



New York State Bar Association
Committee on Professional Ethics

Opinion 1146 (3/20/2018)

Modifies N.Y. State 808

Topic: Contingency Fees: Paying Fees in a Criminal Matter from Personal Injury Settlement

Digest: A lawyer who represents a client in a personal injury matter and proposes to represent the client in a contemporaneous criminal defense matter and apply any funds recovered in the personal injury matter toward payment of legal fees in the criminal defense matter has a differing interest in any recovery in the personal injury matter and must satisfy the requirements of fairness, full disclosure and written consent set forth in Rule 1.8(a) to enter into the proposed retention.

Rules: 1.0(f), 1.0(j), 1.5(a), 1.8(a), 1.8(i)

FACTS

1. The inquirer's law firm represents clients in personal injury, criminal defense, and other matters. Occasionally, a client who has a personal injury case becomes involved in a criminal matter and asks the firm represent the client in the criminal matter as well. Clients who are unable to pay in advance for the criminal defense sometimes propose to secure the payment of fees for the criminal representation against the prospective monetary recovery from the personal injury settlement, judgment, or award.

QUESTIONS

2. The inquirer poses three questions:

(a) Is it permissible for a client to pay fees for services rendered by the firm in criminal defense matters from a settlement, judgment, or award obtained by the firm on behalf of the client in the personal injury matter?

(b) Is it permissible to enter into a criminal retainer agreement with a current personal injury client which grants a lien against the client's potential personal injury award to cover fees earned on an hourly basis in the contemporaneous criminal representation?

(c) If it is not permissible to enter into a criminal defense retainer agreement which purports to create a lien against the personal injury recovery, is it nevertheless permissible to enter into a retainer agreement for the criminal defense matter, and to create a charging lien against the personal injury settlement, papers, or other materials or funds related to the personal injury case, should the client ultimately fail to pay the fees for the criminal defense case?

OPINION

3. We think the inquirer's first two questions pose the same issue, namely, whether the N.Y. Rules of Professional Conduct (the "Rules") permit the inquirer to enter into an agreement with a client to have fees for services rendered in the criminal defense matter paid out of, or secured by, the proceeds of any settlement, judgment, or award obtained in a personal injury matter in which the firm also represents the client. We assume the inquirer will have the client sign an engagement letter in the criminal defense matter that provides for billing the client at a fixed rate, hourly or otherwise, but provides, too, that fees for the criminal defense matter may be paid out of funds obtained in any recovery in the representation of the client in the personal injury matter, thus establishing an additional source for payment of the fees. This is analytically indistinguishable from a scenario in which the lawyer acquires a lien on any recovery obtained in the personal injury matter as security against payment of fees earned on an hourly basis in the contemporaneous criminal representation. In each instance, the proceeds of any recovery in the personal injury matter will be used to cover legal fees in the criminal defense matter only if the client is unable to cover those fees through the client's own personal funds. This arrangement therefore differs from an arrangement in which payment of legal fees in the criminal matter is contingent on the outcome of that matter, which is expressly prohibited by Rule 1.5(d)(1) (a lawyer "shall not enter into an arrangement for, charge or collect" a "contingent fee for representing a defendant in a criminal matter"). Here, payment in the criminal matter is not contingent on its outcome, and thus not the product of the lawyer's defense of the criminal matter.

4. Rule 1.8(i) permits a lawyer "to acquire a lien authorized by law" to secure payment of the lawyer's legal fees or expenses. This differs from the predecessor of the Rules, the N.Y. Code of Professional Responsibility (the "Code"), which in DR 5-103(A) allowed liens only if "granted by law." In *N.Y. State 808* (2007), which was decided under the Code, we contrasted DR 5-103(A) with Rule 1.8(i) of the ABA Model Rules of Professional Conduct (the "Model Rules"), which permitted liens "authorized by law." This led us to conclude that, under the Code, a lawyer could not obtain a security interest in a client's claim when the lawyer represents the client in that claim. But the change from "granted" to "authorized" is of consequence. In explaining the Model Rules, ABA 02-247 said that, "[b]y use of the word 'authorized' in place of the word 'granted' under former [Model] Rule 1.8(j), Rule 1.8(i) is intended to permit any legally recognized lien to secure fees to be acquired in property that is the subject of litigation." The Comments to Rule 1.8 echo this same sentiment concerning New York's adoption of Rule 1.8(i): Although Rule 1.8(i) generally prohibits lawyers from acquiring a proprietary interest in the cause of action or subject matter of a litigation the lawyer is handling, the Rule excepts "liens granted by statute, [] originating in common law and [] acquired by contract with the client." Rule 1.8, Cmt. [16]. Here, the inquirer proposes to enter into a contract with the client providing for a lien on recovery in the personal injury matter, which is permissible under the exception in Rule 1.8(i).

5. While a permitted exception to Rule 1.8(i), the inquirer's proposed arrangement for payment of fees in the criminal defense representation must abide by Rule 1.8(a), which governs business transactions with a client. See Rule 1.8, Cmt. [16] ("When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is

governed by the requirements of paragraph (a).”) Rule 1.8(a) provides that “[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client” unless the transaction is “fair and reasonable” to the client, the terms are fully disclosed to the client in writing, the client is advised and given an opportunity to seek independent legal counsel, and the client gives informed consent in writing signed by the client.

6. “Differing interests” are defined to “include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.” Rule 1.0(f). Here, the interests of the inquirer and the client will differ in connection with the inquirer’s representation of the client in the personal injury action because the client and lawyer may have differing interests with respect to the amount of recovery sought and the risk analysis each would apply to obtaining it. For example, the lawyer may advise the client to reject a settlement that would otherwise be acceptable to the client because it is insufficient to cover costs in the criminal defense matter, or advise that the client accept a settlement that provides certainty in payment of the criminal defense costs rather than risk pursuing the case to trial when a credible chance exists of a larger recovery for the client at trial. *See* N.Y. State 1139 ¶ 9 (2017). In addition, we have previously observed that when a client has no other counsel in the matter and is an individual, and when the lawyer is responsible for client matters in the subject area – which is true here – it is more likely that the client will expect the lawyer to exercise professional judgment on the client’s behalf. *See* N.Y. State 1055 n.1 (2015); *see also* ABA 11-458 (2011) (amendment to fee arrangements that involves a lawyer acquiring an interest in client property is subject to Model Rule 1.8(a)).

7. The lawyer must determine whether the transaction is “fair and reasonable” to the client. Rule 1.8(a)(1). Determining whether a transaction is “fair and reasonable” to the client requires a fact-specific inquiry of the facts ascertainable at the time. *See* N.Y. State 913 ¶¶ 11-12 (2012); *see also* N.Y. State 1139 ¶ 10; ABA 00-418 (2000). In addition, the lawyer must satisfy Rule 1.8(a)’s disclosure and consultation provisions, including assuring that the engagement letter in the criminal defense matter fully discloses the transaction in a manner that can be reasonably understood by the client; that the client provides informed written consent to the terms of the transaction (including the lawyer’s role in the matter) after the lawyer has adequately explained the material risks of the proposed fee arrangement and reasonably available alternatives (*see* Rule 1.0(j)); and that the client has been advised to seek, and has been provided a reasonable opportunity to obtain, the advice of independent legal counsel regarding the proposed engagement. If all of the steps outlined above are taken, we see no ethical prohibition to the proposed fee arrangement.

8. The inquirer’s third question – whether the law firm may enter into a retainer in the criminal defense matter that creates a charging lien against the personal injury case if the client fails to pay the fees in the criminal defense matter – is moot unless the inquirer is unable to comply with Rule 1.8(a). If compliance with Rule 1.8(a) is not possible, then the question whether a charging lien may be created against the recovery in the personal injury matter is an issue of law that is beyond the scope of this Committee. *See* N.Y. State Judiciary Law § 475.

CONCLUSION

9. A lawyer who represents a client in a personal injury matter and proposes to represent the

client in a contemporaneous criminal defense matter and apply any funds recovered in the personal injury matter toward payment of legal fees in the criminal defense matter may do so provided that the lawyer complies with the Rule concerning business transactions with a client.

(38-17)