

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1988/9-26
Contingency Fee Agreements in Workers' Compensation Cases
October 12, 1989

RULE REFERENCES:

- *Rule 1.5
- *Rule 1.5(a)
- *Rule 1.5(c)

CODE REFERENCES:

- *DR2-106(A)
- *DR2-106(B)
- *EC2-17

SUBJECTS:

- *Attorney-Client Relationship
- *Consent
- *Contingent Fees
- *Fees

STATUTORY REFERENCES:

- *RSA 281-A:44
- *RSA 281-A:44(I, II)

ANNOTATIONS:

An attorney may enter into a fee agreement with a client whereby the lawyer would receive a percentage of any recovery, or if no recovery, on an hourly rate. The fee cannot be clearly excessive or illegal. (Rule 1.5)

An attorney may enter into contingent fee arrangements with a client, so long as the arrangement is represented by a writing which satisfies the provisions of Rule 1.5(c) and the arrangement is both legal and not clearly excessive under the circumstances. (Rule 1.5; Rule 1.5(c))

There is no prohibition under Rule 1.5 against mixing a contingent fee arrangement with an hourly fee arrangement for the same client and the same matter. (Rule 1.5)

The question of excessiveness of fees is a question of fact to be determined by reference to the factors set forth in the Code. (Rule 1.5(a)(1-8))

Where by statute or administrative rule, counsel fee are to be established or approved by a court or administrative body, fees in excess of those approved by the appropriate body would be illegal.

QUESTION:

Do the New Hampshire Rules of Professional Conduct prevent a lawyer from entering into a fee agreement with a client involved in a worker's compensation proceeding whereby the lawyer would receive twenty percent (20%) of any recovery the lawyer is able to obtain for the client or, if the lawyer is unsuccessful, an hourly rate?

BRIEF RESPONSE:

Rule 1.5 would not prohibit the kind of fee arrangement outlined above so long as it is approved by the Department of Labor and is not "clearly excessive".

RESPONSE:

This inquiry is governed by Rule 1.5 of the Rules of Professional Conduct. Generally, a fee arrangement between an attorney and a client will satisfy the ethical considerations of the rule so long as it is not illegal or clearly excessive. Rule 1.5(a). The "clearly excessive" standard in the rule is a hold-over from the ABA Model Code of Professional Conduct DR 2-106(B). The new ABA Model Rules replace the "clearly excessive" standard with a "reasonableness" standard. Therefore, the New Hampshire Rule will necessarily have a much narrower application than its counterpart in other jurisdictions and provides New Hampshire practitioners with a "bright line" standard to apply. *See* New Hampshire Comments, Rules of Professional Conduct, Rule 1.5.

Under Rule 1.5(c) New Hampshire practitioners are entitled to enter into contingent fee arrangements with their clients so long as such arrangements are represented by a writing which satisfies the provisions of that section and the arrangement is both legal and not clearly excessive under the circumstances. Additionally, there is no prohibition in Rule 1.5 against mixing a contingent fee arrangement with an hourly fee arrangement with respect to the same client for the same matter. Such mixed fee arrangements have been approved before under both the prior Code of Professional Responsibility and the present Rules of Professional Conduct. *See Ethics Advisory Committee of the South Carolina Bar*, Opinion 84-11, DR 2-106(A) (undated); *Committee of Professional and Judicial Ethics of the State Bar of Michigan*, Opinion CI-1089, DR 2-106(A) and (B); *Cannon Two* (July 8, 1985) (here the lawyer's arrangement entitled him to the greater of one-third of the net recovery or \$30.00 per hour regardless of the outcome, provided, according to the opinion, that the fee is not shown to be "clearly excessive"); *Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada*, Opinion 2 (May 23, 1987).

Since a mixed contingent/hourly fee arrangement is not proscribed by Rule 1.5, the analysis must turn to whether such a fee arrangement in a particular situation is either illegal or clearly excessive. The prohibition against clearly excessive fees is based on the premise that such an arrangement will abuse the professional relationship between a lawyer and a client. *Model Code of Professional Responsibility* EC2-17. Courts have defined "clearly excessive" as requiring a showing of excessiveness amounting to unconscionability or fraud before disciplinary action is deemed appropriate. *See Bushman v. State Bar*, 522 P.2nd 312 (Cal. 1974); *In re: Loring*, 301 A. 2nd 721 (NJ 1973); *In re: Kutner*, 399 NE 2nd 963 (Ill. 1979). Under this standard it is conceivable to have a fee arrangement which may seem unreasonable but which is not clearly excessive. Although on first reading Rule 1.5(a) of the New Hampshire Rules of Professional Conduct appears to mix the reasonableness and clearly excessive standards, the section when read in conjunction with the New Hampshire Comments leads one to conclude that the New Hampshire standard is no broader than "clearly excessive." The question of excessiveness of fees is a question of fact to be determined by reference to the factors set forth in the Code. *Committee on Ethics of the Maryland State Bar Association, Inc.*, Opinion 83-83 (May 10, 1983). These "factors" appeared in the prior ABA Model Code of Professional Responsibility at DR2-106(B) and have been adopted verbatim by the New Hampshire Rules of Professional Conduct at Rule 1.5(a) (1)-(8).

Assuming the fee arrangement in question passes the "clearly excessive" test it must then be determined whether it is also legal. It has been held that where by statute or administrative rule, counsel fees are to be established or approved by a court or administrative body, fees that are charged in excess of those fees which are approved or awarded by the appropriate body would be illegal. *Virigina Supreme Court* (April 24, 1987); *ABA/BNA Lawyers Manual on Professional Misconduct (Case Digest)* (a worker's compensation case). In New Hampshire attorneys' fees in worker's compensation related cases are governed by RSA 281-

A:44. Section II of that statute provides that attorneys' fees at the departmental level must be "approved" by the labor commissioner. Section I of that statute provides that if the matter advances to the superior or supreme court the claimant who prevails is entitled to "reasonable counsel fees as approved by the court". RSA 281-A:44 I, II. Additionally, although contingent fees are clearly allowable and often used in the worker's compensation context, such a fee arrangement is not binding upon the Department nor does it control the amount of the legal fees recoverable under RSA 281-A:44 (formerly RSA 281:37 a). *See Seppala and Aho Construction Co. v. Elton*, 119 N.H. 634 (1979); *Corson v. Brown Products, Inc.*, 120 N.H. 665 (1980).

CONCLUSION:

In the factual pattern provided by the inquiry the fee arrangement was a mixture of a twenty percent (20%) contingent fee or the lawyer's hourly rate, depending on the outcome of the proceeding. Assuming that arrangement has been approved by the labor commissioner, or, if the case advances to the superior or supreme court, by the court, and assuming further that the application of the fee agreement to the facts of the case, including the amount of the ultimate recovery, does not produce an unconscionable result, the mixed contingent/hourly fee arrangement described in the inquiry does not violate Rule 1.5 of the New Hampshire Rules of Professional Conduct.