NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1211 (12/09/2020)

Topic: Fees vs. disbursements, charges of contract lawyer or co-counsel

Digest: If a lawyer is handling a personal injury matter for a client who dies during the case, the attorney-client relationship automatically terminates, but the lawyer may enter into a new attorney-client relationship with the former client's putative personal representative. The new retainer agreement may provide that the lawyer will retain a probate lawyer in a different firm to file a probate matter and to obtain the appointment of the personal representative to carry on the personal injury case in place of the deceased client. The retainer agreement with the personal representative may also provide that the original lawyer will charge the probate lawyer's legal fees and expenses as a disbursement in the personal injury action.

Rules: 1.1, 1.5(b), 1.5(c), 1.5(g)

FACTS

1. The inquirer is a personal injury lawyer. On occasion, a client dies in the course of a lawsuit. Because the inquirer does not have the relevant expertise in probate matters, the inquirer will typically engage a lawyer in another law firm to open a probate matter and seek appointment of a personal representative for the estate of the deceased client. The inquirer then moves in the personal injury action to substitute that personal representative as plaintiff under CPLR § 1015(a). The inquirer advises that in most cases, but for the personal injury litigation, no probate proceeding would need to be filed and no personal representative would need to be appointed, as the estate has no other assets requiring probate.

QUESTIONS

2. Can the legal fees and expenses charged by the probate counsel and paid by inquirer be classified as a "disbursement" and recouped prior to disbursing any recovery obtained by way of settlement or judgment in the personal injury action?

3. Must the treatment of the probate lawyer's fees and expenses as disbursements in the personal injury action be addressed in an engagement letter or retainer agreement with the decedent's personal representative?

OPINION

4. At the outset, we note that the death of the client terminates the attorney-client relationship.

See, e.g., Pace v. Raisman & Assoc., Esqs., LLP, 945 N.Y.S.2d 118, 121 (App. Div. 2d Dept. 2012); *Davis v. Cohen & Gresser LLP*, 51 Misc. 3d 1203(A) (Sup. Ct. N.Y. Co. 2016). As a consequence, "[t]he lawyer . . . may not take any further steps in connection with the matter unless and until she is authorized to do so by the deceased's duly qualified personal representative." ABA 95-397. As explained by the Restatement of the Law Governing Lawyers, "A client's death terminates a lawyer's actual authority . . . . The rights of a deceased client pass to other persons—executors, for example, who can, if they wish, revive the representation." Restatement (Third) of the Law Governing Lawyers § 31 cmt. e (2000).

5. Accordingly, in order to proceed with the personal injury action, the inquirer will need to enter into a new attorney-client relationship with the decedent's putative personal representative authorizing the substitution of parties and the continuation of the case. We therefore focus on that second retainer agreement, not the initial retainer agreement with the deceased client, in addressing whether the N.Y. Rules of Professional Conduct (the "Rules") permit the fees and expenses of probate counsel, which the inquirer will be paying and which are necessary to secure the proper appointment of the personal representative, to be treated as a disbursement in the personal injury action.

6. Whether the deceased former client would have had the power, in the initial personal injury retainer agreement, to bind a future personal representative to continue to use inquirer as counsel for the estate, to require the estate to pay for separate probate counsel, or to specify the terms for engaging probate counsel, are questions of law, not ethics, and therefore are beyond our jurisdiction.

Charging the Fees and Expenses of Probate Counsel as a Disbursement in the Personal Injury Action

7. The Rules do not specify how a lawyer should charge for legal services provided by a lawyer associated with a different firm when those services are necessary to serving the client. Should those legal fees be paid out of the lawyer's legal fee (here, out of the inquirer's pocket), or may the lawyer charge them to the client as a disbursement (*i.e.,* out of the client's pocket)? This question is a matter of contract between the lawyer and the client, and in particular depends on the scope of the work that the lawyer has undertaken to perform for the client. *See generally* ABA 00-420 ("Whether the cost attributable to a contract lawyer is billed as an expense or included in legal services fees is not addressed by the Model Rules and does not seem to be a matter of ethics.").

8. The inquirer and the decedent's personal representative thus have discretion to structure the scope of inquirer's re-engagement in the personal injury action so that the inquirer is not responsible for prosecuting any probate matter necessary to appoint a personal representative. Subject to two caveats, the inquirer and the personal representative may instead permit the inquirer to pay for and charge back the legal fees and expenses arising from the engagement of separate probate counsel as a disbursement in the personal injury action.

9. First, the ancillary legal fees and expenses of the probate lawyer must be reasonably incurred to achieve the objectives of the personal injury litigation. *See* N.Y. State 769 (2003) (approving a separate charge for representation in obtaining litigation financing where the personal injury contingent fee agreement "did not anticipate or include [a] proposed transaction with [a litigation] financing company"); N.Y. County 739 (2008) ("A common practice in personal injury

matters when the client's case requires ancillary legal services related to other specialized fields of law, such as bankruptcy, the calculation of Medicare Set Aside accounts, and disability planning (*e.g.,* special needs trusts), is to charge for said services as a disbursement against the entire proceeds of the settlement"). If the probate proceeding is uncontested, if the only significant estate asset is the personal injury claim, and if the probate application seeks only limited letters to continue the personal injury action, then the legal fees and expenses associated with that proceeding are certainly ancillary to the personal injury action. However, to the extent that the probate proceeding will involve other matters unrelated to the continuation of the personal injury action – for example, a will contest, disputes between heirs, the management or liquidation of estate assets, or the resolution of creditor claims (none of which appear to be present here) – those matters would not be ancillary to the continuation of the personal injury action and the legal fees and expenses so incurred would not be properly chargeable as a disbursement in the personal injury action.

10. Second, charging the legal fees and expenses of the probate lawyer as a disbursement must not violate the prohibition of Rule 1.5 against charging an "excessive" fee or expense, and must also be in compliance with the rules of the Appellate Division that prohibit fees in personal injury actions in excess of stipulated percentages of the recovery. 22 N.Y.C.R.R. §§ 603.25(e) (1st Dep't), 691.20(e) (2nd Dep't), 806.27(a) (3rd Dep't), 1015.15(a) (4th Dep't).

The Engagement Letter (Retainer Agreement).

11. Rule 1.5(b) requires that the lawyer communicate to the client "the scope of the representation and the basis or rate of the fee or expenses for which the client will be responsible" and that the information be communicated in writing where required by statute or court rule. Further, with respect to contingency fee cases, Rule 1.5(c) requires that a lawyer provide to the client a writing stating:

> the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of a settlement, trial or appeal; *litigation or other expenses to be deducted from the recovery*; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. *The writing must clearly notify the client of any expenses for which the client will be liable* regardless of whether the client is the prevailing party.

(Emphasis added.)

12. Whether a retainer agreement in a personal injury contingency fee matter meets the requirement to "clearly notify the client" that it may be necessary to incur fees and expenses of additional specialized counsel may depend, for example, on the entire text of the retainer agreement, the customary practices in the legal profession with respect to the particular legal services being out-sourced, and the sophistication of the client. In this regard, N.Y. County 739 (2008) is instructive. That opinion involved the retention of specialized counsel to resolve Medicare, Medicaid and private healthcare liens that were asserted against a personal injury settlement. The question was whether the lawyer could charge lien resolution services as a disbursement. The New York County Lawyers ethics committee observed: "Historically, the resolution of liens on recoveries was considered a routine part of case management." Given that

historical context, Opinion 739 concluded that the inquiring lawyer was required to provide lien resolution services "at no extra charge" (*i.e.,* "included in the contingency fee") unless the retainer agreement, among other things, "provides that the attorney may engage an outside law firm for lien resolution and that the fee for said service will be charged as a disbursement."

13. We take no position on whether the retention of probate counsel made necessary by the death of a personal injury client is, as a historical matter, "a routine part of case management" (as with lien resolution in N.Y. County 739), such that personal injury lawyers would customarily file the required probate proceeding to secure appointment of a personal representative of the estate without charging any fee beyond the contingent fee. The disposition of that issue is simply not controlling here, where the inquirer must enter into a separate new retainer agreement with the decedent's personal representative in order to continue the personal injury representation after securing the appointment of a duly qualified personal representative to substitute as party-plaintiff. However, in accordance with N.Y. County 739 and Rule 1.5(b), we conclude that the fees and expenses of probate counsel may only be charged as a disbursement in the personal injury action if that second, new retainer agreement between the inquirer and the putative personal representative − in addition to authorizing inquirer to retain separate probate counsel and to continue the prosecution of the personal injury action in the name of the personal representative − clearly so provides.

CONCLUSION

14. A lawyer handling a contingent fee personal injury matter may charge as a disbursement in the personal injury action the fees and expenses of a lawyer separately retained, after the death of the personal injury client, to file a probate proceeding on behalf of the putative personal representative of the deceased former client's estate in order to obtain appointment of the personal representative and authorization to continue the personal injury action, where doing so is not part of the legal services that the personal injury lawyer agrees to provide but is a necessary element of that representation. The personal injury lawyer's retainer agreement or engagement letter with the putative personal representative should clearly notify the client that such legal fees and expenses will be charged as a disbursement in the personal injury action.

(18-20)