

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2022-02
Issued May 12, 2022**

FACTS

The inquiring attorney represents clients on a contingency basis in matters in which attorney's fees may also be awarded. He/she states that certain statutes, as well as many contracts, contain provisions whereby the prevailing party may recover attorney's fees in addition to other compensable damages. He/she states that in some cases, as in cases brought pursuant to the Civil Rights Act or the Fair Labor Standards Act, attorney-fee provisions exist to encourage private attorneys to pursue such cases, even where damages may be minimal, because there is a strong social and public policy behind encouraging private counsel to assist people to vindicate their federal rights. The inquiring attorney proposes to include in his/her retainer agreements with clients that the contingent fee will apply to the total of the damages award plus any court-awarded attorney's fees.

ISSUE PRESENTED

The inquiring attorney asks whether the proposed fee agreement is permissible.

OPINION

It is permissible under the Rules of Professional Conduct for the inquiring attorney to enter into a fee agreement with a client which states that the agreed-upon contingency fee percentage applies to the total of the damages award plus the court-awarded attorney's fees.

REASONING

Rule 1.5(a) of the Rules of Professional Conduct requires that a lawyer's fee be reasonable, and further provides factors to be considered in determining the reasonableness of a fee. The factors include:

- (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.

The factors in Rule 1.5(a) are not exclusive. Rule 1.5, Comment [1].

“[T]he determination of whether an attorney’s fees are reasonable requires particular facts in the form of affidavits or testimony upon which the trial court may premise a decision.” St. Jean Place Condominium v. Decelles, 656 A.2d 628 (R.I. 1995) citing Colonial Plumbing and Heating Supply Co. v. Contemporary Construction Co., 464 A2d 741 (R.I. 1983). The facts and circumstances of each case determine what is fair and reasonable. Colonial Plumbing and Heating Supplies Co., 464 A2d at 743.

In the instant inquiry, the inquiring attorney asks whether he/she may enter into an agreement with a client which states that the agreed upon contingency fee percentage will be applied to the total of the damages award and any court-awarded attorney’s fees. The Panel cannot advise whether the proposed arrangement is reasonable *per se*. To do so would ignore the various factors that affect the reasonableness of a fee. Maine Professional Ethics Commission, Op. 81 (1987); see R.I. Supreme Court Ethics Advisory Panel Op. 96-18 (1996) (Panel has insufficient information to determine if fees for writing and depositing checks and preparing Federal Express forms are reasonable); R.I. Supreme Court Ethics Advisory Panel Opinion 92-42 (1992)(Panel not equipped to give opinion on reasonableness of arrangement where lawyer receives both contingency fee and fixed fee.) The Panel believes, however, that the proposed fee arrangement is not inconsistent with the Rules of Professional Conduct.

An attorney-fee award belongs to the prevailing party, whose right it is to waive, settle, or negotiate it. Okla. Ethics Op. No. 325 (2009), citing State ex.rel. Okla. Bar Assn. v. Weeks, 969 P.2d 347 (1998); see Maine Professional Ethics Committee Op. #160 (1997) (all funds recovered belong to client, and it is permissible to apply contingent fee percentage to all funds collected including attorney’s fee award); see also California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Op. #1989-114 (1989) (in civil rights case attorney is obligated to inform client that statutory attorney’s fees are client’s property which client may waive as condition of settlement.).

Courts have recognized that statutory fee awards and contingency fee arrangements may coexist. Okla. Ethics Op. No. 325 (2009) (citations omitted); see Balducci v. Cigne, 223 A3d 1229 (N.J. 2020) (contingent fees based on total of client’s damage award and attorney-fee award are authorized by several jurisdictions); Bishop Coal Co. v. Salyers, 380 S.E. 2d 238 (W.Va. 1989)(fee

shifting statutes do not impair right of lawyer and client to make private fee agreement); see also Albunio v. City of N.Y., 11 N.E. 3d 1104 (N.Y. 2014)(absent explicit contract to the contrary, statutory fees are not considered to calculate contingency fee, and lawyer is generally entitled to greater of the two.)

The Panel concludes that it is permissible under the Rules for the inquiring attorney to enter into a fee agreement which states that the agreed-upon contingency fee percentage applies to the total of the damages award plus the court awarded attorney's fees. See Red vs. Hill, 304 P.3d 861 (Utah 2013) (contingent fee agreement stating lawyer entitled to one-third of all monies paid to the client meant one-third of total of primary judgment and court-awarded fees); Cambridge Trust Co. vs. Hanify & King Professional Corporation, 721 N.E. 2d 1 (Massachusetts 1999) (contingent fee agreement may expressly provide for percentage of client's total recovery that includes damage award plus court-awarded attorney's fees); Los Angeles City Ethics Op. 523 (2009) (lawyers may use agreement where statutory attorney's fees will be added to damage award to calculate lawyer's one-third contingency fee). The onus is on the inquiring attorney to discuss the fee with the client so that the client can make an informed decision. The fee must be reasonable in light of the facts and circumstances in each case.