

**Nebraska Ethics Advisory Opinion for Lawyers
No. 10-01**

IT IS PERMISSABLE UNDER RULE § 3-501.5 FOR A LAWYER TO MODIFY AN EXISTING CONTINGENT FEE AGREEMENT WHERE THERE IS A CHANGE IN CIRCUMSTANCES AND PROVIDED THE CLIENT IS FULLY INFORMED AND CONSENTS TO SUCH A MODIFICATION.

QUESTION PRESENTED

1. Whether a Nebraska lawyer may charge a fee of Four Thousand (\$4,000.00) Dollars, instead of One Thousand Six Hundred Thirty-Two Dollars and seventeen cents (\$1,632.17), as would have been required under the terms of the original contingency fee agreement.

STATEMENT OF FACTS

A Nebraska Lawyer entered into a fee agreement to represent a client in connection with a claim for workers compensation benefits against his employer for injuries the client incurred.

The original fee agreement was contingent, with the client agreeing to pay his lawyer thirty-three and one-third percent (33-1/3%) of the gross amount of money which the lawyer recovered on the client's behalf. In the event of an appeal, the client agreed to pay his lawyer forty percent (40%) of the gross amount of money recovered on his behalf. The client also remained fully responsible for all court costs and other out-of-pocket expenses incurred by the lawyer in the investigation and prosecution of the client's claim.

The presented facts suggest that at some point in time after the original fee agreement was entered into, it was discovered the majority of any settlement received from the client's claim would be placed into a Medicare Set Aside Arrangement. It was the understanding of the Lawyer and the client that attorney fees could not be paid through monies received for a Medicare Set Aside Arrangement. As a result, the client consented to an agreement outside the original fee agreement, whereby the client agreed to pay his Lawyer Four Thousand (\$4,000) in consideration, out of the Five Thousand (\$5,000) Dollars paid in addition to the Medical Set Aside Arrangement under the terms of the settlement of the client's claim.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE § 3-501.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include 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) whether the fee is fixed or contingent.**

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or**
- (2) a contingent fee for representing a defendant in a criminal case.**

(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 or each lawyer assumes joint responsibility for the representation;**
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and**
- (3) the total fee is reasonable.**

(f) Upon reasonable and timely request by the client, a lawyer shall provide, without charge, an accounting for fees and costs claimed or previously collected. Such an accounting shall include at least the following information:

- (1) Itemization of all hourly charges, costs, interest assessments, and past due balances.**

(2) For hourly rate charges, a description of the services performed and a notation of the person who performed those services. The description shall be of sufficient detail to generally apprise the client of the nature of the work performed.

COMMENT:

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's

ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes Over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

DISCUSSION

Based upon a review of Nebraska Supreme Court decisions and the Rules of Professional Conduct noted above, specifically Rules § 3-501.5, it does not appear, under the facts presented, that it would be improper to charge a fee of Four Thousand (\$4,000.00) Dollars, instead of One Thousand Six Hundred Thirty-Two dollars and seventeen cents (\$1,632.17), as would have been required under the terms of the original contingency fee agreement.

RULE § 3-501.5(a). Fees.

“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include 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) whether the fee is fixed or contingent.”

When presented with a question regarding proper or improper attorney fees, the question is ultimately one of reasonableness. Although, Rule 3-501.5 provides a list of factors to be considered in determining the reasonableness of a fee, Comment [1] to Rule 3-501.5, states that “the factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance.”

The case of *State ex. rel. Counsel for Discipline v. Wright*, 277 Neb. 709, 764 N.W.2d 874 (2009), is instructive here. In *Wright*, the Nebraska Supreme Court was asked to address (among other things) the propriety of *Wright*'s modification of certain client fee agreements from contingent fee agreements to hourly fee agreements. While the Court found most of the clients' complaints actionable, it defended the modification of certain agreements:

We next turn to the issue of whether *Wright* violated any ethical rules when he modified certain contingent fee agreements into hourly fee agreements. A fee agreement between an attorney and a client is an enforceable contract, whether oral or written, and thus may be modified by the agreement of the parties. *Wright* indicated that the parties agreed to the modifications of the agreement, and there is no evidence to contradict this. We therefore conclude that there was not clear and convincing evidence to show that any charged ethical violations occurred by virtue of the modification of these fee agreements.

Id. At 724-25; Citing, *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000); *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

From the facts presented, the Nebraska Lawyer and his client appear to have negotiated the original contingent fee agreement and the modified contingent fee agreement by mutual consent and at arms length. The parties were free to negotiate these terms and modifications of these terms as they wished. There is nothing unethical or unenforceable about the modified fee agreement between the parties which would require the Nebraska Lawyer to honor the originally

contemplated fee. Given the client's acknowledgement of the work performed by the Lawyer and his executed "Consent" to the modification of the original fee agreement, the increased fee is appropriate under the circumstances presented.

CONCLUSION

Under the facts presented, a Lawyer should be allowed to modify his contingent fee agreement and charge a higher fee given his client's informed consent, and such a modification does not violate the applicable Rules of Professional Conduct, specifically RULE § 3-501.5.