KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-269
Issued: May 1983

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at http://www.kybar.org), before relying on this opinion.

Question: May a lawyer who is employed under contingent contract but discharged without cause before completion of the contract, claim any portion of the former client's recovery upon eventual successful completion of the litigation, either by suit or settlement?

Answer: Qualified yes.

References: KBA E-179 (1978); EC 2-23; EC 2-16; EC 2-17; EC 2-20; Henry v. Vance, 111 Ky. 72, 63 S.W.273 (Ky. 1901); ABA Opinion 250 (1943); LeBach v. Hampton, 585 S.W.2d 434 (Ky. App. 1979); DR 2-106(B); Gilbert v. Walbeck, 339 S.W. 2d 450 (Ky. 1060); ABA Informal Decision No. C 790 (1964); KBA E-237.

OPINION

This question is distinguished from the question addressed in Ethics Opinion E-179 (1978), in that the former addressed the entitlement of an attorney discharged from a contingent fee contract by his client, due to the client's dissatisfaction with the settlement negotiated by the attorney, not withstanding that no settlement was eventually reached.

While EC 2-23 cautions attorneys to "avoid controversies over fees" and to sue a client for a fee only when "necessary to prevent fraud or gross imposition by the client", EC 2-16 suggests that "(t)he legal profession cannot remain a viable force in fulfilling its role in society unless its members receive adequate compensation for services rendered, and reasonable fees should he charged in appropriate cases to clients able to pay them." Accordingly, adequate compensation is necessary "to enable the lawyer to serve his clients effectively and to preserve the integrity and independence of the bar." EC 2-17. While EC 2-20 advises that a lawyer should "decline to accept employment on a contingent 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 the 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."

The question in this instance is not whether a client may discharge an attorney without cause in the face of a contingent fee contract, for it has long been held that a client may discharge his attorney at any time, with or without cause, even where a contingent fee has been agreed

upon. Henry v. Vance, 111 Ky. 72, 63 S.W. 273 (Ky. 1901). Notwithstanding such discharge, the Court in Henry v. Vance, *supra* at 276 held that the remedy of the attorney, if the discharge was without cause, was an action on quantum meruit for services already rendered, or if no services had been rendered before the discharge, an action to recover damages for a breach of the contract. While the latter remedy does not appear to be consistent with more recent judicial and ethical opinions ((t)he legal profession "is ... not a mere money-getting trade ...suits to collect should be avoided. Only where the circumstances imperatively require, should resort be had to a suit to compel payment." ABA Opinion 250 (1943), EC 2-23, see also KBA E-237.

As recently as 1979, the Court of Appeals held that an attorney who was employed under a 33 1/3 percent contingent fee contract, but was discharged without cause after performing some services but before completing services he was engaged to perform, was entitled to recover as a fee for such services completed, 33 1/3 percent of the amount eventually recovered by the client less the reasonable value of services of the attorney(s) who completed the litigation after his discharge. The discharged attorney would also be allowed to recover any reasonable expenses of litigation advanced by him. LeBach v. Hampton, 585 5.2d 434, 436-37, (Ky. App. 1979). The Court of Appeals also observed that although the Court in Henry v. Vance, *supra*, designated the remedy available to the discharged attorney as "quantum meruit", the actual holding of the case was that the recovery should be the amount of the contingency fee "less such proportion of the sum as is reasonably represented by the labor and attention and expense that would have been required to plaintiffs to complete their undertaking, but which they did not do."

It follows, therefore, that what becomes the issue subsequent to the discharge of the lawyer without cause from a contingency fee contract is not the breach of the contract per se, but rather whether the discharged attorney is entitled to a "reasonable fee within the context of DR 2-106(B) for that work performed for the client, subject to the successful outcome of the client's litigation. Such designation is again supported by the Court of Appeals in LeBach v. Hampton, *supra* at 436, citing to the opinion in Gilbert v. Walbeck, 339 S.W.2d 450 (Ky. 1960) which observed that the contingent fee contract was no longer of significance because the attorney was discharged before he completed the contract and held that recovery must be on the basis of quantum meruit.

The Committee is persuaded by the words of ABA Informal Decision No. C 790 (1964) which advised, in effect, that the right of a discharged lawyer to a contingency fee upon his client's recovery is a matter of law, not of ethics. Accordingly, we defer to the holding of the Court of Appeals in the case of LeBach v. Hampton, *supra* at 436, which concluded that "our courts have used the term quantum meruit to indicate that the discharged attorney cannot rely upon the contract to collect a full fee but must deduct from the contract fee the reasonable costs of services of other attorneys required to complete the contract."

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.