

Improper Fee-Share Agreement Converted Into Contingent Fee

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In a case involving a fee sharing agreement between present and former counsel which violated DR 2-107 (Division of Fees Among Lawyers), Nassau Cty. Supreme Court Judge Thomas P. Phelan has decided that former counsel should be deemed to have elected a contingent percentage fee.

The underlying litigations which prompted the fee sharing agreement were settled in two stages for a total of \$210,000. In the first stage, former counsel settled with one defendant for \$20,000. Before the second stage, present counsel was substituted under an agreement which provided:

"...our respective share of attorneys fees shall be held in abeyance until this matter is concluded; however [we] agree that the minimum to which [outgoing counsel] will be entitled is 33-1/3 percent of the attorneys fees recovered in the matter Silver v. Levittown Union Free School District."

As the court pointed out, on the date of the agreement, neither attorney could anticipate the course or length of the second stage or what future services would be required to conclude the litigation. As it turned out, the matter proceeded to trial and was eventually settled for \$190,000.

Judge Phelan found that the fee sharing agreement violated DR 2-107 which provides:

- (a) a lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyers law firm unless:...
- (2) The division is in proportion to the services performed by each lawyer.

The fee-sharing agreement violated this provision because it "prematurely fixes a minimum proportionate fee for discharged counsel." In other words, outgoing counsel would receive a pre calculable minimum regardless of the extent of his services.

Under these circumstances, Judge Phelan held, the outgoing attorney could have elected to receive immediate compensation for the reasonable value of his services in quantum meruit or he could have elected to receive a contingent percentage fee based on his proportionate share of the work performed. What he could not do was to guarantee a minimum fee for himself which was not related to the value of his services.

Judge Phelan's decision was to deem that outgoing counsel had elected a contingent percentage fee. He ordered a hearing to determine the lawyers' respective proportionate shares.