Utah Ethics Opinions

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114. USB EAOC Opinion No. 114

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 114

Approved February 20, 1992

Issue: Is a one-third contingency fee charged by an attorney unreasonable or excessive if the recovery includes personal injury protection ("PIP" or "no fault") payments from the client's insurer?

Opinion: Under the Utah Rules of Professional Conduct, which require that a lawyer's fee be reasonable,1 contingent fees charged for the routine filing and collection of undisputed PIP or "no fault" claims from the client's insurer are unreasonable and excessive.2 State bars, courts, and commentators facing this issue uniformly agree that contingent fees charged on the recovery of undisputed PIP payments are unreasonable. "Contingent fees are generally higher [than fixed fees] because receipt of the fee is itself contingent on some possibility. Because PIP benefits are virtually guaranteed to accident victims a fee contingent on receipt of those benefits is likely to be unreasonable."3

Analysis of Authority: The validity and utility of the contingent fee was long ago recognized in the United States. It is justified mainly because it is often the only way that "a person of ordinary means may prosecute a just claim to judgment."4 Due to its vast potential for abuse, however, the contingent fee must be regulated.5 Accordingly, the ABA has recognized that "[a] contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation."6 Implicit in the concept of the contingent fee is the notion that there is an actual contingency upon which the attorney's chances of being compensated are based. In other words, there must be a realistic risk of nonrecovery. A fairly large body of case law supports this general conclusion.7 Commentators also agree.8

During the last twenty years, many states have adopted "no fault" legislation mandating that all automobile owners carry PIP coverage. "The purpose behind this legislatively mandated requirement `is to assure financial compensation to victims of motor vehicle accidents without regard to the fault of the named insured or other persons entitled to PIP benefits.'"9 In the vast majority of these cases "payment is generated automatically by simply filing a standard one page claim form with the insurer."10 "Since there is virtually no risk and the time to be required to the lawyer is minimal, [state bar ethics committees and] courts uniformly hold that contingent fees are an improper measure of professional compensation in such cases."11

State bars that have considered this matter have stated their positions clearly and concisely. According to the State Bar of Georgia:

Generally a lawyer may not charge a fee contingent on a client's receipt of PIP benefits (accident insurance providing compensation to injured persons without regard to fault). Contingent fees are generally higher because receipt of the fee is itself contingent on some possibility. Since PIP benefits are virtually guaranteed to accident victims a fee contingent on receipt of those benefits is likely to be unreasonable.12

The South Carolina Bar agrees:

A lawyer may not consider the amounts recovered from the client's personal injury protection insurance coverage in determining the percentage of his contingent fee unless the insurer denies coverage because of a good faith question concerning the causal connection between the injury and accident. Only when there is a question concerning the availability of coverage are the lawyer's time, labor, skill and expertise instrumental in establishing the injury resulting from the accident. Those factors are not needed when the insurer admits liability or the insurer makes a bad faith denial of coverage. The client must be fully informed and should make the decision whether a fixed fee may be reasonable.13

Similarly, the Maryland State Bar Association has concluded that "[w]hen there is virtually no risk and no uncertainty, contingent fees represent an improper measure of professional compensation" and thus charging a contingent fee for collection of PIP benefits is "unreasonable and unconscionable."14

For these reasons, many attorneys handling personal injury matters on a contingent fee basis submit the PIP claim as a perfunctory accommodation to the client. However, since filling out forms of a legal nature, simple though they may be, is certainly part of a lawyer's work, the Committee feels that a reasonable charge based on the time actually spent in the preparation of the claim may be ethically charged. Also, if a genuine dispute arises with the insurance carrier requiring the attorney to perform substantial legal services

to establish coverage and to generate recovery, of course, he may make an appropriate charge based on time spent and other relevant factors, and, in some cases, based on a contingent fee arrangement.

Courts facing this issue agree that contingent fees charged by an attorney for the recovery of PIP payments are almost always inappropriate.15 In *Attorney Grievance Comm'n v. Kemp*,16 the Maryland Court of Appeals held that a one-third contingent fee in a personal injury case was clearly excessive where it was collected by the attorney on PIP payments that followed automatically upon the filing of a simple form.17 Referring to a 1976 Maryland State Bar Association Formal Opinion,18 the court stated:

[I]t would be unethical, in virtually all cases, for a lawyer to charge a contingent fee for collecting a claim against his client's own insurer under the PIP coverage when the attorney has been engaged on a contingent fee basis to handle a personal injury claim against a third party. . . . [C]ontingent fees are permissible only when they are reasonable under all the circumstances, including such relevant factors as the risk and uncertainty.19

A significant body of case law also supports the general conclusion that where there is virtually no risk of nonrecovery, a contingent fee charged by an attorney on the amount of the recovery is inappropriate.20 For example, in *Committee on Legal Ethics v. Tatterson* ,21 the Supreme Court of Appeals of West Virginia held that disbarment was warranted where, while other disciplinary proceedings were pending against him, an attorney charged a one-third contingent fee to collect the undisputed proceeds of a life insurance policy. The court found that such a contingent fee was not justified, stating:

The client needs to be fully informed as to the degree of risk justifying a contingent fee. Courts generally have insisted that a contingent fee be truly contingent. The typically elevated contingent fee reflecting the risk to the attorney of receiving no fee will usually be permitted only if the representation indeed involves a significant degree of risk. The clearest case where there would be an absence of real risk would be a case in which an attorney attempts to collect from a client a supposedly contingent fee for obtaining insurance proceeds for a client when there is no indication that the insurer will resist the claim. In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is `clearly an excessive fee' 22

Conclusion: Based upon the above authorities and reasoning, it is clear that in the vast majority of cases, a contingent fee charged for the routine filing and recovery of undisputed PIP benefits is unreasonable and thus unethical under Utah Rules of Professional Conduct 1.5.

Footnotes

1. Utah Rules of Professional Conduct Rule 1.5(a).

2. This Opinion is intended to address only those situations in which undisputed PIP benefits are obtained from the client's insurer. This Opinion does not address the propriety of contingent fees in less obvious cases. For example, when a client has been offered a settlement from an adverse party's insurer, and then retains an attorney to assist the client in obtaining a greater recovery than that already offered, a question may arise concerning the ethical propriety of a contingent fee that includes a percentage of the total recovery. The issue of whether an attorney may properly receive a contingent fee on the eventual recovery without first deducting from the recovery that amount offered prior to the attorney's retention is not covered by this Opinion.

3. State Bar of Georgia Op. 37, Lair's Manual on Professional Conduct § 801:2703 (ABA/BNA Jan. 20, 1984).

4. *In re Swartz*, 686 P.2d 1236, 1242 (Ariz. 1984), quoting Note, Lawyer's Tight-Rope-Use and Abuse of Fees, 41 Cornell L.Q. 683, 689 (1956).

5. *Id.*

6. ABA Canons of Professional Ethics 13 (emphasis added).

7. *E.g., Rosquist v. Soo Line R.R.,* 692 F.2d 1107, 1114 (7th Cir. 1982); *Donnarumma v. Barracuda Tanker Corp.*, 79 F.R.D. 455, 467 (D. Cal. 1978); *Kiser v. Miller*, 364 F. Supp. 1311, 1319 (D.D.C. 1973); *In re Swartz*, 686 P.2d 1236, 1239-43 (Ariz. 1984); *People v. Nutt*, 696 P.2d 242, 248 (Colo. 1984); *Anderson v. Kenelly*, 547 P.2d 260, 261 (Colo. Ct. App. 1975); *Robinson v. Sharp*, 66 N.E. 299, 301 (Ill. 1903); *Horton v. Butler*, 387 So. 2d 1315, 1317-18 (La. Ct. App. 1980), cert. denied, 394 So. 2d 607 (La. 1980); *Thomton, Sperry & Jensen, Ltd. v. Anderson*, 352 N.W.2d 467, 469 (Minn. Ct. App. 1984); *Citizens Bank v. C & H Construction & Paving Co.,* 600 P.2d 1212, 1218 (N.M. 1979); *Redevelopment Comm'n of Hendersonville v. Hyder*, 201 S.E.2d 236, 239 (N.C. Ct. App. 1973); *Committee on Legal Ethics v. Tatterson*, 352 S.E.2d 107, 113-14 (W. Va. 1986).

8. Annotation, Reasonableness of Contingent Fee in Personal Injury Action, 46 Am. Jur. Proof of Facts 2d 1, 24-27 (1986). According to this annotation:

A larger fee may be authorized in a case in which the fee depends entirely on the attorney's success than in one in

which the attorney is to be paid regardless of the outcome. It is said that contingent compensation is properly larger than absolute compensation, because the extent of the services required cannot be predicted when the fee agreement is made, and because the attorney's services are at his peril.

* * * *

Disputes over the reasonableness of contingent fee contracts often involve a question of the actual degree of risk assumed by the attorney in accepting the case. If there is little risk involved in the litigation, the fact that the attorney was retained on a contingent fee basis may be entitled to little weight in assessing the reasonableness of the contracted fee.

Id. at 25. *See also Brickman* , Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 UCLA L. Rev. 29, 76-78 (1989) (noting that although explicit judicial and scholarly statements about the risk requirement are rare, "[t]hey occur primarily in cases involving recovery under `no fault' statutes, insurance claims, and claims under a statute providing for the recovery of attorney's fees").

9. *Attorney Grievance Comm'n v. Kemp,* 496 A.2d 672, 678 (Md. 1985), quoting *Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Gartelman,* 416 A.2d 734, 736 (Md. 1980).

10. *Id.*

11. *Brickman, supra* note 8, at 78.

12. State Bar of Georgia Op. 37, Lawyer's Manual on Professional Conduct § 801:2703 (ABA/BNA Jan. 20, 1984).

13. South Carolina Bar Op. 83-3, Lawyer's Manual on Professional Conduct Sec. 801:7907 (ABA/BNA undated).

14. Formal Opinions of the Maryland State Bar Ass'n Comm. on Ethics 76-1 and 77-4 (1976).

15. *See, e.g.,* Attorney Grievance Comm'n v. Kemp, 496 A.2d 672 (Md. 1985); *Pops & Estrin, P.C. v. Reliance Ins. Co.,* 562 N.Y.S.2d 914 (N.Y. Civ. Ct. 1990); *Hausen v. Davis,* 448 N.Y.S.2d 87 (N.Y. Civ. Ct. 1981); *In re Hanna,* 362 S.E.2d 632 (S.C. 1987); *see also Brickman, supra* note 8, at 78.

16. 496 A.2d 672, 677-79 (Md. 1985).

17. *Id.*

18. *See supra* note 14.

19. *Kemp,* 496 A.2d at 678. It appears that every other court facing this issue has reached the same conclusion. *See Pops & Estrin P.C. v. Reliance Ins. Co.,* 562 N.Y.S.2d 914, 915 (N.Y. Civ. Ct. 1990) (holding that "an attorney and his client may enter into a private arrangement to collect a fee in connection with the representation in a no fault matter. This arrangement is perfectly valid so long as the terms of the agreement are not put in the form of a contingency fee."); *Hausen v. Davis,* 448 N.Y.S.2d 87, 89 (N.Y. Civ. Ct. 1981) (holding that where the attorney had secured a contingent fee on a no fault claim in the same way that he had done in the personal injury action and where the insurer had never denied the claim and payment was made on the no fault claim within 30 days of submission the contingent fee on the no-fault claim was unreasonable); *In re Hanna,* 362 S.E.2d 632 (S.C. 1987) (holding that an attorney representing a client in a personal injury or wrongful death action on a contingency basis should not charge for collecting PIP benefits, unless the PIP claim is disputed or denied).

20. *See supra* note 7 and accompanying text.

21. 352 S.E.2d 107 (W. Va. 1986).

22. *Id.* at 113-14.

Rule Cited:

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