

DIGEST OF ETHICS ADVISORY PANEL  
OPINION #89-21, REQUEST #68  
Issued December 7, 1989

An attorney seeks Panel advice as to the propriety of certain fee arrangements under the circumstances he describes.

The attorney advises the Panel that every client who retains his office in connection with a workers compensation matter signs a retainer agreement. The attorney states that he has recently revised the agreement in an attempt to make the fee arrangement as clear as possible. This agreement, a copy of which the attorney has submitted for Panel review, covers both the simple situation in which the Commission awards benefits and sets the attorney's fee and the more problematical situation in which a case is settled outside of the Commission. It is this later scenario with which the attorney is most concerned.

The attorney advises the Panel that in some circumstances the insurance company in question will pay a specific amount: \$2100, for example, as a scarring award. The attorney states that in this circumstance, the one-third (1/3) fee agreed upon is obviously \$700. The attorney adds, however, that sometimes an insurance company will add a smaller amount which is designated "attorney's fee." If, for example the insurance company paid \$2100 as a scarring award and \$300 as an "attorney's fee" then the gross proceeds would be \$2400. The attorney advises the Panel that he has revised the retainer agreement to make it clear that the fee in such a case will be 1/3 of the gross proceeds, however denominated. The attorney asks whether the retainer agreement, and specifically this provision thereof is ethically permissible.

The Panel is not equipped to "embark on the task of editing" documents, and therefore cannot give general approval to a document as a whole. See Digest of Ethics Advisory Panel Opinion 87-3. It is well established, however, that an attorney may utilize any reasonable business practice in fixing the terms of a fee arrangement "so long as the client understands and agrees . . ." ABA/BNA Manual of Professional Conduct 41:601. The Panel takes the position that provided the client understands and agrees, it is permissible for the inquiring attorney's firm to receive one third of the total sum received from the insurance company in a settlement which takes place outside the Commission regardless of how the insurance company has designated those funds.

The Panel must take issue, however, with one other portion of the retainer agreement which the attorney has submitted. The agreement provides that if a settlement offer is tendered prior to the client removing his or her case from the inquiring attorney's firm, the client agrees that the inquiring attorney's office will place a lien on the file of fifteen percent (15%) of the amount of the settlement offer.

Rule 1.5 provides, in pertinent part that:  
(a) A lawyer's fee shall be reasonable.

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- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) The division is in proportion to the services performed by each lawyer . . .
  - (2) The client is advised of and does not object to the participation of all the lawyers involved; and
  - (3) The total fee is reasonable.

It is well settled in this and other jurisdictions that when a client who has retained an attorney on a contingent fee basis discharges that attorney prior to reaching an agreement as to settlement, the discharged attorney is only entitled to payment for services rendered on a quantum meruit basis. See, e.g. Opinions 80-92 and 81-79 rendered by the Philadelphia Bar Association Professional Guidance Committee and reported at ABA/BNA Manual of Professional Conduct 801:1103. An agreement which provided otherwise would be contrary to the requirement that a fee be "reasonable." If a second firm commenced representation of the client, then the provision at issue would also violate Rule 1.7(e).

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.