

## Contingent Fee Agreements

By the NHBA Ethics Committee

Practical Ethics Article: August 18, 1988

Are all of your contingent fee agreements in writing? If not, then you are in violation of Rule 1.5(c) of the Rules of Professional Conduct for any agreement entered into after February 1, 1986. This rule requires that all contingent fee agreements be in writing and state the method by which the fee is to be determined. While it is not explicitly required by the rule, you should also make sure that your client signs the written fee agreement at the beginning of the representation.

What does the rule mean when it requires you to set forth the method by which the fee is to be determined? At a minimum, it requires that you explain whether litigation costs and other expenses are to be deducted from the gross recovery before or after the fee calculation is made. This implies that either method is ethically proper. With regard to the subject of litigation costs, it is also important to note that the Rules of Professional Conduct have done away with the old prohibition found in D.R. 5-103(B) of the Code of Professional Responsibility. This rule prevented an attorney from advancing litigation costs for the client without holding the client ultimately liable for those costs. Now, you are able to advance litigation costs for your clients, without requiring them to repay you as the case proceeds, and without forcing them to reimburse you if the case is unsuccessful. Rule 1.8(e)(1).

Rule 1.5(c) also requires you to set forth the different percentages you will receive if the matter is settled without suit, after suit is brought, during or after trial, or upon an appeal. Of course you are not required to utilize a system of graduated percentages in your fee agreement. But if you do, you must set them forth with enough specificity to avoid future disputes with your clients. For example, if you charge 25% if the matter settles prior to "bringing suit", does that mean prior to your preparing a writ and sending it to the sheriff, prior to your making service upon the defendant, prior to your entering the writ in court, or prior to the defendant appearing and starting the litigation process? Similarly, if you state that your percentage will increase to 33 1/2% if the matter "goes to trial", does this mean that you are entitled to that greater fee if you prepare for trial and then settle the case on the court house steps, or if the matter settles after the jury is sworn, or does it mean that the trial must be concluded to verdict before you are entitled to the higher percentage fee? Finally, if you charge 40% if the matter "is appealed", does this mean that if either party files a notice of appeal, then the higher percentage is triggered, or must the appeal actually be heard and decided? Some attorneys avoid these problems by simply having one flat fee for all cases. But if you believe that it is important to scale your percentage fee according to the amount of work you are required to do, you must set forth the exact moment when the higher fee will be triggered in language that your client can understand and cannot later dispute.

Other matters which are not specifically covered by the rule but which should be addressed in your fee agreement include how to treat statutory interests, costs reimbursed by the defendant after judgment, and court ordered attorney's fees. If you have a large case that takes several years to go to judgment, it is possible that a great amount of interest and litigation costs will be added to your judgment following a verdict. Also, there are many types of cases in which you can now recover court ordered attorney's fees. Your agreement form should set forth whether and how your percentage calculation will apply these portions of a recovery.

Finally, in today's practice, because of the growing use of structured settlements, it is wise to have this subject covered in your standard contingent fee agreement. The agreement should set forth whether the attorney's fee should come from the initial, up-front payment or should be structured together with the annuity

payments. The attorney's fee should be based upon a percentage of the fair market value of the structured settlement as determined by an annuity expert hired by plaintiff's counsel.

In addition to the ethical requirements of the Rules of Professional Conduct, you should be aware of a fairly recent statute regulating contingent fee. RSA 508:4-e states that no attorney shall enter into a contingent agreement without first advising the client of the right, and affording the client an opportunity, to retain the attorney under some other form of compensation such as an hourly fee agreement or a flat fee agreement that reflects the reasonable value of the attorney's services. Also, all written contingent fee agreements must be filed with the court at the time of the entry of pleadings by the plaintiff's attorney. Finally, the law requires that you submit a statement of your fees upon the settlement or judgment of any action, and the court must approve your fees in any action resulting in a settlement or judgment of \$200,000 or more. These provisions went into effect on July 1, 1986. There is some debate about their constitutionality, and it remains to be seen how these provisions will be treated by the courts.

Once the case is over and you are ready to divide up the proceeds, you cannot simply give your client a check and a hand shake. Rule 1.5(c) further requires you to render a written statement detailing all of the sums recovered, all of the deductions, and the amount of the balance due to the client. The basis for the deductions shown on the statement must match the provisions set forth in the written contingent fee agreement. We all know that some clients can become difficult when a contingent fee case is about to be settled, and they start to question why they are paying the attorney so much money out of the settlement amount. If you follow these straightforward ethical rules by preparing and having the client sign a well drafted written fee agreement at the beginning of the representation, and in rendering a detailed final statement, you can minimize any disputes with your clients over the amount of your fees in contingent fee cases.