Defense costs per claim in the same year averaged around \$5,700. (Ex. 20, appendix 6). Claimants' attorney fees appear to have consistently increased despite a drop in overall litigation. Most importantly, it appears the Board's collection of defense fees in the aggregate has been achieving HB 2764 goals of ensuring more equitable awards of attorney fees.

Member Lanning's proposal properly focuses any changes on clarifying what the claimants' attorney has done on a file to merit their requested fee. If the Board does move forward with requiring a defense statement of services, we would ask

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that claimants' attorneys also be required to submit this information and the information from both sides be limited to the issue in litigation. Any disclosure procedures should also minimize the inadvertent or unauthorized disclosure of protected information in compliance with ORPC 1.6(c).

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Anderson", written in a cursive style.

Kevin J. Anderson

KJA:kms  
Enclosures

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

*Adopted 01/01/05*

*Amended 12/01/10: Paragraph(c)(3) added.*

*Defined Terms (see Rule 1.0):*

"Firm"

"Informed Consent"

"Matter"

"Reasonable"

*Comparison to Oregon Code*

Paragraphs (a), (b) and (c)(1) and (2) are taken directly from DR 2-106, except that paragraph (a) is amended to include the Model Rule prohibition against charging a "clearly excessive amount for expenses." Paragraph (c)(3) had no counterpart in the Code. Paragraph (d) retains the substantive obligations of DR 2-107(A) but is rewritten to accommodate the new concepts of "informed consent" and "clearly excessive." Paragraph (e) is essentially identical to DR 2-107(B).

*Comparison to ABA Model Rule*

ABA Model Rule 1.5(b) requires that the scope of the representation and the basis or rate of the fees or expenses for which the client will be responsible be communicated to the client before or within a reasonable time after the representation commences, "preferably in writing." Model Rule 1.5(c) sets forth specific requirements for a contingent fee agreement, including an explanation of how the fee will be

determined and the expenses for which the client will be responsible. It also requires a written statement showing distribution of all funds recovered. Paragraph (c)(3) has no counterpart in the Model Rule. Model Rule 1.5(e) permits a division of fees between lawyers only if it is proportional to the services performed by each lawyer or if the lawyers assume joint responsibility for the representation.

#### RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

**Fiscal:** Fiscal impact issued

**Revenue:** No Revenue Impact

**Action Date:** 05/27/15

**Action:** Do Pass With Amendments To The A-Eng Bill. (Printed B-Eng.)

**Meeting Dates:** 05/13, 05/27

**Vote:**

Yeas: 3 - Dembrow, Gelser, Rosenbaum

Nays: 2 - Knopp, Thatcher

**Prepared By:** Matthew Germer, Committee Administrator

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#### WHAT THE MEASURE DOES:

Modifies circumstances under which attorney fees may be awarded and amount of attorney fees in workers' compensation claims. Requires interest payment on compensable benefits, attorney fees and costs that are withheld pending an appeal. Allows attorney fees under certain circumstances for representation related to or before the Director of Department of Consumer and Business Services. Requires attorney fees awarded to be equitable in aggregate in relation to fees earned by attorneys for insurers or self-insurers. Directs Board to review attorney fees biennially. Declares emergency, effective on passage.

#### ISSUES DISCUSSED:

- Overview of workers' compensation system
- Compromise between management and labor that led to the -A9 amendments
- Support of Management-Labor Advisory Committee
- Attorney compensation limits in workers' compensation claims
- Complexity involved in certain workers' compensation claims
- New attorney fees permitted in the measure
- Funding for attorney fee increase

#### EFFECT OF COMMITTEE AMENDMENT:

Removes penalties. Requires attorney fees be proportionate to benefit of injured worker if insurer unreasonably delays or refuses to pay attorney fees or costs and raises attorney fees cap from \$3,000 to \$4,000 in such cases. Expands circumstances in which attorney fee is assessed.

#### BACKGROUND:

Claimant attorneys are private attorneys hired by injured workers to represent them through the workers' compensation claims process. Claimant attorneys cannot be paid directly by the injured worker but instead are paid out of the compensation awarded to the injured worker or awarded as an assessed fee paid by the insurer or self-insurer based on the adjudicator's judgment. There are five broad reasons for which a claimant attorney can be awarded fees: reversing a denial, obtaining an increase in compensation, obtaining penalties or sanctions, preventing a reduction in compensation, and negotiating settlements. Some claimant attorney fees are set in statute by the Legislative Assembly and some fees are set through administrative rule by the Workers Compensation Board. Attorneys representing insurers and self-insurers are compensated without limits.