

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-333
Issued: November 1988

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 1: Is it ethical for an attorney to enter into a contingent fee arrangement with a client whose claim is based upon 42 U.S.C. 1983 and 1988, the latter statute providing for an award of attorney fees?

Answer 1: Yes.

Question 2: If the answer to the first question is yes, is the amount that the lawyer may be paid limited by the amount awarded by the Court? Specifically, if the court awarded fee is less than that provided for in the contingent fee agreement, is the lawyer precluded from recovering the difference from the client?

Answer 2: No. As a matter of “legal ethics,” the total fee that can be collected by the lawyer is not necessarily limited to the amount awarded by the court. However, the judicial decisions of the forum must be consulted.

References: DR 2-106(A) and (B); KBA E-6 (1962); KBA E-282 (1984); , 719 F.2d 1496 (10th Cir. 1983); Hamner v. Rios, 769 F.2d 1404 (9th Cir. 1985).

OPINION

In KBA E-6 (1962) the Committee opined that a lawyer may not charge a fee in excess of a state statutory fee. That opinion specifically dealt with fees awarded by the Workmen’s Compensation Board. The Committee noted that the state statute fixes the fees of lawyers (and limits the Board’s authority to deny or reduce this set fee except in cases of solicitation).

In KBA E-282 (1984), the Committee stated that an attorney may not charge or accept a fee in excess of a statutory or court-ordered fee. The Committee noted that if a court awarded a partial attorney’s fee against an adverse party, the lawyer could charge the client a fee in excess of that ordered by the judge toward the total so long as the total fee were “reasonable.” On the other hand, the Committee went on to observe that a lawyer may not accept a gift from the client that would equal the amount of the difference between the statutory or court ordered limit and the contractual fee. This opinion has led to considerable confusion, and prompted a remarkable number of inquiries.

We must begin with the language of the Code. 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).

Regarding fees set by statute, it would seem that a charge in excess of the amount so set would be an “illegal fee.” In KBA E-6 the Committee observed that it would not only be unethical but unlawful to contract for a fee in excess of that fixed by statute. A similar rationale underlies opinions prohibiting public defenders appointed to represent needy people (who are paid compensation set by law) from seeking additional fees from their clients. KBA E-165 (1977). Neither may a county attorney charge a client a fee for services if he or she has a statutory duty to perform the same services in the name of the Commonwealth for the use and benefit of his client, without charge to his client. KBA E-165 (1973).

When an action is brought to enforce a right under a statute that provides for the possibility of court awarded attorney fees (for example, 42 U.S.C. 1983 and 1988) the question presented is fundamentally different. Such statutes do not set a fixed dollar or percentage limit on fees. Actions brought pursuant to such statutes may be undertaken pursuant to contingent fee agreements. For disciplinary purposes, the total fee that is ultimately paid to the lawyer may be examined to see if it is in excess of a reasonable fee in light of the factors set forth in DR 2-106 (B). The Code section states that a fee is clearly excessive (and therefore prohibited by the Code) when a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

We note that there exists substantial judicial authority (in the federal court, at least) for the proposition that contingent fee arrangements are subject to the supervision of the court. However, the federal courts of appeal have not yet agreed on a supervisory rule to be applied in this context.

For example, in Cooper v. Singer, 719 F.2d 1496 (10th Cir. 1983) the Tenth Circuit opined that it was the intent of Congress that a prevailing party receive a reasonable attorney fee in an amount to be determined by the court, and that if the amount awarded is less than the amount owed under a contingent fee, then the lawyer will be expected to reduce his or her fee to the amount of the court award.” The court then opined that in the case of the client who is unable to pay under an hourly arrangement, a lawyer can contract to receive the amount that will be awarded by the court to the client under section 1988. (The court rejected the notion that a contingent fee contract sets the upper limit, and observed that counsel will be entitled to the entire statutory award if it exceeds the agreed contingent fee.)

In contrast, the 9th Circuit has concluded that a contingent may be enforced if it is unreasonable” (within the meaning of Code?), although it exceeds the amount awarded by the court, Hamner v. Rios, 769 F.2d 1404. (9th Cir. 1985). The court observed that enforcement of contingent fee contracts would better preserve the rights of the parties to enter into their own contracts, and would avoid unnecessary interference with the attorney-client relationship. The court also observed that “if attorneys begin to view statutory fees in civil rights cases as a ceiling for fees could lead to reluctance to represent civil rights plaintiffs, thus frustrating the intent of Congress.” However, the court agreed that a trial judge retains the discretion to determine whether or not the plaintiff should be compelled to pay the difference between the statutory amount and the

contingent fee originally promised to his or her lawyer depending on the facts of the particular case, the lawyer's performance, and the degree of disparity between the contingent fee and the court's calculation of the reasonable value of the lawyer's services.

In terms of the rules of ethics, as they are set forth in the Code, we find no basis for us to opine that the lawyer's fee must, in every case, be limited to the amount of the court award. Nor are we able to locate any Code provision that dictates use of the form of contingent fee contract promoted by the court in Cooper. Of course, counsel may not collect both the amount of the statutory fee award and the total contingent fee. But it is not unethical to enter into a contingent fee arrangement with a set-off for court-awarded fees and a statement that the client will owe no additional fee if the court awarded fee meets or exceeds the amount promised in the fee agreement.

It is not our function to fashion or "review" supervisory rules for the courts. Counsel must take account of the fact that the enforceability of the particular fee arrangement may be questioned by the court, depending on the governing case law.

Even the Cooper court conceded that a "reasonable fee may mean one thing in the context of the court's calculation of a figure that represents the court's approximation of the value of the lawyer's services, and mean another thing in the context of a fee calculated by another court or reached by voluntary agreement. In the latter context, the court is determining whether the fee falls within a range that is neither excessive nor inadequate.

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.