

**ETHICS OPINION NUMBER 92
OF THE MISSISSIPPI BAR
RENDERED MARCH 23, 1984
AMENDED APRIL 6, 2013**

FEES - Calculation of fee in structured settlement of personal injury case.

The Ethics Committee of the Mississippi Bar has been asked to render an opinion on three questions which the requester says often arise when a lawyer has a standard contingent fee contract in a personal injury case and a structured settlement is reached whereby the plaintiff will receive a lump-sum payment plus periodic payments for the remainder of his life.

1. How should the contingent fee be calculated?

The determination as to how a contract should be applied when there is a result that was not provided for in the contract is a legal, not an ethical, subject. However, the Mississippi Rules of Professional Conduct contains ethical guidance which should be helpful in preventing problems in this regard.

Rule 1.5, MRPC, provides that a lawyer's fee shall be reasonable, lists factors to be considered in determining the reasonableness of a fee, and states that the basis or rate for the fee shall be communicated to the client before or within a reasonable time after commencing the representation. Furthermore, Rule 1.5(c), MRPC, requires that contingent fee agreements be in writing, 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, the 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.

In serious personal injury cases in which claims for substantial future damages are being made, structured settlements are becoming more common. Therefore, to prevent misunderstandings with a client, we suggest that in such cases a provision relating to the method of calculating the lawyer's fee in the event of a structured settlement be included in a contingent fee contract. But, if a contingent fee contract does not explain the method of calculating the lawyer's fee under a structured settlement, it is suggested that the lawyer discuss the matter with his client and agree upon the method of calculating a contingent fee in the event of such a settlement as soon as the question of periodic payments becomes involved in settlement negotiations, or as soon as it occurs to the lawyer or client that a structured settlement might be proposed.

If the method of calculating the fee in event of a structured settlement is agreed upon in advance, there is less likelihood of a controversy over the fee. However, when the calculation of the fee in the event of a structured settlement is not prescribed in the contingent fee contract, a lawyer should be zealous in his efforts to be fair with the client and should make an earnest effort to resolve the matter to the client's satisfaction.

2. Should the percentage mentioned in the standard fee contract be applied to the total amount to be received by the plaintiff in a structured settlement, to a discounted present value of the total to be received by the plaintiff, or to the total cost of the settlement to the defendant?

The answer to this question would require a legal interpretation of the wording of the agreement between the lawyer and client and we can only express an opinion relating to matters to be considered from an ethical viewpoint.

For the purpose of responding to this question, we assume that the lawyer is to receive his fee in a lump sum at or about the time of settlement.

In the ordinary structured settlement the defendant is, in effect, investing money for the plaintiff's benefit. Unless the contingent fee agreement entitles the lawyer to receive a portion of the future income from the investment of the client's share of a lump-sum settlement, in the absence of unusual circumstances we do not believe the lawyer should expect to receive a portion of the future income from the client's share of a structured settlement. We suggest that when the lawyer's fee is to be paid in a lump sum as part of a structured settlement, in the absence of unusual circumstances the fee should be based upon the present value or upon the cost to the defendant, whichever is agreed upon between the lawyer and client.

3. Is it ethical for the plaintiff's lawyer to require that a structured settlement include a lump-sum cash payment of his fee?

Rule 1.2(a), MRPC, states in part: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."

This question points up the advantage of a lawyer having a clear agreement in advance with the client. If the client has agreed that the lawyer's fee is to be paid in a lump sum at the time of a structured settlement, there is nothing ethically wrong with the lawyer

insisting that a structured settlement include that provision. But, where there is no clear agreement with the client, a lawyer may not ethically include that requirement if such requirement would substantially prejudice the client's chance of a settlement