THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 660

July 2016

QUESTION PRESENTED

Does Professional Ethics Opinion 549 (August 2003), which addressed the calculation of a lawyer's contingent fee in a workers' compensation case, apply outside the context of workers' compensation?

STATEMENT OF FACTS

In Opinion 549, this Committee concluded that "a lawyer representing a workers' compensation claimant in [a] third-party action pursuant to a contingent fee arrangement may not collect a fee from the client/claimant based on the gross recovery, part of which is required to be paid to the workers' compensation carrier." The question considered now is whether this conclusion applies to situations outside the workers' compensation context in which a client's recovery may be reduced by a subrogation claim.

For example, consider the case of an injured client who is insured under an individual health insurance policy. The policy in question contains subrogation and right-of-reimbursement provisions that appear to require the client to pay the insurer out of any recovery from the tortfeasor, without any reduction for attorney fees or expenses. In representing such a client under a contingent-fee agreement, may a lawyer collect a fee from the client based on the entire amount of recovery from the tortfeasor? Or must the lawyer deduct from the fee calculation the amount that the client, under the insurance policy, is obligated to reimburse the insurer?

DISCUSSION

In Opinion 549, this Committee addressed whether a lawyer who represents a worker's compensation claimant in a third-party action may collect a contingent fee from the client based upon the client's "gross recovery" rather than the client's net recovery after reimbursing the client's insurance carrier. Opinion 549 noted that section 417.002(a) of the Texas Labor Code provides that the "net amount recovered by a claimant in a third-party action shall be used to reimburse the insurance carrier for benefits, including medical benefits, that have been paid for the compensable injury." The Committee relied on Texas law holding that the carrier was legally entitled to the "first money" out of any third-party recovery:

> "Under settled Texas law, a workers' compensation carrier is entitled to the first money out of any third-party recovery until the carrier is reimbursed for benefits paid, regardless of whether the recovery is in an action initiated by the worker or in an action initiated by the workers' compensation carrier. The first money recovered in any third-party action belongs to the workers' compensation carrier, and until the carrier is repaid in full neither the employee nor his representative has any right to any of the third-party funds . . . ."

Opinion 549 (citing *Fort Worth Lloyds v. Haygood*, 246 S.W.2d 865 (Tex. 1952)). Because of this law, Opinion 549 concluded that it would violate Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct for a lawyer representing a workers' compensation claimant in a third-party action under a contingent fee agreement to collect a fee from the client/claimant based on the gross recovery, part of which is required to be paid the workers' compensation carrier.

Opinion 549 was limited to the collection of fees from a workers' compensation claimant. The opinion noted that section 417.003 of the Texas Labor Code defines how and to what extent the attorney for the claimant may recover attorneys' fees and expenses from the carrier with regard to funds recovered from the third party and paid to the carrier. Nothing in Opinion 549 suggested that the attorney may not collect fees from both the client and the carrier or that the aggregate amount of fees so collected could not equal the amount of a contingent fee on the gross amount of recovery. Further, the opinion addressed only the collection of fees, which in a contingent fee arrangement generally occurs after a subrogation claim is known and the amount of recovery has been paid. Opinion 549 did not address pre-collection engagement arrangements, which generally must be evaluated based on the circumstances and the knowledge of the parties at the time of execution.

The question presented here is whether the analysis in Opinion 549 applies to subrogation situations outside the narrow context of collecting a contingent fee for representing a worker's compensation claimant in a third-party claim. The Committee concludes that it does not.

The usual determination of whether a fee is unconscionable requires consideration of all material facts regarding the engagement. Rule 1.04(a) provides that "[a] lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable." There are many factors that may be considered in determining the reasonableness of a fee, including the eight factors specifically identified in Rule 1.04(b), which are not exhaustive. "The fees of a lawyer will vary according to many factors, including the time required, the lawyer's experience, ability and reputation, the nature of the employment, the responsibility involved, and the results obtained." Comment 4 to Rule 1.04.

There are many varieties of subrogation claims, and not all subrogation situations are the same. The rights of the involved parties may vary based on the circumstances, the

terms of the applicable contracts, statutes, or law, and whether the insurer is represented in the third-party action. Indeed, in a given situation there may be multiple parties asserting separate subrogation claims governed by different laws. A lawyer representing an injured client against a third-party tortfeasor must often devote substantial attention to resolving, by negotiation or otherwise, applicable subrogation claims. *See, e.g.*, Clayton Starnes and Scott Freeman, *The Do's and Don'ts of Medicare and Medicaid Lien Resolution and Settlement Practices,* 51 HOUSTON LAWYER 10 (Sep./Oct. 2013) ("The purpose of this article is to help attorneys navigate the tangled web of complex lien resolution and benefit preservation."); and Randal Kauffman, *The War of the Cockatrice,* 60 TEX. BAR J. 310 (Apr. 1997) ("After successfully fighting [discovery and evidentiary] battles and obtaining a reasonable settlement, or verdict, the [personal injury] attorney may also have to battle the cockatrice known as SUBROGATION.").

Given the variables above, the Committee concludes that the "bright line" rule of Opinion 549 does not apply beyond the context of workers' compensation. In other representations in which the client's recovery may be subject to a subrogation claim, whether the amount of a contingent fee is reasonable within the meaning of Rule 1.04 requires consideration of all relevant factors.

CONCLUSION

This Committee's conclusion in Opinion 549 is limited to the workers' compensation context. Under the Texas Disciplinary Rules of Professional Conduct, in other situations in which a client's recovery may be subject to a subrogation claim, determining whether a contingent-fee calculation is reasonable requires consideration of all relevant factors, including those identified in Rule 1.04(b).