

PLAINTIFF'S PERSONAL INJURY PRACTICE

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The new Minnesota Rules of Professional Conduct, effective September 1, 1985, changed the ethical responsibilities of plaintiff's personal injury (P.I.) lawyers in several ways. These changes may also affect other lawyers, and there are other rule changes that indirectly affect P.I. lawyers. There are several particular rule changes which are, however, of particular importance to the personal injury bar.

Contingent fees. Rule 1.5(c), (d). The rules expressly authorize contingent fees except in criminal and family law matters. A new requirement is that contingent fee agreements must be in writing. The method of calculating the fee, including the applicable percentage payable, must be stated not just generally, but for each stage, that is, "in the event of settlement, trial or appeal, . . ." Developing case law has made it clear that fee agreements for structured settlements must timely and plainly state the method of arriving at the fee and the time or times for fee payment. The comment to the rules also reminds attorneys of statutory limitations on percentage fees; and the Minnesota Supreme Court has recently suspended an attorney for misconduct including charging unauthorized worker compensation fees. The comment also suggests, "When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications." It should also be noted that Rule 1.5(a), "A lawyer's fee shall be reasonable", apparently imposes a tighter standard than the former DR 2-106(A), "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."

Written Accounting. Rule 1.5(c) requires:

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Costs and Expenses. Rule 1.8(e) permits lawyers to advance court costs and expenses of litigation for the client without the requirement that the client remain ultimately liable for the expenses. Former DR 5-103(B) allowed advancing costs and expenses only, ". . . provided the client remains ultimately liable for the expenses." The initial fee agreement must also state clearly whether expenses are to be deducted before or after the contingent percentage is calculated. Rule 1.8(e)(3) also allows a lawyer, in certain circumstances and upon certain conditions, to guarantee a loan to a client, when needed to withstand delay in litigation.

Fee Splitting. Rule 1.5(e) allows lawyers from different firms to divide fees on three conditions: 1) either the division is proportional to services performed by each or, by written agreement with the client, each lawyer is jointly responsible for the matter; 2) the client is informed and does not object to the fee-sharing; and 3) the fee is reasonable. Former DR 2-107(A) required that fee division be proportional to

services performed. The apparent policy reason for liberalizing the rule was to encourage lawyers to refer matters to specialists where appropriate.

Specialization and Fields of Practice Designations. Former DR 2-105(B), forbidding a lawyer to hold himself or herself out as a specialist until appropriate regulations were promulgated, was declared unconstitutional. New Rule 7.4 generally permits truthful communications that “the lawyer does or does not practice in particular fields of law.” Rule 7.4(b) forbids a lawyer to indicate he or she “is a specialist in the field of law” unless the lawyer is so certified. On October 10, 1985, the Minnesota Supreme court promulgated rules for the establishment of a State Board of Legal Certification to implement Rule 7.4.

Advertising and Solicitation. Rule 7.1(c) includes as an impermissible misleading communication one which “compares the lawyer’s services with another lawyer’s, unless the comparison can be factually substantiated.” Rule 7.2(b) requires that copies of advertisements be kept for two years after dissemination, along with records of dissemination. Rule 7.2(d) requires that advertisements include the name of at least one lawyer responsible for the content. Rule 7.3 continues the prohibition of in-person or telephone solicitation, adding the circumstance “when a significant motive for the lawyer’s doing so [soliciting] is the lawyer’s pecuniary gain.” This modification was made to accommodate case law authorizing solicitation in certain public interest matters.

Witnesses and Unrepresented Persons. Two rule changes increase a lawyer’s duty to unrepresented persons. Rule 4.3, “Dealing with Unrepresented Person” requires a lawyer to make clear to unrepresented persons that the lawyer is not representing them and to disclose any adversity of interest. Rule 4.4 forbids tactics that “have no substantial purpose other than to embarrass, delay, or burden a third person” The word “substantial” is, in effect, an addition to the predecessor rule, DR 7-102(A)(1).

There are many other changes in the new rules which are of general import and will also affect the personal injury lawyer. The rules specifically discussed above also apply of course to other lawyers. While many of the above rule changes reflect a general trend of liberalization of the commercial aspects of the practice of law, others (such as those affecting fees and fee agreements) are somewhat more restrictive.