STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 4
June 16, 1987

QUESTION - 1. May a lawyer agree to the following fee arrangement, when it is one his client has proposed?
(a) The lawyer will be paid monthly but at a rate equal to 80 percent of his usual hourly fee;
(b) If the litigation succeeds and the client recovers the stock and other property that are the subject of the suit, the lawyer is to receive a $150,000 bonus; and
(c) As an additional bonus, the lawyer is to receive 50 percent of any punitive damage award the client might recover.
2. May a lawyer contract with his client's out-of-state counsel to share one-third of the bonus called for by his combined fixed/contingent fee contract with the client?

ANSWERS - 1. The proposed combination fixed/contingent fee contract does not violate the Nevada Rules of Professional Conduct so long as the fee does not appear at the conclusion of any representation to be unreasonably high. The agreement, like any fee agreement, must be explained to the client in sufficient detail to permit an intelligent evaluation of it. As a contract for a contingent fee, the agreement must also be in writing.
2. The division of fees with out-of-state counsel is permissible, provided the requirements of the Supreme Court Rule 155(5) (1986) [hereinafter SCR] are met, and provided SCR 189, addressing unauthorized practice by out-of-state lawyers, is not violated. SCR 155 (5) permits a lawyer to divide fees with another lawyer who is not a member of his firm so long as the client consents after full disclosure, the total fee is reasonable, and the division is either proportionate to the services rendered by each lawyer or, although disproportionate, the client's written consent to the division of fees is obtained and the lawyers agree to assume joint responsibility for the representation.

AUTHORITIES RELIED ON
Nevada Rules of Professional Conduct (Supreme Court Rules) 154, 155, 157, 158 and 189 (1986)

DISCUSSION
The Model Rules of Professional Conduct, as adopted in Nevada, contain no prohibition against combination fixed/contingent fee contracts. Compare SCR 155(3) with SCR 155(4) (contingent fees are generally permitted, except in criminal and certain domestic relations matters); see also South Carolina bar Ethics Advisory Comm., Op. 84-11 (July 23, 1984) (attorney is not prohibited from contracting with client to charge a contingent fee for representation in connection with the client'' affirmative claims and an hourly fee for defending any potential counterclaim); cf. District of Columbia Bar Legal Ethics Comm., Op. 42 (Nov.23, 1977) (there is nothing intrinsically improper in an attorney contracting to try a case on a contingent fee basis but agreeing that, in the event of an appeal, additional compensation at the attorney's usual hourly rate would be paid).

The rules do require, however, that "[a] lawyer's fee shall be reasonable.'' SCR 155(1). This requirement applies alike to contingent and fixed fee contracts. G. Hazard & W. Hodes, The Law of Lawyering: A Handbook of the Model Rules of Professional Conduct 79 (1985) [hereinafter Hazard & Hodes].

The determination of reasonableness is a factual one. Thornton, Sperry & Jensen, Ltd. v. Anderson, 352 N.W.2d 467, 468-69 Minn. Ct. App. 1984); Oregon State Bar Legal Ethics Comm., Op. 154 (June 30, 1967). SCR 155(1) sets out eight criteria by which reasonableness is to be judged:
(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite

to perform the legal service properly;
(b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(c) The fee customarily charged in the locality for similar legal services;
(d) The amount involved and the results obtained;
(e) The time limitations imposed by the client or by the circumstances;
(f) The nature and length of the professional relationship with the client;
(g) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
(h) Whether the fee is fixed or contingent.

Additional criteria, suggested by the inquiry in this case, are the sophistication of the client, Note, Judicial Power over Contingent Fee Contracts: Reasonableness and Ethics, 30 Case Western Reserve L. Rev. 523, 531 (1980); the fact that the arrangement was proposed or insisted on by the client, Foshee v. Lloyds, 643 F.2d 1162 (5th Cir. 1981); of New York City Bar Ass'n Comm. on Professional Ethics, (Op. 80-14); and the importance of the issues and the amount of money at stake, R. Aronson, Attorney/Client Fee Arrangements: Regulation and Review 40-43 (1980) [hereinafter Aronson]. Also bearing on the reasonableness of the proposed combination fixed/contingent fee contract is that here the lawyer risks loss of only 20 percent of his usual fee, which is much less than the all-or-nothing risks inherent in conventional contingent fee contracts. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1317 (May 17, 1975) (an attorney who purchases insurance against loss of prospective contingent fee income must disclose that fact to the client and, having reduced his risk of loss, may have to reduce the size of his fee accordingly). The reasonableness of the $150,000 contingent "bonus" and the 50 percent share of any punitive damage award, which is in absolute terms a high percentage, would have to be measured against the total amount at stake and the degree of difficulty and risk involved in the case, generally, and on its punitive damages aspect, specifically, which are not stated in the inquiry. For a general discussion of "reasonableness" and the interpretation it has received, see Hazard & Hodes, supra p. 2, at 70-74; Aronson, supra; ABA/BNA Lawyers' Manual on Professional Conduct 41 (1987); S. Speiser, Attorneys' Fees ch. 8 (1973); Rhein, Judicial Regulation of Contingent Fee Contracts, 48 J. Air L. & Com. 151 J. Air L. & Com. 151 (1982); see also Hazard & Hodes, supra p.2, at 173 (Model Rule 1.8(j), codified as SCR 158 (10), prohibits a lawyer from acquiring through a contingent fee arrangement such a substantial "investment" in the case that the lawyer loses his perspective).

This Committee is not constituted as a fact-finding body. See SCR 222-228. Absent facts sufficient to permit a per se finding of unreasonableness, the ultimate determination of reasonableness must be left to the courts and disciplinary authorities to decide on a fully contested, case-by-case basis. E.g., ABA Comm. on Ethics and Professional Responsibility,

Informal Op. 1091 (Dec. 1, 1968) ("The Committee will not pass upon questions regarding the amount of an attorney's fee [because the] Committee cannot possibly undertake to pass

judgment on the reasonableness of [a] fee [without being fully] informed as to the extent of the services rendered and to be rendered"); see also Oregon State Bar Legal Ethics Comm., Op. 154 (June 30, 1967); Arizona State Bar Comm. on Rules of Professional Conduct, Op. 262 (Jan. 9, 1969); Virginia State Bar Standing Comm. on Legal Ethics, Op. 526 (Sept. 13, 1983); Maine Bar Board of Overseers Professional Ethics Comm'n, Op. 48 (Feb. 2, 1977). This is mandated by the fact-specific nature of the inquiry and because reasonableness cannot be determined in advance but must abide the termination of the representation. ABA/BNA Lawyers' Manual on Professional Conduct 41.903 (1986) (the inquiry as to reasonableness extends "to considering the unfairness resulting from enforcement of an originally fair contingent fee contract"); Connecticut Bar Ass'n Comm. on Professional Ethics, Informal Op. 81-8 (Nov. 18, 1980).

In addition to being reasonable, the fee arrangement must be thoroughly understood by and explained to the client. This is required by SCR 155(2), as well as by SCR 154 and 157. Under these rules,

A client must be given sufficient information so that he is able to direct the lawyer's actions intelligently. An important consideration for many clients is whether the service received will be worth the price. Similarly, a client's decision to continue pressing a legal matter may be heavily influenced by the prospective costs involved.

Hazard & Hodes, supra p. 2, at 71. The lawyer should make clear to the client how costs will be billed and collected; the parties should also be made aware that certain activities of the lawyer may relate both to the assertion of the claims for which the client has agreed to pay him hourly and to others, such as the punitive damages claim, which are contingent, and that this may result in the inability of the lawyer to distinguish billable from non-billable hours. South Carolina Bar Ethics Advisory Comm., Op. 84-11 (July 23, 1984). And, finally, the contingent fee agreement must be in writing. SCR 155(3).

1. Under the Model Code of Professional Responsibility, only "clearly excessive" fees were prohibited. DR 2-106. The somewhat awkward language of DR 2-106, equating fees that were "clearly excessive" with those that were "in excess of a reasonable fee," led some authorities to conclude that only grossly unreasonable fees were a basis for discipline under the Code. Hazard & Hodes, supra p. 2, at 73. Model Rule 1.5(a), adopted in Nevada as SCR 155(1), adopts the better Code review that unreasonable fees are per se prohibited. Id.

The division of fees with out-of-state counsel is controlled by SCR 155(5), which provides:
A division of fee between lawyers who are not in the same firm may be made only if:
(a) The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
(b) The client is advised in writing of and does not object to the participation of all the lawyers involved; and
(c) The total fee is reasonable.

The inquiry does not state whether the proposed one-third/-two-thirds division of fees is proportionate to the contemplated division of the services to be rendered. SCR 155(5) represents a departure form prior law in that it permits fee divisions that are disproportionate to the services to be rendered provided the lawyers assume joint responsibility for the representation. Again, the agreement must be preceded by full disclosure to the client and the client must agree to it in writing.

The facts posed to the Committee do not describe in detail the responsibilities out-of-state counsel will assume or discharge. SCR 189 provides:
A lawyer shall not:
1. Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
2. Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

"The law in most jurisdictions treats lawyers who are licensed elsewhere almost as if they were lay persons for purposes of the 'unauthorized practice' rules." Hazard & Hodes, supra p.2, at 481. Depending on the particular facts involved here, pro hac vice admission may be required. Id. Care should be taken that the out-of-state lawyer does not step over the line marking what Nevada considers to be the unauthorized practice of law.

CONCLUSION

The combined fixed/contingent fee arrangement is not unreasonable per se. The final determination of reasonableness must abide the termination of the litigation and is, in any event, for the courts and the disciplinary authorities to decide on a fully developed record, not for this Committee to decide on the basis of incomplete, hypothetical facts. It is not improper to divide the contingent portion of the fee with

out-of-state counsel, provided the requirements of SCR 155(5) are met and SCR 189 is not violated. Both the fee arrangement with the client and the arrangement must be preceded by full disclosure to the client and embodied in a writing signed by the client, expressing his understanding and assent to the terms of the fee arrangement.