

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 697 - 12/30/97 (41-97)

Topic: Legal fees; combination of hourly and contingency fee.

Digest: It is proper for a lawyer to charge a combination of an hourly and a contingency fee.

Code: DR 2-106(A), 2-106(C)(1).

QUESTION

May a lawyer charge both an hourly fee, irrespective of outcome, and, in the event of a recovery by settlement or verdict, a percentage of the net recovery? Such a combined fee is sometimes referred to as a “modified contingent fee” or a “hybrid fee.”

OPINION

DR 2-106(A) provides that a lawyer may not enter into an agreement for an excessive fee. In determining whether a fee is excessive, one of the criteria is whether the fee is fixed or contingent.

Contingent fees are normally greater than the hourly fees that would be charged for the same representation, because the contingent fee lawyer bears the risk of receiving no pay if the client loses and the higher fee is compensation for that risk. See *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 897 (1st Cir. 1985); see generally American Law Institute, Restatement of the Law Third, Restatement of the Law Governing Lawyers, §47, comment c (Proposed Final Draft No. 1). Similarly, a contingent fee may be upheld, even though the lawyer devoted relatively little time to the representation, since the lawyer risks having to provide services without extra pay if the representation entails a greater expenditure of time than the lawyer anticipated when the contingent fee was negotiated. However, it has been held that large fees are unreasonable when they are unearned by either effort or a significant period of risk. *Id.*

Of course, a lawyer may never charge a contingent fee for representing a defendant in a criminal case. DR 2-106(C)(1). Similarly, the Rules of the Appellate Division of the New York Supreme Court limit the amount of legal fees in certain actions for personal injury or wrongful death where the fee is dependent in whole or in part upon

the amount of recovery. *See, e.g.*, 22 NYCRR §603.7(e)(1st Dep't). Consequently, any combination of an hourly fee and a contingent fee in such a case would have to conform to the maximum fee schedules in the court rules. *See* DR 2-106(A)(a lawyer shall not charge an illegal fee).

We believe a hybrid or modified contingent fee is permissible as a matter of ethics as long as the total fee is not excessive. This will usually mean that the contingency percentage will be lower than it would be if the fee were based on a pure contingency. Whether the hourly fee must also be reduced depends on whether the fee as a whole exceeds a reasonable fee.

Although the lawyer who charges a modified contingent fee does not assume the full risk of no recovery (since the lawyer is receiving an hourly fee), we believe that the lower risk to the lawyer is balanced by the lower bonus in the event of a successful completion, as defined in the retainer agreement. Moreover, if the hourly fee is reduced, it is likely to make counsel available to clients whose cases do not have such a high probability of success that a straight contingency fee would be attractive to prospective counsel. Thus it meets the goal expressed in EC 2-20 of providing a means by which a client may economically afford, finance and obtain the services of a competent lawyer to prosecute a claim.

Modified contingent fees have also been upheld in other jurisdictions. *See Boston & Main Corp. v. Sheehan, Phinney, Bass & Green, P.A., supra* (hourly fee and reduced contingent fee was reasonable even though the justification for a pure contingency fee – lawyer's risk of no compensation – was not present. In return for the lower risk, Sheehan accepted a much lower contingency fee – 15%); Nevada Formal Op. 4 (1987)(reduced hourly fee plus bonus).

CONCLUSION

In a case in which a lawyer could charge a contingency fee, the lawyer may charge a modified contingency fee (for example, an hourly fee less than the lawyer would charge for a retainer on an hourly fee basis, and a contingent fee less than the lawyer would charge for a pure contingency retainer) as long as the total fee is reasonable. A fee in a personal injury matter that exceeded the Appellate Division's fee schedule for certain contingency fees would not be reasonable.
