

Ethics Opinion No. 74-3

Propriety of a Contingent Fee Contact when Client Can Afford to Pay for Services At an Hourly Rate.

The Committee has been asked the following question: "Is it unethical for an attorney to insist upon a contingent fee basis or retention in a personal injury situation where the client can well afford to pay for services at an hourly rate?"

First, it should be observed that an attorney cannot be compelled to accept any particular employment against his wishes, except by court appointment. EC 2-26. The Code of Professional Responsibility, however, properly counsels that a lawyer should not lightly decline proffered employment.

Second, it should also be observed that a lawyer is under no circumstances justified in charging a fee except as sanctioned by the Code of Professional Responsibility. The Code provides that:

"A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106(A).

The Code goes on to define what constitutes a clearly excessive fee, and enumerates the factors to be considered in determining the reasonableness of a fee.

Once these two extremes are passed, however, the lawyer is in a sensitive area of determining fees for individual clients. The sensitivity arises from not only the potential conflict of interest between the lawyer and his client in the fixing of the fee, but also from the necessity and desirability of maintaining a proper professional appearance for the lay public.

The first responsibility of a lawyer in fixing a fee arrangement with his client is the utmost in candor.

"A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes." EC 2-19.

The Code goes on to observe:

"Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client

who, after being fully informed of all relevant factors, desires that arrangement."
EC 2-20.

In the Committee's opinion, for the client to be fully advised of all relevant factors with respect to a fee arrangement, it is necessary for the lawyer to explain fully, fairly and with the utmost candor to his client the possible fee arrangements in a particular case. This explanation should include both the advantages and disadvantages of each particular possible fee arrangement, and should be done in such a manner to insure the particular client can make a knowledgeable choice between the alternatives, uninfluenced by the lawyer's personal preference.

The lawyer also has a duty to advise with candor as to whether or not other lawyers in the community would proceed on the basis of a particular fee arrangement, even though he, himself, is unwilling to undertake the matter on that basis.

Thus, it is the Committee's opinion that under no circumstances is an attorney justified in charging a clearly excessive fee, as proscribed by DR 2-106(A), and should always strive to charge a reasonable fee as set forth by EC 2-17. In the matter of establishing a fee arrangement, the lawyer has an ethical obligation to explain fully to the client, in such a fashion to assure that the client is able to make a knowledgeable judgment, all the possible fee arrangements in the matter, even though the attorney himself is only willing to undertake the matter under a particular fee arrangement which he proposes.

Adopted by the Board of Governors on October 11, 1974.

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