REGULATING CONTINGENT FEES IN NO-FAULT CASES

BY KENNETH L. JORGENSEN

Contingent fees are the norm for lawyers representing plaintiffs in personal injury cases. Most lawyers routinely have clients sign contingent fee agreements authorizing a percentage fee based upon the total amount recovered. Typically, these lawyers calculate their fee by applying the agreed upon percentage to all amounts recovered, without regard to the specific sources of recovery. This practice raises problems if the amount upon which the fee is calculated includes the recovery of uncontested no-fault benefits.

The charging of a contingent fee to collect uncontested no-fault benefits has been recognized as improper in a number of jurisdictions. Various state ethics authorities have previously opined that charging a contingent fee for collecting uncontested no-fault benefits is unethical.[1] New York has enacted a statute prohibiting contingent fees in no-fault claims.[2] Case law includes several reported opinions involving the professional discipline of lawyers for charging contingent fees to collect no-fault benefits.[3] All of these prohibitions are based upon the theory that collection of undisputed no-fault benefits does not involve risk and hence renders a contingent fee excessive.

Over the past several months, the Minnesota Lawyers Professional Responsibility Board studied the issue of contingent fees in no-fault matters. In addition to studying the authorities from other jurisdictions, the Board placed public notices inviting comments from the bar on whether it should issue a formal Board opinion on this subject. Of the nine comments received, eight were from plaintiff personal injury lawyers, and the other from the Minnesota Trial Lawyers Association (MTLA), which includes more than 1,300 members, many of whom represent clients in auto accident injury claims. The overwhelming majority of the comments agreed that charging of contingent fees to collect uncontested no-fault benefits is improper. An informal poll conducted by the MTLA reflected that only a few of its members charge fees of any type in processing no-fault claims.

While most of the comments agreed with the premise that charging contingent fees to collect no-fault benefits was improper, about half opposed the issuance of a formal Board opinion. Most of the opposition focused upon the difficulty of formulating a rule or definition that would comprehensively address or clearly describe exactly when no-fault claims are "uncontested." The MTLA pointed out that even where there has been no formal denial by the insurer, the claim can still be disputed or contested to the extent that legal representation is not only prudent, but necessary. See, e.g., *Neal v. State Farm*[4] in which the Court allowed the insurer to "suspend" instead of denying or terminating benefits until the claimant had submitted to an independent medical examination. Even though the Minnesota no-fault system is over 25 years old, the "suspension" of benefits procedure and nomenclature originated within the last five years. Several comments, including the MTLA's, expressed the belief that existing ethics rules were sufficient to address abusive fee practices in the no-fault area.

The Board's Opinion Committee considered these comments when it recommended that no formal opinion regulating no-fault fees be issued. At its April meeting, the Board approved the Opinion Committee's recommendation.

A number of factors were cited in determining that an opinion was not necessary. Information from the Director's Office did not indicate that charging contingent fees in uncontested no-fault claims was a pervasive problem. Only a handful of complaints including such allegations have been filed in the past several years. An even smaller number involved no-fault claims that were clearly uncontested. This observation, along with the MTLA's indication that very few of its members charge any type of fee in uncontested no-fault claims, caused the committee to conclude that the vast majority of lawyers recognize the impropriety of contingent fees in uncontested no-fault matters. Moreover, it appears that many lawyers who handle no-fault claims do so on a *pro bono* basis unless the claims proceed to the arbitration stage.

The Board agreed with the comments that existing ethics rules are adequate to address abusive no-fault fee practices. Specifically, Rule 1.5(a), Minnesota Rules of Professional Conduct, prohibiting excessive fees, can and will be used to scrutinize complaints about contingent fees in undisputed matters. The Board was concerned about the proliferation of rules and regulations governing lawyer practice and concluded that additional regulations are unnecessary unless there appears to be compelling need for them. All of the above factors weighed against the issuance of an opinion.

Lawyers should not interpret the Board's decision as condoning or authorizing contingent fees in the collection of uncontested no-fault benefits. The clear consensus was that contingent fees in uncontested claims are excessive unless the contingency rate or total amount charged is nominal. Attorneys who charge standard contingency rates in cases where there is virtually no risk of non-recovery will be subject to professional discipline.

In determining not to issue an opinion, the Board recognized the difficulty of defining with particular clarity just when no-fault claims are contested or disputed. Rather than attempting to articulate a definitional standard, which experience has shown can change over time, the Board chose to continue its current practice of considering such issues on a case-by-case basis. This decision recognizes the unique factors in each particular claim and the varying degrees to which no-fault claims may not be promptly paid.

Lawyers representing no-fault claimants can take certain precautions to limit disciplinary exposure to fee related complaints. Maintenance of time records for "legal services necessary" to collect no-fault bene-

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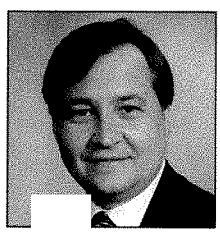

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fits is always beneficial in rebutting an excessive fee complaint. When a claim reaches the contested or disputed stage, lawyers can enter into a separate written contingent fee agreement for the collection of no-fault benefits. This separate agreement can be accompanied by disclosure to the client of the reasons the lawyer believes "legal services" have become necessary. In addition, at least one state supreme court has already held that such a disclosure must include advising the client that no-fault claims can be submitted to the insurer without a lawyer's assistance.[5]

A separate agreement or provision, which specifically authorizes the deduction of fees for recovering contested no-fault benefits, may also loom large in fee dispute litigation with a client. Minnesota courts have routinely placed the burden upon the lawyer to clearly communicate the basis for the compensation and where ambiguities exist, the courts have indicated they will construe the agreement in favor of the client.[6]

Finally, exercising good professional judgment will also limit disciplinary exposure. The Board and the Director's Office recognize the difficulty of predicting which claims are going to be contested. Both are also aware of the varying degrees to which claims can be disputed. As in any other representation, the total fee charged for assisting a client in a no-fault claim should be commensurate with the amount of legal services provided and the risk of non-recovery. Where the services are limited or clerical in nature and the risk of non-recovery is slight, the charging of a standard rate contingency fee is likely unethical. □

NOTES

1. See e.g., *Utah State Bar Ethics Committee Op. 114 (1992)*; *Maryland State Bar Committee on Ethics Op. 76-1 (1976) and 77-4 (1977)*; *North Carolina State Bar Op. 35 (1987)*; *Georgia State Bar Formal Advisory Op. 37 (1984)*; *Oklahoma Bar Legal Ethics Op. 1641 (1995) and others.*
2. *NYCRR § 691.20 (e)(7).*
3. People v. Sather, *936 P.2d 576 (Colo. 1997)*; In re Lehman, *690 N.E.2d 696 (Ind. 1997)*; In re Hanna, *363 S.E.2d 632 (S.C. 1987)*; State Bar v. Tatterson, *352 S.E.2d 107 (W. Va. 1986)*; In re Hausen, *488 N.Y.S.2d 742 (App. Div. 1985)*; In re Kemp, *496 A.2d 672 (Md. 1985).*
4. *529 N.W.2d 330 (Minn. 1995).*
5. Archuyleta v. Hughes, *969 P.2d 409, 414 (Utah 1998). The court also said the client should be advised that a fee will be taken from the no-fault payments if the client uses the lawyer's services to collect the no-fault benefits.* See also *Arizona State Bar Op. 87-16 (1987), where the ethics committee stated that contingent fee agreements "must include a provision that makes clear against what fund the contingent fee is to be calculated."*
6. See e.g., Untiedt v. Grand Labs, *532 N.W.2d 571, 575 (Minn. App. 1996) in which the court denied the attorney's attempt to collect 40 percent of the attorney fees and costs recovered because the fee agreement did not clearly indicate the contingency rate would be applied to fees and costs.* See also Cardenas v. Ramsey County, *322 N.W.2d 191 (Minn. 1982), in which the court cited an attorney's sophistication and fiduciary status as a basis for favoring an interpretation of the fee agreement that comported with the client's expectation.*