



Ohio Board of Professional Conduct

OPINION 2024-03

Issued April 5, 2024

Withdraws Adv. Op. 1995-07

Propriety of Fee Agreement Permitting Conversion from an Hourly Rate to a Contingent Fee

SYLLABUS: It is improper for a lawyer to enter into a fee agreement where the client agrees to pay an hourly rate until settlement or collection of judgment at which time the lawyer may choose between charging the hourly fee or receiving a total fee equal to a percentage of the settlement or judgment depending upon whichever results in the larger fee to the lawyer.

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Ohio Board of Professional Conduct

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APPLICABLE RULES: Prof.Cond.R. 1.2, 1.5.

QUESTION PRESENTED:

May a lawyer enter into a fee agreement where the client pays an hourly rate until settlement or collection of judgment at which time the lawyer chooses between keeping the hourly fee or receiving a total fee equal to a percentage of the settlement or recovery depending upon whichever results in the larger fee to the lawyer?

ANALYSIS:

Contingent Fee Agreements

Lawyers are permitted to enter into contingent-fee agreements with clients. Prof.Cond.R. 1.5(c). Contingent fee arrangements enable clients to pursue actions when

they do not have the financial resources to pay a lawyer during impending and pending litigation. Contingent fees are normally greater than the hourly fees that would be charged for the same representation because the lawyer bears the risk of no recovery, and the higher fee is compensation for incurring that risk. N.Y. Eth. Op. 697 (1997). In essence, contingent fee agreements imply a "shared risk of non-recovery" between the client and the lawyer. *Cincinnati Bar Ass'n v. Schultz*, 71 Ohio St. 3d 383, 384, 1994-Ohio-46.

Reasonableness of Fee

Any fee charged by a lawyer must be reasonable. Prof.Cond.R. 1.5(a). Prof.Cond.R. 1.5, cmt. [5]. Prof.Cond.R. 1.5(a) lists eight nonexclusive factors to be considered in the determination of whether a fee is reasonable. Prof.Cond.R. 1.5, cmt.[1]. A decision of which fee will be imposed based on the amount of the fee at the conclusion of the representation is not a factor considered to determine reasonableness under the rule. Moreover, the fact that a client agrees to a particular fee arrangement does not relieve the lawyer from the reasonable fee requirement of Prof.Cond.R. 1.5(a).

The Supreme Court has reviewed contingent fee contracts that give a lawyer the right to charge an hourly fee when (a) the representation concludes prematurely or (b) upon the unsuccessful occurrence of the contingency and held that the lawyers consequently violated the reasonable fee requirement of what is now Prof.Cond.R. 1.5(a). *Cuyahoga Cnty. Bar Ass'n v. Levey*, 88 Ohio St. 3d 146, 148, 2000-Ohio-283 (disciplining attorney whose "contingent-fee agreement with [clients] provided for an hourly charge if he was discharged whether or not, a successful completion [of case] occurred"); *Columbus Bar Ass'n v. Klos*, 81 Ohio St. 3d 486, 489, 1998-Ohio-610 ("The contingent fee portion of the contract * * * was also flawed" because it "provided that should the attorneys be discharged or withdraw prior to settlement, they would be compensated" at the hourly rate.)

Interference With Client's Decision to Settle

The proposed fee agreement gives the lawyer the unilateral ability to choose the higher of the hourly rate or contingent fee when the matter is successfully resolved. This type of fee agreement likely interferes with the client's authority to choose when and whether to settle a matter and increases the likelihood in some circumstances for the charging or collection of an unreasonable or excessive fee. See Prof.Cond.R. 1.2(a) (a

lawyer shall abide by the client's decision whether to settle a matter.) Under the proposed fee arrangement, interference with the client's decision to settle the matter may arise if a client perceives that it is better to settle the matter early in order to avoid mounting hourly fees, irrespective of the amount that may be offered in settlement.

Improper Fee Agreement

With regard to the question presented, the Board concludes it is improper for a lawyer to enter into a fee agreement where the client agrees to pay an hourly rate until settlement or recovery, at which the lawyer can unilaterally decide whether to charge an hourly rate or a contingent fee. Other jurisdictions have reached a similar conclusion. *See e.g.* Tex. Comm. Prof. Ethic 518 (1996). Such an agreement is largely illusory since the lawyer can elect to charge the larger of two fees without incurring any risk of no recovery. The traditional risks that a lawyer accepts by entering into a contingency fee agreement with a client cannot be eliminated by permitting the lawyer by agreement to collect the fee with the highest value at the conclusion of the matter.