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**E-82-5      Contingent fees**

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The opinion of the State Bar Professional Ethics Committee has been requested on three factual situations. They are as follows:

Situation 1: A client in a personal injury matter, having entered into a 25 percent contingent fee contract with his attorney, decides to abandon the claim prior to obtaining a settlement offer. The attorney informs the client that he has a good cause of action and wishes to pursue the matter. He advises the client that he has expended 100 hours of time on the client's case, and asserts the right to bill the client at his usual rate under an implied contract in lieu of the contingent fee arrangement.

Situation 2: Same facts as Situation 1 above, except that the contingent fee contract contains the following provision:

In the event, contrary to the advice of the attorney, the client instructs the attorney to discontinue the matter, the attorney shall discontinue the matter and the client shall pay the attorney for the time expended in the matter at the attorney's hourly rate of \$80 per hour plus expenses.

Situation 3: Same facts as Situation 1 above. The contractual provision contained in Situation 2 above is not included in the fee contract. The attorney obtains a settlement offer of \$2,000 which the client wishes to accept, but the attorney disagrees. Under the contingent fee contract, the attorney would receive \$500 in attorney's fees, but if he is allowed to charge his usual rate, the attorney would be entitled to \$800 for his services.

**Opinion**

Situation 1: The Wisconsin Supreme Court has held that the client has the unilateral right to compromise or even abandon his claim if he sees fit to do so. *Knoll v. Klatt*, Wis. 2d 265, 271, 168 N.W. 2d 555 (1969). This holding is consistent with SCR 20.34(2)(d), which declares that the authority to make decisions is exclusively that of the client, i.e., it is for the client to decide whether he or she will accept a settlement offer or waive an affirmative defense. *See also* SCR 20.34(2)(e).

However, it does not necessarily follow that an attorney who has performed legal services for a client who discharges him without fault on the attorney's part is not entitled to reasonable compensation for his services. Whether compensation should be allowed on the theory of breach of implied contract and the amount of compensation allowable are questions of law and are, therefore, beyond the scope of this opinion.

However, the committee has difficulty with the ethics of asserting the claim, except under the most extreme circumstances in which the client desires to withdraw without cause on the part of the attorney, and consequently recommends that the contingent fee contract be phrased to include a provision covering reasonable terms of withdrawal after the attorney has expended time and incurred expenses. The clause, however, should be limited to only those cases where the client desires to terminate the employment of the attorney without cause, and when no recovery or offer has been made.

Situation 2: Wherein the committee's recommendations in the preceding paragraph would be incorporated in this situation, reference is made to SCR 20.12(1) and (2)(h) which provide as follows:

Fees for legal services: (1) A lawyer may not enter into an agreement for charge or collect an illegal or clearly excessive fee.

(2) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

One of the factors to be considered in determining the reasonableness of a fee is:

(h) Whether the fee is fixed or contingent.

SCR 20.06(6)(b) provides in part:

(b) The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the disciplinary rules. The fees of a lawyer will vary according to many factors, including the time required, his or her experience, ability and reputation, the nature of the employment, the responsibility involved and the results obtained. . . .

SCR 20.06(6)(d) provides in part:

. . . Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not

necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement.

The Ethics Committee of the American Bar Association, in its Informal Opinion 1389 dated July 14, 1977, in approving a contingent fee for services in a tax matter, stated in part as follows:

Also, an attorney can agree with a client on a contingent fee where he is only to be paid if he accomplishes a tax saving for the client. Similarly, an attorney can agree with a client on a fixed fee coupled with a contingency on the outcome of the case providing it is also understood that the fixed fee applies irrespective of the outcome and that the contingency applies only to the tax savings effected.

Based on the foregoing, the committee's suggested provision in the contingent fee contract is not unethical if the fee so determined is not clearly excessive. The reasonableness of a fee includes consideration of the following factors, in addition to the terms of the fee agreement.

(2) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (a) The time and labor involved, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services 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 lawyer performing the services.

Situation 3: An attorney who enters into a contingent fee contract is (or should be) aware that the client has the right to determine whether a settlement offer is acceptable. Therefore, the risk that the attorney may not receive the same

compensation that he would receive on an hourly basis is inherent in the contingent arrangement. Thus, the attorney is entitled to a fee of \$500.

Situation 4: Although not posed, another situation occurs when an offer is received which the attorney deems inadequate, but the client desires to accept, and the contingent fee contract would contain the language set forth in Situation 2.

In that situation, it would be improper for the lawyer to attempt to charge on an hourly basis. If the lawyer were permitted to charge on an hourly basis, the client, to some extent, loses control of his case as he or she would face the choice of a lawyer's bill he cannot afford and a lawsuit which he or she doesn't want to pursue. Moreover, the large attorney's fees which are generated by the contingent fee can only be justified because of the risks the lawyers must bear of not making an adequate recovery to cover his or her time in certain cases. The client's desire to accept a less than satisfactory settlement offer is an inherent part of that risk. To suggest a lawyer can have it both ways with the use of the proposed clause is not acceptable to the committee.

Therefore, to include the proposed language in the contingent fee contract so as to permit charging a client on an hourly basis if the lawyer deems a settlement offer inadequate, is, in the opinion of the committee, overreaching and, therefore, unethical.