ALASKA BAR ASSOCIATION

ETHICS OPINION NO. 2004-2

May An Attorney Contingently Agree to Pay Attorney's Fees Assessed Against a Client if the Client Loses on Appeal?

I. Introduction

The Committee has been asked to give an opinion as to whether a plaintiff's attorney, who has a defense verdict returned in a contingency fee case, is ethically permitted to agree to pay the attorney fee award against his or her client, should an appeal of the verdict be unsuccessful. In the scenario presented, the case has excellent points for appeal, plaintiff's counsel will not be paid absent a successful appeal, and plaintiff may be reluctant to proceed for various reasons, potentially including a settlement offer made contingent on foregoing appeal.

It is the Committee's opinion that such an agreement is permissible. The Committee interprets "expenses of litigation," that may be made contingent on the outcome of a matter under Alaska Rule of Professional Conduct 1.8(e), to include costs and attorney fees awarded against a client.

II. Analysis

The Committee's analysis is based on its interpretation of Alaska Rule of Professional Conduct 1.8 (e) and (j) which provide:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
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> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the indigent client.
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> . . . . .
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> (j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

While there are no Rule comments to 1.8(e), the section (j) comment notes that paragraph (j) is the traditional rule prohibiting lawyers from acquiring a proprietary interest in litigation, arising out of the common law rules on champerty and maintenance.[1] Excepted from this prohibition are "reasonable contingency fees set forth in Rule 1.5 agreements and the exception for certain advances of the costs of litigation set forth in paragraph (e)." Comment, ARPC 1.8 (j).

Although the "expenses of litigation" referenced in paragraph (e) are neither defined or explained in the Alaska Rules, the Committee can see no practical or rational basis for excluding an attorney fee award from the definition of "expenses of litigation." The Committee is also of the opinion that an attorney's agreement to pay an attorney fee award, is a natural extension of, or at least not sufficiently distinguishable from, a traditional and permissible contingency fee agreement.

The Committee is not unaware of concerns its opinion may raise. Consideration was specifically given as to whether permitting an attorney to guarantee the payment of an attorney fee award could be construed as an impermissible loan guarantee or whether it could reduce a client's incentive to weigh the merits of his or her case before filing suit, or run counter to the other Civil Rule 82 objectives of encouraging settlement and avoiding protracted litigation. Risks of frivolous litigation, compromised loyalty or overreaching on account of an attorney's economic self-interest were also taken into account. Ultimately, however, it is the Committee's opinion that all of these risks are generally inherent and acceptable in any contingency fee representation and that viewing them any differently where the contingency is that of paying an attorney fee award is not justified.

Thus, the Committee interprets the language, and policy behind, Alaska Model Rule 1.8 (e) and (j) to permit a plaintiff's attorney to agree to assume responsibility for a clients' adverse attorney award in the event that an appeal taken is unsuccessful.

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[1] Champerty has been defined as "an investment in the cause of action of another by purchasing a percentage of any recovery" and maintenance has been considered "another form of investment by providing living or other expenses to finance litigation." State Bar of Michigan Informal Opinion RI-14 (1989).

III. Conclusion

The Committee concludes that "expenses of litigation" may be interpreted to include an adverse attorney fee award, and that under Alaska Model Rule 1.8(e) and (j), the client's obligation to pay such expense may be made contingent on the outcome of the matter.

Approved by the Alaska Bar Association Ethics Committee on February 5, 2004.

Adopted by the Board of Governors on April 27, 2004.