ethics and the law

The Attorney's Duty to Reduce the Contingent Fee: In the Matter of Swartz Revisited

by Douglas C. Fitzpatrick

Any personal injury attorney knows that the good cases have three components:

1. A tortfeasor with adequate liability insurance coverage or the ability to pay the claim;

2. Clear liability without issues of comparative fault or non-parties at fault;

3. Serious damages clearly caused by the tort.

The good cases can result in a substantial contingent fee without investing hundreds of hours litigating. For that matter, the prospect of earning a substantial contingent fee without even filing a lawsuit are excellent.

Ethical considerations can surface when the contingent fee becomes excessive. In fact, ethical considerations can invalidate the contingent fee agreement altogether if literal enforcement of the agreement would result in payment of an excessive fee to the attorney.

In *In the Matter of Swartz*, 141 Ariz. 266, 686 P2d 1236 (Supreme Court of Arizona, 1984), the client was seriously injured when hit by a car. He sustained severe multiple injuries. One leg was eventually amputated. The client, Steven Sarge, was on the job when he was injured and received workers' compensation benefits. The industrial carrier that paid the benefits had a statutory lien against the recovery in Sarge's personal injury claim.

In Sarge's tort claim against the motorist, there was no question about who was at fault. The driver was covered by two separate liability policies with limits of $50,000 and $100,000. Shortly after Sarge retained Swartz on a one-third contingent fee basis, one of the liability carriers turned over its $100,000 policy limits. About two months later, the second carrier turned over its $50,000 policy limits. The time demands on Swartz in negotiating payment of the liability insurance money were minimal. Of the $150,000 obtained by Swartz, he took $50,000 as his one-third contingent fee. The industrial carrier that paid the workers' compensation benefits received most of the remaining $100,000 by virtue of its statutory lien against the recovery. Sarge got nothing.

The Arizona Supreme Court concluded that, under the circumstances, the one-third contingent fee was excessive and disciplined Swartz. The Court reasoned that, in light of the clear liability of the motorist who injured Sarge, there really was no contingency. The Court observed that there were no difficult problems in the case. In obtaining the $150,000 in liability insurance money, there were no significant demands on Swartz' time. The Court also thought it was significant that Swartz didn't have to file a lawsuit. With regard to the one-third contingent fee, the Court observed that, although such fee agreements are often proper when contracted, they may turn out to be excessive.

> We hold, therefore, that if *at the conclusion of a lawyer's services*, it appears that a fee, which seemed reasonable when agreed upon, has become excessive, the attorney may not stand upon the contract; he must reduce the fee. (141 Ariz. at 273.)

We learn from *Swartz* that, as a practical matter, the attorney may collect *up to* the full contingent fee contracted if (1) there is some degree of uncertainty or contingency with respect to liability; or (2) there is some other aspect of the case which renders it problematic; or (3) processing the case is labor intensive, creating significant time demands on the attorney.

Typically, the contingent fee agreement provides for a percentage lien against the recovery whether the case is settled prior to filing suit or whether the case has been litigated through a jury trial. If the attorney's fee is to be reduced, to keep it reasonable, the decision whether to compromise the fee and by what amount is left to the attorney. Untrained in the law or legal ethics, or in the absence of any provision in the fee agreement concerning the duties of the attorney under ER 1.5[1] or *Swartz*, the client would have no way to know about the duty of the attorney to reduce the fee in certain circumstances.

In the context of advertising by attorneys, ER 7.2 provides in part:

> A lawyer shall not make false or misleading communications about the lawyer or about the lawyer's services. A communication is false or misleading if it: Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

ER 1.4(b) provides:

> A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The crux of the matter is whether many attorneys are using contingent fee agreements that are significantly false or misleading. Do such agreements create the impression that the full contingent fee is to be paid to the attorney in any event? Are contingent fee agreements often misleading because they fail to disclose the ethical constraints upon the attorney which would compel a fee reduction in many situations?

There may not be any easy answers with respect to the issues raised. Dialogue within the bar concerning the ethics of drafting contingent fee agreements may be a start. If plaintiffs' attorneys are challenged to be more creative and thorough in drafting contingent fee agreements, the clients are likely to be more informed and benefit from such disclosure. The key may be to draft agreements by which the attorney's compensation is some function of the attorney's time, effort, skill and energy that have been invested into the case.

Across-the-board fixed percentage fees for all cases whether settled or tried may not comply with the letter or spirit of ER 1.5 or *Swartz*. Further regulation of contingent free agreements by the Arizona Supreme Court may be the least desirable option. However, since the state's high court has already undertaken to regulate contingent fees, it might as well do so in a manner that is meaningful to both the attorney and the client. The court has found that the public is served by stringent regulation of attorney advertising. It may be that mandatory disclosures in fee agreements consistent with *Swartz* and ER 1.5 are the necessary next step to level the playing field between the attorney and the client.

Douglas C. Fitzpatrick *is a sole practitioner in Sedona.*

ENDNOTE:

1. ER 1.5 Fees
(a) A lawyer's fee shall be reasonable. 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.

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