

Nebraska Ethics Advisory Opinion for Lawyers
No. 95-1

AN ATTORNEY MAY NOT ETHICALLY INCLUDE IN A FEE AGREEMENT CLAUSES PROVIDING (1) THAT THE CLIENT MAY NOT SETTLE THE CASE WITHOUT THE LAWYER'S APPROVAL, OR (2) THAT IF THE CLIENT DOES SETTLE THE CASE WITHOUT THE ATTORNEY'S APPROVAL, THE ATTORNEY WOULD BE ENTITLED TO RECOVER THE GREATER OF THE AGREED UPON PERCENTAGE OR AN HOURLY FEE THAT WOULD BE CUSTOMARY FOR THE TYPE OF LAWSUIT.

STATEMENT OF FACTS

A member of the Nebraska State Bar Association regularly represents clients on a contingent fee basis. He is concerned about the situation in which a client elects to settle a case for an amount less than the attorney believes is the reasonable value of the case. Such a settlement will naturally reduce the amount of the attorney's contingent fee.

QUESTIONS PRESENTED

The attorney has requested an opinion as to whether he can ethically include in his fee agreements clauses providing (1) that the client may not settle the case without the lawyer's approval, and/or (2) that if the client does settle the case without the attorney's approval, the attorney would be entitled to recover the greater of the agreed upon percentage or an hourly fee that would be customary for the type of lawsuit.

DISCUSSION

Both of the proposed provisions raise questions involving the relative authority of attorney and client, as well as the parties' ability contractually to alter their authority. The second provision also presents a situation in which the resulting fee may be considered

"excessive."

I. No Settlement Without the Consent of the Attorney.

Within the lawyer-client relationship, the client traditionally retains the authority to make decisions regarding the objectives of representation. The Code of Professional Responsibility states that "[a] lawyer shall not intentionally [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.." CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1980). More specifically, EC 7-7 provides that:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As [a] typical example[] in civil cases, it is for the client to decide whether he will accept a settlement offer. . . .

See, also, *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985) (quoting EC 7-7). The Model Rules are even more clear on the issue, stating plainly that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a)(1983). While the Model Rules have not been adopted in Nebraska, they are consistent with the Model Code and may be instructive. Thus it seems clear that the authority concerning whether to accept a settlement offer lies exclusively with the client. The question remains, however, as to whether the client may enter into a contractual arrangement with his attorney in which he or she gives this decisionmaking power to the attorney. Although the Code of Professional Responsibility does not directly address this issue, the language of the relevant provisions indicates that the lawyer may not contract away the client's authority to settle. For

example, EC 7-7 states that the authority to make decisions is "exclusively" that of the client. EC 7-8 further provides that "[i]n the final analysis ... the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."

Comment 5 to Rule 1.2 of the ABA Model Rules of Professional Conduct strongly supports this position:

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to ... surrender the right to . . . settle litigation that the lawyer may wish to continue.

The Committee finds this Rule, although not specifically adopted, to be instructive. See, also, *Southworth v. Rosendahl*, 133 Minn. 447, 158 N.W. 717 (1916) which concludes that a contractual provision removing a client's ability to compromise, settle or negotiate his own claim would be void as against public policy.

Accordingly, it is the opinion of the Committee that any provision limiting the client's ultimate authority to settle a matter will be unenforceable and improper.

II. If the Client Settles for Less Than What the Attorney Believes is the Reasonable Value of the Case, May the Attorney Charge the Greater of the Contingent Percentage or an Hourly Rate Customary for that Type of Lawsuit.

A provision allowing the attorney to choose between the contingent percentage and an hourly fee presents issues similar to that discussed above. From the client's perspective, this provision restricts the authority to settle a matter, because presumably the only time this will be an issue is when early settlement results in a contingent fee less than the hourly fee. The client's authority is restricted because while considering settlement the client must not only consider his or her

own interests, but the attorney's fee as well.

From the attorney's perspective, this merely presents an arm's-length contractual arrangement that will never result in anything but a reasonable fee. Either the client will pay the agreed-upon contingent percentage or a reasonable hourly fee. With this arrangement fully disclosed at the outset, the client still retains complete authority over whether or not to settle his case.

The proposed provision raises two distinct ethical issues concerning the client's ultimate authority to settle a matter and the "reasonableness" of a fee arrangement under the Model Code. Moreover, enforcement of such a provision would raise several practical problems.

A. Client's Ultimate Authority.

As discussed above, a provision that requires the attorney's consent prior to settlement is improper. A provision providing for an hourly fee if the attorney does not approve of a settlement offer raises a more difficult question. Clearly the client's authority is restricted, but the client still retains the ability to settle. An early settlement will result merely in a higher legal fee.

The Wisconsin State Bar Association Advisory Committee addressed a situation in which the attorney's contingent fee contract contained 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.

Wisconsin Ethics Opinion E-82-5. In the relevant situation, the client has received an offer that the attorney deems inadequate, but the client desires to accept. Finding the provision improper, the committee stated:

In that situation, it would be improper for the lawyer 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.

Id. See, also, *Jones v. Feiger, Collison & Killmer*, slip opinion, 1994 WESTLAW 716892 (Colo. Ct. App. 1994) (unpublished) (provisions of fee agreement which allow law firm to withdraw if client refuses to accept settlement unenforceable as inappropriately impinging on client's right to control settlement).

Under the reasoning of the Wisconsin State Bar Association Advisory Committee, a provision giving the attorney the option between a contingent fee and an hourly fee if the client accepts a settlement offer which the lawyer deems unsatisfactory is an impermissible transfer of the authority of the client to the attorney. Additionally, under the Model Code, this is arguably in violation of DR 7-101(A) and EC 7-7 (discussed above).

B. Excessive Fee.

In addition to improperly limiting the client's authority to settle a matter, the proposed language may result in an "excessive" fee arrangement under the Model Code. DR 2-106(A) states that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106(B) continues:

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: .(8) whether the fee is fixed or contingent.

See, also, Kirby v. Liska, 214 Neb. 356, 334 N.W.2d 179 (1983) (quoting DR 2-106(A) and (B)). The relationship of contingency to reasonableness can best be explained by the purposes behind allowing contingent fees in the first place. Generally, a lawyer is forbidden from taking a proprietary interest in a cause of action. DR 5-1 01 (A). EC 5-7 explains that "[t]he possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation." An exception has been carved from this general rule allowing a lawyer to charge a reasonable contingent fee in a civil case. DR 5-103(A)(2). EC 2-20 explains the reasons for this exception:

Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid.

Similarly, EC 5-7 provides that "although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice."

The contingent fee is also justified by the fact that the attorney shares in the risk of the action. In its discussion of a contractual provision identical to the one proposed, the Wisconsin State Bar Association discussed the relationship between the risks involved in a contingent fee arrangement and the percentage charged

by the attorney.

"[T]he 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 that a lawyer can have it both ways with the use of the proposed clause is not acceptable to the committee."

Wisconsin Ethics Opinion E-82-5. The Ethics Opinion concludes its discussion by stating that "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." *Id.* Accordingly, to include the proposed provision may result in a fee arrangement considered "excessive" under DR 2-106.

There is a line of Nebraska cases that might support an argument allowing the hourly fee provision. For example, in *Baker v. Zikas*, 176 Neb. 290, 125 N.W.2d 715 (1964), the attorney and client entered into a contingent fee arrangement. When the attorney was discharged without the payment of any fees by the client prior to resolution of the case, the Nebraska Supreme Court held that the attorney could recover the reasonable value of the services already rendered. The court determined that "under the law the maximum reach of [the attorney's] right to fees is the reasonable value of [his] services actually rendered to date of discharge." *Id.* at 294, 125 N.W.2d at 718. The attorney was allowed to recover in quantum meruit.

An argument might be raised that this decision impliedly permits the type of fee agreements proposed in the instant inquiry. The Supreme Court in *Baker*, however, was not addressing an either/or type of agreement. It was merely considering whether an attorney discharged

under a contingent fee agreement might be entitled to attorney fees. Under that consideration it determined that the maximum amount of fees the attorney fee could recover would be at an hourly rate. If the question is rather the contingent fee percentage or the hourly rate, it would be reasonable to require the attorney to adhere to the contract, and allow him or her to collect only the contingency.

C. Practical Problems.

One further problem with this provision is that it gives the attorney broad discretion as to what he or she believes is the "reasonable value of the case." Theoretically, once the lawyer has invested enough time in the matter that the contingent fee of any reasonable settlement will not be sufficient, the attorney could withhold approval and charge an hourly fee.

It should be noted that a lawyer intentionally withholding consent to generate a higher hourly fee would clearly be unethical. EC 5-1 states that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties." Personal interests should not be permitted to dilute the attorney's loyalty to the client.

Determining whether a lawyer is legitimately withholding approval of a settlement offer or wrongfully doing so would be extremely difficult. This issue would surely be raised by an unhappy client each time a lawyer tries to charge the higher hourly fee under such a provision. This difficult issue could be completely avoided by prohibiting the proposed contractual provision in the first place. Moreover, EC 2-23 states that "[a] lawyer should be zealous in his efforts to avoid controversies over fees with clients...." The subjective nature of the lawyer's determination of the "reasonableness" of a settlement offer has great potential for controversy.

CONCLUSION

(1) It is improper, if not void as against public policy, for a lawyer to attempt to contract away the client's right to settle his or her claim.

(2) It is the opinion of the Committee -that a contractual agreement whereby a client electing to settle a case for an amount less than the amount which the attorney believes is the reasonable value of the case, may be charged an hourly fee, instead of the contingent fee otherwise agreed upon, unduly restricts the client's ability to accept settlement offers and may result in excessive charges. Such a contractual provision is not permissible. This opinion does not address the case when a lawyer is dismissed, but the claim continues to be prosecuted.

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