

Ethics Opinion

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We have been asked for an opinion by an attorney who successfully represented a client in a civil matter. In the process the client incurred \$80,000 in attorney fees and costs which the client is unable to pay. The client has inquired into the possibility of filing a malicious prosecution case against the party who originally sued him. The elements of an action for malicious prosecution case are stated to be present. The attorney is considering an assignment of a portion of the client's malicious prosecution claim or a fee agreement which guarantees the attorney the first \$80,000 of any recovery and a percentage of any excess judgment.

QUESTION PRESENTED: May an attorney take an assignment of a client's cause of action to secure payment of a fee earned in an earlier case for the same client?

ANSWER: Yes, so long as the interest is for security purposes only and the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction in accordance with Rule 1.8(a)(2).

QUESTION PRESENTED: May the attorney testify in the current case (a claim for malicious prosecution) as the reasonable value of his services in a successful defense of the underlying case?

ANSWER: Yes. Testimony as to the reasonable value of an attorney's services appears to be authorized by Rule 3.7(a)(2), though the Rule appears to be directed toward fees for services rendered in the case in which the testimony is offered. The attorney should consider enlisting the assistance of outside counsel to review the records in the underlying case to present expert testimony on the value of the services rendered.

ANALYSIS: Rule 1.8(j) provides

lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted 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.

This rule is founded upon the Common Law prohibition against champerty which involved a third party investing in a person's cause of action. This prohibition was originally enforced through criminal proceedings.

However, since an attorney is allowed to secure the lawyer's fee, an assignment for security purposes is not violative of the rule. In *Skarecky & Hornstein v. 3605 N. 36th St.*, 825 P.2d 949 (Ariz.App. 1991), the court held that such an assignment of an interest in the subject of the lawsuit was acceptable. However, at page 952 the court observed, "An absolute assignment would create an impermissible proprietary interest."

The court relied, in part, on *Burk v. Burzynski*, 672 P.2d 419 (Wyo. 1983). In that case an attorney took an assignment of a client's potential recovery. The assignment provided ". . . to secure the statutory attorney's lien rights of the Assignee and shall be interpreted as securing and protecting such lien rights and not as an absolute assignment."

In Montana an attorney is statutorily granted a lien upon his client's cause of action "which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof . . ." § 37-61-420, M.C.A. Thus, it is clear that an attorney may secure a fee based upon a potential recovery. However, in the present case the fee being secured is the fee which was earned in the underlying case, not the fee to be earned in the malicious prosecution case. In our view, no legitimate purpose is served by allowing an attorney to secure a fee in the underlying case, but not allow such an arrangement in the subsequent malicious prosecution case.

However, in *Landsman v. Moss*, 579 N.Y.S.2d 450 (App.Div. 1992) (which contains facts remarkably similar to the instant matter), an attorney entered into a contingent fee agreement in a malicious prosecution case whereby the first \$12,000 of the recovery would compensate the attorney for fees in the underlying case and then the attorney would receive a percentage of any excess judgment. The New York Court found this to be violative of the rule. However, in *The Law of Lawyering, Hazard and Hodes*, at page 286.1, this view is criticized as being inconsistent with the intent of the Rules.

The lawyer is cautioned to take an assignment for security purposes only and in doing so to give the client a reasonable opportunity to seek the advice of independent counsel in the transaction in accordance with Rule 1.8(a)(2). It should be made clear that this is a consensual lien as contrasted with either a retaining lien or a charging lien and is further distinct and separate from the fee arrangement in the malicious prosecution case. With respect to the fee arrangement for the malicious prosecution case, the lawyer is further cautioned to avoid taking an excessive or unreasonable fee in violation of Rule 1.5(a).

The attorney also inquires as to whether he may testify in the malicious prosecution case as to the reasonable value of his services in the underlying case. This appears to be authorized by Rule 3.7(a) which provides:

lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(Although the rule seems to be directed at attorney fees for services rendered in the case in which the testimony is offered.)

Alternatively, the attorney may wish to consider having another attorney review his time records in the underlying case in order to express such an

opinion. In the malicious prosecution case the fees in the underlying case are damages which will or may be the basis for a further contingent fee in favor of the lawyer/witness whose credibility would accordingly be more subject to challenge than in the usual situation.

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