



STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 18
April 29, 1994

QUESTION

What portion of a contingent fee is a discharged attorney entitled to when the discharge occurs after an initial offer of settlement has been made?

ANSWER

The attorney is entitled to a recovery in quantum meruit.

AUTHORITIES RELIED ON

Nevada Rule of Professional Conduct (Supreme Court Rule) 155, and 166.4, NRS 18.015, Formal Opinions #4 and #17, *In re Kaufman*, 93 Nev. 452, 567 P.2d 957 (1977), ABA Informal Op. 86-1521 (1986), *Hayes v. Secretary of Health and Human Services*, 923 F.2d 418 (6th Cir. 1991), G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1985); R. Aronson, *Professional Responsibility in a Nutshell* (1990).

DISCUSSION

Supervision of contingent fee agreements rests with the state supreme courts. In Nevada, as in the majority of jurisdictions, the supreme court has determined through case law that disputes arising out of contingent fee agreements based upon the discharge of the attorney are to be determined in quantum meruit.¹

The question asked of this committee presupposes that the contingent fee agreement at issue was in writing, that the terms were reasonable and that the discharge was without cause. This committee's response is based upon those

¹ Because of the universal application of this standard, attorneys are advised to keep complete and accurate time records in contingency fee cases. *See* Closen and Tobin, *The Contingent Contingency Fee Arrangement: Compensation of the Contingency Fee Attorney Discharged by the Client*, 76 Ill. B.J. 916 (1987).

presuppositions, but would point out that an attorney normally has an obligation to advise a prospective client of alternative fee arrangements, such as a reasonable fixed fee, if there exists any doubt as to the reasonableness of a contingent fee under the circumstances. ABA Informal Op. 86-1521 (1986).

If a dispute and subsequent discharge arises between an attorney and a client, the attorney must take affirmative steps not to prejudice the client's case. NRS 18.015, authorizes and sets out the procedure for exercising an attorney's lien for an attorney's lien for fees. It does not authorize the retention of a client's papers. While SCR 166.4 recognizes that an attorney "...may retain papers relating to the client to the extent permitted by other law", the case law developed pursuant to the issue appears to condemn such an approach. (The case law specifically recognizes NRS 18.015 as the charging lien, as opposed to a common law retaining lien). The exercise of retaining liens in Nevada has resulted in sanctions against the attorney when the client can demonstrate prejudice. *In re Kaufman*, 93 Nev. 452, 567 P.2d 957 (1977). SCR 166.4 calls upon the terminated attorney to "surrender papers and property to which the client is entitled.". SCR 166.4 also calls upon the terminated attorney to "take steps to the extent reasonably practicable to protect a client's interests..".

Since an attorney's fee in a contingent fee case has not been earned until there has been a recovery, an attorney acts at extreme risk in exercising a lien against a client's file. The preferred method, as set out in NRS 18.015, would be to notify the client, the succeeding attorney and the insurance carrier (if one exists) as to the written agreement, so that when the matter is resolved, the fees of the first attorney, to the extent earned, will be protected.

Ethics authorities have recognized that a strict application of the terms of the contingent fee, for example a claim of one third of the settlement after the deduction of expenses, would work an undue hardship on the client in the pursuit of subsequent legal help. See G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1985); R. Aronson, *Professional Responsibility in a Nutshell* (1990). The first attorney is obligated to wait for the conclusion of the case in order to determine what, if any, fee the attorney is entitled to. It is possible that a subsequent loss of the case at trial will result in no recovery to the first attorney, even if a settlement offer had been previously advanced.

Once the case is resolved and the total recovery is known, the two attorneys can then determine how much of their individual efforts should be proportioned against a total legal fee of one third. If NRS 18.015 is utilized, the court can be asked to settle the matter if the attorneys cannot come to an agreement. Since the one third fee (or other agreed amount) can be placed in escrow pending this resolution and one third would be the total legal fee under most circumstances, distribution of proceeds in whole or

substantial part can be made to the client, thus avoiding unnecessary delay.²

Quantum meruit is simply the application of a reasonable fee based upon the results, the time expended and the other factors enumerated in SCR 155. See our Formal Opinion #17. The Sixth Circuit has opined that a fee is presumed to be reasonable if it does not exceed twice the prevailing fee in the relevant market for comparable work charged on an hourly basis. Hayes v. Secretary of Health and Human Services, 923 F.2d 418 (6th Cir. 1991). However, what is reasonable will always be fact specific and is an issue for the court (or fee dispute committee) to decide on a fully developed record. See our Formal Opinion #4.

This committee does not have enough information to offer an opinion as to whether one third of the initial offer is reasonable, with the second attorney taking one third of any subsequent increases of that offer. The initial offer may have been made based upon an immediate recognition of liability and damages. The first attorney may have received such an offer only after a few hours of time expended. In such a situation, the hourly rate may amount to several thousand dollars an hour, which would be unreasonable and a violation of SCR 155. On the other hand, the first attorney may, by reputation, experience and ability have acquired an offer which would not normally have been made at a given stage in the case, and which offer constitutes a significant percentage of the total recovery. In that event the first attorney may be entitled to a proportion of the legal fees in excess of twice the hourly rate. The novelty and complexity of the case and the issues it presents, the more reasonable it becomes to apply a time expended/hourly rate analysis.

An additional consideration would be whether the fee agreement contains a clause which sets the fee amount in the event of a termination without cause. Such a clause, if openly arrived at and reasonable under the circumstances, would be given significant weight in the event of termination and a subsequent fee dispute.

This committee cannot emphasize enough the importance of advising the client as to his or her fee options, drafting a comprehensive and fair fee agreement which takes into account the demands of the case, and of keeping good time records. For when a fee dispute arises, the burden will be placed upon the attorney to establish the reasonableness of the fee. What is reasonable will be based upon the time expended, results obtained, the nature of the case and the understanding of the parties.

² SCR 165.2 requires a prompt notification and delivery of funds received on behalf of a client. SCR 165.3 permits any disputed portion of funds (property) to be set aside until the dispute is resolved. Caution must be exercised here as at least two reported cases have held that a refusal to turn over unearned fees constitutes misappropriation. See *In Re Garcia*, 366 N.W. 2d 482 (N.D. 1985); *In Re Hedrick*, 301 Or. 750, 725 P.2d 343 (1986).

CONCLUSION

A terminated attorney is entitled to a quantum meruit settlement of fees at the conclusion of the client's case. The total fee must be reasonable, and the terminated attorney should protect his or her fee in accordance with NRS 18.015. The fact that an offer of settlement has been made to the first attorney is just one factor to be considered in reaching an equitable division of fees.

This opinion is based by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.