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Petitioner

BEFORE THE ARIZONA SUPREME COURT

In the Matter of	Supreme Court No. R-07-0028
PETITION TO AMEND ER 1.5 OF THE ARIZONA RULES OF PROFESSIONAL CONDUCT	PETITIONER'S REPLY TO COMMENTS TO PROPOSED AMENDMENT TO RULE 1.5 OF THE ARIZONA RULES OF PROFESSIONAL CONDUCT

I. The Arizona Trial Lawyers Association (ATLA) alleges that the amendment is not necessary because there is no evidence that lawyers are charging unreasonable fees.

The issue is whether lawyers are making required written disclosures so that clients have informed consent when they enter contingent fee agreements. There is evidence that lawyers are not making such disclosures and that, as a result, clients are being treated arbitrarily in connection with fee adjustments in cases which settle early and easily.

For instance, *ER 1.5[c]* requires written disclosure of the method by which contingent fees are calculated. *ER 1.8[a]* requires that, in transactions between lawyers and their clients, lawyers fully disclose the terms of the transaction in writing in a manner that can be reasonably understood by the client. Nonetheless, lawyers are not making written disclosure that, in cases which settle early and easily, they must reduce their fees.

When it comes to understanding how a contingent fee is calculated, clients only know what is in the fee agreement. Under the existing system, there is no way for clients to know that payment of the agreed contingent fee could result in payment of an excessive fee. Neither do

clients know that the lawyer's fee must be "reasonable" and "reasonable" may mean something other than what is in the fee agreement.

Most contingent fee agreements provide for a baseline contingent fee percentage of 30%, more or less. As the claim ripens into a filed complaint, the fee increases to 35% or 40%. If the case proceeds to trial, the percentage escalates. There is no provision by which the fee is reduced for claims that settle early and easily.

The Arizona State Bar's Sample Fee Agreement follows the traditional pattern of escalating contingent fee percentages: the percentage starts at 25%. It increases to 33.3% after a complaint is filed then to 40% if there is a recovery "during or immediately after the first trial by settlement or otherwise." The Sample Fee Agreement provides for a maximum fee percentage of 45% "if an appeal or further action is taken after the first trial."[1] It does not have a provision for payment of a reduced contingent fee if the case settles early and easily.

These issues raise some difficult questions:

- Do the Rules of Professional Conduct[2] really protect clients from overreaching lawyers when clients have no way to know that such safeguards exist?

- How would the client know of protections afforded by the ethical rules when they are not addressed in the fee agreement?

- Why would a lawyer not charge a full contingent fee without concern for a bar complaint if the client believes that the lawyer is not taking anything not contemplated by the fee agreement?

Under the existing system, it is unlikely that clients are informed about the protections of *Swartz* and counsel's duty under the look-back system unless they seek independent counsel

[1] http://www.myazbar.org/Members/Brochures/SampleAgreement.cfm
[2] ER 1.0(c), 1.4(b), 1.5(c), 1.8(a)(1)

before entering the fee agreement. Clients do not generally seek independent counsel in negotiating fee agreements with their own lawyer. The absence of evidence that lawyers are charging unreasonable fees[3] only means that, in entering contingent fee agreements, clients are navigating in the dark in a system that is foreign to them.

II. ATLA alleges that the amendment oversimplifies the look-back analysis because it fails to appreciate that there may be a great deal of "post-settlement" work.

If a case involves the identification and payment of numerous third-party lien claimants, the demands on counsel can be onerous. This is especially true if the claims involve bureaucracies such as AHCCCS or Medicare. Attempts to compromise such claims can add to the burden on plaintiffs' counsel.

ATLA's characterization of this process as "post-settlement" work is misleading in that a case is not settled until all of the liens against the recovery are identified and paid. Any attorney who would pay himself a contingent fee and release the balance of the settlement proceeds to the client without resolving the claims of third parties would invite a malpractice claim.

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[3] It can also be said that there is no evidence that lawyers are reducing their contingent fees in claims which settle early and easily. Consider the following hypothetical: In the lawyer's first meeting with his client, he learns that the client has been rear-ended. There are no liability issues, claims involving non-parties or third-party claims against the recovery. There is $100,000 in coverage. The lawyer determines that the case is worth $75,000. The client simply wants to settle the claim. The lawyer makes a demand for the $100,000 policy limits and receives a counter-offer for $75,000. The case is settled. The lawyer and client have entered an agreement which provides for a fee of 30% of the recovery if the case settles prior to suit. From initial client contact through distribution of the settlement funds, the lawyer has spent five hours on the case. Pursuant to the fee agreement, the lawyer's contingent fee is $22,500 or $4,500 per hour.

What would happen if 100 lawyers were asked the following questions about this scenario: 1] Should the lawyer discount the contingent fee? 2] Is a fee of $22,500 for five hours of work excessive or was this simply a good case which enabled the lawyer to earn a large fee? 3] If the fee should be reduced, how is the size of the discount determined?

It is unlikely that all of the lawyers in the test group would agree that a discount is necessary. Of the lawyers who believe a fee discount is appropriate, it also unlikely that there would be any consistency concerning the amount of the fee reduction each would feel compelled to make.

Cases involving a number of third-party liens would not trigger counsel's duty under the amendment. Such cases do not generally settle "early." The process by which lien claimants are identified and paid can hold up distribution of settlement proceeds for months or longer. Neither do such cases settle "easily." Identifying all of the potential lien claimants and settling their obligations can be both difficult and time-consuming.

III. The State Bar alleges that it "seems" unnecessary to require written notification to the client of the lawyer's obligation and could unnecessarily burden the lawyer.

Written notification to the client **is** necessary to disclose "the method by which the fee is to be determined." *ER 1.5[c]*. Full disclosure **in writing** of the terms of any transaction between the lawyer and his client is required by *ER 1.8[a]*. Thus, if a lawyer has a duty to reduce his fee in accordance with *Swartz* and the Rules of Professional Conduct, such duty and the parameters by which the fee is reduced should be disclosed in writing.

Bar counsel alleges that to make such written disclosure "could unnecessarily burden" lawyers. Although no reasons are indicated why disclosure would create an unnecessary burden, the benefits to the client outweigh such theoretical burden. By making full, written disclosure of all the important terms of the agreement in a manner that can be reasonably understood by the client, the client benefits and the public's understanding of and confidence in the rule of law and the justice system is advanced.

IV. ATLA alleges that the amendment is politically motivated and that petitioner has a "private agenda."

Petitioner has practiced law for thirty two years. He has been through the litigation process as a represented plaintiff in a claim for personal injuries. From these experiences has

come the realization that, unbeknownst to the clients, whether a contingent fee percentage is reduced and the amount of any fee reduction is left to the unfettered discretion of the lawyer.

A corollary to this realization that the look-back analysis means only the lawyer decides whether a fee reduction is in order, is that clients lack informed consent concerning how the fee is calculated in cases which settle early and easily. A premise of the Rules of Professional Conduct is that clients are entitled to receive full written disclosure concerning the terms of the agreement in a manner which can be reasonably understood. Nonetheless, informed consent for clients in the context of contingent fee agreements is an illusion.

The Preamble to the Rules of Professional Conduct challenges lawyers to "seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession." It also states that lawyers "should further the public's understanding of and confidence in the rule of law and justice system" and "be mindful of deficiencies in the administration of justice." The amendment represents petitioner's attempt to improve our justice system by leveling the playing field between lawyers and their clients.

Conclusion

It is time for lawyers to start making the written disclosures required by the Arizona Rules of Professional Conduct so that clients know, in entering contingent fee agreements, that the lawyer's fee percentage must be reduced in cases which settle early and easily. The fact that the state bar's Sample Fee Agreement includes no such disclosure is significant. It demonstrates the standard practice among plaintiffs' counsel to use fee agreements which do not disclose their duties under *Swartz*. None of the input from ATLA or the state bar claims that lawyers are already making the required written disclosures because they are not. For as long as lawyers

perceive their duty under the amendment as an unnecessary and unreasonable burden, clients will not receive the full written disclosure to which they are entitled.

DATED this 25th day of June, 2008.

LAW OFFICE OF DOUGLAS C. FITZPATRICK

BY /s/ Douglas C. Fitzpatrick
Douglas C. Fitzpatrick
Petitioner

An electric copy filed with
the Clerk of the Supreme Court
this 25th day of June, 2008.

/s/ Douglas C. Fitzpatrick
Douglas C. Fitzpatrick