

ADVISORY ETHICS OPINION 94-04

SYNOPSIS:

An attorney may accept employment on a contingency fee basis to represent a client seeking temporary total disability payments in a worker's compensation case, regardless of whether such payments are past due or not, provided that the fee is reasonable and not excessive under the circumstances.

FACTS:

For the past two years, efforts at reform in Vermont's worker's compensation laws have brought a heightened awareness among Vermont attorneys to certain recurring issues. One of these issues relates to the appropriateness of various types of fee arrangements between attorneys and clients in this area of practice. The requesting attorney has been participatory in the legislative consideration of these reform efforts, and has requested that the Committee expand upon a prior Opinion. In this Committee's Opinion 91-17 we expressed the view that a contingent fee arrangement on past due temporary total disability ("TTD") benefits was not prohibited by the Code of Professional Responsibility. The requesting attorney has asked our opinion as to whether a contingent fee arrangement is similarly permissible in situations in which the fee will be applied to current TTD benefits, as distinguished from past due benefits. For purposes of the request, the Committee has also been asked to assume that payments are to be made by the claimant on a voluntary basis, and that the worker's compensation benefit checks are mailed directly to the claimant.

DISCUSSION:

The pertinent provisions of the Code of Responsibility, DR 2-106, state as follows:

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service 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.
 - (8) Whether the fee is fixed or contingent.

Under 21 V.S.A §678(a) the Commissioner of Labor and Industry may allow prevailing claimants to recovery "reasonable attorney fees," when they prevail. Similar provision for fee awards is made for appeals to the Superior or Supreme Courts in §678(b).

On October 12, 1990, the Professional Conduct Board ("PCB") issued a decision entitled PCB No.3. In this decision, the Board addressed the propriety of an attorney's having undertaken to represent a worker's compensation claimant on the basis, of one-third contingent fee agreement. In the case at Issue, the claimant's TTD benefits had been cut off. The attorney agreed to represent the claimant under an agreement which provided that the claimant would pay one-third of any received benefit check to the attorney. As part of the fee agreement, the claimant agreed to allow any future benefit checks to be mailed to the attorney's office, where the client would go to pick up his share of the net benefits after deduction of the attorney's contingent fee share.

After undertaking representation, the attorney learned that benefits had been stopped because medical information to verify disability had not been forwarded to the carrier. The attorney forwarded the information, and benefits were resumed. After ultimately becoming disenchanted with the attorney's perceived lack of effort in finalizing matters, the claimant secured a permanent partial disability payment in the amount of \$6,629.30 and negotiated with the attorney for a reduction in the fee to an amount equal to 10% of the permanent partial disability benefits. The net effect of the fee arrangement was that the attorney generated fees in the amount of \$2,237.51 as compensation for 7.75 hours of legal work expended in the client's behalf. The attorney "acknowledged," in light of views expressed by the Department of Labor and Industry, that the fee agreement

regarding TTD worker's compensation benefits should not be based on a percentage of the TTD benefits recovered. The attorney also agreed to abide by a decision of the VBA fee arbitration committee as to an appropriate fee in the case.

PCB No. 3 was very fact-specific to the case at hand. Under any fair reading of it, however, it is reasonably clear that two of the most significant factors leading to the Professional Conduct Board's admonition of the attorney resulted from a combination of the attorney's having imposed what, in essence, amounted to a constructive lien on the benefit checks by reason of having made arrangements for the checks to be made directly to the attorney's office, and his apparent insistence upon an arrangement for ongoing deduction of his fees from each TTD check as received.

We agree with the PCB that ongoing deduction of contingent fee payments from such weekly disability awards would frequently impose a hardship on the client, since such benefits are a sustenance level replacement for actual wages. We are also mindful that, in its decision, the PCB phrased its conclusion in rather restrictive terms: "Respondent ... acknowledges that a fee agreement regarding temporary total disability worker's compensation benefits should not be based on a percentage of the temporary total disability benefits recovered." Given the specific facts before the PCB, however, we are disinclined to accept this expression of its view as meaning anything more than that the PCB felt it inappropriate for an attorney to insist upon deduction of the contingent fee on an ongoing basis from TTD benefit checks as they are received, under the circumstances of that case. Mere calculation of the fee on such a basis would not seem to violate the intent of PCB No. 3.¹ We would expect that billing and/or collection would normally be deferred until conclusion of the case, absent special circumstances.

Obviously, there will sometimes be circumstances in which TTD benefits are paid to a claimant on an ongoing basis, and at the end of the entitlement period, the claimant fully recovers and receives no permanent partial disability award. In such circumstances, because no lump sum payment will be forthcoming to the client, the attorney will necessarily be at risk for ultimate collection of all or a portion of his fee, depending upon whether the client had willingly made progress toward payment of the fee over the course of the TTD benefit period.

¹ Notably, the PCB did not make a finding that the attorney violated DR 2-106. Rather, its decision was premised upon DR 2-106(A)(5)'s prohibition of "conduct prejudicial to the administration of justice."