



NEW JERSEY STATE BAR ASSOCIATION

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Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Attention: Retainer Fee Agreements in Fee-Shifting Cases
Hughes Justice Complex, P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Recommendations re: Retainer Fee Agreements
In Fee-Shifting Cases

Dear Judge Grant:

The New Jersey State Bar Association (NJSBA) thanks the Court for extending the time to review and comment on recommendations made by the Advisory Committee on Professional Ethics (ACPE) relating to retainer fee agreements in statutorily based discrimination cases in furtherance of the Court's decision in *Balducci v. Cige*, 240 N.J. 574 (2020). As you may know, the NJSBA participated in the *Balducci* case as *amicus curiae* because of the anticipated impact of the decision on practicing attorneys and their clients. The NJSBA is grateful for the opportunity to provide comments on these proposals resulting from that decision, as they will have broad ramifications to its members and practicing attorneys as a whole.

The NJSBA appreciates the time and effort the ACPE spent developing these proposals and recognizes that it is the committee charged with examining ethics related matters. However, the NJSBA strongly suggests that the proposals, with the comments submitted, be further reviewed by the relevant Court Rules Committees and then presented in the ordinary cycle which rule changes follow. Those committees are best suited to fully evaluate the impact of these proposals on the everyday practice of law and following that process will ensure the greatest opportunity for various perspectives to be discussed, debated and considered.

In offering the NJSBA's comments, we note the ACPE's recommendations expressly address "retainer fee agreements in statutorily fee-shifting discrimination cases." As such, the comments below are limited to statutorily-based discrimination case retainers. To the extent there is any consideration of application to retainers for other types of cases, the NJSBA reserves the right to amend its comments and expressly requests such an opportunity.

The NJSBA's specific comments on each proposal are:

1. Explicit Disclosure of Identifiable Fees or Costs That Clients Must Pay; Oral Review of Such Provisions

The NJSBA agrees that retainer fee and cost disclosures be made in writing in clear, plain language, consistent with existing Rules of Professional Conduct (RPC) 1.4 and 1.5; however, a clear, plain language retainer contract compliant with the RPCs does not and should not require additional oral review. This new requirement would constitute a significant and unjustified departure from current contract law and would raise potential statute-of-fraud issues. Furthermore, it has the capacity to dilute an otherwise binding contract based on a client's subjective experience of the oral contract review, not the language in the written agreement. An oral review of the retainer agreement in *Balducci* would not have remedied the flawed agreement therein. In fact, it was the alleged conversations that occurred during the retainer process which were at the core of the dispute in that litigation. Formalizing a process that has the potential to cause that issue in case after case will only exacerbate the very problem the Court is seeking to address.

2. Estimated Fees and Costs and Range of Value of Case Set Forth at the Initiation of Representation

The NJSBA opposes a requirement that lawyers provide clients with an estimate of fees and costs and the range of case values at the initiation of representation. Every case is unique and much of the attorney time and costs spent on any given case is not reasonably predictable at case initiation. There are many variables that will change costs and value, such as the availability of relevant policies of insurance, the financial health of the parties, documentary support for the claims that may arise through the course of discovery, the need for multiple experts, and the presentation of witnesses. Predicting costs and case value at or near the outset of representation is not only unreliable, but also likely to set inaccurate expectations of the client. Even more, it may result in a client being unreasonably encouraged to choose an attorney based upon the value the attorney places on the case. In addition, attorneys who fail to meet or exceed initial projections, even if it is through no fault of their own, may be met with a new variety of legal malpractice claim. It is not fair to the client or the attorney and only jeopardizes the process of retaining counsel. Retainers are not opinion letters as to case value, nor should they be.

The NJSBA is mindful that at case initiation, should an attorney find there is sufficient information available to speak to probable case value, costs or fees, disclosures may be made to the client pursuant RPC 1.4. The propriety of any such disclosures should be assessed by the attorney on a case-by-case basis. However, lawyers should not be required to speculate as to unknown or uncertain factors at the earliest stage of retention.

3. Continuing Obligation to Inform Clients About Rising Fees and Costs

The NJSBA believes this recommendation is consistent with a lawyer's current continuing obligation to keep a client reasonably informed of fees and costs associated with litigation. Mindful of the ethical obligations in RPC 1.2 and 1.4, attorneys have a fiduciary responsibility to take the best actions for their client's case and to communicate progress and other changes in status to the client, which may include periodically sharing information regarding accumulated fees and costs. The nature and frequency of these communications may depend upon many factors, including the type of legal engagement, a retainer's terms, a client's expressed preferences, the nature of costs expended or fees accrued, or material changes in case status that may cause an increase or decrease in costs and fees. Diligent practice conforming with the current RPCs should yield a reasonable exchange of rising fees and costs on a schedule that makes sense for the client and the case.

4. Obligation to Notify Client That Fees and Costs Are Likely to Invade Client's Recovery; When Fees and Costs Are Likely to Exceed Client's Recovery, Client Must Give Informed Consent on Whether to Continue Litigation

The NJSBA believes that the current guidance in RPC 1.4 to keep clients reasonably informed address the concerns this recommendation seeks to ameliorate. Attorneys should be permitted to use their best judgment and discretion about the specific information that is necessary to meet their obligation to communicate with a client to ensure the client can make informed decisions about the case. Any additional requirements would be burdensome and create confusion.

5. A Contingency Fee Agreement When There is No Risk of Nonpayment of Fee is Presumptively Unreasonable

The NJSBA opposes this recommendation as presented without a definition of "risk." While in concept a contingency fee arrangement with absolutely no "risk" is unreasonable, there can be reasonable arrangements with reduced "risk." In addition, RPC 1.5 already requires an attorney's fee to be reasonable. This standard would appear to address concerns aimed at contingency fee agreements that require alternative payments of an hourly or other type of fee.

6. A Contingency Fee on Combined Damages and Fee Award Is Not Presumptively Unreasonable

The NJSBA supports the recommendation that a contingency fee on combined damages and fee award is not presumptively unreasonable.

7. A Retainer Agreement May Not Prohibit Client from Settling Case When Settlement Waives Lawyer's Fee Award

The NJSBA agrees that a retainer may not prohibit a client from settling a case when the settlement provides for waiver of a statutorily based fee award, but notes that there are remedies for situations where a matter is settled without fees or for a non-monetary resolution, such as *quantum meruit* fees. Those remedies should continue to be permitted to ensure counsel are reasonably compensated for services rendered to effectuate the objectives of the fee-shifting statute at issue. The retainer agreement should specifically address the method of computation of an attorneys' fee where the terms of settlement do not address plaintiff's attorneys' fee.

8. There Should Not Be a Cap on Fees Recoverable in Statutory Fee-Shifting Cases, But Lawyers Must Place in the Retainer Agreement When the Fee Percentage Is Higher than 33 1/3%

The NJSBA supports the recommendation that there should be no cap on fees recoverable in statutory fee-shifting cases, however, the NJSBA opposes the recommendation that "lawyers who charge fees that are above 33 1/3% be obligated to inform clients, either in the retainer agreement or orally, that their fees are higher than the presumptive percentage of the recovery amount." There is no "presumptive percentage of the recovery" applicable to fee-shifting discrimination cases, so any reference to same would be incorrect and potentially misleading. RPC 1.5(a) requires that attorney fees are reasonable, and RPC 1.5(c) requires that a "contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." Thus, disclosure of the percentage is already mandated irrespective of the actual agreed-upon number.

9. There Need Not be Proportionality Between Fee Award and Damages Award

The NJSBA supports the recommendation that there need be no proportionality between the fee award and damages award.

Again, the NJSBA appreciates the opportunity to provide comments on these important and potentially far-reaching recommendations. We hope the comments prove valuable to the Court's consideration, and we stand ready to provide further comments or assistance as needed.

Respectfully yours.



Domenick Carmagnola, Esq.
President

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cc: Jeralyn L. Lawrence, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director