

Advisory Opinion 1988-10

An attorney representing the claimant in a worker's compensation proceeding under the Interim Act has asked whether he may actively seek his fees under NMSA 1978, Section 52-1-54 (Cum. Supp. 1986) when his client objects to him being awarded any fee. Section 52-1-54 requires the hearing officer to set the amount of the attorney's fee and requires it to be paid out of the claimant's recovery. The statute provides that the fee shall not exceed certain percentages of the recovery depending on how big the recovery is. The attorney has a written agreement with the client providing that the fee would be based on the New Mexico Workmen's Compensation Act. When the hearing on fees was scheduled, the client announced she did not consent to a "procedure in which her attorney is arguing for a fee when that fee works to reduce the benefits paid to the client." The attorney requests our opinion on whether his seeking his fee would violate various ethical and related rules or the legal doctrines involving separation of powers, equal protection, or due process. It is our opinion that the attorney may actively seek his fee and that such action may cause a termination of the attorney-client relationship for purposes of the fee hearing.

The Committee does not see the situation presented by the attorney as being materially different than any other potential fee dispute encountered between attorneys and clients after the completion of the substantive representation. In particular, the attorney is concerned with SCRA 1986, 15-304, providing that attorneys accept no compensation from anyone other than the client or with his consent; the Preamble to the Rules of Professional Conduct, providing that an attorney shall zealously advocate his client's position; SCRA 1986, 16-107(B), prohibiting conflicts of interest; and SCRA 1986, 16-108(B), prohibiting the use of information to the disadvantage of the client.

With respect to Rule 15-304, the client's written agreement to a fee in accordance with the Workmen's Compensation Act serves as consent. moreover, the rule is intended to operate where a third party is paying the fee on behalf of the client and there is a danger that the third party will bring influence to bear on the attorney. This rule has no application here. With respect to zealous advocacy and conflicts of interest, we have opined that these considerations do not apply in fee disputes after the representation is concluded. New Mexico Advisory opinion 1986-7. At least one court in an analogous case, where the attorney for a social security claimant was entitled to a maximum of 25% of the recovery and where the attorney and the claimant took adverse positions in the fee hearing, held that the attorney-client relationship was terminated for purposes of the hearing on the fee petition. *Lewis v. Secretary of Health and Human Services*, 707 F.2d 246 (6th Cir. 1983). With respect to the use of information to the disadvantage of the client, a long-standing exception has always been that a lawyer is permitted to use information to collect his fee. SCRA 1986, 16-106(D).

In short, we believe that, where the client is informed of how the fee will be set and consents thereto, the client cannot thereafter frustrate the attorney's entitlement to a reasonable fee by changing his mind. We note that SCRA 1986, 16-105(B) requires the basis of fees to be communicated to the client, preferably in writing, before or within a reasonable time after the commencement of the representation. We would encourage counsel to fully explain to clients the probable procedure under the Workmen's Compensation Act at the time the basis of the fees is communicated to the client. A fuller explanation or clearer agreement in this case may have eliminated the client's objection to the procedure at a later date.