**Damages in Personal Injury**

NBI October 2018

**VI. Legal Ethics**

1. **Attorney’s Fees**

**Contingent fee basics** (from Contingency Fee Agreement Checklist, by Gina Hendrix, then General Counsel, OBA, found at http://www.okbar.org/members/GeneralCounsel/articles/ContingencyFeeAgreementChecklist.aspx):

**Must be in writing** (Rule 1.5(c) ORPC)

**Signed by the client** (2008 amendment to ORPC)

**State the method of determining the fee percentage**--pre-filing, after filing, if tried, on appeal

**Do you agree to take on appeal**

**State method for handling expenses**: deducted before or after applying fee percentage (i.e., net or gross)?

Will expenses be reimbursed by client in the event of no recovery?

**Provide a written settlement statement** at conclusion of contingent fee matter--financial breakdown of total recovery, expense handling, medical or other lien/subrogation claims, and net to client

**Contingent fee in fee shift cases** (see OK Ethics Opinion No.325)

Can you take both your contracted contingent fee and the award of statutory attorney fee in, say, property damage case (12 O.S. Section 940), or insurance case under 36 O.S. 3629? Short answer: No.

Your fee must always be “reasonable.” Rule 1.5(a) of the Oklahoma Rules of Professional Conduct. A “reasonable” contingent fee is always spelled out in writing: A contingent fee agreement shall be in writing signed by the client *and shall state the method by which the fee is to be determined . . . .”*

Long answer: (1) whatever you do should be set out in your contract; (2) you can take one, or the other, but not both; (3) you can also aggregate the total recovery and take the contractual percentage fee from the total recovery-*-if you have this option spelled out in your contract*. This is what we have always done. Be aware though, if you do not explain this in the contract, you may take the greater of the contingent percentage on the total recovery minus the statutory fee, or the statutory fee, but not a fee on the aggregate.

The basis for this decision is that the statutory attorney fee award is not an award to the attorney (so that you could take both), but is an element of the client’s damages (No.325 cites here *OBA v. Weeks,* 1998 OK 83, 969 P.2d 347), which is why you can aggregate with other damages and take your fee against the total.

Practically speaking, in addition to putting this in the contract, this is something you better spell out clearly with your client. Otherwise, you may find yourself with an angry client, if you have not spelled out that the court awarded “reasonable” fee (spelled out in *State ex. Rel. Burke v. City of OKC,* 1979 OK 115, 598 P.2d 659) has no correlation with the fee it actually takes to get an attorney to handle a particular case. No. 325 has good discussion of the purpose of statutory fee “to assist potential plaintiffs in securing reasonably competent counsel, not to avoid honoring their contractual agreements even if their contractual liability is greater than the statutory award that they may collect from losing opponents.” So, you might tell them the statutory fee is a minimum fee for competency.

May even be able to offset the contingent fee with the statutory fee and keep any surplus. Some support for this in No.325, but I would not recommend. Whatever you do, don’t violate the 50% of net rule (net recovery is gross recovery less legal expenses (see OK Ethics Opinion 26)).

OK Ethics Opinion 324 applies this rule to attorney fee awarded as sanction for discovery abuse.

**When can lawyer take fee on medpay?**

Only when medpay is hotly contested. OK Ethics Opinion No. 306 answers the following question: “Is it per se unreasonable for an attorney to take as a fee a percentage of the client’s own med-pay when the insurance company has not denied coverage?”

Factually, the questioner does not appear to be the attorney taking the fee as the opinion talks about “further inquiry” revealing the “issue” is “a practice of treating payments under the “medical payments” provision of a client’s own insurance policy as included within the amount “recovered” under the contingent fee contract. And this despite “little or no effort on the part of the lawyer” to obtain the medpay.

Opinion cites Rule 1.5(a) of the Oklahoma Rules of Professional Conduct: “a lawyers (sic) fee shall be reasonable.” Does not give bright-line rule, but says the same fee charged on a recovery against a third-party carrier, would “probably” be excessive and exorbitant, “and hence unreasonable,” when applied to payments made under medpay without dispute, by the client’s own carrier. Does not issue “universal rule,” though, saying the contingent fee must be scrutinized in light of the applicable facts and circumstances.

Beware--That the contract might specifically allow for such a fee is “irrelevant to the determination whether the fee is ‘reasonable.’”

**B. Handling Client Trust Accounts**

For general overview, see *Because It Is Not Your Money!,* D. Scott Pappas (<http://www.okbar.org/members/BarJournal/archive2015/AugArchive15_2/obj8621Pappas.aspx>).

Rule 1.15 ORPC provides the framework. You have a fiduciary duty to protect client funds. Any money do to the client (or another party) or unearned fee, should remain in your trust account until the soonest that you can pay them to the client, earn any fee and pay it to your operating account, or resolve any competing claims and get the money into the hands of the client or the interested party.

Keep records for five years after termination of any representation

Must be interest bearing, demand account in approved financial institution (OBA approved).

Must be IOLTA (Interest on Lawyer Trust Accounts). Point of IOLTA is that any interest earned on client funds belongs, technically, to that client. But is is very difficult, if you have funds belonging to different clients, to properly allocate that interest. IOLTA lets you solve this accounting problem by just making the Bar Foundation the recipient of the interest.

If though, you will have client funds in trust for a substantial period, you must isolate that client’s funds in a separate interest bearing trust account, and pay the interest to the client.

Do not negotiate funds deposited into trust until your bank has cleared the funds as available.

Bank has obligation to report you if you overdraw your trust account--by even one red cent.

Bank will make availability decision for each deposit, based upon several factors, so don’t just assume funds will be available within so many days.

Do not pay trust account bank fees out of client funds. You may deposit nominal amount of own funds to cover these fees.

Don’t leave earned fees in trust at end of year in order to put an earned fee over into a new tax year. IRS (and our Court) watches for that sort of thing.

If you take credit cards, set up a separate “merchant account,” so that credit card fees are not paid out of your trust account. Once a card payment clears your merchant account, you can transfer the unearned fee to you trust account.

**How not to manage your trust account:**

Count VIII incorporated Counts I–VII and alleged that the respondent did not regularly produce time and expense records or billing statements. She had no accounting system or office policies in place that would allow her to properly review her financial information and control expenditures and deposits. She did not use her IOLTA trust account and habitually deposited client funds into her operating account from which she made cash withdrawals and paid for personal expenses. The OBA alleges that as a result of her intentional actions as well as her negligence, the respondent violated her fiduciary duty to her clients, thereby constituting professional misconduct in violation of Rules. 1.15 and 8.4, ORPC, and Rule 1.3, RGDP, which warrants the imposition of professional discipline. *State ex. Rel. OBA v. Rowe,* 212 OK 88, 288 P.3d 535.

**C. Disbursement of Settlement Proceeds**

**Referral Fees**

This used to be prohibited. No longer, *if* you satisfy the following, in ORPC 1.5(e):

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) the client agrees to the arrangement and the agreement is confirmed in writing; and
(3) the total fee is reasonable.

You must satisfy all three: first the easier questions: (2) memorialize the agreement in writing, signed by the client; (3) the total fee must be reasonable. Be careful charging one fee if the case is not referred and a greater fee for a referred case. That is likely to be an excessive fee even if it does not exceed the 50% limitation. Why? If one lawyer can do the work competently for ⅓ of the recovery, then it is probably unreasonable to add another attorney into the mix and charge more.

With respect to (1), if you are going to pay a referral fee you need to be sure the referring attorney is paid *either* proportionate to the work performed, *or* the referring attorney assumes joint responsibility for the representation. That test is probably (hopefully) satisfied by putting the referring attorney on the contract so that the referring attorney is professionally responsible for the representation. Does that give rise to obligation to inquire whether the referring or referred attorney maintains malpractice insurance?

**Plaintiff’s Attorney May Not Indemnify Defendant--**Defense Attorney Can’t Ask For That

Defendant may not require counsel for Plaintiff to sign indemnification agreement in release (see OK Ethics Opinion No.328). It is common for settlement agreements to contain indemnity language where the plaintiff agrees to indemnify the defendant for later arising claims against settlement proceeds, such as medical bills, subrogation, or liens, or to hold harmless against any future action. This language is typical and permissible. A twist on the permissible indemnity agreement, though, adds the attorney for the plaintiff into the indemnity agreement. This is improper according to Opinion 328. This violates the rule that a lawyer “shall not provide financial assistance to a client in connection with” litigation.” The requested indemnity does not fit in the exceptions to the prohibition which allow only for a lawyer to advance costs and expenses and to pay costs and expenses for an indigent client.

The opinion cites a Florida ethics opinion which frowns on the practice because it puts the attorney into a conflict with the client by creating a hazard that the representation would be materially limited by the attorney’s personal interest in not having to pay a client’s debt.

But do not think this keeps the plaintiff attorney safe from direct claims, such as a claim by Medicare that the attorney did not honor a Medicare lien.

**D. Litigating Ethically**

Though we are to be zealous advocates, we also have duties as officers of the court.

ORPC Preamble charges us with having “a special responsibility for the quality of justice.”

Also from the preamble:

“…A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

**ORPC 3.1: Bring only meritorious claims.**

Comment: The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of the clients’ cases and the applicable law and determine that they can make good faith arguments in support of their client’s positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

**ORPC 3.2: Lawyer shall make reasonable efforts to expedite litigation.**

Comment: Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

**ORPC 3.3: Quit lying to the judge. Don’t let your client lie, either**.

Does anyone know what this means:

A lawyer shall not fail to disclose legal authority in the controlling jurisdiction known to be directly adverse and not disclosed by the opposing side” Does that include a COCA decision? Once where mandate has not issued?

**ORPC 3.4: What do you mean we have a law that says I have to be fair to the other side**?

Don’t worry, the rule itself just says you can’t lie or destroy or suppress evidence. Oh, or make a frivolous discovery request.

**ORPC 3.5: no undue influence on the judge or a juror—or ex parte communication with the same.**

You may remember from your Professional Responsibility class, though, the above does not prevent us from making absurd claims regarding the value of our case.

**E. Personal Injury Lawyer Advertising**

Only a very small percentage of bar complaints relate to advertising. Attorney neglect is always the most common complaint.

OK Ethics Opinion No.30 (1932): “Is it advertising [and thus unethical] for an attorney to acquire space in telephone directory, immediately after his name in the attorney’s classification section, and insert the following: ‘General practitioneers [sic]: Special attention given to Personal Injury Damage Suits, Corporations, contracts and probate law …… Former District Judge. ’24 Years General Practice in All Courts, contracts, liens, titles, corporations, damages, probate.’” The answer: Yes. Anything more than the name and telephone number of the lawyer, in the same type and size as the other attorney listings, violated the rule against attorney advertising.

In the very early days, lawyer advertising was common and unregulated, but with the advent of the Canons of Professional Ethics by the ABA in 1908, legal advertising was strictly prohibited. That was the landscape until the 1972 case of *Bates v. State Bar of AZ*, 433 U.S. 350, 97 S.Ct. 2691, 53 L. Ed. 2d 810 (1972). The Supreme Court found that attorney advertising facilitates the process of intelligent selection of lawyers and makes legal service more accessible--and is protected by the First Amendment. But, still, the states may ban false, deceptive, and misleading advertising. See OK Ethics Opinion 315 for discussion. Also, No. 310, which notes earlier, “inconsistent” ethics opinions are outdated.

**Discussion of lawyer advertising begins with ORPC 7.1-7.5, with the First Amendment superimposed.**

ORPC 7.1: Lawyers may not make false or misleading statements about their services.

ORPC 7.2: Lawyers may advertise their services, but cannot pay for referrals other than in certain limited circumstances.

ORPC 7.3: Lawyers may not solicit employment “in-person, live telephone or real-time electronic communication” except to other lawyers or to family and close relations, or prior clients. Also, shall not solicit by non real-time (letters, email, etc.) if the target has made known a desire not to be solicited or the solicitation involves coercion, harassment, or duress.

ORPC 7.4: Lawyer may advertise that he concentrates practice is particular fields, but may not claim he or she is “certified as a specialist,” except Patent, Admiralty, or as certified by the Oklahoma Supreme Court. Comments: No outright prohibition of claiming “specialization,” but, may not claim “certified” because it implies official recognition. Also, if you claim to be specialist that will be scrutinized for truthfulness (Rule 7.1) and may be used against you in adverse actions to determine your standard of care.

ORPC 7.5: Firm Names and Letterhead: May use trade name that does not imply a connection with government agency, or with public or charitable legal services. May use same firm name in multiple jurisdictions, but must note which attorneys are not licensed in that jurisdiction. Lawyers no longer practicing must be removed from name and letterhead. Comments: may use name of some or all, may use web address as firm name. Oklahoma County Legal Clinic, or some such is improper. May not imply attorneys are in partnership if only sharing office space.

**Current state of the law:**

Would the phone book ad above pass muster today?

The mere fact of the advert would not be prohibited.

Seems to claim specialization, but does not claim certification, so that should be okay.

Claim to be “former judge.”—could not find it, but I believe there is a prohibition on doing this because it implies you will be able to obtain special favors from current judges.

**Other advertising rules:**

Advertising good results (Opinion 320—as long as the don’t violate confidentiality, are factually accurate, and accompanied by disclaimer).

May advertise law degrees (J.D., L.L.M., but not non legal degrees (M.A., Ph.D.) Opinion 277

May use name of deceased firm member on letterhead, but must indicate deceased Opinion 300.

John Doe, and Associates—proper if no partners and Doe is sole practitioner who employs associates. Doe & Roe, and Associates, if two partners who employ associate attorneys. Opinion 288.

Mail solicitation: Must not conspicuously on the envelope: “This is an Advertisement.” Must include OBA address to report inaccurate or misleading ads and may not use certified or registered mail.

Advertising on the internet; webpages and social media sites must comply with the rules regarding truthful advertising, as well as rules about unauthorized practice (your webpages reach out to the entire world).

Good resource: Ethical Considerations for Promoting Your Practice Online, Richard M. Goehler, Christopher G. Johnson, Kyle Melloan, and Ali Razzaghi (https://apps.americanbar.org/litigation/litigationnews/trial\_skills/070710-ethics-promoting-law-practice-online.html)

The authors recommend a disclaimer that provides the following:

“• an explanation of where the attorney is licensed to practice law;
• a description of where the attorney maintains law offices and actually practices law;
• an explanation of any limitation on the courts in which the attorney is willing to appear; and
• a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney’s website.”

If you offer a chat window on your website, beware you are stepping closer to solicitation than mere advertising.

Beware of answering legal questions through your web chat, where you will be unlikely to have gained sufficient information to adequately advise. You may well have created an attorney-client relationship.

Do you create attorney-client relationship by accepting emails from your website. In some states the answer is yes.

The authors cautions are apt:

“Generally, ethics rules regarding advertising, solicitation, and the creation of an attorney-client relationship apply to an attorney’s activities on social-networking sites such as Facebook, LinkedIn, and MySpace. For example, disclosing on MySpace that you are an attorney and casually posting messages about legal issues may require you to include all the advertising disclosures and disclaimers required by your particular jurisdiction. Similarly, lawyers informally conversing about legal subjects on Facebook should realize that their conduct may create an attorney-client relationship. This could give rise to inadvertent conflicts, malpractice claims, allegations of improper solicitation of clients, or even assertions that an attorney is improperly practicing law by giving legal advice to individuals in jurisdictions in which the attorney is not licensed.”

Their advice to avoid running afoul of the rules:

“• If you maintain a website as an attorney, your website should clearly explain where you are licensed and where you maintain offices;
• Know who your advertising reaches, where your clients are located, and where the effects of your services will likely be felt;
• Avoid publishing information in an electronic forum that would otherwise be unethical if it appeared in other printed media;
• Avoid interactive communications and active pursuit of potential clients in electronic media that more closely resemble “live, in-person” communication;
• Refrain from providing legal advice in any electronic medium unless you intend to create an attorney-client relationship with the recipient of the advice; and
• If you are maintaining a website, include express disclaimers explaining that the information provided or received by the recipient will not be treated as confidential.”