THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 588

September 2009

QUESTION PRESENTED

May a lawyer enter into a contingent fee agreement with a client for representation concerning a claim under the Deceptive Trade Practices-Consumer Protection Act where the terms of the fee agreement would in some circumstances permit the client to retain a portion of the amount awarded in the judgment or settlement as statutory attorneys' fees?

STATEMENT OF FACTS

Client, who is not a lawyer, consults Lawyer concerning a claim under the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), section 17.41 et seq. of the Texas Business and Commerce Code. Under the DTPA, a prevailing consumer is entitled to recover statutory attorneys' fees that are "reasonable and necessary" in prosecuting the action. Texas Business and Commerce Code section 17.50(d). In accordance with Lawyer's usual practice, Lawyer proposes a contingent fee agreement that provides Lawyer will receive one third of the total amount recovered and requires the client to pay all costs and expenses. Client agrees to the contingent fee agreement and retains Lawyer to prosecute the DTPA claim.

Following a jury trial, a verdict is rendered in favor of Client. The jury's verdict results in a final judgment of $12,000 based on $2,000 in actual damages, trebled to $6,000, and $6,000 for reasonable and necessary attorneys' fees based on time spent on the case by Lawyer and a customary hourly rate.

The defendant does not appeal and pays the judgment. Upon receipt of payment, Lawyer distributes the funds based on the contingent fee agreement as follows:

Total payment	$12,000
Contingent fee to Lawyer	$ 4,000 (1/3 of total payment)
Net payment to Client	$ 8,000.

DISCUSSION

The Texas Disciplinary Rules of Professional Conduct prohibit sharing legal fees with non-lawyers. Rule 5.04(a) provides that, with exceptions not here relevant, "[a] lawyer or law firm shall not share or promise to share legal fees with a non-lawyer . . . ." The principal reasons

for prohibiting fee sharing with non-lawyers are to prevent soliciting by lay persons of clients for lawyers and to avoid encouraging or assisting non-lawyers in the practice of law. Comment 1 to Rule 5.04.

There will be no violation of Rule 5.04(a) when some or all amounts paid for legal fees pursuant to a judgment or settlement in a case are retained by the litigant unless the award of legal fees legally belongs to the lawyer rather than the lawyer's client. Under Texas law, in most cases an award of legal fees belongs to the litigant and not to the litigant's lawyer. See *Murrco Agency, Inc.* v. *Ryan*, 800 S.W.2d 600, 603 (Tex. App. – Dallas 1990, no writ) (claims for attorneys' fees belong to litigants, not to their attorneys). This general rule applies to attorneys' fee awards in DTPA cases:

> "Section 17.50(d) states the consumer shall be awarded his attorneys' fees. The DTPA creates an additional claim or cause of action for the consumer; it does not create a new cause of action for the consumer's attorney."
> *Satellite Earth Stations East, Inc.* v. *Davis*, 756 S.W.2d 385, 387 (Tex. App. – Eastland 1988, writ denied).

Accordingly, in the factual circumstances here considered, a division pursuant to the terms of a contingent fee agreement of an amount awarded to Client for attorneys' fees under Section 17.50(d) of the DTPA does not constitute an impermissible division of fees between Lawyer and Client. The $6,000 awarded for attorneys' fees in the judgment belongs to Client, and the agreement that provides for a payment of only part of this amount to Lawyer is not an agreement for the division between Lawyer and Client of a legal fee payable to Lawyer. This conclusion is consistent with the statement in Comment 3 to Rule 5.04 that ". . . the division between lawyer and client of the proceeds of a settlement judgment or other award in which both damages and attorney fees have been included does not constitute an improper sharing of legal fees with a nonlawyer." Client's payment of legal fees to Lawyer for services in the DTPA litigation is an entirely separate matter from the award of attorneys' fees to Client and is governed by the fee agreement between Client and Lawyer. Provided that the fee arrangement meets the generally applicable standards for legal fees set forth in Rule 1.04, the terms of the fee agreement between Client and Lawyer will be permissible under the Texas Disciplinary Rules of Professional Conduct.

The conclusion here reached may be contrasted with the conclusion reached in Professional Ethics Committee Opinion 526 (May 1998), which ruled that attorneys' fees awarded to a lawyer in a class action suit could not be shared with clients because such an arrangement would constitute improper fee sharing in violation of Rule 5.04(a). The result in Opinion 526 is fully consistent with the result reached in this opinion because in normal class actions a court award of attorneys' fees is specifically made to the attorneys representing the class and not to the class members or the class representatives, who receive distinct, specifically identified awards in the proceeding.

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not prohibit a lawyer from entering into a contingent fee agreement in a case under the Texas Deceptive Trade Practices-Consumer Protection Act where the agreement could result in a client receiving a court award of attorneys' fees in an amount that exceeds the amount the client is required to pay the lawyer as legal fees pursuant to the fee agreement.