THE BAR ASSOCIATION OF SAN FRANCISCO

Legal Ethics
Ethics Opinions

OPINION 1989-1

Disclosure of Lawyer A's quantum meruit claim for fees should be made to the client by a successor attorney hired on a contingency fee or other basis. In the opinion of the Committee, a successor attorney may ethically indemnify a client from the former discharged attorney's claim for fees under a contingency fee contract.

QUESTION:

Where a client discharges Lawyer A in a contingency fee case and consults Lawyer B, may Lawyer B replace Lawyer A on a contingency fee basis without advising the client of Lawyer A's claim for fees?

Would Lawyer B's obligation be different if the case were accepted other than on a contingency fee basis?

Is it permissible for Lawyer B to indemnify the client with regard to Lawyer A's claim for fees?

DISCUSSION

Although the attorney-client relationship is a fiduciary one, Lee v. State Bar (1974) 2 Cal.3d 927, 939, agreements between the attorney and the client relating to the hiring or compensation of the attorney are generally excluded from Probate Code Section 16004(c). See, Cooley v. Miller & Lux (1909) 156 Cal. 510, 525; Walton v. Broglio (1975) 52 Cal.App.3d 400. Accordingly, the attorney and client are viewed as being able to negotiate at arm's length concerning the fee agreement. Berk v. Twenty-nine Palms Ranchos, Inc (1962) 201 Cal-App.2d 625, 637.

However, a special situation arises where a client who has retained counsel under a contingency fee contract, subsequently discharges that counsel before the contingency occurs and enters into negotiations with a successor counsel to take the case on a contingency fee basis. The California Supreme Court in Fracasse v. Brent (1972) 6 Cal.3d 784 established the rule that the former counsel is limited to a quantum meruit recovery in seeking payment of attorney's fees under a contingency fee contract, and then only when the contingency has occurred [1]. Although the client has the absolute right to discharge counsel at any time, doing so does not by itself discharge the attorney's lien. The discharged attorney is allowed to recover attorney's costs and fees, once the contingency occurs, out of the proceeds of any settlement or judgment, assuming a valid lien is filed.

The majority in Fracasse suggested in dictum that the client may be subject to the jeopardy of paying more than one fee by changing attorneys in a contingency fee case.

"To the extent that such discharge is followed by the retention of another attorney, the client will in any event be required, out of any recovery, to pay the former attorney for the reasonable value of his services. Such payment, in addition to the fee charged by the second attorney, should certainly operate as a self-limiting factor on the number of attorneys so discharged." Fracasse v. Brent, supra , at 791.

In Spires v. American Bus Lines (1994) 158 Cal-App.3d 206, the First District Court of Appeal applied the Fracasse rule in a situation where the contingent fee was insufficient to meet the quantum meruit claims of both the discharged and existing counsel by using "an appropriate pro-rata formula which distributes the contingent fee among all discharged and existing attorneys in proportion to the time spent on the case by each." Spires v. American Bus Lines, supra , at p. 216. It is unclear whether other courts will follow the same formula in similar cases and what the result will be in cases where the recovery is more than sufficient to meet the claims of each attorney. Cf. Cazares v. Saenz (1989) 208 CalApp. 279, 285 et seq . There is no assurance under current law that the client will not be forced to make a double payment of fees, at least in the latter instance. See Alexander, "Consumers' Rights In The Legal Marketplace: Problems of Contingency Fee Clients Who Change Attorneys," 54 California State Bar Journal No. 5, p. 314 (1975).

A previously discharged attorney may file a notice of lien in a pending action. Hansen v. Jacobsen (1986) 186 Cal.App.3d 350. As a result, the discharged attorney can obligate the parties and insurers in the underlying

action by filing a notice of lien and thereby cause delay in the payment of the settlement or satisfaction of the judgment. The discharged attorney in most cases must, however, maintain a separate action to enforce his lien rights and may not intervene in the underlying action in order to establish his lien interest in the anticipated recovery. See, e.g., Siciliano v. Fireman's Fund Insurance Co. (1976) 62 Cal.App.3d 745. Courts have recognized claims by a discharged attorney against the former client, as well as the successor attorney, for money had and received, conversion, interference with a contractual relationship and constructive trust. See Weiss v. Marcus (1975) 51 Cal.App.3d 590.

An attorney may be entitled to quantum meruit recovery even where the attorney withdraws from the case, if the attorney can establish that withdrawal was mandatory and in adherence to ethical mandates. Estate of Falco (1987) 188 CalApp. 1004, 1016. See also Hensel v. Cohen (1984) 155 CalApp. 563 (no quantum meruit recovery where the attorney voluntarily abandons the case).

In the opinion of the Committee, it is better practice for an attorney who proposes to succeed a discharged attorney in a contingency fee matter to advise the client concerning the discharged attorney's quantum meruit claim for fees, particularly under current California law where the client's obligation to the discharged attorney for payment of the quantum meruit claim could be in addition to the contingency fee paid the successor attorney. In addition, it may not be clear to the client in a particular situation whether the former attorney was actually discharged by the client or voluntarily withdrew. The successor attorney acts competently by informing the client of the existence of the prior lawyer's quantum meruit claim. See Rule 3-110.

Business & Professions Code sec. 6147(a)(2) requires that an attorney who contracts to represent a plaintiff on a contingency fee basis shall, at the time the contract is entered into, provide in the contract how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery. Even in the situation where counsel cooperate in the transfer of the case and agree to an allocation of one fee between the two of them for the work performed, the attorneys arguably should obtain the consent of the client pursuant to Rule 2-200(A) [2] which provides:

"A member should not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless (1) the client has consented in writing thereto after a full disclosure has been made in writing that a division of the fees will be made and the terms of such division; and (2) the total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in Rule 4-200."

Furthermore, a lawyer may not enter into an agreement for, charge or collect an illegal or unconscionable fee. Rule 4-200 (former Rule 2-107). Unconscionability of a fee agreement is determined on the basis of all the facts and circumstances existing at the time the agreement is entered into, except where the parties contemplate that the fee will be affected by later events. Rule 4-200(B). A contingency fee may be found to be unconscionable. See Setzer v. Robinson (1962) 57 Cal.2d 213. As the client's net recovery is diminished by attorneys' fees based on the combination of the contingency fee under the contract and fees based on a quantum meruit claim, the likelihood of the fees being found unconscionable increases. See Estate of Raphael (1951) 103 CalApp.2d 792.

In the opinion of the Committee it is permissible for a lawyer to agree to indemnify and hold the client harmless against the discharged attorney's claim for fees. Rule 4-210(A)(3) makes a substantive change to former Rule 5-104 in permitting the attorney to advance the costs of litigation, the repayment of which may be contingent on the outcome of the matter. Costs within the meaning of Rule 4-210(A)(3) "shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client." It is the opinion of this Committee that an agreement to indemnify the client against the former counsel's quantum meruit claim, thereby limiting the attorney's compensation to a single fee, is permissible under Rule 4-210. Even if the successor attorney agrees to indemnify the client, the successor attorney should advise the client that the discharged attorney may be required to sue the client to enforce his fee claim. In this instance, the attorney who agrees to indemnify the client against the former counsel's claim should provide in the contingency fee contract the extent, if any, the client could be required to pay fees or costs in defense of the former attorney's lawsuit for fees. Business & Professions Code Section 6147(a)(3).

The opinions expressed by this Committee do not depend on whether Lawyer B replaces Lawyer A on a contingency fee or other fee basis.

In summary, a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney. This will enable the client to knowingly and intelligently determine whether to pursue litigation and choose an appropriate attorney.

Footnotes:

1. Prior to Fracasse , an attorney discharged without cause under a contingent fee contract could recover the full amount of the contract on the rationale that the client was deemed to have breached the contract thereby becoming liable to the attorney for the agreed fee. Baldwin v. Bennett (1854) 4 Cal. 392. Since Fracasse , a client who is represented by an attorney under a contingency fee contract has the absolute right to discharge his attorney at any time without breaching the contract. See e.g. Kallen v. Delug (1984) 157 CalApp.3d 940.
2. The amendments to the Rules of Professional Conduct became operative on members of the State Bar on May 27, 1989.

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