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Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

OPINION 715

Contingency Fees In Consumer Protection Cases

Inquirer represents debtors against creditors in consumer protection actions that statutorily provide for recovery of attorneys' fees, and asks about an arrangement under which 50 percent of the net sum recovered after deduction of disbursements would be provided to the client and the other 50 percent would be payable as contingent legal fees. Inquirer notes that *R.* 1:21-7(c) generally permits a maximum contingency fee of 33 1/3 percent in certain cases, and inquires whether the proposed arrangement of a 50 percent contingency fee on a recovery that includes an award of attorneys' fees would be consistent with the *Rules of Professional Conduct.*

As a first principle, attorney fees must be reasonable, under the factors set forth in *RPC* 1.5. This judgment must be made in the particular circumstances of each case. We note, however, that a fixed 50 percent fee would appear to be questionable, unrelated or unresponsive to several of the factors in *RPC* 1.5, particularly (a)(1) (time and labor involved, novelty of question and required skill involved) and (a)(3) (fee customarily charged in the locality for similar legal services). A 50 percent contingency, which is much higher than that permitted in tort matters, cannot *per se* be deemed to be "reasonable."

A contingency fee arrangement is defined as an agreement for legal services the payment of which is "contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement, . . . in an amount which either is fixed or is to be determined under a formula." *R.* 1:21-7(a). Contingent fee agreements are generally permissible in many types of cases. *RPC* 1.5(c).

Rule 1:21-7(c) provides that a contingency fee in a matter "where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims," and where the client is not a subrogee, is capped at 33 1/3 percent of the first $500,000 recovered, with lesser percentages for each additional $500,000 recovered. A higher percentage contingency fee may be permitted on application to the Assignment Judge. *R.* 1:21-7(f). The 33 1/3 percent cap does not apply to statutorily-based discrimination and employment claims, business torts, or non-tort actions such as consumer claims. *R.* 1:21-7(c). *See* Notice to the Bar, 95 *N.J.L.J.* 341 (April 13, 1972) (*RPC* 1:21-7(c) limitation on contingency fee percentage applies to "negligence cases" but not "business torts"); *H. Rosenblum, Inc. v. Adler*, 221 *N.J. Super.* 507, 511-12 (App. Div. 1987) (*R.* 1:21-7(c) cap does not apply to accountant malpractice "business tort" case).

While contingency fees in tort actions are capped under *R.* 1:21-7(c), contingency fees as high as 50 percent in purely consumer actions require a different analysis. Many consumer matters carry statutory fees and costs, which are considered and awarded pursuant to both the statutory terms and many years of decisional law. Although ultimately a question of substantive law in each case, we note generally that private contingency fee agreements generally are unlikely to supervene or justify higher fees than

permitted by such statutory, regulatory or decisional law principles. This Committee therefore cannot broadly approve a contingency arrangement that, as a general rule, may exceed such a statutory, regulatory or decisional framework. Where a recovery includes both tort and statutory victories, allowable fees will have to be determined in proportion to the amount of the recovery attributable to each source.

Equally splitting amounts awarded as attorneys' fees with the client also may raise concerns under *RPC* 5.4(a), which prohibits an attorney from sharing fees with a non-attorney. Under the specific facts presented, however, the Committee does not view this *RPC* as prohibiting the proposed fee arrangement.