



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-20
July 2012

Subject: Contingent Fees

Digest: Whether a lawyer may charge a contingent fee for seeking to identify and recover unclaimed property of a client is dependent on the extent of the lawyer's knowledge of various factors at the time of undertaking the representation. However, such a fee, even if otherwise appropriate, must be reasonable.

References: Illinois Rule of Professional Conduct 1.5(a)

In re Teichner, 104 Ill. 2d 150, 470 N.E. 2d 972 (1984);

In re Gerard, 132 Ill. 2d 507, 548 N.E. 2d 1051 (1989);

In re Doyle, 144 Ill. 2d 451, 581 N.E. 2d 669 (1991);

Guerrant v. Roth, 334 Ill. App. 3d 259, 777 N.E. 2d 499 (1st Dist. 2002);

In re Estate of Sass, 246 Ill. App. 3d 610, 616 N.E. 2d 702 (2nd Dist. 1993);

Schweih's v. Davis, Friedman, Zavett, Kane, 344 Ill. App. 3d 493, 800 N.E. 2d 448 (1st Dist. 2003);

Robert S. Pinzur, Ltd. v. The Hartford, 158 Ill. App. 3d 871, 511 N.E. 2d 1281 (2nd Dist. 1987)

ISBA Opinion No. 91-13

QUESTION

An attorney inquires whether he may properly charge a contingent fee for representing a client in discovering and obtaining unclaimed property.

OPINION

A. Case Law Discussion

The present inquiry in reality presents two (2) questions; i.e., (a) the propriety of charging on a contingent fee basis to discover and obtain unclaimed property; and (b) the reasonableness of the contingent fee as is thereafter sought to be collected by the attorney.

Several Illinois Supreme Court cases have dealt with similar issues in a disciplinary setting. Such cases have concluded that the charging of a contingent fee for services akin to those involved here is not of itself improper if the attorney is unaware at the time of undertaking the representation that the locating and obtaining of such property will be simple and involve minimal services or risk on his part. However, the Court has in each such instance then gone on to test the reasonableness of the amount of the contingent fee sought to be collected as against the time incurred, the difficulty encountered, the risk of non-recovery undertaken by the attorney, and the applicability of the other factors listed in Rule 1.5(a) in determining the reasonableness of a fee.

To this effect, Rule 1.5(a) of the Illinois Rules of Professional Conduct has as its benchmark that “(a) lawyer shall not make an agreement for, charge, or collect an unreasonable fee...” The list of factors therein set forth to be considered in determining the reasonableness of a fee includes, among other things, “whether the fee is fixed or contingent.” Comment 3 to such Rule goes on to elaborate that “[c]ontingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule,” and that “[i]n 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.”

The Illinois Supreme Court discussed such issues in *In Re Teichner*, 104 Ill. 2d 150, 470 N.E. 2d 972 (1984). Such case involved a disciplinary proceeding arising from an attorney’s having undertaken to represent a woman on a twenty-five percent (25%) contingent fee basis for seeking to recover as beneficiary of a life insurance policy taken out by the man with whom the client had cohabited and raised a family for in excess of twenty (20) years. The client had already, at the time of retaining the attorney, submitted a claim with the insurance company. She was concerned, however, as to her right to recovery both because she and the decedent were never married, and because the decedent was still legally married at the time of his death to a woman who had indicated that she would make a claim on the policy. However, the wife thereafter failed to make any such claim, and the insurance company paid off on the policy to the attorney’s client in a matter of just three weeks, with little being done by the attorney other than a couple of phone calls to the insurance company. The attorney claimed and received a contingent fee of approximately \$7,000.00 against the \$28,000.00 value of the life insurance policy.

The Supreme Court in *Teichner* first discussed the propriety of the attorney having undertaken the insurance policy claim on a contingent fee basis. The Court expressed its belief that the disciplinary hearing panel had been unduly critical of the attorney’s taking the matter on

a contingent basis, with the Court stating that at the time of doing so, realistic concerns existed as to the right and ability of the client to recover on the policy. While the client shortly thereafter obtained payment on the policy with little effort by the attorney, the Court recognized that the attorney was unaware at the time of taking on the representation that such a routine payment would so quickly resolve the matter. The Court concluded that, judging the matter in light of the circumstances as they existed when presented to the attorney, the attorney's belief that the claim might prove questionable and time consuming was not unreasonable. Accordingly, while noting that the better course might have been for the attorney to await word from the insurance company as to the already submitted claim before taking the case on a contingency basis, the Court deemed the taking of the claim on such basis to be appropriate under the circumstances.

However, the Court's inquiry did not end there. Rather, the Court went on to analyze the reasonableness of the fee collected under the circumstances as they came to be known subsequent to the undertaking of the representation. In so proceeding, the Court noted that a contingency fee contract is always subject to the supervision of the Court as to its reasonableness, and that it is the duty of the Court to guard against the collection of an excessive fee.

The Court determined that the services claimed to have been rendered by the attorney were minimal and artificial, and took little effort on the attorney's part. Accordingly, the Court determined that the attorney was not entitled to collect a contingency fee in the amount claimed and originally agreed upon with the client. In so holding, the Court stated that a lawyer of ordinary prudence would be left with "a definite and firm conviction" that a \$7,000.00 fee in the circumstances of the case was not only excessive, but was, as the hearing panel had earlier concluded, unconscionable, and warranted discipline.

Similar considerations were presented in *In Re Gerard*, 132 Ill. 2d 507, 548 N.E. 2d 1051 (1989). Such case involved an eighty-four (84) year old woman who, in the process of having her will prepared by the attorney, asked his help in finding certain paper assets which she claimed to be missing, and which she believed to have been taken from her when she had recently been hospitalized. The attorney offered her the choice of an hourly or contingent fee, and she selected a one-third (1/3) contingency. At the time, the attorney did not know the nature of the assets that were missing, their value, or the circumstances of their disappearance beyond what is recited above. Shortly thereafter, however, upon making inquiry, the attorney learned that the supposedly missing assets were Certificates of Deposits issued by seven (7) financial institutions, the funds of which were safely accounted for at the issuing banks, and the value of which totaled approximately \$450,000.00. Under such circumstances, the attorney had little more to do than to register the CD's in the name of the trust which he had established for the client. The attorney claimed and received for his efforts, as per the agreed upon contingent fee, a fee in the amount of almost \$160,000.00.

The Supreme Court did not agree with the client's contention that the attorney had committed a fraud in having entered into a contingent fee agreement, stating, as it had in *Teichner*, that such a claim must be viewed in light of what was known by the attorney at the time of entering into the fee agreement. The Court went on, however, to analyze the

reasonableness of the amount of the fee as against the work performed by the attorney, and concluded that the fee was excessive. As in *Teichner*, the Court stated that a lawyer of ordinary prudence would have been left with a definite and firm conviction that a \$160,000.00 fee was excessive for what the Court termed to be essentially administrative/non-legal services, and stated that the attorney, upon learning the true facts concerning the status of the CD's, should have reformed the fee agreement with the client to provide for a fee in a reasonable amount. The Court thus found that the circumstances presented warranted discipline of the attorney.

It should be noted that the Court in *Gerard*, in discussing the propriety of contingent fees generally, questioned the charging of such a fee in a non-adversarial, non-litigation setting. The Court stated that it is common knowledge that contingent fees are to be collected only if an attorney successfully champions the legal rights and claims of his client, with the result that the client is compensated through a settlement or judgment against those who denied his claims. The Court went on to state that the attorney in the case before it could not charge or collect a one-third (1/3) contingent fee because he did not "recover" the CD's by means of a settlement or judgment. The Court cited approvingly to an Appellate Court decision (*See Robert S. Pinzur, Ltd. v. The Hartford*, 158 Ill. App. 3d 871, 511 N.E. 2d 1281 (2nd Dist. 1987)), to the effect that the term "recovered" requires that an attorney's recovery of property or money for a client resulted from an action taken by the attorney, and that otherwise the attorney receives an unjust windfall.

Finally, in 1991, the Supreme Court decided the case of *In re Doyle*, 144 Ill. 2d 451, 581 N.E. 2d 669 (1991), where the Court went through a similar analysis in determining the propriety of an attorney's collecting a contingent fee of \$34,000.00 as against the proceeds of a life insurance policy which was recovered.

In reliance upon *Teichner*, the Court recognized that, while a contingent fee contract may be valid at the time of its formation, the Court still has a duty, after review of the facts, to safeguard the public from the collection of an excessive fee. Thus, the Court recognized that the attorney in question had a good-faith belief, at the time of taking on the representation on a contingent fee basis, that the client's claim on the insurance policy would be disputed, and therefore that the charging of a contingent fee was appropriate. The Court went on, however, to conduct a reasonableness analysis. In doing so, it recognized that by the time that such contingent fee actually came to fruition, the attorney was aware that no challenge had been brought as to the policy, and that the policy had been honored in routine fashion within a mere month of the claim on the policy having been submitted. The Court nonetheless found, however, that the contingent fee agreed upon was reasonable because it was to be applied in payment not just for the services performed in making the claim on the insurance policy, but also for a multitude of other services performed by the attorney, which the Court found to be substantial. Having conducted such an analysis, the Court found that, contrary to the circumstances present in *Teichner* and *Gerard*, a lawyer of ordinary prudence would not have definitely and firmly believed that a \$34,000.00 fee was excessive, and the Court accordingly found that no discipline was warranted.

It should again be noted that, as had been stated by the Supreme Court in *Gerard*, the

Court in *Doyle* reiterated that a contingent fee is appropriate and may be collected only if an attorney champions the legal rights and claims of the client, with the client being compensated through a settlement or judgment against those who denied his claims.

Other cases subsequently decided by the Illinois Appellate Court in reliance on the aforesaid Supreme Court decisions include *Guerrant v. Roth*, 334 Ill. App. 3d 259, 777 N.E. 2d 499 (1st Dist. 2002); *In re Estate of Sass*, 246 Ill. App. 3d 610, 616 N.E. 2d 702 (2d Dist. 1993); and *Schweih's v. Davis, Friedman, Zavett, Kane*, 344 Ill. App. 3d 493, 800 N.E. 2d 448 (1st Dist. 2003)).

B. Application of the Law to the Present Inquiry

The present inquiry asks the general question of whether an attorney may represent a client on a contingent fee basis in seeking to discover and obtain unclaimed property. However, it sets forth none of the information from which such an inquiry may be answered. The Supreme Court Opinions previously discussed recognize that no per se prohibition exists as would in all instances preclude the charging of a contingent fee for the type of services here involved (but see discussion, *infra*). Rather, the propriety of charging such a fee in any given instance is dependent on the extent of the attorney's knowledge at the time of undertaking the representation as to the existence, amount and difficulty in locating and obtaining the property, as well as the risk being undertaken by the attorney that the representation will result in a non-recovery. By way of example, were the lawyer's task limited to a simple internet search or the submission of a claim form, we would consider undertaking such an engagement on a contingent fee basis improper. Conversely, if the matter required significant effort or sophisticated research, or both, with no certainty on the lawyer's part that any property exists, a contingent fee would likely be appropriate. Accordingly, just as we cannot say that the charging of a contingent fee for locating and recovering unclaimed property is per se improper, we cannot state as a general proposition that the charging of a contingent fee for the locating and recovery of unclaimed property is appropriate in all instances. We can only direct the inquiring attorney to apply the Supreme Court's decisions against the circumstances of his situation.

Moreover, the attorney must be aware that even if the charging of a contingent fee would otherwise be proper based on the facts known to him at the time of undertaking the representation, the reasonableness of such a fee will remain at issue, and subject to the Court's subsequent review. Accordingly, the possibility exists that an agreed upon contingent fee may not be fully recoverable should the services actually performed be such as to, in the words of the Supreme Court, result in a definite and firm conviction that the amount of the fee is excessive.

We feel that some comment is necessary on our part as to the discussion in *Gerard*, also referenced in *Doyle*, to the effect that any contingency fee is proper only if the attorney successfully champions the legal rights and claims of his client, with the result that the client is compensated through a settlement or judgment. Although such was stated by the Court, the fact is that neither the *Gerard* case, nor arguably the *Teichner* or *Doyle* cases, involved adversarial or litigated claims, yet the Court in each such instance conducted an analysis of the propriety of charging a contingent fee and concluded in each such instance that the charging of such a fee

was proper under the circumstances. Seemingly, such discussion would have been unnecessary were a contingent fee to always be improper in matters not involving adversarial or litigated claims subject to resolution by settlement or judgment.

Moreover, we see no reason why the propriety of charging a contingency fee should be restricted to litigated or adversarial matters resulting in a settlement or judgment. In this regard, see our previous Opinion No. 91-13, where we recognized, in accord with the Comments to ABA Model Rule 1.8 then existing, that contingency fee agreements may be employed in non-litigation contexts. We noted, however, that since such matters generally involve less uncertainty than litigation, the reasonableness of the contingent fee may be more closely scrutinized by the Courts. We believe such rationale to be correct, and to be consistent with the analyses conducted in the Supreme Court Opinions.

Additionally, we believe, consistent with the above, that contingent fees have a proper place in providing counsel to persons not otherwise able to afford an attorney to locate unclaimed property, regardless of the possibly non-adversarial nature of the matter involved. A contingent fee in such circumstances may provide the only means by which a party can obtain the services of a lawyer. Moreover, should lawyers not be allowed to charge a contingent fee to perform services of the nature here involved, the only alternative remaining available to the client may be to use the services of an asset finding firm, which typically charges on a contingency basis for the purported locating of assets which it is already aware of both as to location and amount. Such firms are not, however, as are lawyers, subject to ethical rules which would limit the contingency fee charged to an amount that is reasonable, and subject to review by the Court. Accordingly, a client is afforded substantial protections by being able to retain an attorney to investigate and recover property on a contingent fee basis, rather than being left to other available alternatives.

Finally, question could be raised as to whether an attorney's being retained solely to locate and recover unclaimed property is so non-legal in nature as to be inappropriate, regardless of whether done on a contingency or other fee basis. For many of the reasons already stated, we do not believe such to be the case. Moreover, as previously alluded to in our discussion of the *Gerard* case, the Supreme Court in such instance referred to the services therein involved, i.e., locating a client's CD's, as being essentially administrative and non-legal in nature, and requiring no legal skills. The Court nonetheless approved of the attorney's taking of such matter on a contingency basis, criticizing the attorney only for the unreasonableness of the amount subsequently sought to be collected based on the services actually performed. Accordingly, it does not appear that the Court viewed services such as the locating of a client's CD's as being inappropriate for an attorney to perform, regardless of whether they were being done on a contingency or other fee basis. The same would seemingly be true in the present instance.

CONCLUSION

Whether an attorney may represent a client on a contingent fee basis for seeking to discover and obtain unclaimed property depends largely on the extent of the attorney's knowledge at the time of undertaking the representation as to the existence, amount, and difficulty in locating and obtaining such property, and the risk of there being a non-recovery.

However, the contingent fee charged, even if otherwise appropriate at the time of the representation being undertaken, must be reasonable

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