

ABA Informal Op. 86-1521  
A.B.A.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1521

American Bar Association

## OFFERING ALTERNATIVES TO CONTINGENT FEES

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A lawyer normally has an obligation to offer a prospective client an alternative fee arrangement before accepting a matter on a contingent fee basis.

The Committee has been asked whether a lawyer has an ethical obligation to offer a client an alternative fee arrangement before accepting a matter on a contingent fee basis. In most circumstances, the lawyer has that obligation.

The English rule is, and the early American rule was, that contingent fee arrangements are champertous and therefore improper, but American courts have, for many years, recognized the propriety of contingent fees where appropriate, even though lawyers are otherwise prohibited from acquiring a proprietary interest in the cause of action. [\[FN1\]](#) The commonly stated rationale is that the contingent fee provides the only means by which some persons can obtain access to the court system. [\[FN2\]](#)

The propriety of contingent fees is recognized in both the Model Rules of Professional Conduct (1983) and the predecessor Model Code of Professional Responsibility (1969, revised 1980). Rule 1.5(c) specifically states that a fee may be contingent on the outcome of the matter for which the service is rendered, except in domestic relations or criminal matters or where otherwise prohibited by law. By prohibiting contingent fees in criminal cases, DR 2-106(C) of the Model Code implicitly recognizes the propriety of contingent fees in other cases. The “reasonableness” and “clearly excessive” provisions of the Model Rules and the Model Code also recognize that fees may be contingent. Rule 1.5(a) requires that a lawyer’s fee be “reasonable,” and DR 2-106(A) of the Model Code requires that the lawyer not charge an “illegal or clearly excessive fee.” Both Rules set forth factors to be considered in making these determinations which include “whether the fee is fixed or contingent.”

Although neither Rule 1.5 nor DR 2-106 states specifically whether a lawyer must offer an alternative fee arrangement, that issue must be addressed in a context of the “reasonableness” and “clearly excessive” tests of the Model Rules and the Model Code, the commonly expressed rationale for permitting contingent fees and the Comment to Rule 1.5 and the Ethical Considerations of the Model Code. The Comment to Rule 1.5 states: “When there is doubt whether a contingent fee is consistent with the client’s best interest, the lawyer should offer the client alternative bases for the fee and explain their implications.” EC 2-20 of the Model Code notes the rationale for permitting contingent fees and then states: “Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement.” [\[FN3\]](#) As noted in the EC, contingent fees are not necessarily improper even when the client has the money to pay a fixed fee; however, if the client is in a position to pay a fixed fee, the lawyer should permit the client to make the decision whether to pay a reasonable fixed fee or to pay a percentage fee contingent on results. Similarly, under the Comment to Rule 1.5, when a client is in a position to pay a fixed fee, the lawyer should not seek unilaterally to determine whether a contingent fee is consistent with the client’s best interest, but should provide the client with the opportunity to make that deter-

mination after consultation.

A lawyer has an obligation of fair dealing with even a prospective client who consults the lawyer. With respect to the fiduciary obligations of an attorney in dealing with a prospective client in arranging a fee, Comment e to Section 390 of the Restatement (Second) of Agency (1957) notes:

A person is not ordinarily subject to a fiduciary duty in making terms as to compensation with a prospective principal. If, however, as in the case of attorney and client, the creation of the relation involves peculiar trust and confidence, with reliance by the principal upon fair dealing by the agent, it may be found that a fiduciary relation exists prior to the employment and, if so, the agent is under a duty to deal fairly with the principal in arranging the terms of the employment.

The fiduciary requirement of fair dealing is reflected in the “reasonableness” and “clearly excessive” tests of the Model Rules and Model Code and in the other fee restrictions in the Model Rules and the Model Code; it is consistent with a requirement that a lawyer offer a prospective client who can pay a reasonable fixed fee the alternative of doing so and an explanation of the alternatives before accepting a contingent fee arrangement from a client. The client with a meritorious claim is entitled to representation and should not be required to relinquish a share of the claim to get representation if the client has the money to pay a reasonable fixed fee and is willing to assume the contingency risk. It may also be in some cases that a contingent fee arrangement is the only practical basis upon which a matter can be handled, but that decision should be made after consideration of the relevant facts and circumstances in consultation with the client.

Contingent fees are subject to the “reasonableness” and “clearly excessive” tests of the Model Rules and the Model Code. Whether a contingent fee is reasonable and whether it is in the best interest of the client may be dependent on many factors, including the estimated amount of a reasonable fixed fee, the degree of contingency in fact involved and the probable size of the recovery, factors which the client normally has the right to consider before agreeing to a fee arrangement. Thus, when there is any doubt whether a contingent fee is consistent with the client's best interest, which can normally be determined only in light of all the facts and circumstances after consultation with the client, the lawyer must offer the client the opportunity to engage counsel on a reasonable fixed fee basis before entering into a contingent fee arrangement.

[\[FN1\]](#). Comment, Judicial Regulation of Contingent Fee Contracts, 48 J.Air L. & Com. (1982-83); Model Rules of Professional Conduct (1983) Rule 1.8(j); Model Code of Professional Responsibility (1969, revised 1980) DR 5-103(A).

[\[FN2\]](#). See generally Comment, Judicial Regulation of Contingent Fee Contracts, 48 J.Air L. & Com. (1982-83); Model Code of Professional Responsibility (1969, revised 1980) EC 2-20.

[\[FN3\]](#). A “fixed fee” for this purpose refers to any fee which is payable in all events without regard to whether the client prevails in the matter.  
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