LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 458

(January 24, 1990)

CONTINGENCY FEE CONTRACT - CLIENT'S KNOWLEDGEABLE CONSENT - INSURANCE RECOVERY. An attorney and client may enter into a written contingency fee contract under which the fee is based upon both a medical offset taken by the insurance carrier and the settlement actually received by the client if the contract complies with Rule of Professional Conduct 4-200 and Business and Professions Code § 6147 and the client gives its informed consent to the contract.

AUTHORITIES CITED:
Warner v. State Bar, 34 C.3d 36, 43; 192 Cal.Rptr. 244 (1983)
Bushman v. State Bar, 11 C.3d 558, 563; 113 Cal.Rptr. 904 (1974)
Denton v. Smith, 101 Cal.App.2d 841, 844; 226 P.2d 723 (1951)
California Business & Professions Code §6147
California Rules of Professional Conduct Rule 4-200
Los Angeles County Bar Assoc. Formal Opinion No. 352 (January 15, 1976)

DISCUSSION

The Committee's opinion has been requested in connection with the following:

Description of Insurance Policy and Its Effect on Recovery By Client

The inquiring attorney has been retained to represent a client in a litigated claim against the client's insurance carrier for uninsured or underinsured motorist benefits. The client has uninsured/underinsured motorist coverage and medical coverage from the same insurance carrier. The client's uninsured/underinsured policy allows the carrier to offset the medical expenses on the same claim against the settlement/award owed to the client. For example, client A has an auto insurance policy with uninsured/underinsured motorist coverage of $15,000.00 and medical coverage of $5,000.00. After an accident involving an uninsured motorist, the carrier reimburses client A $5,000.00 for medical expenses. Client A also claims $15,000.00 from her uninsured/underinsured motorist coverage as the reasonable value of the claim. Under the policy, the carrier takes credit for the $5,000.00 it has paid toward medical expenses, and Client A will receive a monetary settlement/award from the carrier of $10,000.00. Thus, the client is reimbursed $5,000.00 for medical expenses and is

paid $10,000.00 under the uninsured/underinsured motorist coverage.

Factors to Consider In Proper Measurement Of Base Upon Which Contingency May Be Measured.

We have been asked whether an attorney may ethically base the contingent fee upon both the medical offset taken by the carrier and the settlement/award actually paid to the client or whether the fee can only be based upon the monetary settlement/award actually paid to the client. Using the above hypothetical, may the contingency fee be based upon the $15,000.00 claimed from the uninsured/underinsured motorist coverage, or must it be based upon the $10,000.00 monetary settlement/award actually received by the client? Including the medical offset in the base from which the contingent fee is calculated will necessarily increase the attorney's payment and decrease the net amount of settlement/award the client receives.

Fee agreements in California are subject to the conscionability requirements of California Rule of Professional Conduct 4-200. Under Rule 4-200(A), a member cannot "enter into an agreement for, charge, or collect an illegal or unconscionable fee." Most cases in which discipline is imposed upon an attorney for charging and attempting to collect an unconscionable fee "involve an element of fraud or overreaching by the attorney, so that the fee charged, under the circumstances, constituted a

practical misappropriation of the client's funds." Bushman v. State Bar, 11 C.3d 558, 563; 113 Cal.Rptr. 904 (1974); see also, Warner v. State Bar, 34 C.3d 36, 43; 192 Cal.Rptr. 244 (1983).

Rule 4-200(B) provides, in part, that: "unconscionability of a fee agreement shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events". Rule 4-200(B) then lists the following eleven factors as among those to be considered, where appropriate, in determining the conscionability of a fee.

> "(1) The amount of the fee in proportion to the value of the services performed.
>
> (2) The relative sophistication of the member and the client.
>
> (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
>
> (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
>
> (5) The amount involved and the results obtained.
>
> (6) The time limitations imposed by the client or by the circumstances.
>
> (7) The nature and length of the professional relationship with the client.
>
> (8) The experience, reputation, and ability of the member or members performing the services.

(9) Whether the fee is fixed or contingent.

(10) The time and labor required.

(11) The informed consent of the client to the fee agreement."

Thus, under Rule 4-200(B)(9), whether the fee is fixed or contingent is one of the factors that may be considered in determining whether the fee is conscionable. There is no specific maximum contingent fee rate for automobile personal injury cases nor is there only one method by which the total recovery upon which the contingent fee is based must be calculated. California Business and Professions Code § 6147 requires, among other things, that the contingent fee contract be in writing and state the contingency fee rate and explain how disbursements and costs incurred in connection with litigating the claim will affect the contingent fee and the client's recovery.

Rule 4-200(B)(11) states that the informed consent of the client to the fee agreement is another factor to be considered. Under California law, a fee contract is presumptively invalid if the attorney does not explain and the client does not understand the contract. Denton v. Smith, 101 Cal.App.2d 841, 844; 226 P.2d 723 (1951).

In the opinion of the Committee, it is not necessarily unconscionable for the attorney and client to base a contingent fee upon the medical offset and the settlement/award paid to the client as long as:

(1) the manner by which the fee will be calculated has been fully explained to the client and the client has given knowledgeable consent to those terms; and

(2) the written contract specifies the manner by which the fee will be calculated, and the contract meet all of the requirements of California Business and Professions Code § 6147.

However, it is emphasized that Rule 4-200(B)(10) lists "the time and labor required" as a factor to consider in the analysis of the conscionability of a fee. Therefore, there would be a substantial issue of conscionability if the time and labor required to recover the medical offset is nothing or de minimis. Even if the proper disclosures are made and consent obtained, for a fee to be conscionable, the fee must be reasonable considering all of the factors of Rule 4-200(B).

In order to obtain the client's knowledgeable consent, the attorney must fully inform the client that including the medical offset in the contingent fee calculation will decrease the net amount of settlement/award the client actually receives. It should be noted in the contract that, under this manner of calculating contingent fees, in those instances where the only recovery from the carrier is the medical offset, the client may be required to pay to the attorney a contingent fee even though the client

receives no monetary settlement/award. Failure to obtain the client's informed consent that the contingent fee will be based upon the amount of the uninsured/underinsured claim rather than the amount actually received by the client is a violation of Rule 4-200 and Section 6147. Again, even if such consent is present, there may still be a significant issue under Rule 4-200(B)(10) for reasons relating to the time and labor required.

In Formal Opinion No. 352, this Committee advised that it was improper for a lawyer having a contingent fee contract in a personal injury case to accept additional compensation for services rendered on the same claim from the client's medical insurance carrier unless the client gave knowledgeable consent in writing. Opinion No. 352 noted that such consent would be precluded except in "extraordinary circumstances" because of the nature of the adverse and conflicting interests in that fact situation. The Committee stated that the difficulties of explaining to the client all of the possible conflicts and adverse interests of representing two clients, the claimant and its insurance carrier, in litigation against a third party defendant, would for all practical purposes preclude obtaining knowledgeable consent of the client except, as noted, in extraordinary circumstances.

The present case is distinguishable from the facts presented in Opinion No. 352 because the attorney here is

not representing the client's medical insurance carrier in an action against a third party, but rather is seeking recovery directly from the carrier under the client's uninsured motorist policy. This case does not pose any of the difficult issues relating to conflicts and adverse interests that were present in this Committee's Opinion No. 352. Our concern in the present case, rather, is that the client be fully informed and consent to the basis for calculation of the contingent fee.

Analysis of "Hypothetical Contract"

It is the opinion of the Committee that the "hypothetical contract" proposed by the inquiring attorney, standing alone, does not satisfy the disclosure and informed consent requirements set forth in this opinion. The "hypothetical contract" states that the basis for calculation of the contingent fee includes "any and all monies collected or received by way of settlement, compromise, or adjustment prior to commencement of suit," and in the event suit or arbitration is commenced, "any and all monies received or recovered thereafter, whether by judgment, award, settlement or compromise." The "hypothetical contract" further provides in bold type that "if no monies are collected or received [the lawyer] agrees to charge no attorney's fee." It does not appear that this contractual language , taken together, fully informs the client of the basis upon which the contingent fee will be

calculated because of uncertainty over the words "received" and "collected". To comply with Rule 4-200 And Business & Professions Code Section 6147, the contract should specifically state that the contingent fee will be based upon both the medical offset or other offsets taken by the carrier and the settlement/award actually paid to the client. Finally, for the fee to be consciionable under Rule 4-200, all of the factors listed therein also must be considered.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based on such facts only as are set forth in the question submitted.