

## Some Hidden Rules in Contingent Fee Cases

by  
Martin A. Cole, Senior Assistant Director  
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Minnesota Lawyer* (May 3, 1999)

Are you familiar with the three sections of the Rules of Professional Conduct set out below? Really familiar?

Oh, most lawyers know generally that contingent fee agreements must be in writing, but are they aware of the specific requirements contained in Rule 1.5(c)? How many lawyers who regularly advertise for contingent fee cases are in compliance with Rule 7.2(e)? Did you know that because of Rules 1.8(e) and 7.2(e), that if you don't put in your advertisement that the client is responsible for costs regardless of the outcome, then they are not? Is that what you intended? Is that what you are actually doing? Were you aware that a written statement of recovery and method of determining the client's share is required by Rule 1.5(c), and is not just a good business practice?

**RULE 1.5: "(c) . . . A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. 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."**

**RULE 1.8: "(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:**

**(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."**

**RULE 7.2: "(e) Advertisements and written communications indicating that the charging of a fee is contingent on outcome must disclose that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable. "**

There are many "hidden" requirements in the Rules of Professional Conduct, at least if you define hidden as meaning not particularly well known even by many well-intentioned practitioners. Nevertheless, occasionally even such well-intentioned practitioners run afoul of the disciplinary system and receive private admonitions for violation of these three rules. Most of these admonitions are issued for failure to have the required written fee agreement in a contingent fee case. Yet few of the complaints in those matters specifically identified that as the basis of the complaint.

Complainants who file complaints concerning contingent fee cases often are more upset about the costs which have been deducted from their settlement, or various amounts withheld for medical providers (pursuant to letters of protection) or to pay subrogation interests. The client may not be unhappy about the percentage fee itself. Many of these complaints are dismissed without investigation as being fee disputes,

but depending on the exact allegations involved (or if other allegations are included which require investigation), some are investigated and the attorney may be asked to produce the written fee agreement. When unable to do so, the lawyer discovers he has a problem, even if the original allegation in the complaint proves unsupported.

Very few, if any, complaints are received each year about alleged violations of Rules 1.8(e)(1) or 7.2(e). This may be due to a high rate of compliance, or it may be due to lack of client awareness of the protections these rules are intended to provide them. Again, the complaint may identify the costs and the method of calculation as an issue, but almost never will the complainant add that the lawyer's advertisement said something different. If the advertisement is not raised as an issue by the complaint, should the Director's investigator nevertheless ask the complainant if they retained the lawyer in response to an advertisement, and if so then review the attorney's ad for compliance? To date, such a question is not routinely asked.

Certainly most lawyers want to comply with the Rules of Professional Conduct in all respects. If you are regularly representing clients in contingent fee cases, you should be sure that you have a written fee agreement in all such cases, and then review your written fee agreements and advertisements to ensure compliance with the rules and that they accurately reflect your intentions concerning payment of costs and expenses.