

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 92-4**

**Acceptance of Subrogation Case on a
Contingent Fee Basis Where Client is
Able to Pay on an Hourly Basis**

QUESTION PRESENTED

Is it ethical under the Code of Professional Responsibility for a lawyer to accept a subrogation case on a contingent fee basis from a subrogated insurer who desires such an arrangement but is capable of paying on an hourly basis?

CONCLUSION

A lawyer may ethically accept a subrogation case on a contingent fee basis from a client who desires such an arrangement even though the client is able to pay on an hourly basis, provided that the client has been fully informed of all relevant fee arrangement alternatives and the proposed contingent fee arrangement is reasonable and not excessive.

STATEMENT OF FACTS PRESENTED

On larger property damage losses, particularly fires, the owner of the property is usually reimbursed by insurance for the loss. The paying insurer then becomes subrogated to the rights of the insured either by virtue of the insurance policy provisions or by common law. Subrogated insurers on large losses typically bring an action against a third party to recover part or all of their payment where they believe the third party was responsible for causing or contributing to the loss.

Most subrogated insurers have adequate financial resources to pay a lawyer on an hourly basis. Some of these subrogation cases are handled on an hourly basis by counsel who normally do defense work for such insurers. Other subrogation cases are handled on a modified contingent fee basis with the insurer paying a reduced hourly rate plus an additional contingent fee if there is a recovery.

In the past few years, however, the practice has arisen of large insurers refusing to pay any hourly fee for subrogation work but instead insisting on a pure contingent fee arrangement. Some insurers have engaged in lawyer shopping based on who will agree to the lowest fee, including lead counsel from outside Alaska. It is alleged that such counsel from outside Alaska routinely violate the requirements of Civil Rule 81(a)(3). Further, it is contended that because

subrogated insurers on a contingent fee basis have no investment in the litigation other than costs, they are more likely to take a case to trial rather than settle it.

DISCUSSION

Ethical Consideration 2-20 of the Code of Professional Responsibility states in pertinent part:

Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement.

Disciplinary Rule 2-106 of the Code separately requires that any fee arrangement must be reasonable and not excessive.

The Model Rules of Professional Conduct¹ similarly permit the use of contingent fee arrangements in all types of cases except for criminal and domestic relations matters. See Model Rules 1.5(c) and (d). Significantly, the cautionary language of EC 2-20 quoted above has been omitted from the Model Rules.

Although the contingent fee has gained acceptance largely as a means of providing legal services to those who otherwise could not afford them, courts have not restricted contingent fee arrangements solely to indigent clients. See DeGraff v. McKesson & Robbins, Inc., 31 N.Y.2d 862, 292 N.E.2d 310, 315, 340 N.Y.S.2d 171, 177 (1972) (Breitel, J., dissenting). Apart from the need to provide legal services to those who cannot afford them, there is also an important economic reason to support the use of contingent fees. In many instances a contingent fee arrangement provides a client with an efficient way to share or spread the risk of nonrecovery. If a client, fully advised of alternative fee arrangements, prefers to have the lawyer share the risk of nonrecovery in return for a potentially higher fee, there is no logical reason why such an

¹/ A version of the Model Rules of Professional Conduct has been approved by the Board of Governors of the Alaska Bar Association and is under consideration for adoption by the Alaska Supreme Court. arrangement should be limited to indigent clients. See generally Note, The Contingent Fee: Disciplinary Rules, Ethical Considerations, or Free Competition?, 1979 Utah L. Rev. 547, 550; Comment, Are Contingent Fees Ethical Where Client Is Able to Pay a Retainer?, 20 Ohio St. L.J. 329 (1959).

In Alaska Ethics Opinion No. 74-3, the Committee addressed substantially the same question of whether it was unethical for an attorney to insist on a contingent fee in a personal injury case where the client had the ability to pay

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on an hourly basis. The Committee found that such a practice was not unethical as long as the fee charged was not excessive and the lawyer fully explained to the client all possible fee arrangements so that the client could make an informed decision uninfluenced by the lawyer's personal preference.

The Committee hereby reaffirms the views expressed in Ethics Opinion No. 74-3 and specifically applies them to the facts presented here. A subrogation claim arising out of a personal injury or property damage is typical of the kinds of tort claims that traditionally have been pursued on a contingent fee basis. Even though a subrogated insurer may be financially capable of paying a lawyer on an hourly basis, there is no ethical reason why the insurer should not be permitted to choose payment on a contingent fee basis regardless of the lawyer's preferred form of payment. If the lawyer does not wish to perform the work on a contingent fee basis, he or she is free to decline the work.

Regarding the alleged violations of Civil Rule 81 by counsel outside Alaska, such complaints are beyond this Committee's authority and should be referred to the court or to the bar disciplinary process. Furthermore, the concern regarding the impact of contingent fees on an insurer's willingness to settle subrogation claims does not raise an ethical issue. It is not the purpose of the ethics rules to balance the economic forces between parties in litigation.

Given the sophistication and financial resources of most insurers, the negotiation of a fee arrangement in subrogation cases would appear to involve two equally knowledgeable parties. Nonetheless, before entering into a contingent fee arrangement with any client, a lawyer should ensure that the client is fully informed of alternative fee arrangements and that any proposed contingent fee is reasonable and not excessive.

Approved by the Alaska Bar Association Ethics Committee on
April 2, 1992.

Adopted by the Board of Governors on June 1, 1992.

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