

You have presented a hypothetical situation in which a client, a former federal worker, has retained counsel to represent him in an appeal to the Merit Systems Protection Board of the decision to deny him disability retirement benefits when he was fired from his position. The attorney entered into a fee agreement which stated that payment was contingent upon obtaining a successful outcome. The appeal was successful and the award called for both a monthly lifetime annuity and a lump sum payment. Certain disputes arose between the attorney and the client, and the client fired the attorney before all necessary paperwork was completed in order for the client's payment to begin; however, all non-administrative, legal work in the case was completed. The attorney asserts that he is entitled to one-third of the lump sum as well as one-third of the value of the lifetime annuity plus compensation of \$200 per hour for time expended by the attorney and \$150 per hour for time expended by his associate. The client maintains that he believed that the attorney would be entitled only to the hourly compensation, as attorney's fees were awarded by the Merit Systems Protection Board. The attorney maintains that the majority of the fee award was paid to the client's first attorney, who had originated the case, and has now filed suit against the client seeking one-third of the lump sum. He plans to amend the pleadings to seek also the life time annuity, though not the hourly compensation called for in the fee agreement. The client maintains that the attorney/client contract is void because it is a "mixed" fee agreement, combining a percentage and an hourly fee, and, therefore, quantum meruit is the only appropriate standard for the attorney's recovery.

Under the facts you have presented, you have asked the committee to opine as to whether it is ethical to include both a percentage of recovery and an hourly fee in an attorney's fee agreement if both are contingent upon a successful outcome and whether it is ethical for the attorney to amend his pleadings to increase his recovery solely because the former client challenges the attorney's calculation of the fee.

Your first question asks for a determination of the propriety of a "mixed fee"<sup>1</sup> involving a contingent fee, with the specific amount to be determined by a sum of a percentage of the award plus an hourly amount for legal work performed. The committee notes that while the term "mixed fee," frequently is used to describe an agreement containing an hourly amount that is fixed combined with a percentage that is contingent, the agreement in the present hypothetical makes both the hourly and the percentage portions of this fee contingent upon a successful the outcome in the case.

This fee agreement, like all fee agreements, is subject to the requirement of Rule 1.5 (a) that the fee be "reasonable." Thus, the fee in the hypothetical is only permissible if the sum of one-third

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<sup>1</sup>This opinion uses the term "mixed fee" but that term is considered to be synonymous with the terms "blended fee" and "split fee."

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of the recovery plus \$200 and \$150 per hour for the lawyers' time does not amount to an unreasonable fee for the work performed. Determination of whether the fee agreement in this hypothetical is reasonable would involve consideration of the factual context in which the agreement was entered. Rule 1.5(a) provides an extensive list of factors for that determination:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (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.

Application of those factors would involve a fact-specific analysis that is outside of the purview of this committee. However, the committee notes that the fact that a client consents to a fee agreement does not obviate the lawyer's obligation to charge only reasonable fees. See Rule 1.5.

Along with the general requirement of reasonableness applicable to all legal fees, contingent fees have additional requirements. For a contingent fee to be appropriate, there must be actual risk of nonpayment and a res from which the fee can be paid. LEO 1606. The agreement contemplated in the hypothetical meets those criteria in that there is a clear risk of nonpayment as the lawyer is paid nothing if he does not prevail and there is a clear res as the case involves a potential award of retirement benefits. Rule 1.5(c) proscribes requirements for contingent fees; however, those requirements involve clarity and communication of calculation method and do not dictate whether a contingent fee must be a percentage, an hourly rate or a flat fee. Thus, nothing in rule 1.5(c) directly prohibits a "mixed" contingent fee that is determined by combining an hourly rate with a percentage of the res, nor that is determined by combining a fixed and a contingent fee so long as any resulting total fee remains reasonable.

Your second question is whether it is ethically permissible for the attorney to amend pleadings to seek a larger portion of the fee outlined in the fee agreement in response to the client's challenge of this fee. It is well-established that a lawyer may sue a former client for unpaid fees. See. LEOs ##995, 996, 1325, & 1544. As to motive for pursuing a particular amount, the committee lacks sufficient information regarding the motive behind the amended pleading;

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however, the appropriate standard for determining such a question would be Rule 3.1's directive that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous..." Determination of the merit of the particular pleading in this hypothetical is not within the purview of this committee. The committee does note as pertinent to the resolution of this fee dispute is the concept of quantum meruit as discussed in LEO 1606. That opinion states as follows:

When the attorney is discharged prior to the completion of the representation he may only recover the reasonable value of the services which he has rendered. He cannot recover for damages for the breach of the contract, and, in instances where the fee is contingent upon the outcome of the matter, the attorney may not recover the full agreed upon fee. He is entitled only to a recovery in quantum meruit for services actually rendered.

Whether that concept, first articulated in *Heinzman v. Fine, Fine, Legum and Fine*, 217 Va. 985 (1977), has been triggered in the hypothetical scenario is for a trier of fact to determine, and as such is outside the purview of this committee.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.