

April 23, 2008

*Certified Specialist Injury and
Wrongful Death, Arizona Board
of Legal Specialization

Justices of the Arizona Supreme Court
c/o Rachele M. Resnick, Clerk Of Court
ARIZONA SUPREME COURT
1501 West Washington St., Room 402
Phoenix, Arizona 85007

**Re: *Comment to Proposed Amendment of Rule 1.5 of the Ariz. Rules of Prof. Conduct
Petition No. R-07-0028***

Dear Justices:

Our firm has been practicing law in Arizona for nearly 30 years. In our personal injury practice we generally limit our representation to plaintiffs' personal injury and wrongful death claims. By way of some background, both of the undersigned are currently Directors of the Arizona Trial Lawyers Association, partners in the law firm and serve as judges *pro tempore*. Mr. Trachtenberg has served as a panelist for the Arizona State Bar fee arbitration program and has co-authored a publication discussed below, *Arizona Personal Injury Lien Law & Practice*. Mr. Cohen is certified by the Arizona State Bar as a specialist in injury and wrongful death litigation.

We are writing to oppose the proposed amendment of Rule 1.5 of the Arizona Rules of Professional Conduct as set forth in Petition No. R-07-0028. This amendment calls for clients to be advised that, "if the client's claim settles early, easily and without litigation, the lawyer's fee will not exceed the value of the representation" pursuant to Rule 1.5(a). Such an amendment is unnecessary, confusingly redundant, grossly oversimplifies the look-back analysis that must be made in each case and fails to appreciate the likelihood that such situations often involve a great deal of post-settlement work, knowledge and skill.

First and foremost, whenever any new rule is proposed, the proponent should identify objective and factually based reasons to support the proposed change. There is no evidence lawyers are charging unreasonable fees or that fee dispute resolution programs of the Arizona State Bar are not working to implement the existing rules fairly. There is simply no evidence Rule 1.5 is "broken" and that it has not been working exactly as intended in "quick settlement" cases. Petitioner Fitzpatrick has not articulated any basis for needing to change the existing rule and, for that reason alone, the Petition should be denied.

In fact, the same proposed rule change was already rejected by this same proponent, who appears to have a private agenda. In 2003, Petitioner Fitzpatrick petitioned this Court for an identical change to Rule 1.5 – *i.e.*, a petition to "limit contingent fees in claims that settle early, easily and without litigation." The Court rejected his earlier petition without comment. Further, Mr. Fitzpatrick's proposed change appears politically and ideologically motivated. He is "*pro*

bono local counsel” to a radical, tort-reform group calling itself Common Good, which has been attacking the rights of consumers to access affordable representation in tort cases and which advocates other anti-consumer, tort reform positions.

Insofar as there is no evidence of abuse and no evidence the existing rules are not doing an adequate job of mandating fair “look back” analyses by lawyers with respect to all settlements, and in light of the personal agenda of Mr. Fitzpatrick, we urge you to reject his petition again and reaffirm the neutral provisions of Rule 1.5. We point out, however, something Mr. Fitzpatrick does not seem to recognize; in virtually every “quick settlement” case, the settlement is quick because of limited insurance proceeds which then raises a secondary battle between various third-party lienholders, assignees and subrogees competing to share in the limited funds. This post-settlement battle adds no additional “value” to the gross settlement amount, but often overshadows the efforts in obtaining the policy proceeds. It is unknown if Mr. Fitzpatrick’s new re-prioritization of Rule 1.5 would account for these significant work efforts. The current Rule 1.5 mandates inclusion of all work done to put any money in the client’s pocket.

To be sure, this Court has recognized that the fees from contingency arrangements ultimately “may be much larger than that attorney or others would have charged had they been retained and paid on a time basis.” *In re Swartz*, 141 Ariz. 266, 273, 686 P.2d 1236, 1243 (1984). Yet, every attorney’s fee must be reasonable in light of Rule 1.5(a), which requires consideration of 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) the degree of risk assumed by the lawyer.

Rule 42, Ariz.R.Sup.Ct., ER 1.5(a). Moreover, the Comment to Rule 1.5(a) provides that “[t]he factors specified in (1) though (8) are not exclusive.”

The proposed amendment calls for the introduction of an unnecessarily confusing statement to be put into fee agreements that will confuse the look-back evaluation. The proposed amendment itself says that, where a case settles quickly, the fee must be reasonable in light of Rule 1.5(a). Although this is technically accurate (since every fee must be reasonable in light of Rule 1.5(a)), it incorrectly suggests that an early settlement takes precedence over the other factors listed in Rule 1.5(a), which itself already references the “time and labor required” in obtaining results for a client, and confuses the nature of the reasonableness determination.

More important, such a statement about early “settlement” ignores the significance and importance of post-settlement work, knowledge and skill. These days, fully resolving personal injury matters is complex, regardless of the time that it takes to obtain a settlement. Post-settlement resolution of third-party liens, assignments, subrogated interests and reimbursement rights represents a legal briar patch of increasing size and complexity. Indeed, annual seminars and recent publications, such as the Arizona Personal Injury Lien Law & Practice, are designed to educate attorneys concerning the ever-changing landscape of federal, state and administrative rules and regulations on third-party recovery rights.

This complicated legal overlay is further affected by factual circumstances that are typically unique to every claimant. For example, it is not enough to be current on all aspects of ERISA recovery rights. Each time a private health plan asserts a right to recovery pursuant to ERISA, an attorney must evaluate and compare the terms of the Plan itself, the Summary Plan Description and the Form 5500s filed with the Department of Labor. Likewise, just being familiar with AHCCCS’s rights of recovery under federal and state law is no longer sufficient since those rights may depend upon a host of factors such as the nature of the recovery, comparative fault and equitable considerations. Even seemingly simple healthcare provider liens pursuant to A.R.S. 33-931, *et seq.*, require investigating the perfection of the lien, nature of the recovery and evaluating the “customary charges” asserted as a basis for the lien. Although it would be relatively easy to go on with additional examples, the point is that these matters are extremely common and equally complex.

Most significant here, it is almost always far more difficult to resolve third-party recovery rights when a case settles quickly because, in almost every such instance, the case settles quickly due to a lack of adequate insurance coverage. In those cases, third-party recovery rights typically eclipse the available funds to the injured parties and an attorney’s successfully resolving such recovery rights in a client’s favor takes on even greater importance. Indeed, it is generally an attorney’s devotion of time as well as superior knowledge, skill, expertise and reputation that results in favorable post-settlement resolution of third-party recovery rights.

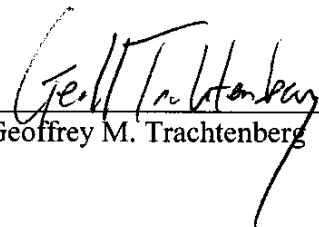
“In the final analysis, the client’s best interest is the determinative factor” in whether a fee is reasonable in a personal injury case. *See* Bruce E. Meyerson, *et al.*, ARIZONA ATTORNEYS’ FEES MANUAL § 12.4 (4th Ed. 2003). Our current Rule 1.5 mirrors the American Bar Association’s Model Rules of Professional Conduct, as amended through February, 2002, and already requires a detailed look-back analysis of whether fees are reasonable. Injecting the language from the proposed amendment into client agreements will only cause confusion and undermine the post-settlement efforts taken by attorneys to secure recoveries in the best interests of injured clients.

Respectfully,

LEVENBAUM & COHEN



Steven A. Cohen



Geoffrey M. Trachtenberg

