

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 17th day of May 2021.

On March 5, 2021, came the Virginia State Bar, by Brian L. Buniva, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, Paragraph 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1878.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1878 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 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.

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 cases² which address a discharged attorney’s *quantum meruit* fee entitlement do not set forth how a successor attorney’s legal fee should be calculated under these circumstances.³

¹ See § 54.1-3932 of the 1950 Code of Virginia, as amended, and Virginia Legal Ethics Opinion 1865 (2012), “Obligations of a Lawyer in Handling Settlement Funds when a Third Party Lien or Claim Is Asserted.”

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

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) (remanding a case to the trial court to adjudicate *both* original counsel’s and successor counsel’s respective fee entitlements.)

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

(a) **A lawyer's fee shall be reasonable.** The factors to be considered 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; 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 added.]

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 advise the client of potential liability to predecessor counsel for work performed by the latter prior to discharge. Successor counsel may not have knowledge of the nature and extent of the work performed by the client's former attorney or the opportunity to review predecessor counsel's complete file before being engaged by the client. For example, the client may have engaged or consulted with successor counsel before discharging the predecessor counsel. Successor counsel's information about the status of the claim at the time she is engaged may be limited or even nonexistent. The successor attorney nonetheless must advise the client that the predecessor attorney may have an enforceable lien for fees which will be in addition to successor counsel's legal fees.

The Committee recognizes that the successor attorney may lack information sufficient to advise the client of the value of predecessor counsel's services. Even if the predecessor counsel has identified a dollar amount for his claimed lien,⁴ the amount of the lien or the lien itself may be in dispute or challenged. Under some circumstances, 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. Without knowledge of what tasks were performed by the discharged lawyer, it is also possible that the successor lawyer will duplicate those tasks. The presence of unknowns may require that how predecessor counsel will be compensated must await the time of recovery upon the claim. Nevertheless, if successor counsel accepts a contingent fee client knowing that the client has discharged their former attorney, successor counsel must advise the client of the predecessor attorney's potential lien for fees against the settlement or recovery obtained by successor counsel.

⁴ See Legal Ethics Opinion 1812 (2005), "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.

ABA Formal Opinion 487, issued on June 18, 2019,⁵ 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 added.]

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 and ellipsis added.]

This Committee endorses the view expressed in San Francisco Bar Association's issued

⁵ Fee Division with Client's Prior Counsel

<https://www.americanbar.org/content/dam/aba/images/news/2019/06/FormalOpinion487.pdf>

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 based upon *quantum meruit* to prior counsel. Successor counsel should address both the client's potential fee obligation to prior counsel and to successor counsel under her contingency fee agreement. Although *each* attorney's fee must be reasonable under Rule 1.5(a), a client who discharges her first counsel without cause may be obligated to pay combined fees in excess of the contingent fee which applied to her engagement with predecessor counsel. The important consideration is that successor counsel must make the client aware of that possibility. *See also* Rule 1.4(b), which requires that a lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In order to document compliance with the obligations imposed by Rules 1.4 and 1.5(b) and (c), the Committee recommends that successor counsel in a contingent fee matter include in her proposed contingent fee agreement with the client, the following general principles (but this exact language is not required):

- a. the state of the law in Virginia regarding perfection of attorneys' liens and *quantum meruit* awards available to attorneys discharged without cause;
- b. a statement that the client's recovery may be subject to both the discharged lawyer's attorney's lien and the contingent fee charged by the successor lawyer; and whether the discharged lawyer's lien would be included within or in addition to the successor lawyer's contingency fee;

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, to the extent possible, 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.

- 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, or the apportionment of any recovery among counsel claiming a lien on the recovery and the client.

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

Contracts for legal services are not the same as other contracts. "[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).

⁷RULE 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:

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(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.

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 predecessor counsel must be assessed on a case-by-case basis. For example, a successor attorney, whose contingent fee agreement contains a provision for adjustment of her own fee by the amount of the predecessor attorney's *quantum meruit* claim so as to limit the client's liability to payment of a specific total fee, may ethically represent the client in negotiations with or litigation against prior counsel, but 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 hypothetical posed in ABA Formal Opinion 487 must be obtained under Rule 1.7(b).⁸ But, as stated above, whether a concurrent conflict of

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

interest exists with its commensurate duty to obtain informed consent must be assessed on a case-by-case basis.

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 any potential material limitations conflict by acting in a dual role. In these situations where successor counsel's representation is materially limited by a concurrent conflict of interest, the client's informed consent must be obtained pursuant to Rule 1.7(b).

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 determine or agree in advance of successor counsel's engagement how predecessor counsel's fee will be calculated, then successor counsel must advise the client of the client's potential obligation to pay fees on a *quantum meruit* basis to discharged counsel, as well as the successor counsel's fees under her contingent fee agreement, each of which must be reasonable using the factors identified in Rule 1.5(a). When applicable, successor counsel should advise the client that the combined fees of both lawyers may exceed the amount which would have been paid to predecessor counsel in the event the client had not changed counsel. 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).

A Copy,
Teste:

Douglas B. Robelen, Clerk



By:

Deputy Clerk

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.