

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

OPINION 669 - 6/14/94 (69-93)

Topic: Contingent fees; computation thereof.

Digest: Under what circumstances, if any, may an attorney's fee in a contingency fee case be computed prior to deducting from the amount recovered the expenses of the litigation.

Code: DR 2-101, 2-106(A), 2-106(C), 2-106(D); EC 2-17, 2-18, 2-19, 2-20

QUESTION

Under what circumstances may an attorney's fee in a contingency fee case be computed *prior* to deducting from the amount recovered the expenses of the litigation?

OPINION

The rules of the respective Appellate Divisions require that a contingent fee in any claim or action for personal injury or wrongful death be computed on the net sum recovered after deducting expenses and disbursements chargeable to the enforcement of the claim or prosecution of the action. *See, e.g.*, 22 NYCRR §806.13(c). DR 2-101, as amended effective July 1, 1993, permits advertising of contingent fee rates provided that the advertisement discloses "whether percentages are computed *before or after* deduction of costs, disbursements and other expenses of litigation" (emphasis supplied).

Because the interpretation of the Appellate Divisions' rules entails primarily a question of law beyond this Committee's jurisdiction, we decline to opine on whether a contingent fee would be proper under those rules in cases other than those involving personal injury or wrongful death. We do not believe that limitation, however, to be a necessary implication of the rules as written. We do not perceive any inherent ethical impropriety in charging contingent fees, moreover, in various kinds of cases in addition to personal injury and wrongful death cases, other than matrimonial cases, in which they are rarely justified, EC 2-20, DR 2-106(C)(2), criminal cases, in which they are proscribed *per se*, EC 2-

20, DR 2-106(C)(1), and other cases in which a contingent fee is proscribed by law or regulation, DR 2-106(C)(3).

Assuming, without deciding, that there is a broader range of cases in which a contingent fee would be legally proper, we offer the following general observations with respect to the computation of such fees in all such cases. In personal injury or wrongful death actions, matters which are within the ambit of the Appellate Divisions' rules governing the computation of contingent fees, the fee may be computed only after deducting the costs and expenses of litigation. As a general rule of statutory construction, the specific governs over the general. Under the Lawyers' Code of Professional Responsibility, moreover, it would be unethical to charge an illegal fee. DR 2-106(A). Thus, despite the general language of DR 2-101 regarding advertising of contingent fees, the Appellate Division rule with regard to personal injury and wrongful death actions controls as to the computation of a contingent fee in those matters.

Furthermore, in all cases, an attorney's fee should be reasonable in light of the circumstances. DR 2-106; *see also* EC 2-17, 2-18, 2-19 and 2-20. Thus, in cases outside the ambit of the Appellate Divisions' rules with respect to the computation of contingent fees in personal injury and wrongful death cases, the charging and computation of a contingent fee, like the charging and computation of all fees for professional services, must be reasonable in light of all the circumstances. Thus, in cases beyond the ambit of the Appellate Divisions' rules but in which a contingent fee would be proper in light of all the circumstances, whether the contingent fee may be computed on the gross recovery also will depend on whether the computation and resultant fee would be fair and reasonable in light of all the circumstances.

Finally, DR 2-106(D) specifically provides that a lawyer must promptly provide to the client in a contingent fee matter a written statement that includes, *inter alia*, whether expenses are to be deducted before or after the contingent fee is calculated.

CONCLUSION

In matters not covered by the Appellate Division rules regarding contingent fees, a lawyer may compute the attorney's fee prior to deducting litigation expenses, provided the fee is otherwise legal and reasonable in light of all the circumstances, and the attorney has provided a prompt written statement to the client stating how the fee is to be calculated, including whether expenses are to be deducted before or after the fee is calculated.
