LEO 1878:

SUCCESSOR COUNSEL'S ETHICAL DUTY TO INCLUDE IN A WRITTEN ENGAGEMENT AGREEMENT PROVISIONS RELATING TO PREDECESSOR COUNSEL'S *QUANTUM MERUIT* LEGAL FEE CLAIM IN A CONTINGENT FEE MATTER

I. INTRODUCTION

This opinion examines the ethical duties of an attorney who assumes representation of a client in a contingent fee matter when predecessor counsel may have a claim against the client or a lien for legal fees earned on a *quantum meruit* basis against the proceeds of a recovery.[1]

A lawyer discharged without cause from representation in a contingent fee matter may assert a lien upon the proceeds of a recovery ultimately obtained in the same matter by successor counsel. The Virginia cases[2] which address a discharged attorney's *quantum meruit* fee entitlement do not set forth a legal principle which states how a successor attorney's legal fee should be calculated under these circumstances.[3]

It is beyond the purview of this Committee to advocate a legal principle which limits either counsel's fee to a given percentage of the recovered sums, or to a particular dollar amount or method of calculation. Lawyers must, however, observe the *ethical* requirements in the Rules of Professional Conduct to adequately explain fees charged to a client and to impose only reasonable fees. Successor counsel in a contingent fee matter must adequately explain at the

[1] *See,* § 54.1-3932 of the 1950 Code of Virginia, as amended, and Virginia Legal Ethics Opinion 1865 "Obligations of a Lawyer in Handling Settlement Funds when a Third Party Lien or Claim Is Asserted."

[2] *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 958, 234 S.E.2d 282 (1977); *Fary v. Aquino*, 218 Va. 889 , 241 S.E.2d 799(1978); *Hughes v. Cole*, 251 Va. 3, 465 S.E.2d 820 (1996).

[3] In contrast, for example, Louisiana has identified a governing legal principle that the total fee charged by both attorneys could not exceed the largest fee to which the client had agreed. *See, Saucier v. Hayes Dairy Products, Inc.,* 373 So.2d 102 (1979) wherein the Supreme Court of Louisiana remanded a case to the trial court to adjudicate *both* original counsel's and successor counsel's respective fee entitlements.

inception of the representation the client's *potential* obligation to all counsel, and should ensure that her fee ultimately charged to the client is reasonable. Rules 1.5(a) and (b) provide:

> **RULE 1.5. Fees.**
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> (a) **A lawyer's fee shall be reasonable.** The factors to be considered in determining the reasonableness of a fee include the following:
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> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.
>
> (b) **The lawyer's fee shall be adequately explained to the client.** When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably

> in writing, before or within a reasonable time after commencing the representation. [Emphasis is supplied.]

With regard to the issue of "reasonableness" of fees to be apportioned between predecessor and successor counsel, American Bar Association (ABA) Formal Opinion 487, issued on June 18, 2019, succinctly states that

> Successor counsel must address with the client whether the client risks paying twice: one contingent fee to the predecessor counsel and another to the successor counsel. A client cannot be exposed to more than one contingent fee when switching attorneys, given that under the Rule 1.5(a) factors, each counsel did not perform all of the services required to achieve the result. **Thus, neither the predecessor nor the successor counsel ordinarily would be entitled to a full contingent fee.** [Emphasis is supplied.][4]

In Virginia, where a *quantum meruit* determination of predecessor counsel's fee applies, it remains the case that *payment to successor counsel of a "full contingent fee" may be unreasonable.*

II. QUESTIONS AND ANALYSES

A. What must successor counsel address in her written contingent fee agreement when predecessor counsel may be entitled to a fee based on *quantum meruit*?

An attorney who accepts a case wherein predecessor counsel has performed legal services toward effecting the ultimate recovery must take into account the client's potential liability to predecessor counsel in setting a fee which is reasonable under Rule 1.5(a). In many cases, successor counsel's review of predecessor counsel's

[4] Fee Division with Client's Prior Counsel
https://www.americanbar.org/content/dam/aba/images/news/2019/06/FormalOpinion487.pdf

file reveals how far predecessor counsel progressed with the claim by way of investigation, negotiation, and litigation, to include discovery conducted and responded to, and the consultation and retention of experts. Thus, successor counsel should in many if not most cases be able to determine at the very least that predecessor counsel will have an enforceable lien for fees which will be in addition to successor counsel's legal fees.

The Committee recognizes that the value of predecessor counsel's services is frequently not easily determined under a *quantum meruit* analysis as of the time the client seeks replacement counsel, even when the predecessor counsel has identified a dollar amount for his claimed lien.[5] Under such circumstances, and absent knowledge of what the recovery will be when the case concludes in the hands of successor counsel, it may be difficult for the client, predecessor counsel, and successor counsel to agree upon how predecessor counsel is to be compensated when a recovery is achieved. In addition to the "unknown" of the recovery to be had, if any, there are other "unknowns," such as the balance of work which will actually be required to complete the matter and the extent to which predecessor counsel's legal services will have contributed to the recovery and relieved successor counsel from performing services otherwise required.

Of course, there are "unknowns" and risks attendant to all contingent fee representations, even when one attorney handles a client's claim from start to finish. The presence of unknowns should not in and of itself mean that in all cases addressing how predecessor counsel will be compensated must await the time of recovery upon the claim. Ideally, the value of predecessor counsel's fee claim for legal services payable in the event of a recovery—either by way of a fixed dollar amount or formula—can be agreed upon as of the time successor counsel is engaged based upon a good faith assessment of the value of predecessor counsel's legal services and estimates of the remaining work and the value of the case. The interests of the client are advanced when successor counsel and the client reach an understanding with predecessor counsel regarding his fee upon recovery. Successor counsel can be authorized at the outset to disburse fees to predecessor

[5] *See,* Legal Ethics Opinion 1812, "Can Lawyer Include in a Fee Agreement a Provision Allowing for Alternative Fee Arrangements Should Client Terminate Representation Mid-Case without Cause". There are instances when a discharged counsel's compensation based on his hourly rate would result in an unreasonable fee.

counsel at the conclusion of the matter based on an agreement, and the effort and cost of negotiation or adjudication at the conclusion of the matter can be avoided.

ABA Formal Opinion 487, cited above, speaks to successor counsel's obligation to provide an adequate explanation of her fees thusly:

> **Although Rules 1.5(b) and 1.5(c) do not specifically address obligations when one counsel replaces another, both rules are designed to ensure that the client has a clear understanding of the total legal fee, how it is to be computed, when it is to be paid, and by whom.** *** A contingent fee agreement that fails to mention that some portion of the fee may be due to or claimed by the first counsel in circumstances addressed by this opinion is inconsistent with these requirements of Rule 1.5(b) and (c) To avoid client confusion, making the disclosure in the fee agreement itself is the better practice, but this disclosure may be made in a separate document associated with the contingent fee agreement and provided to the client at the same time. [Emphasis and ellipsis supplied.]

In 1989, the San Francisco Bar Association issued LEO 1989-1, which answered, among others, the question under review here: "Where a client discharges Lawyer A in a contingency fee case and consults Lawyer B, may Lawyer B replace Lawyer A on a contingency fee basis without advising the client of Lawyer A's claim for fees?" The opinion concluded that

> a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney. This will enable the client to knowingly and intelligently determine whether to pursue litigation and choose an appropriate attorney.

In reaching that conclusion, the writers stated that

> it is better practice for an attorney who proposes to succeed a discharged attorney in a contingency fee matter to advise the client concerning the discharged attorney's quantum meruit claim for fees, particularly under current California law **where the client's obligation to the discharged attorney for payment of the quantum meruit claim could be in addition to the contingency fee paid the successor attorney**. *** [Emphasis is added.]

This Committee endorses the view expressed in San Francisco Bar Association issued LEO 1989-1 and ABA Formal Opinion 487, and further opines that Virginia Rules of Professional Conduct 1.5(b) and (c)[6] *require* that successor counsel, at the inception of proposed representation in a contingent fee matter, advise her client in writing of the client's potential obligation to pay legal fees to prior counsel. Successor counsel should address both the client's potential obligation to prior counsel as well as the potential need for an adjustment to her own contingent fee to ensure that her fees are reasonable under Rule 1.5(a).

In view of the obligations imposed by Rules 1.5(b) and (c), and in the absence of an agreement between the client, predecessor and successor counsel concerning the method of calculating predecessor counsel's fee upon recovery, the Committee considers it advisable that successor counsel in a contingent fee matter include in her proposed contingent fee agreement with the client, the following:

a. the state of the law in Virginia regarding perfection of attorneys' liens and *quantum meruit* awards available to attorneys discharged without cause;

[6] Rule 1.5(c), pertaining to contingent fee agreements, requires that "A contingent fee agreement shall state in writing the method by which the fee is to be determined. . ." Thus, the agreement should identify the means of determining the reasonable fee required by Rule 1.5(a) in view of predecessor counsel's agreed or adjudicated *quantum meruit* fee entitlement in the event of a recovery via settlement or trial.

b. a statement that the successor counsel's fee may be adjusted in light of the predecessor counsel's lien or *quantum meruit* claim, determined by either agreement or adjudication; and

c. who bears the expense (legal fees and court costs, if any) of determining predecessor counsel's fee entitlement, to include the cost of adjudicating the validity and amount of any claimed lien, through an interpleader action or otherwise.

B. May successor counsel represent the client in negotiations and litigation involving the prior counsel's claim of lien?

One of the circumstances giving rise to a concurrent conflict of interest under Rule 1.7(a)(2)[7] is when "a personal interest of the lawyer" presents a "significant risk" that her competent and diligent representation of the client would be "materially limited." Thus, there may be instances when successor counsel cannot provide diligent and competent representation to a client because successor counsel herself would not be capable of exercising the independent professional judgment and objectivity required to assess the value of the relative contributions which she and the predecessor attorney made in effecting the recovery. The client may need independent legal advice and advocacy regarding the calculation of successor counsel's fee, the value of predecessor counsel's *quantum meruit* lien and the apportionment of any recovery between them.

Contracts between attorneys and their clients stand on a different footing than conventional contracts:

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[7] **RULE 1.7 Conflict of Interest: General Rule.**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

> Contracts for legal services are not the same as other contracts.
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> "(I)t is a misconception to attempt to force an agreement between an attorney and his client into the conventional modes of commercial contracts. While such a contract may have similar attributes, the agreement is, essentially, in a classification peculiar to itself. Such an agreement is permeated with the paramount relationship of attorney and client which necessarily affects the rights and duties of each." *Krippner v. Matz*, 205 Minn. 497, 506, 287 N.W. 19, 24 (1939).

Heinzman v. Fine, Fine, Legum and Fine, 217 Va. at 962, 234 S.E.2d at 285, (1977). Although the *Heinzman* court was speaking to the issue of the enforceability of a discharged attorney's contract, the principle that contracts between lawyers and clients stand on a different footing than ordinary commercial contracts applies equally to successor counsel.

Whether a concurrent conflict of interest exists for successor counsel to represent her client in the determination of fees to be paid both counsel must be assessed on a case-by-case basis. For example, a successor attorney whose fee agreement contains a provision for adjustment of her own fee so as to limit the client's liability to payment of a specific total fee which is reasonable in light of predecessor counsel's agreed or adjudicated *quantum meruit* compensation, may ethically represent the client in negotiations with or litigation against prior counsel, at no additional charge to the client. ABA Formal Opinion 487 addresses the ethical issues involved when successor counsel seeks to charge her client fees related to any dispute with predecessor counsel regarding his fees:

> Successor counsel's compensation for representing the client in the client's dispute with predecessor counsel must be reasonable, which in this context means, at a minimum, that the successor counsel cannot charge the client for work that only increases the successor counsel's share of

> the contingent fee and does not increase the client's recovery. Successor counsel must also obtain the client's informed consent to any conflict of interest that exists due to successor counsel's dual roles as counsel for the client *and* a party interested in a portion of the proceeds.

The "informed consent" referred to in the above quotation should be obtained under Rule 1.7(b).[8]

In sum, successor counsel may represent the client in negotiations and litigation involving the prior counsel's claim of lien, provided she has explained to the client the potential material limitations conflict by acting in the dual role, pursuant to Rule 1.7(a)(2) with the client's informed consent.

III. CONCLUSION

Successor counsel in a contingent fee matter must charge a reasonable fee and must adequately explain her fee to the client. If the client, predecessor counsel, and successor counsel cannot agree in advance of successor counsel's engagement how predecessor counsel's fee will be calculated, then successor counsel should address in her written contingent fee agreement the client's potential obligation to pay fees to discharged counsel, as well as that successor counsel's fees might need to be adjusted in view of predecessor counsel's *quantum meruit* lien, so as to

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[8] **RULE 1.7 Conflict of Interest: General Rule.**

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.

ensure that successor counsel's fee is reasonable using the factors identified in Rule 1.5(a). Successor counsel may represent the client in negotiations and litigation involving the predecessor counsel's claim of lien, provided that there is no conflict under Rule 1.7(a)(2) or that she obtains informed consent to a potential conflict in accordance with Rule 1.7(b).