Don't Impair Your Client's Right To Settle

An Alaska case[1] demonstrates the awful things that can befall a lawyer who attempts to interfere with the client's exclusive right to decide whether to settle.

The trouble started when lawyer Nicholas Kittleson filed a consumer protection action for his clients Mr. and Mrs. Nelvis against a used-car dealer. Kittleson used a "hybrid" contingent-fee contract that provided that he would receive 33 percent of any amounts recovered from the defendant plus any award of attorney's fees, which were provided by Alaska's consumer protection statute. If, however, the Nelvises decided either to drop the case or settle for an amount that would yield Kittleson attorney's fees of less than $175 an hour for the time he invested, he was to "receive an amount over and above the 33% to compensate me at the rate of $175 per hour before you receive your portion of the settlement."

The fee agreement was signed, suit was filed and the case got under way. Mr. Kittleson had expended $30,000 worth of time on the case when an offer of judgment for $25,000 was received from the defendant, essentially the amount the Nelvises were claiming as damages. When Mr. Kittleson told his clients that they would receive nothing under the terms of the fee agreement, they decided not to settle and proceeded to trial. At this point things really went south for the Nelvises. The used-car dealer prevailed on all claims at the hearing, and was awarded costs and statutorily "enhanced" attorneys' fees in the amount of $100,000.

The judgment against them caused the Nelvises to file for bankruptcy, whereupon the Trustee, pointing to the fee agreement, sued Kittleson for legal malpractice, citing his use of a fee agreement that in effect interfered with his clients' right and ability to compromise a case that obviously should have been settled.

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Mr. Kittleson raised several points in his defense, one of which was that because the case was brought under Alaska's consumer protection laws, and that because a plaintiff under those laws could recover attorneys' fees only if the case went to verdict, he had to be protected against a client's settling a case that would leave the lawyer in a small case with little or nothing to show for his efforts.

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Too bad, said the court: The cases on the issue, with few exceptions,[2] emphasize the very personal nature of a client's right to settle, and expressly reject as irrelevant any inquiry into how a clients' choices might affect the economic interests of the lawyer.[3] Kittleson then pointed out that after the offer of judgment had been received and rejected by the Nelvises, he had agreed to modify the fee agreement to provide for a straight contingent fee. Too bad again, said the court. Since the time for accepting the offer of judgment had expired and the offer was never renewed, the damage had been done. The court then proceeded to grant the Trustee's motion for summary judgment, holding that the fee agreement was prohibited under Alaska's Rules of Professional Conduct.[4]

The commentators and ethics authorities that have considered the issue are uniform in their reservations about "convertible" fee agreements.[5] The common denominator in the authorities is the condemnation of the pressure upon the client that is inherent in any fee arrangement that changes a contingent fee to an hourly fee if the client elects to settle for an amount that the lawyer thinks is inadequate for any reason, but especially if the lawyer simply believes he didn't get as much of a fee as he would have liked.[6] The court in *Kittleson* noted that the large attorneys' fees allowed in contingent fee cases are justified only because of the risks that lawyers are required to bear when things don't turn out as well as everybody hoped.[7] One of these risks is that the client may decide to settle for less than the lawyer thinks is reasonable or economically satisfactory. In short, the lawyer can't have it both ways, particularly if the "springing" obligation to pay based on the client's desire to settle cannot be determined with any certainty at the outset of the representation—information to which every client is entitled before embarking on litigation.[8] AZAT

endnotes

1. *Compton v. Kittleson,* 171 P.3d 172 (Alaska 2007).
2. *See Ramirez v. Sturdevant,* 26 Cal. Rptr. 2d 554 (Ct. App. 1994) (supplemental retainer agreement requiring client to accept settlement offer of $150,000 or more did not breach lawyer's fiduciary duty to client).
3. *See* ER 1.2(a), Rule 42, ARIZ.R.S.CT. (a lawyer shall abide by a client's decision whether to settle a matter); Arizona Ethics Op. 94-02 (Mar. 1, 1994) (unethical to limit a client's right to discharge attorney or to settle case); *See* cases collected and discussed in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT at § 41:910.
4. Alaska, like Arizona, has adopted the ABA's Model Rules of Professional Conduct.
5. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 8.15 (3d ed. 2003); Wisconsin Formal Op. E-82-5 (1982); Nebraska Formal Op. 95.1 (1995); Colorado Formal Op. 100 (1997).
6. *See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT at § 41:930; for a good discussion of the issue, *see Nehad v. Mukasey*, 535 F.3d 962, 970-72 (9th Cir. 2008).
7. *Kittleson,* 171 P.2d at 178.
8. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 at cmt. d (lawyer must explain the basis and rate of the fee and advise on the agreement's implications for the client).