

FORMAL ETHICS OPINION NO. 124

With the enactment of the Idaho Rules of Professional Conduct and the passage of many statutes permitting awards of attorney fees to prevailing parties in litigation, the Idaho State Bar Committee on Ethics and Professional Responsibility has received a number of inquiries regarding the calculation of contingent fees in light of Formal Opinion No. 102. For purposes of illustration, the Committee makes reference to the following example:

An attorney successfully prosecutes a claim for \$18,000 pursuant to a contingent fee contract calling for the attorney to receive one-third of the recovery in the event of a favorable verdict. The trial court then awards attorney fees of \$6,000.

The first issue is whether the attorney recovers \$6,000 (one-third of \$18,000) or \$8,000 (one-third of \$24,000). Although Formal Opinion No. 102 seems to indicate that the answer should be \$8,000, it is the Committee's opinion that the attorney is limited to a fee of \$6,000. To the extent that Formal Opinion No. 102 indicates the contrary, it is superseded by this opinion.

The second issue is whether the answer to the first question can be changed by contract between the attorney and the client. It is the Committee's opinion that an attorney can ethically contract to receive a higher fee than that specified above. However, the Idaho Rules of Professional Conduct require the conclusion that he cannot ethically agree to accept a fee that is less than that awarded by the court.

I. CALCULATION OF THE CONTINGENT FEE

The Committee's reasoning on this issue can be summarized as follows:

1. In calculating a contingent fee, the agreement between the attorney and client should generally control if it makes specific provision for this issue. The exception to the general rule is discussed in Section II of this opinion;

2. Generally speaking, an award of fees is intended by the court to benefit the client rather than the lawyer. Therefore, if the contingent fee agreement fails to deal with this issue, the attorney should not be permitted to benefit from an award of fees until the client has been made whole;

3. If an award of fees exceeds the sum required to make the client whole, the attorney is entitled to the surplus. This comports with the apparent legislative intent in enacting fee statutes such as Idaho Code § 12-120 or §12-121.

The Committee's full analysis is set forth in the following paragraphs.

Insofar as is relevant here, Rule 1.5(c) of the Idaho Rules of Professional Conduct reads:

A contingent fee agreement shall be in writing 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 quoted provision is identical to the Model Rules of Professional Conduct in all respects. The Committee notes the possibility of some difficulty in interpreting the quoted portion of Rule 1.5(c) on account of the unusual juxtaposition of "trial or appeal," and "litigation and other expenses." Separating these phrases by "the" or "whether" would clarify the construction of the sentence. The addition of "the" is sufficient, by itself, to solve the problem, but if "whether" is inserted, it is necessary for grammatical reasons to insert "are" after "expenses." To minimize the modification to the rule, the Committee concludes that, for purposes of construing the Rule, it will deem "trial or appeal," to be separated from "litigation and other expenses" by "the." Thus, for purposes of this Opinion, the provision from Rule 1.5(c) that is quoted above shall be construed to read:

A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including:

(1) the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;

(2) the litigation and other expenses to be deducted from the recovery; and

(3) whether such expenses are to be deducted before or after the contingent fee is calculated.

(additions underlined)

Since this is the only provision of the Idaho Rules of Professional Conduct that defines the necessary elements of a contingent fee contract, it is entirely possible for an attorney to prepare an agreement that satisfies the rules, but does not treat the problem now being considered by the Committee. Nevertheless, because awards of attorneys fees are increasingly common, the attorney should address the issue, even though the rule does not require it. See Formal Opinion No. 102. However, given the failure of the rule to require that the attorney do so, the Committee will not adopt a result-oriented rule that uniformly penalizes the attorney (or the client) simply because the agreement does not specify a particular result. In such an event, however, the lawyer is bound by this opinion.

In the absence of a contract that specifies a particular result, the first step in determining the contingent fee after an award of attorney fees is to calculate what the client would have paid the attorney had no fees been awarded by the court and what sum would be required to make the client "whole". In the example set forth above, assuming there to be no litigation or other expenses and no award of fees by the court, the client would have paid \$6,000 under the contingent fee contract and needed a net sum of \$18,000 to be made whole. These figures are the benchmarks against which the contingent fee should be calculated.

For purposes of analysis, assume that for some reason the Court had awarded attorney fees of only \$3,000. Application of the one-third contingent fee to the total recovery of \$21,000 would result in a fee of \$7,000 and net payment to the client of \$14,000. However, reference to the benchmarks indicated above shows that the attorney would have increased his fee by \$1,000, while the client would still need an additional \$4000 to be made whole.

In the hypothetical set forth at the outset, the attorney had agreed to accept a fee of \$6,000 for prosecuting a claim worth \$18,000. Generally speaking, with the exception noted below, an award of attorney fees is intended to benefit the client rather than the attorney. In the absence of a contract specifying a different result, the attorney should not be

permitted to profit from an award of fees before the client has been made whole. Therefore, if the court awards attorney fees of \$3,000, increasing the total recovery to \$21,000, the attorney is limited to a fee of \$6,000. The client then receives the entire benefit of the \$3,000 with the result that he nets \$15,000, but remains \$3,000 short of being whole.

Implicit in this reasoning is the conclusion that the attorney's fee is not limited to \$3,000 on account of the court's action. An award of a sum less than that called for by the contingent fee contract may reflect a number of considerations, such as a reluctance to bankrupt a party losing a lawsuit, that have nothing to do with the quality of the services provided by the attorney. Therefore, the client should not be permitted to use an award of fees by the court to avoid his contractual agreement to pay a fee of \$6,000 for the recovery of his \$18,000 claim. If the court awards fees of less than the \$6,000, the client remains liable for the difference.

Suppose, however, that the Court had awarded attorney fees of \$12,000 rather than \$3,000. In this example, application of the one-third contingent fee to the total recovery of \$30,000 results in a fee of \$10,000. The client, however, would net \$20,000, or \$2,000 more than the sum necessary to make him whole. In this case, assuming proper disclosure of the attorney's contract with the client pursuant to Formal Opinion No. 125 issued with this opinion, the Committee concludes that

the most reasonable interpretation of an award of fees that is greater than what is required to make the client whole is that it is intended to benefit the attorney. This is consistent with what the Committee perceives to be the legislative intent behind such statutes as Idaho Code §12-120 or §12-121. Those statutes mandate or permit awards of fees in certain cases.¹ The statutes are primarily intended to enable a client to afford the cost of litigating a claim or defense that would otherwise be uneconomic or to recover the cost of overcoming unreasonable opposition to a claim or defense. However, it does little good to make the client whole if no attorney can afford to handle the case.

In the Committee's view, therefore, a secondary purpose of the statutes is to encourage an attorney to accept a case that might otherwise be declined because the attorney could not economically justify the investment of sufficient time and resources to handle it properly. Therefore, if the Court awards a fee in excess of that required to make the client whole, it is logical to conclude the award was intended for the benefit of the attorney. Otherwise, the client ultimately recovers more than his original claim, which in essence converts an award of

¹ In addition to Idaho Code §12-120 or §12-121, a number of other Idaho statutes, such as Idaho Code §41-1839 or 48-608(3), mandate an award of fees in certain cases. The reasoning of this opinion applies to those statutes as well as those identified in the body of the opinion.

attorney fees into a kind of punitive damages. See Linscott v. Rainier National Life Insurance Co., 100 Idaho 854, 606 P.2d 958 (1980). The Committee can see no reason for permitting such a result.

Therefore, in the hypothetical in which the court awarded attorney fees of \$12,000, the attorney is entitled to that sum as his fee. This short statement must be recognized, however, as the net result of several calculations. The client initially promised to pay \$6,000 to the attorney to prosecute a claim worth \$18,000. The attorney therefore receives that sum from the client. The client is then reimbursed this expense from the fees awarded by the court, so that he is made whole. A balance of \$6,000 remains and, because the client has been made whole, the attorney is entitled to that sum, which gives him a total fee of \$12,000.

The reasoning used in resolving these two examples shows the proper result in the hypothetical set forth at the outset of this opinion to be a fee of \$6,000, because that is the sum for which the attorney agreed to prosecute a claim for \$18,000, because and the client is not made whole unless he receives the benefit of the fees awarded by the court.

Another way of stating this result in general terms is that the attorney is always entitled to the entire fee awarded by the court. If that fee is less than that required by the

contingent fee agreement in the absence of an award of fees, the client is liable for the balance.

The Committee turns now to a secondary issue: How should the contingent fee be calculated in the event of an award of attorney fees pursuant to Rule 11 of the Idaho Rules of Civil Procedure prior to entry of a judgment in favor of the attorney's client? Such an award results from different considerations than those addressed in connection with statutes such as Idaho Code §12-120 or §12-121, because neither side can yet be deemed the prevailing party with regard to the underlying claims. In fact, under Rule 11, the fee must be predicated upon unreasonable conduct by the opposing party or his counsel. In such a case, the Committee has concluded that the attorney is entitled to the entire award because he is the only person affected by the improper conduct, at least insofar as the award of attorney fees is concerned.

If the award of fees pursuant to Rule 11 was the only recovery in the lawsuit because the opposing party ultimately prevailed in the litigation, the client would clearly be entitled to nothing, but for the award of fees. To give the client a part of those fees would convert them into a type of damages. Such a conversion is no more appropriate in this case than it was when considering an award of fees in excess of the sum required to make the client whole.

Moreover, since by hypothesis the client owes no attorney fee because his claim was defeated, he has incurred no additional debt as a result of the improper conduct. He therefore has no interest in the outcome of the Rule 11 motion. Insofar as attorney fees are concerned, the unreasonable conduct by the opposing party or his counsel therefore adversely affected only the attorney. Hence, it is appropriate for the attorney to receive the benefit of the interim award of fees.

The same result is just even if the client is ultimately successful in his claim, regardless of whether the court makes an additional award of attorney fees at the conclusion of the case. Because the client's fee is determined by reference to the amount of recovery rather than the time or effort invested by the attorney into the case, the attorney remains the only person who was affected by the improper conduct.

This reasoning highlights the need for counsel, in pursuing a Rule 11 motion in a contingent fee case, to distinguish clearly between attorney fees and costs incurred by the client as a result of the improper conduct. While the attorney is entitled to any award of fees resulting from the Rule 11 motion, the client should generally be entitled to costs awarded by the court to reimburse him for out-of-pocket expenses resulting from the improper conduct.

In conclusion, the Committee notes that, by according the contract between the parties first preference in resolving

the issues addressed in this opinion, it does not sanction written contingent fee contracts that specify unreasonable percentages of recovery or that result in unreasonable fees. We will consider those issues when they are properly raised. We turn now to the ethical bounds placed by the Idaho Rules of Professional Conduct upon an attorney's contingent fee contract with his client.

II. MAY AN ATTORNEY ETHICALLY CONTRACT TO RECEIVE A FEE DIFFERENT THAN THAT SPECIFIED IN SECTION I?

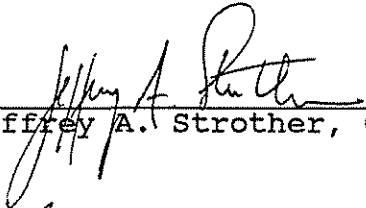
This Committee has previously held that Rule 5.4(a) of the Idaho Rules of Professional Conduct precludes a lawyer from splitting fees with a nonlawyer, even if the nonlawyer is his client. See, e.g., Formal Opinion No. 117. In Formal Opinion No. 125, we have today reaffirmed that result. Hence, while an attorney may promise to reimburse the client for fees and expenses paid or owed by the client, he may not otherwise split fees awarded by a court with his client.

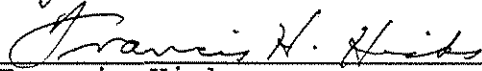
The rule and opinions cited in the preceding paragraph show that an attorney may not enter into a contingent fee contract that requires him to receive less of a fee than what is awarded by the court. However, no similar authority precludes the attorney from adopting by contract the result approved in Formal Opinion No. 102 or any other provision which gives the attorney a fee that exceeds that allowed by the court in a particular case. Hence, the Committee concludes that such a

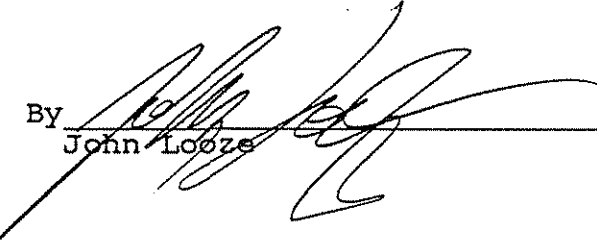
contract is permissible under the Idaho Rules of Professional Conduct.

DATED this _____ day of _____, 1988.

IDAHO STATE BAR COMMITTEE ON ETHICS
AND PROFESSIONAL RESPONSIBILITY

By 
Jeffrey A. Strother, Chairman

By 
Francis Hicks

By 
John Looze