

Advisory Opinion 1995-2

ATTORNEY'S FEES IN TERMINATION OF CONTINGENT FEE AGREEMENTS

The Advisory Opinions Committee has received inquiries from attorneys regarding whether they are entitled to fees when contingent fee agreements are terminated. Lawyers have inserted provisions in contingent fee agreements that "guarantee" some fees when one or the other party terminates the agreement. It is the opinion of the Committee that the Rules of Professional Responsibility and the common law allow for the recovery of fees in some circumstances. However, there are ethical limitations on the amount of the fees and the circumstances of the termination of the representation.

Contingent Fee Agreements

At the outset, New Mexico attorneys know that a contingent fee agreement must comply with New Mexico Rule of Professional Conduct 16-105. First, the fee must be reasonable. Rule 16-105 (A). Second, a contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and, if there is a recovery, showing the remittance to the client and the method of its determination.

Rule 16-105 (C). The ABA Comment to this rule further reminds attorneys that:

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interests. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications.

Id. cmt., Terms of Payment.

Further, case law has established that certain provisions attempting to restrict a client's rights are contrary to public policy. For example, a contingent fee agreement that prohibits a client from compromising or settling a claim is void. *Dombey, Tyler, Richards & Greiser v. Detroit, T. & I.R.R.*, 351 F.2d 121 (6th Cir. 1965)

Clients have the right to discharge their attorneys at any time, with or without cause. Attorneys may withdraw from representation of a client, subject to both ethical and procedural rules. Both types of termination of the attorney-client relationship have an impact on a lawyer's contingent fee agreement.

Termination by the Client

The seminal case of *Martin v. Camp*, 114 N.E. 46 (N.Y. 1916), emphasized that the nature of the attorney-client relationship necessitates the rule that a client can discharge his or her attorney at any time without cause and without penalty. This rule was predicated on "the peculiar relation of trust and confidence" between a lawyer and the client. *Id.* at 47. This fiduciary relationship, not traditional contract principles, defined the standards to be applied to disagreements over fees, and the *Martin* court held that the discharged attorney could collect no fee. The *Martin* court implied a provision in the retainer agreement that recognizes the right of the client to fire the attorney. The ABA Comment to Rule 16-116 essentially embraces the basic holding in *Martin* regarding the client's right to discharge the lawyer.

A contingent fee agreement amounts to a joint venture to which the client brings his or her claim and the attorney brings time and effort. *DeGraff v. McKesson & Robbins, Inc.*, 292 N.E.2d 310 (N.Y. 1972). The attorney charges a risk premium for accepting the client's case on the contingency. Part of the risk that the attorney assumes is that the client will exercise the right to fire the attorney. *L. Brickman, Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 *Emory L.J.* 367 (1992).

Courts in Ohio, California, Indiana, Minnesota, Missouri, Texas, and Illinois disagreed with the *Martin* court and held that contractual analysis was appropriate when clients fired attorneys.

These courts held that, if the discharge were without "cause," the client would be liable for the value of the attorney's services in quantum meruit. *Annotation, Limitation to Quantum Meruit Recover, Where Attorney Employed under Contingent Fee Contract is Discharged without Cause*, 92 *A.L.R.3d* 690 (1979). Those courts holding that a contractual

analysis was correct have split on whether the amount in quantum meruit may exceed the "contract price," the amount to which the lawyer would have been entitled upon completion of the contingent fee agreement. There is also disagreement as to when the fired lawyer's right to sue in quantum meruit arises: upon discharge or upon the occurrence of the contingency.

In *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), the Court allowed quantum meruit recovery when the discharge was "without cause." The Rosenberg court did not define "without cause." The Rosenberg court reviewed the jurisdictions that had allowed recovery under opposing analyses and concluded that the best interests of the clients and the legal profession were served by allowing a quantum meruit approach, limited in amount to the "maximum contract fee," the amount to which the lawyer would have been entitled upon completion of the contingent fee agreement. *Id.* at 1021. The Rosenberg court further held that the cause of action arises "only upon the successful occurrence of the contingency." *Id.* at 1022.

The Committee agrees that the holding in *Rosenberg* best protects the interests of both clients and the profession. A contingent fee agreement may state that the lawyer is entitled to fees in quantum meruit if the client discharges the lawyer without cause. The agreement should give, or refer to, a reasonable definition, of "cause," as it applies to the lawyer's conduct, and should limit the amount of hourly fees so that they do not exceed the eventual contingency.

There are extremes of behavior for which it is clear that "cause" exists. The courts have held that violations of the Rules of Professional Conduct constitute "cause" for which a client may discharge a lawyer. But "there is a large intermediate area in which lawyers are probably discharged for valid reasons which do not rise to the level of legal cause." *Brickman*, at 394. Abandoning a client or failing to communicate are examples of conduct that the courts have held allow a client to fire a lawyer for "cause." For further examples of what actions constitute "cause," see *Annotation, Right to Compensation as Affected by Incapacity, Death, Voluntary Withdrawal, or Disbarment of Attorney before Complete Performance*, 45 A.L.R. 1135 (1926) and *Annotation, Circumstances under which Attorney retains Right to Compensation Notwithstanding Voluntary Withdrawal from Case*, 88 A.L.R.3d 239 (1978).

Termination by the Lawyer

A lawyer may not simply abandon a client. See *In re Chowning*, 100 N.M. 375, 671 P.2d 36 (1983). Rule 16-116(B) makes it clear that a lawyer may withdraw only if that withdrawal does not materially impair the client's interests or if other grounds obtain.

The Committee recognizes that lawyers entering into a contingent fee agreement may later determine that their initial assessment of their possible fee was inaccurate. "The fact that the attorney discovers the case is not as profitable as first imagined is not good cause [for the lawyer] to withdraw." *Suffolk Roadways, Inc. v. Minuse*, 287 N.Y.S.2d 965 (Sup. Ct. 1968). As the ABA Comment to Rule 16-103 points out, the Rules requires the lawyer to pursue the client's matter with due diligence, even if it is inconvenient for the lawyer. The client's interests, not the lawyer's, are paramount. Rule 16-107(B).

A lawyer may not enter into a contract with a client that makes the lawyer better off for terminating the agreement than pursuing the original ends of the agreement. For example, a lawyer may not receive a quantum meruit fee if the contingency does not occur. See Rule 16-105 cmt. Any provision that allows a lawyer to claim fees in quantum meruit after withdrawing from or abandoning a client's case, without cause, violates this rule.

The lawyer that represents a client under a contingent fee agreement should be vigilant in seeing the contingent matter pursued to the fullest extent possible, consistent with the client's interests. "The refusal to settle by a client can never be sufficient grounds to constitute 'good cause' for an attorney to withdraw." *Ambrose v. Detroit Edison Co.*, 237 N.W.2d 520 (Mich. Ct. App. 1975); *Suffolk*.

Further Considerations

The client depends on the lawyer for advice and counsel. The lawyer's duty of loyalty to the client requires that the lawyer exercise the greatest care in drafting a fee agreement with the client. As the ABA Comment to Rule 16-107 reminds us, the lawyer's need for income may not allow the lawyer to place the lawyer's interests before the client's interests.

CONCLUSION

The contingent fee agreement may not contain provisions that reward the lawyer for failing or refusing to carry the matter to conclusion. The agreement may state that the lawyer has a quantum meruit claim if some behavior of the client, arising to the level of "cause," leads the lawyer to withdraw, subject to the relevant ethical and procedural rules.

The agreement should not effectively punish a client who decides to end either the relationship or the litigation, both of which are rights of the client. The agreement should give the client some guidance as to what constitutes "cause" for purposes of the quantum meruit claim. The provisions of a contingent fee agreement should not compensate the lawyer more handsomely for terminating the agreement than for concluding the original contingent goal; the quantum meruit fee must be limited to the amount to which the lawyer would be entitled under the contingency. The contingent fee agreement may give the lawyer a right to a quantum meruit fee, determined only upon the occurrence of the contingency.