

## **Advisory Opinion 2005-2**

May 30, 2005

### **Application Of The Rules Of Professional Conduct Pursuant To A Lawyer's Duty To Report An Unreasonable Fee**

#### **Factual Background**

In recent years, questions have arisen as to the reasonableness of contingent fees, including but not limited to, automobile accident cases where insurance coverage will cover some if not all of the resulting settlement or judgment.

Prior to filing lawsuits, lawyers often engage in settlement discussions with the adverse party or their insurance company. Questions arise when lawyers negotiate settlements with little expense of time or talent but still charge the client the same contingent fee they would have had the case gone to trial. A specific example presented to the committee with respect to a contingent fee case is as follows:

Two minor members of a family are injured in a motor vehicle accident. The lawyer representing the two injured parties requests from the insurance carrier immediate payment of one million dollars (\$1,000,000.00) based on the lawyer's understanding of the insurance policy limits. The insurance carrier, through no work of the lawyer representing the injured parties, informs the lawyer that the policy limit is actually three million dollars (\$3,000,000.00), which the carrier immediately agrees to pay.

Under the above fact pattern, the lawyer representing the insurance carrier questioned the reasonableness and potential misconduct based on a \$1,000,000.00 contingent fee for work that the lawyer believed mostly involved phone calls, was not novel or difficult, was in an uncontested matter, and was not time-consuming.

#### **Question Presented**

Does a lawyer have an obligation to report what the lawyer believes to be an unreasonable fee charged by another lawyer?

#### **Brief Answer**

Yes. A lawyer has a mandatory duty pursuant to Rule 16-803 to report professional misconduct. Charging an unreasonable fee is misconduct under the New Mexico Rules of Professional Conduct. Lawyers also have a duty to diligently represent their client, which includes challenging an unreasonable fee.

#### **Analysis**

The core issue in this opinion is not whether a one million dollar (\$1,000,000.00) contingent fee is reasonable under the circumstances set forth in the Factual Background, but whether a lawyer has a duty to report an ethical violation based upon the possibility of an unreasonable fee of another lawyer. Three factors must be examined in answering this question. First, under the New Mexico Rules of Professional Conduct, what are the duties a lawyer has for reporting a potential violation of the Rules of Professional Conduct? Second, does charging an unreasonable fee, contingent or hourly, constitute misconduct under the Rules? And third, does a lawyer's duty to diligently represent a client require the lawyer to report a potentially unreasonable fee?

*Mandatory Reporting:* Rule 16-803 NMRA provides the following mandatory duty to report:

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

This Rule follows the recommendation by the American Bar Association with respect to a lawyer's mandatory duty to report misconduct of another lawyer. *See* Formal Opinion 1988-8 Committee on Ethics of the New Mexico State Bar Association. This mandatory duty extends to the knowledge of a lawyer about another lawyer's breach of the Rules of Professional Conduct.

Further, the ABA comment to Rule 16-803 provides:

This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent... The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the Bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate under the circumstances.

Although lawyers have a mandatory duty to report misconduct, there appears to be no guidance in New Mexico for actions against lawyers who fail to fulfill the mandatory duty of reporting. The Committee recognizes that a good deal of uneasiness exists with a mandatory duty of reporting. However, it should be noted that this duty is imposed on lawyers by the Rules of Professional Conduct because the profession is self-regulating. Very rarely will lawyers report their own misconduct, although they are required to do so. Failure to fulfill the mandatory duty to report misconduct not only is a breach of a mandatory duty identified in the rules, but also violates the public trust.

*Unreasonable Fee:* The Committee finds that charging an unreasonable fee rises to the level of reportable conduct in New Mexico. *See, In re Roberts-Hohl*, 116 N.M. 700, 866 P.2d 1167 (1994). Further, lawyers have the burden to establish the value of their services. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967), rev'd on other grounds, 80 N.M. 119, 452 P.2d 188 (1969). We refer to our Formal Opinion 1988-8 for a further explanation of “knowledge,” and “substantial question.” Also, Formal Opinion 1988-8 provides that the appropriate professional authority to which the reporting should occur can be either the disciplinary board or the court in which the matter is pending.

Rule 16-105 creates a duty of a lawyer to charge a reasonable fee. The Committee refers to Rule 16-105, the case law cited in the annotations to that rule, and case law herein cited to evaluate whether any particular fee should be considered unreasonable.<sup>1</sup> The Committee notes that although the example cited above concerns a contingent fee, all other types of fees are subject to the same scrutiny and analysis.

*Diligence:* Rule 16-103 NMRA provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Every lawyer has a duty of diligence to protect against the unraveling of a settlement, especially where that settlement involves a minor or otherwise incapacitated person. An unreasonable fee may be a basis for unraveling of a settlement, thereby exposing the client to the risk of continued litigation. Therefore, a lawyer representing a client in the settlement of the claims of minor children should consider reporting a potentially unreasonable fee to the court in which the action is pending.

## **Conclusion**

A lawyer has a mandatory duty of reporting misconduct. A lawyer charging an unreasonable fee has committed a violation of the Rules of Professional Conduct. If such a breach occurs, any lawyer with knowledge of the breach has a mandatory duty to report the misconduct. Finally, a lawyer’s duty of diligence to his or her client may also require reporting the unreasonable fee to the court approving the fee, especially in circumstances involving minor children or otherwise incapacitated persons.

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<sup>1</sup> *In Re Jones*, 119 N.M. 229, 889 P.2d 837 (1995) (Any fee is excessive when absolutely no services are provided.); *See also Lester Brickman, Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?*, 38 UCLA L. Rev. 29 (1989)(Arguing that where the possibility of a zero recovery is small or nonexistent, much of the justification for a contingent fee is removed.); *Eich v. Gregory A. Maceau P.C.*, 14 Law. Man. Prof. Conduct 20 (Colo. App. 1997)(not officially published)(Lawyer who deducted a standard one third contingent fee for recovering the full amount of his clients uninsured motorist policy, which the company paid upon demand, was found to have charged an excessive and unreasonable fee.); *Matter of Swartz*, 141 Ariz. 266, 686 P.2d 1236 (1984).