Committee on Professional Ethics

Opinion 880 (10/6/11)

Topic: Prohibition of contingent fees in criminal matters; violations of the Vehicle and Traffic Law; refund of legal fees

Digest: Prohibition of contingent fees in criminal matters is inapplicable to simple traffic infractions which are expressly deemed noncriminal; violations of the Vehicle and Traffic Law which constitute misdemeanors or felonies are subject to the prohibition on contingent fees. In agreements to provide legal services for such violations and in advertising related thereto, it must be clear that contingent fees are not available with respect to misdemeanor or felony charges. In criminal matters, an agreement to refund a fee paid in advance upon the occurrence of a certain outcome may be deemed a prohibited contingent fee

Rules: 1.5(d)(1) and (c); 7.1(a)

QUESTION

1. May a lawyer offer to refund all legal fees paid by a client in connection with proceedings for violations of the Vehicle and Traffic Law if the charges are not dismissed or reduced?

OPINION

2. Rule 1.5(d) of the Rules of Professional Conduct states:

> "A lawyer shall not enter into an arrangement for, charge or collect:
> (1) a contingent fee for representing a defendant in a criminal matter...."

3. The question posed requires us to interpret the terms "contingent fee" and "criminal matter" within the meaning of Rule 1.5(d).

4. As to the meaning of "contingent fee," the question is whether that term includes a fee received by a lawyer on an understanding that the client may be entitled to a refund of the fee if the charges are not dismissed or reduced. Of course in some circumstances, refund of fees is clearly contemplated by the rules. *See* Rule 1.16(e) (obligating lawyer to refund "any part of a fee paid in advance that has not been earned"). We believe that when entitlement to a refund depends on the outcome of the matter, then the arrangement must comply with the rules on contingency fees. To trigger those rules, it is not necessary that the stated contingency occur prior to payment of the fee. The common understanding of a contingent fee envisions payment at the conclusion of a matter. However, fees for criminal defense work are typically paid in advance. To construe the term to apply only to fees paid subsequent to the contingency would render the traditional prohibition too easily evaded and virtually meaningless in many cases.

5. Interpreting the term "criminal matter," we first turn to the New York State Vehicle and Traffic Law ("VTL") for guidance. The VTL proscribes a wide variety of conduct including traffic infractions, misdemeanors and felonies. *See*, *e.g.*, VTL § 1193 (providing that driving while ability impaired is a traffic infraction or misdemeanor, and driving while intoxicated is a misdemeanor or felony, depending on factors including prior record). Simple "traffic infractions" (including most tickets for speeding) are expressly designated as noncriminal. VTL § 155 ("A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment").

6. Although the VTL applies throughout the State, local regulations provide for considerable variation in the type of conduct proscribed as well as the manner in which violations are prosecuted. Noncriminal traffic infractions are most commonly addressed by the local city, town or village courts, but in New York City, Buffalo, Rochester and the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown in Suffolk County, they are heard by the Traffic Violations Bureau ("TVB") of the State's Department of Motor Vehicles. Violations heard by the TVB are purely civil administrative matters without the involvement of any local city, town or village court or the public prosecutor. Some local courts hearing simple traffic infractions are designated as "criminal courts" and may impose short periods of incarceration. In many local courts, plea bargains are usually negotiated by the issuing officer; however, where the issuing officer is a State Trooper, the plea is negotiated with a representative from the District Attorney's office who, if the negotiations fail, will proceed to trial.

7. The policy underlying Rule 1.5(d) reflects the profession's aversion to allowing defense counsel to have a financial interest in the outcome of a criminal case. *See* Former Code of Professional Responsibility DR 2-106(C)(1)(prohibiting a "contingent fee for representing a defendant in a criminal case"); *see also*, *e.g.*, District of Columbia Opinion 262 (1995) (allowing contingent fee in coram nobis proceeding after defendant had been released, and reviewing various policy arguments underlying the traditional prohibition); Charles W. Wolfram, *Modern Legal Ethics*, § 9.4.1, at 526-28 (1986); Standards Relating to the Prosecution and Defense Function: The Defense Function § 3.3(e) (ABA 1971); Geoffrey C. Hazard, Jr. & Susan P. Koniak, *The Law and Ethics of Lawyering* at 508 (1990); Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. Crim. L. & Criminology at 498 (1991); Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 595 (April, 1993).

8. When a matter is essentially civil, albeit having some relation to the penal law or prior criminal proceedings, the authorities have long recognized that the ban on contingent fees is inapplicable. Thus it has been deemed permissible to agree that a lawyer's fee for representing the accused in defense of certain criminal charges will be satisfied by his or her contingent fee for representing that same client as the plaintiff in a related civil action seeking damages for false arrest. Illinois Opinion 84-9 (1985); *see also*, *e.g.*, Indiana Opinion 4 (1991); N.Y. City 1986-3 (fee for defense of ancillary criminal case may be tied to success in negligence action).

9. Similarly, the ban on contingent fees in criminal matters has been held inapplicable to related administrative or civil proceedings. *See*, *e.g.*, Connecticut Inf. Opinion 91-1 (1991) (license revocation proceeding following client's arrest for drunk driving); Kansas Opinion 96-10 (1997) (driver's license revocation proceeding); Pennsylvania Opinion 92-183 (1993) (habeas corpus petition to have client transferred to a different prison); Nassau County Opinion 90-12 (civil action for forfeiture of proceeds of crime); Michigan Inf. Opinion RI-269 (1996) (seizure of property by government); Virginia Opinion 1748 (2000) (civil forfeiture proceeding).

10. In light of the foregoing, we believe that when the VTL defines the initial charge as a noncriminal traffic infraction, the proceedings should not be deemed a "criminal matter" within the meaning of Rule 1.5(d). This result should obtain regardless of whether the venue is denominated a "criminal court," whether the District Attorney's office is involved in the proceedings, or whether the penalty may involve a period of incarceration. When the initial charge constitutes a misdemeanor or a felony, however, the proceedings should be deemed a "criminal matter" within the proscription of the Rule. In such cases, a contingent fee or refund is impermissible even if the lawyer may, or ultimately does, obtain a reduction to noncriminal charges.

11. We are aware of one recent ethics opinion which would apply the traditional ban to so-called "quasi-criminal matters" including traffic tickets. In New Jersey Opinion 717 (2010), the New Jersey Advisory Committee on Professional Ethics determined that its version of the rule should be interpreted to apply to "quasi-criminal matters in municipal

court, including motor vehicle cases." In so holding, the Advisory Committee observed the procedural and jurisdictional similarities between clearly criminal matters and those before its municipal courts in hearing "non-indictable and motor vehicle offenses." The question before us concerns noncriminal violations charged under the New York VTL and the procedures for resolving such charges. In that context, for the reasons discussed above, we reach a different result. Moreover, we note that the Advisory Committee recognized that the potential conflict addressed by the prohibition on contingency fees "is not present in many municipal court matters and the [rule against contingency fees in criminal cases] may be fairly criticized as overbroad. Accordingly, the Committee has invited the Supreme Court, in its administrative capacity, to evaluate [that rule] and consider whether a revision would be appropriate." N.J. Opinion 717.

12. Rule 1.5(c) states: "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law." But contingency fee arrangements must meet certain standards. For example, when the fee is contingent, Rule 1.5(c) further requires that the fee agreement be in writing and "clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party."

13. Rule 7.1(a) provides: "A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule."

14. Together, Rules 1.5(c) and 7.1(a) require that in contingent-fee agreements to provide representation in connection with violations of the VTL, and in advertising relating thereto, it must be clear that contingent fees (or, as in the question posed, "refunds") are not available with respect to misdemeanor or felony charges.

CONCLUSION

15. The prohibition on contingent fees in criminal matters is inapplicable to initial charges of simple traffic infractions which are expressly deemed noncriminal under the Vehicle and Traffic Law. Charged violations of the VTL which constitute misdemeanors or felonies are, however, subject to the prohibition. In agreements to provide legal services for violations of the VTL and in advertising related thereto, it must be clear that contingent fees are not available with respect to misdemeanor or felony charges. In a criminal matter, an agreement to refund a fee paid in advance depending on the outcome may be deemed a prohibited contingent fee.

(24-11)