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ON THE MARK
The Reasonableness of a Contingency Fee: Should a Jury Decide?
PART 1

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Imagine you are a personal injury lawyer. You are asked by the primary counsel for the victim of an accident, car crash, product liability or malpractice to be lead counsel at the trial stage. After doing some initial work, reviewing pleadings, deposition testimony and meeting with experts, you enter into a written contingency fee agreement with the plaintiff that provides for attorney fees at 25% if the case resolves prior to a trial setting, and 33 1/3% after a trial setting. At the time you undertake representation, the defendants have offered $180,000 to settle the case. You further agree in writing to give the client a set off for legal work already performed and will take no attorney fees from the $180,000 offer. Once you become involved, you provide much needed strategy, including facilitating the filing of a motion for leave to file punitive damages, but don't technically file an appearance because negotiations are rapidly moving in the right direction. The defendants then offer $1.1 million dollars in settlement, which is accepted. This occurs just over two months after the ink is dry on the written contingency agreement. The plaintiff then refuses to pay you.

Your dispute then goes to trial before a jury, rather than a bench trial as you expected. The jury finds that you performed on the contract. Good. Your former client breached the contract. Good. You sustained damages as a result of the breach. Good. The contract is enforceable since it clearly states the method by which the contingent fee is to be determined and the sets out two alternative percentages in compliance with Illinois Rule of Professional Conduct (RPC) 1.5(c). Right on.

Wait a minute! You lose. The jury finds that the contract is unenforceable because the contingent fee claimed is unreasonable, purportedly in violation of RPC 1.5(c). The plaintiffs' bar collectively shudders.

Questions come fast and furiously now. How can 25% and 33 1/3% be considered unreasonable? Don=t these amounts represent the custom and practice in the legal community consistent with RPC 1.5(a)(3)? The Illinois legislature has even dictated similar graduated amounts in medical malpractice cases under 735 ILCS 5/2-1114; 33 1/3% of the first $150,000 of the sum recovered, 25% of the next $850,000 of the sum recovered, and 20% of any amount recovered over $1,000,000 of the sum recovered with court reserving the right to review contingency agreements for fairness and in special circumstances, where an attorney performs extraordinary services involving more than the usual participation in time and effort the attorney may apply to the court for approval of additional compensation. Could the short time interval be responsible? Understandingly, of course, under RPC 1.5(a)(1) one of the factors to consider in determining reasonableness is the time and labor involved. Notwithstanding the short time interval, however, the plaintiff's settlement offer increased six-fold during your representation. So does the jury=s verdict mean that two months is too short a time to earn a quarter-million dollar attorney fee in a hotly contested matter? Most importantly, shouldn't the reasonableness of a contingency fee be a matter of law for the court to decide?

The irony is that such a decision could be devastating to future plaintiffs and to the contingency fee as we know it. Although the personal injury plaintiff may have prevailed against a lawyer here, he could well have ruined it for future personal injury plaintiffs. Contingency fees are the only keys to the courthouse for the middle class, the poor, and the disenfranchised. We have seen the news, heard the pundits, and read the cover story in *The Atlantic* - these groups are growing exponentially. If lawyers are faced with the prospect that a jury can dismantle a written contingency fee contract in contravention of the rules of professional responsibility, established law, and long-standing customs and practices of the bar personal injury lawyers may as well take down their shingles because a jury will always believe an attorney's fee to be unreasonable. Simply put, this could have a chilling effect on the American system of justice that we are all so proud to embody.

Under RPC 1.5(c), all contingency fees must be in writing. I contend that if the written contract adheres to the dictates of that rule, then under black letter contract law, courts should be loath to second-guess the parties' agreement. I would further argue that the shortage of precedent on this issue is due to the fact contingency fee disputes rarely arise. There are no issues to litigate as long as all of the plaintiffs' attorneys in Illinois have form contracts in their offices that provide for contingency fees that ranges from 25 to 40%. If none of those same contracts provide for fees to increase based on the amount of time it takes to garner a settlement or award, there will be no issue. The contract will fulfill the settled expectations of the parties. The custom of the legal industry is clear and consistent with RPC 1.5(a)(3)Cthere is no need for the jury to step in the box.

The Committee Comments to RPC 1.5 point out that 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. However, few of the reasonableness factors set out under the rule actually apply in the context of a contingent fee. There is absolutely no guidance or instruction for the trier of fact; it simply states that that whether or not there is a contingency fee is a factor in determining reasonableness of a fee. The rule needs to be clear - contingency fees of 25-40% made at the time if the agreement have been deemed, or are presumed, reasonable.

Neither the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly (RPC 1.5(a)(1)) nor the experience, reputation, and ability of the lawyer or lawyers performing the services (RPC 1.5(a)(7)) are easily factored into the contingency fee model. In contrast to hourly fee structures, there is no Apremium percentage@ concept among lawyers who charge a contingency fee that would be based on the subject matter of the case or the stature of the attorney retained. The concept seems repugnant in this context - an attorney with a better reputation or more experience or perceived skill should take a bigger piece of the pie from the plaintiff. Surely the rule was not intended to mean this.

It is seldom apparent to clients who sign contingency fee agreements that accepting their case will preclude their lawyer from pursuing other employment as outlined in RPC 1.5(a)(2). So this doesn't register as a factor. Consideration of any time limitation imposed by the client or by the circumstances (RPC 1.5(a)(5)) is equally benign in the contingency fee settings. In my experience, even if a client were to come in on the day that the statute of limitations ran, that fact would not and should not alter the contingency fee percentage.

Similarly, when a case involves a personal injury, the nature and length of the attorney-client relationship (RPC 1.5(a)(6)) is rarely a factor. In most cases, the client is first introduced to the attorney after he or she is injured. It is rare that a client would have a lifetime of personal injury claims for which she turns to the same attorney.

So what should be done about this issue and what does case law tell us about the "reasonableness of attorney fees"? Stay tuned for my next installment and we will get to those hot topics.