ETHICS OPINION NUMBER 144
OF THE MISSISSIPPI BAR
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AMENDED APRIL 6, 2013

FEES - A lawyer may contract for any reasonable fee. Special ethical considerations apply to contingent fee contracts.

CLIENT FILE - The right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause. The ownership of specific items in a client's file is a matter of law. However, ethically, the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client.

TERMINATION OF EMPLOYMENT - A lawyer may not ethically prohibit his client from terminating the contract. Likewise, the lawyer may terminate the contract, but ethically, he must take such reasonable steps as necessary to avoid foreseeable prejudice to the client by his withdrawal.

The Ethics Committee of The Mississippi Bar has been requested to render an opinion on the following facts:

> Lawyer wants to develop a contingent fee contract which protects his fee for services and expenses. The proposed contract would provide as follows:
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> 1. Client may terminate lawyer.
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> 2. Upon termination, client agrees, at lawyer's option, to:
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> a. pay $60.00 per hour and all out-of-pocket expenses, or
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> b. pay twenty (20%) percent of the total amount of any judgment or settlement received, plus out-of-pocket costs.
>
> 3. If lawyer selects option for hourly fee, then until all fees and costs are paid:

a. client cannot obtain another lawyer, and

b. lawyer will retain client files.

4. New lawyer must accept, in writing, the terms and conditions of the discharged lawyer's contract before the discharged lawyer will release the client files.

I. Law or Ethics

The area of fees involves both legal and ethical considerations. The law permits persons to contract with each other on any terms not prohibited by statute or public policy. However, lawyers, as members of a learned profession, have historically considered themselves engaged in more than "a mere money -getting trade" and have imposed upon themselves restraints in the charging and collecting of fees. See ABA Canons of Professional Ethics, canons No 12-14.

Hundreds of ethical opinions and numerous rules dealing with the employment relationship between the lawyer and the client have been written. Several of the more notable areas which have been addressed ethically are:

1. the need for written contracts in contingency fee matters (Rule 1.5, MRPC);

2. the basis for determining what is a reasonable fee (Rule 1.5, MRPC);

3. the means by which a lawyer may collect a fee;

4. the splitting of fees between lawyers and non-lawyers (Rule 1.5, MRPC);

5. the depositing of advance payments in trust accounts (Rule 1.15 and 1.16(d), MRPC); and

6. the prohibition against contingency fee contracts for certain types of matters (Rule 1.5, MRPC).

Each of these areas involves significant legal issues, and yet the profession has historically involved itself with each area. Perhaps the reason for the profession's involvement lies in the recognition that the relationship between lawyer and client is one of trust and confidence with fiduciary obligations. Wade, 21 La. Law Review 130 (1960). If the profession fails to provide the ethical self-restraint for the protection of the client, then the law must. As a profession, lawyers have sought, by self-

governance, to maintain the highest standard so that neither the courts nor the legislatures needed to involve themselves in protecting the client from his own lawyer. The courts, legislatures, and, in recent years, the Federal Trade Commission have sought to provide guidance in cases between lawyers and clients. *See* 56 ALR 2d 13. The involvement of these branches of government in the relationship between the lawyer and the client has resulted from the failure of the profession to adequately address the issue.

II. Fees

A lawyer may contract for any fee so long as it is not clearly excessive. Formal Opinion ABA No. 190 (Feb. 17, 1939). This early Opinion points out that the profession has not involved itself in fee disputes, unless they were clearly excessive. ABA Canons of Professional Ethics, Canon No. 12 guided lawyers in fixing the amount of the fee and contained six matters which lawyers were to consider in fixing the fee.

This Canon was succeeded by ethical considerations and disciplinary rules which sought to solve specific problems. In most instances, the disciplinary rules mirrored the opinions of courts and amounted to the profession adopting, as ethics, the better-reasoned cases.

The current Mississippi Rules of Professional Conduct 1.5 require that legal fees be reasonable, and following in the pattern of Canon 12, sets out eight factors to be considered in determining the reasonableness of a fee. In addition, Rule 1.5(c) specifically recognizes contingent fee contracts as ethical, except in the areas of domestic relations and criminal defense. However, Rule 1.5(c) places certain ethical limitations on contingency fee arrangements, including the requirement that the agreement be in writing.

The Mississippi Rules do not limit the amount of the contingency contract, but that issue is covered by the general requirement that all fees be reasonable. Only to the extent that the contingency fee is determined to have been unreasonable will the lawyer be involved in a violation of the Rules. The reasonableness issue applies to both the fee earned at the conclusion of the case and to the fee earned by the discharged lawyer prior to its conclusion. Therefore, a termination fee provision in a contract will be judged ethically on the basis of whether or not the provision required the client to pay an unreasonable fee to the discharged lawyer.

The Mississippi Bar has previously adopted the rule that a discharged lawyer in a contingency fee case is entitled to receive a fee based on quantum meruit. See

Advisory Ethical Opinion MSB No. 49 (May 4, 1979). This ethical Rule follows the legal rule adopted by most courts. *Newman v. Melton Truck Lines*, 443 F.2d 896 (1971). However, the current Mississippi Rules of Professional Conduct did not specifically adopt this prior ethical opinion. Therefore, to the extent the prior ethical opinion imposes an ethical requirement of using a quantum meruit basis only in determining a reasonable fee for the discharged lawyer, this committee concludes that the prior opinion should be overruled. Rule 1.5 requires only that the fees be reasonable and does not require the use of a quantum meruit basis in arriving at a reasonable fee. Accordingly, this committee concludes that a lawyer may include in his employment contract any termination fee agreement which does not result in an unreasonable fee. This committee points out that it is concerned with the ethics of the fee which is a matter of reasonableness, and that the courts must determine the enforceability of the fee. The quantum meruit basis of arriving at a fee for the discharged lawyer provides a safe harbor ethically for the lawyer.

III. Attorney Liens

Under the laws of most states, lawyers acquire attorney liens (either retaining or charging) in the course of performing legal services. The issues concerning the enforceability of these liens are generally matters of law, not ethics. Formal Opinion ABA No. 209 (Nov. 23, 1940).

When a lawyer withholds a client's paper and property for the purpose of securing a fee, he is enforcing a retaining lien. As stated above, his right to do this is a legal matter. See cases cited in Mississippi Digest, "Attorney and Client", No. 182.

However, ethics does play a part for the lawyer in deciding when to invoke these legal remedies. A lawyer has an ethical duty to turn over the client's files when requested by the client. The Mississippi Rules of Professional Conduct recognize this duty in Rule 1.16(d) where a discharged lawyer is required to:

> take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advanced payment which has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

The lawyer considering enforcement of an attorney lien by retaining a file to secure payment of the fee is admonished that "the mere existence of a legal right does not

entitle a lawyer to stand on that right if ethical considerations require that he forego it." Informal Opinion ABA No. 1461 (Nov. 11, 1980). As was pointed out in Informal Opinion No. 1461, the enforcement of a retaining lien should be considered on the same basis as suing a client over a fee. Generally, it should only be done if "necessary to prevent fraud or gross imposition by the client".

Prior to adoption of the current Mississippi Rules of Professional Conduct, Mississippi followed the rule that a discharged lawyer must deliver the client file, even if he has not been paid. Advisory Ethics Opinion No. 49 (May 4, 1979) and No. 105 (Sept. 9, 1985). This rule followed the majority view. See Informal Opinion ABA No. 1376 (Feb. 18, 1977). Citing DR9-102(b)(4); Informal Opinion ABA No. 1461 (Nov. 11, 1980); Informal Opinion San Francisco Bar Association 1973-12; Informal Opinion Maryland Bar Association, Maryland Opinions 76-50 March 1, 1976); Informal Opinion Missouri Bar Bulletin May, 1978 (Jan. 6, 1978).

This committee concludes that M.R.P.C. 1.16 modified the prior ethical rules of the Mississippi Bar Association only to the extent that the prior opinions required the unconditional delivery of the file by the lawyer. The current Rule only requires that the lawyer surrender papers and property to which the client is entitled. The Rule recognizes the lawyer's right to retain papers to the extent permitted by law. Thus, the issue is primarily a legal matter concerning the ownership of the items in the file and the legal enforceability of the attorney's lien. However, the ethical issue which the lawyer must weigh in the balance with his legal rights is at what point will the enforcement of his legal right breach his ethical duty under 1.16(d) to "take steps to the extent reasonably practicable to protect a client's interest." Each case will turn on its own facts, and it is not possible to anticipate each situation. Generally, if retaining the client's file prevents the client from obtaining another lawyer or from proceeding with his case in a timely manner, then the lawyer may have breached the ethical duty owed to the client.

IV. Client's File

The ownership of the specific items contained in a file is a matter of law. Informal Opinion ABA No. 790 (Oct. 26, 1964). The client's file consists of the papers and property delivered by the client or which the client caused to be delivered to the lawyer. In addition, the "end product", or in other words, what the lawyer was hired to do, is usually also considered to belong to the client. Wisconsin Bar Bulletin, June 1970 Supplement (Memo Opinion 4-78). On the other hand, the notes and memorandums are usually considered to belong to the lawyer and be his work product. Missouri Bar Bulletin, May 1978, Informal Opinion (Jan. 6, 1978). Contrary opinions can be found which indicate the client has no absolute right to the files.

Maryland Opinions Informal Opinion 76-50 (March 1, 1976). This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. San Diego Bar Association, 25 Dicta, May 1978 (Opinion 1977-3). However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.

V. Substitution of Counsel

Almost all Bar associations recognize that a lawyer cannot ethically keep a client from discharging him and hiring another lawyer. Informal Opinion ABA No. 1142 (Jan. 20, 1970). Mississippi recognizes this general Rule in its Mississippi Rules of Professional Conduct 1.16 by implication in Subparagraph (d). However, the implication of the Rule is made specific by the comment:

> A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment of the lawyer's services.

This committee concludes that the comment was not intended to create a condition on the right of the client to discharge the lawyer. Accordingly, a lawyer may not ethically condition his discharge by the client on the prior payment of all fees. However, the discharge does not terminate the client's liability for the lawyer's services. If the discharged lawyer wishes to sue for breach of contract, he may do so. Informal Opinion ABA No. 834 (April 26, 1965). The ethical issue with regard to the discharged lawyer's fee will ultimately be the reasonableness of the fee. M.R.P.C. 1.5.

VI. Duties of Substituting Lawyer

Ethically, the substituting lawyer should not accept a client until the client has notified the substituted lawyer of his discharge. Informal Opinion ABA 834 (April 26, 1965). A substituting lawyer has no ethical obligation to see that the fee of the substituted lawyer is paid. See Informal Opinion ABA 1142 (Jan. 20, 1970), followed by Maryland Opinion 76-50 (March 1, 1976) and, to a limited extent, followed in Florida Opinion 76-29 (April 26, 1977). A contrary opinion was issued by the Connecticut Bar Association in 53 Connecticut Bar Journal 466 (1979) (Opinion 31, October 11, 1978) where the Connecticut Bar found that, in a contingency fee arrangement, the burden was on the substituting lawyer to protect the fee of the substituted lawyer by either

entering into an express agreement prior to taking the case, or by withholding from the client sufficient funds with which to pay the fee.

This committee concludes that, unless the substituting lawyer agrees to take over the client's obligation to the substituted lawyer, then the substituting lawyer owes no ethical duty to the substituted lawyer.

VII. Right of Lawyer to Withdraw

Generally speaking, a lawyer has the ethical right to withdraw from representation of a client and, in some instances, is required to do so. The area is fully covered by Rule 1.16, MRPC. In exercising the right to withdraw, the lawyer should take reasonable steps to avoid foreseeable prejudice caused to the client by his withdrawal. *See also* Informal Opinion ABA No. 1455 (June 4, 1980). Although a lawyer has the right of withdrawal, a lawyer is ethically admonished to exercise this right cautiously. Rule 1.16(c), MRPC, reminds lawyers that they shall continue representation notwithstanding good cause if a court requires them to do so. However, in certain instances, the lawyer has an equal obligation to withdraw. Rule 1.16(a). In both instances, the ultimate ethical consideration is for the lawyer to take those reasonable steps necessary to avoid foreseeable prejudice to the client.

VIII. Specific Inquiry

1. Although it is not a per se violation, the provision in the contract allowing the discharged lawyer to select at his option either $60.00 an hour or 20% of the recovery as his fee may result in an unreasonable fee in violation of Rule 1.5, MRPC. Each case will turn on its own facts as to the unreasonableness of the fee. For legal purposes, the courts have adopted the quantum meruit basis for compensating discharged lawyers, and the inclusion of such a provision in the contract would be ethically safe.

2. Although it is not a per se violation, the provision in the contract which permits the lawyer to retain the client's file, even if the case is pending, until all fees and costs are paid may result in a violation of Rule 1.16(d), MRPC, if retaining the file prejudices the rights of the client.

3. The provision which denies the client the right to change lawyers until all fees and costs are paid is a per se violation of Rule 1.16, MRPC.

4. The provision which requires the client to have the substituted lawyer accept the discharged lawyer's contract in writing is a per se violation of Rule 1.16, MRCP. This

provision effectively deprives the client of the right to change lawyers. The substituted lawyer is forced to become the surety for the client's obligations to the discharged lawyer. Such a provision will surely chill, if not totally freeze out, the client's ability to discharge the lawyer.

In conclusion, the relationship of lawyers and their clients regarding fees is interwoven with the law and ethics. What is legal may not be ethical, and the mere existence of a legal right does not entitle a lawyer to stand on that right if ethical consideration requires that he forego it. Informal Opinion ABA No. 1461 (Nov. 11, 1980).