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Accepting Employment Upon Contingent Fee–Proper Conditions Indicated

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QUESTIONS AND ANSWERS OF COMMITTEE ON PROFESSIONAL ETHICS OF NEW YORK COUNTY LAWYERS ASSOCIATION

QUESTION NO. 141

ACCEPTING EMPLOYMENT UPON CONTINGENT FEE—PROPER CONDITIONS INDICATED.—Is it, in the opinion of the Committee, consistent with the “essential dignity of the profession” for a lawyer to accept professional employment upon a contingent fee, even under the safeguards mentioned in Canon 13 of the American Bar Association?

If the Committee considers the practice to be, as a general rule, undignified or otherwise improper, does the Committee recognize as exceptions,

(a) Cases of commercial collections, tax-reductions or tax-refunds, and similar cases, in which it appears to be the universal custom to make compensation contingent upon success and measurable by the sum collected, refunded, etc.;

(b) Meritorious cases of any kind undertaken on behalf of poor persons?

Is the propriety of accepting employment on a contingent fee dependent to any extent upon the custom in that regard which prevails generally among members of the bar in the community wherein the lawyer in question practices?

ANSWER NO. 141

In the formulation of the canons of ethics of the American Bar Association, no subject precipitated such debate as Canon 13, the one relating to contingent fees, which reads as follows:

“Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.”

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1 In answering questions this Committee acts by virtue of the following provisions of the by-laws of the Association, Article XVI, Section III:

“This Committee shall be empowered when consulted to advise inquirers respecting questions of proper professional conduct, reporting its action to the Board of Directors from time to time.”

It is understood that this Committee acts on specific questions submitted ex parte, and in its answers bases its opinion on such facts only as are set forth in the question.
QUESTIONS ON PROFESSIONAL ETHICS

Even as it was formulated after the debate, it has not been universally accepted. The Bar Association of Boston adopted instead the following:

"A lawyer should not undertake the conduct of litigation on terms which make his right to reasonable compensation contingent on his success, except when the client has a meritorious cause of action but no sufficient means to employ counsel unless he prevails; and a lawyer should never stipulate that in the event of success his fee should be a fixed percentage of what he recovers, or a fixed sum, either of which may exceed reasonable compensation for any real service rendered.

"Such practices tend to corrupt and discredit the Bar. Lawyers who try to get business by charging nothing unless they succeed, even though they leave the size of their fees to be determined by the amount and character of their services, are constantly tempted to promote groundless and vexatious suits. Those who go further and bargain that, if successful, their fees shall be fixed sums or percentages, are not only apt to become public pests, but are in constant danger of abusing or betraying their own clients. When making such a bargain the lawyer's superior knowledge and experience give him an advantage which tempts him to overreach his client. By making it, he, in effect, purchases an interest in the litigation. Consequently, unhappy conflicts between his own and his client's interest, in respect to the settlement or conduct of the suit, are always likely to arise; his capacity to advise wisely is impaired; and he is beset by the same temptations which beset a party to be dishonest in preparation and trial."

Experience shows that the contingent fee, as a general practice in any branch of the law, has a tendency to breed the twin evils of solicitation of employment and improper division of fees. It develops both in the lay and in the professional mind a conception of the practice of the law as a business, not as a profession, and tends to lower the essential standards of the Bar.

While we recognize that under existing standards each lawyer is largely the judge of the soundness of his conduct in such cases, we think that the time has come for the members of the American Bar in their respective states to reconsider the basis for the existing law upon the subject, and to consider whether all contingent

* The Code of Ethics of The West Virginia Bar Association provides, § 46, as follows:

"Contingent fees may be contracted for, but they lead to many abuses, and certain compensation is to be preferred."
fees should not by law be made subject to summary review by a Court on the application of the client.

As to the specific inquiry (a) put by the inquirer, the Committee can see no reason for applying any different principle.

As to the case (b), the Committee is of opinion that, while the practice of the contingent fee finds some justification in "meritorious cases . . . . undertaken on behalf of poor persons," nevertheless such arrangements should also be under the complete supervision of the Court.

So long as the present practice prevails generally among members of the Bar in any community, this Committee cannot assume to say that there is any impropriety in lawyers practicing in such community accepting such cases, where they are unsolicited.