

WHO GETS THE FEE WHEN COUNSEL IS DISCHARGED IN A CONTINGENCY CASE—DISCHARGED COUNSEL OR SUCCESSOR COUNSEL?



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Tom is a frequent lecturer and author on civil litigation and professional responsibility topics. He is the co-editor of the Pennsylvania Ethics Handbook (5th edition), a comprehensive review of the rules of conduct governing lawyers, with extensive citations to case decisions and ethics opinions addressing all aspects of the lawyer-client relationship. He is co-author (with Cozen O'Connor attorney Dan Harrington) of the chapter on conflicts of interest in the Pennsylvania Ethics Handbook. He is the co-author of the chapters on lawyer and judicial regulation in *The Supreme Court of Pennsylvania: Life and Law of the Commonwealth 1684-2017*.

Tom is a past president of the Pennsylvania Bar Association, and a past chair of its Legal Ethics and Professional Responsibility Committee. He is a member of the Board of Governors of the American Bar Association, and has served on the ABA Standing Committee on Professionalism. He is active in the Section of Litigation's Ethics and Professionalism Committee. He is also an active member of the Philadelphia Bar Association's Professional Guidance and Professional Responsibility Committees.

When a client terminates its legal representation in a contingent fee matter without cause, and subsequently retains new counsel from a different firm, the Rules of Professional Conduct related to the division and disbursement of fees impose certain requirements on the successor attorney. The American Bar Association issued Formal Opinion 487¹ (ABA Opinion) to identify the applicable rules and to clarify the duties owed to the client by the successor attorney.

The ABA Opinion explains that Model Rule of Professional Conduct (Rule) 1.5(e) (or its state equivalent)

has no application to the division of fees in cases of successive representation.² Such situations are instead governed by Rule 1.5(b)-(c), which requires the successor counsel to “notify the client, in writing, that a portion of any contingent fee earned may be paid to the predecessor attorney.”

Specifically, Rule 1.5(b) requires attorneys to communicate the rate or basis of legal fees, and Rule 1.5(c) requires that the written fee agreement include the method of determining the fee. Both subsections are designed to ensure that the client has a clear

understanding of the total legal fee, how it will be computed, and when and by whom it will be paid. When a client replaces its original counsel with new counsel in a contingent fee matter, the discharged attorney may have a claim for fees under quantum meruit or pursuant to a clause in the contingency fee agreement; and the successor counsel's failure to communicate to the client the existence of such claim would run afoul of Rule 1.5(b)-(c). Therefore, even if the exact amount or percentage (if any) owed to the first attorney is unknown at the time, it is incumbent on the successor attorney to advise a contingency client of the existence and effect of the predecessor attorney's claim for fees as part of the terms and conditions of the engagement from the outset.

While the foregoing ABA guidance is reasonable, Rule 1.5(b) and (c) do not provide the most compelling basis to obligate successor counsel to advise the client of the predecessor's possible fee claim. As explained in Pennsylvania Bar Association Formal Opinion 2020-200: Obligations of Successor Contingent Fee Counsel to Advise Client of Potential Obligations to Prior Counsel, "[a] contingent fee agreement that fails to mention that some compensation may be due to, or claimed by, the predecessor counsel in circumstances addressed by this opinion is inconsistent with Rules 1.4(b) and 1.5(c)," which "mandate that successor counsel provide written notice that compensation may be claimed by Lawyer 1, and explain the effect of that claim on Lawyer 2's contingent fee."³ Pennsylvania Rule 1.4(b) is identical to Model Rule 1.4(b).

The role of the successor attorney with respect to the discharged attorney's claim for fees should also be set forth in the engagement agreement. The ABA Opinion advises that the engagement agreement should expressly state whether the issue is one to be decided between the discharged attorney and the client or, alternatively, whether the successor attorney will represent the client in connection with the resolution of prior counsel's fee interest. If the latter, the successor attorney must obtain the client's informed consent to the conflict of interest arising from his or her dual role "as counsel for the client

and a party interested in a portion of the proceeds" (emphasis in original). In many situations, the fees paid to the discharged and successor attorneys may not affect the client's ultimate recovery, and the client may make an informed decision to leave the matter for the two attorneys to determine among themselves. In resolving any such dispute, both attorneys remain bound by Rule 1.6 confidentiality or pursuant to any confidentiality provisions in any underlying settlement agreement.

Upon recovery, the successor attorney must comply with Rule 1.15(d) by notifying the discharged attorney of the receipt of funds. However, client consent is required prior to disbursement of any fees that may be payable to the discharged attorney.⁴ If there is a disagreement about the discharged attorney's claim or the amount owed, the successor attorney must hold the disputed fees in a client trust account under Rule 1.15(e) until the dispute is resolved.

The Disciplinary Board of the Supreme Court of Pennsylvania (Board) proposed that the guidance in the ABA Opinion be incorporated into the comment supporting Pennsylvania Rule of Professional Conduct 1.5 governing fees. Recognizing that the ABA Opinion is not binding precedent, the Board published a notice for comment in late 2019 stating that the ABA Opinion represents "helpful guidance to successor counsel and predecessor counsel in this common situation. The original lawyer in a contingency-fee matter will often assert a lien on the proceeds but if the client retains new counsel, that client may not understand there is a continuing obligation to pay the original lawyer for the value that lawyer contributed or was entitled to under the original fee agreement."

The Board proposed, and the Supreme Court thereafter approved, an amendment to Comment [5] of Rule 1.5 to expressly reference the ABA Opinion. In light of this amendment, practitioners would be wise to include a notice to clients that a portion of the fee may be claimed by predecessor counsel. In addition, successor counsel should confirm, preferably in writing, any undertaking to resolve the prior counsel's fee interest. Since the ABA Opinion

characterizes this as involving a conflict of interest requiring the client's informed consent to a waiver, the successor firm should also confirm that consent in writing. The new comment language notes that conflict waivers do not require a writing in Pennsylvania, but that "written consent may benefit both the client and successor counsel" because a writing tends to impress upon clients the seriousness of the decision and helps to avoid later disputes that may arise in the absence of a writing.

Inclusion of an express reference to an ABA or other ethics opinion in the text of a comment to a disciplinary rule is unusual. The Board presumably felt it appropriate to supplement the guidance on this important topic to lawyers handling contingent fee cases because lawyers often fail to engage in earnest efforts to resolve the respective fee interests promptly after successor counsel is retained, leaving

the unsuspecting client exposed to complications, potential litigation and delays over the allocation of fees and costs following an award or settlement.

CONCLUSION

When asked by a prospective client to replace the client's counsel in a pending contingency fee case, attorneys and firms should be mindful of the duties imposed by the ABA Opinion on successor counsel, as well as the specific Rules of Professional Conduct in the relevant jurisdiction and any other applicable substantive law or authority. In many cases, compliance with the new guidance will require updating contingent fee agreements, as well as ensuring the client is adequately informed of the prior counsel's ongoing fee interest and how it will be addressed in the event of a recovery. 🔥

Notes

- 1 ABA Formal Opinion 487 (Fee Division with Client's Prior Counsel), June 18, 2019.
- 2 Model Rules of Prof'l Conduct R. 1.5(e) applies to the division of fees between lawyers of different firms who are representing the client concurrently or who maintain joint ethical and financial responsibility for the matter as a whole. See cmt. [2].
- 3 See also Philadelphia Bar Ass'n Professional Guidance Comm. Op. 2004-1, available at <https://www.philadelphiabar.org/page/EthicsOpinion2004-1?appNum=4> ("In discharging the inquirer's obligations under Rule 1.1 (Competence) and Rule 1.4 (Communication), the Committee recommends that the inquirer have a thorough discussion with the client about the potentials for a fee and/or cost claim by the discharged attorney, and how such a claim, if made, might affect the inquirer's representation of that client and/or the client's ultimate distribution, if there is any recovery in the client's case.").
- 4 See Model Rules of Prof'l Conduct R. 1.5(a).