

ETHICS ADVISORY OPINION

FROM THE STATE BAR OF NEW MEXICO'S ETHICS ADVISORY COMMITTEE

Formal Opinion: 2013-01

Contingent Fee Agreements; Charging Interest On Costs

RULES IMPLICATED: Rule 16-105(A) and (C)(fees); Rule 16-107(A)(2), (B)(1), and (B)(4)(conflict of interest; current clients); 16-108(I)(2)(contingent fees agreements generally permitted). This opinion is based on the Rules as amended effective as of July 15, 2013. Subsequent changes in the Rules could impact the opinion provided.

DISCLAIMER:

The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising inquiring lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued (the "Rules") to the specific facts as supplied by the inquiring lawyer. The Committee does not render opinions on matters of substantive law. Lawyers are cautioned that should the Rules subsequently be revised or different facts be presented, a different conclusion may be appropriate. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the request.

QUESTION PRESENTED:

Relating to Property Damage Claims and Contingent Fees

1. In representing an individual in an "auto accident-related property damage claim," is it permissible to charge a contingent fee for those legal services dependent on obtaining a recovery for the property damage claim?

2. If such a contingency fee is permissible, are you able to advise whether the Ethics Advisory Committee would view a 10% fee for recovery or up to \$10,000 (20% for recovery in excess of \$10,000) for the property damage claim as reasonable?

Relating to Interest on Costs Advanced

3. Under a New Mexico contingent fee agreement that meets all other requirements for contingent fee agreements, is it permissible to charge reasonable interest on costs that are advanced during the case?

4. If so, how is the interest rate to be calculated and determined?

5. Is there an upper limit as to what the Ethics Committee would deem reasonable?

SUMMARY ANSWER

While a contingent fee contract for the recovery is not prohibited by the Rules provided it is written, reasonable, effectively explained and communicated to the client pursuant to Rules 16-105 (A) and (C), the Committee cannot provide a "hard-and-fast" rule regarding the amount of the contingent fee that may be charged since that depends upon the circumstances outlined in Rule 16-105(A).

Likewise, the Rules do not prohibit the deduction of expenses from a client's recovery for property damage so long as

the deduction of expenses, including interest, are reasonable under Rule 16-105(A) and communicated effectively under Rule 16-105(C). Also, in charging interest or obtaining credit for the client, the attorney must avoid a conflict of interest as explained in Rule 16-107(A)(2) or obtain informed consent in writing from the client under Rule 16-107(B). The Committee is not able to speculate on the upper limit of the rate of any such interest.

FACTS:

No background facts were presented with this inquiry; rather, the facts were presented in a series of succinct questions.

ANALYSIS:

*Issues Relating to Contingent Fees
in Auto Accident Cases and Property Damage*

While these inquiries involve the reasonableness of a contingent fee and related expenses under our rules, we take this opportunity to review some of the fundamental requirements of contingent fee contracts. First, there is no ethical impediment to a contingent fee contract in an "auto accident-related property damage" case.¹ Such a contract must be in writing and signed by the client.² The contract must contain the precise basis for the calculation of the fee and the deduction of expenses from any recovery for the client, including a clear notification concerning the client's responsibility for expenses irrespective of any recovery.³ The Rules state:

[The contingent fee contract] shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation *and other expenses to be deducted from the recovery*, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses *for which the client will be liable whether or not the client is the prevailing party.*

See NMRA 16-105(C)(2013)(emphasis supplied).

Second, the contract must provide for a reasonable fee and charge reasonable expenses. The rule provides, in pertinent part:

A. Determination of Reasonableness. A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) *the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) *the fee customarily charged in the locality for similar legal services;*
- (4) *the amount involved and the results obtained;*
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) *whether the fee is fixed or contingent.*

NMRA 16-105(A)(2013)(emphasis supplied).

We emphasize certain factors in the rule cited above since we believe these particularly affect the evaluation of the reasonableness of a fee for property damage claims arising out of an auto accident. When we consider the first factor, we are mindful that in many situations a property damage claim may be a routine matter that does not involve extensive time, labor, or skill. When we examine the next two highlighted factors, the Committee is mindful that many personal injury attorneys in New Mexico do not charge a fee for the handling of such a claim; instead, they handle it at no charge because of the relatively small amount of money and time involved when compared to the bodily injury claim that accompanies most contingent fee auto accident cases. Essentially, it appears to be the practice that the handling of the property damage claim is an accommodation to the client for representation on the related bodily injury claim.

In those situations in which liability for the property damage is disputed and more extensive negotiation or litigation is involved, circumstances may well justify the charging of a reasonable contingent fee; however, where the representation involves a relatively small amount and routine handling procedures, a much smaller fee, if any, may be reasonable under the circumstances.

Issues Relating to Interest on Costs Advanced

Our rules contain no prohibition against the charging of interest on costs advanced to a client incident to litigation. Rule 16-105(A) states only that a lawyer “shall not make an agreement for, charge, or collect . . . an unreasonable amount for expenses.”⁴ Rule 16-105(C) provides that the written contingent fee contract “shall” state the method by which “litigation and other expenses [are] deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated.”⁵ The rule also provides: “The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.”⁶ Hence, the Rules offer no prohibition against the charging of interest on costs advanced to a client provided they are 1) reasonable under Rule 16-105(A) and 2) clearly communicated to the client in writing under Rule 16-105(C).

The Committee also believes that attorneys must be mindful of avoiding an arrangement with a client that impairs the lawyer’s duty of loyalty; that is, one that creates a conflict of interest between the lawyer and the client. Rule 16-107 explains that a conflict of interest arises if “there is a significant risk that the representation of [the client] will be materially limited by the lawyer’s responsibilities to . . . a third person or by a personal interest of the lawyer.” In those situations in which the client remains liable for the payment of costs and interest charges irrespective of a recovery in the underlying case, the advance-

ment of costs on interest or arranging a third-party lender for such costs may well cause a conflict of interest to arise between the lawyer and the client. If the lawyer’s personal interest in the client’s repayment of advanced costs and interest poses a significant risk that the lawyer’s representation of the client will be materially limited, then a conflict will have arisen. If the lawyer does not perceive a significant risk of a material limitation on the representation, then there will be no conflict of interest. A conflict of this nature, if it arises, may be waived by the client under Rule 16-107 (B) if the lawyer reasonably believes that despite the conflict, the lawyer will be able to provide diligent and competent representation to the client and the client gives informed consent to the arrangement in writing.⁷

The amount of interest that may be charged to a client is subject to the same Rule 16-105(A) factors that control the amount of a contingent fee that may be charged a client and the Inquiring Lawyer must be guided by that rule. The Committee may not provide advice on the proper amount or on the maximum amount of interest that may be charged to a client.

CONCLUSION

An attorney may charge a contingent fee in an auto accident related property damage case so long as the fee is reasonable considering, among other factors contained in Rule 16-105(A), the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the fee customarily charged in the locality for similar legal services, and the amount involved and the results obtained. The Committee is not, however, able to provide advice concerning the reasonableness of any particular percentage for the contingent fee because that is something that requires a case-by-case analysis.

The Rules do not prohibit a lawyer’s charging a client reasonable interest for costs advanced. What constitutes a reasonable interest charge is governed by the same considerations given the attorney’s contingent fee. The lawyer must disclose the details of the interest charges pursuant to Rule 16-105(C). In charging a client interest on costs advanced, or in securing a third-party lender for the advancement of such costs, the lawyer must avoid a conflict of interest with the client or secure informed consent from the client in writing.

¹ See NMRA 16-105(C)(2013)(prohibited contingent fee contracts in domestic relations and criminal cases only); NMRA 16-108(I)(2)(2013)(contingent fee agreements generally permitted).

² See NMRA 16-105(A)(2013).

³ See NMRA 16-105(C)(2013).

⁴ See NMRA 16-105(A)(2013).

⁵ See NMRA 16-105(C)(2013).

⁶ See *id.*

⁷ See NMRA 16-107(B)(1) and (4)(2013).