Committee Opinion
March 7, 1997

LEGAL ETHICS OPINION 1696

CONTINGENCY FEE ON MEDICAL PAYMENTS WHEN THERE IS NO RELATIONSHIP BETWEEN CLIENT AND INSURANCE CARRIER MAKING THE PAYMENT.

You have presented a hypothetical situation in which an attorney represents a client in a personal injury claim. The fee agreement provides that the attorney will receive 30% of any amounts obtained for the client, including medical payments coverage which might exist under the tortfeasor's insurance.

Under the facts you have presented, you have asked the committee to opine as to the propriety of the attorney applying a contingency fee to medical payments obtained by attorney on behalf of the client when there is no contractual or other relationship between the insurance carrier and the client regarding medical payments coverage.

During the course of representing the personal injury client, the tortfeasor's insurance carrier ignores your two written inquiries regarding the availability of medical expense coverage. In addition, you indicate that it was necessary to convince the tortfeasor's insurance company that the medical treatment for which payment is sought was " accident related" and "medically necessary."

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-105(A) & (C) which state respectively that "A lawyer's fees shall be reasonable and adequately explained to the client" and "A fee may be contingent on the outcome of the matter for which the service is rendered, except in criminal cases or other matters in which a contingent fee is prohibited by law. A contingent fee arrangement 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, the expenses to be deducted from the recovery and whether 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 closing statement showing the fee and the method of its determination." Further guidance is available in Ethical Considerations 2-19 [EC:2-19] and 2-20 [EC:2-20].

The committee has previously opined that it is improper for a personal injury claimant's attorney to charge a contingency fee for the collection of medical expense payments under the claimant's own insurance policy if collecting the medical payments involved merely the gathering and submission of the client's medical bills to the carrier for payment. Where the process is ministerial in nature and payment by the insurer is automatic, the committee has concluded that a contingency fee is unreasonable and improper. LE Op. 1641, LE Op. 1461; DR:2-105(A).

In the facts you present, claimant's attorney is proceeding against the tortfeasor's insurance policy for medical expense payments, not the client's own insurance. The tortfeasor's insurance carrier ignored and later questioned the attorney's requests for

medical expense payments, making the task more difficult and requiring the attorney to apply legal skills, knowledge, experience and advocacy to effect a settlement. Under these extenuating circumstances, where the pursuit of medical payments becomes a more complex task, a contingent fee arrangement may be appropriate. LE Op. 1461, supra.

This does not mean that a contingency fee arrangement is appropriate for all medical expense claims made against third party insurers. The issue is whether the services of an attorney are reasonably necessary to secure the payments from the insurance company. In the facts you present, the committee believes that it would not be improper to include the medical expense payments collected as part of the gross recovery against which the contingency fee is charged.