

QUESTION: I received the referral of a case that I agreed to take as a contingency fee matter. We ultimately prevailed in the case and now have the opportunity to petition the court for an award of attorney fees. The referring lawyer did not work on the case, and therefore, will not have any billable time included in the fee petition. Can I ethically receive both a court award of attorney fees and recover fees under the contract with the client? Also, can I ethically give the referring lawyer a portion of the attorney fees the court awarded.

ANSWER:

Question # 1: You can ethically take a fee under the contingency agreement with the client and petition the court for an award of attorney fees under any applicable fee-shifting statute if the combined amount does not rise to the level of a “clearly excessive fee” under Rule 1.5 (a), Alabama Rules of Professional Conduct. Importantly, you must disclose to the court that you plan to take a fee under both the fee petition and the contingency agreement. Furthermore, any fees awarded by the court must be used as a credit and/or offset toward the amount owed by the client under the contingency agreement. If the attorney fee amount awarded by the court exceeds the amount you would take under the contingency agreement, you can not take any additional fee from the client. There may be an exception for taking an additional fee from the client if the court awarded fees exceeds the total amount contemplated by the contingency agreement, however it would be the rare instance. It would further need to be approved by the court awarding the fee.

Question # 2: You can ethically share court awarded fees with a referring lawyer whose work, if any, was not included in the fee petition.

DISCUSSION: Under Rule 1.5 (a), Alabama Rules of Professional Conduct, “[a] lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee.” Whether a fee is “clearly excessive” is determined by the factors listed in Rule 1.5(a)(1)-(9), Alabama Rules of Professional Conduct. Under your contingency fee agreement with the client, your fee is limited to 40% of the net recovery of the settlement or litigation proceeds. For purposes of simple math, if your client recovered \$100,000 as a net recovery, then you would be entitled to a fee of \$40,000 ($\$100,000 \times .40 = \$40,000$) under the fee agreement. You have indicated that you are going to petition the court for an award of attorney fees under a fee shifting statute. Whether you can take any additional fee from the client depends on the amount the court awards you on your fee petition. Using the illustration above, if the court awarded you an attorney’s fee of \$35,000 as a result of the fee petition, then you could ethically recover an additional \$5,000 from the client since that total would equal the \$40,000 allowed for under the contingency agreement. If the court restricts your ability to get any additional fees from the client, then you would be ethically obligated to follow that order, absent a successful appeal. If the court were to award you an attorney fee in excess of the \$40,000, you could accept that amount, but you should not take any additional fee from the client since it exceeds the amount you are entitled to under the contingency agreement. It is the opinion of the Disciplinary Commission that you would be taking a

“clearly excessive fee” if you took an additional fee from the client in circumstances where the court has already awarded you more than you were entitled to under your agreement with the client.

As to your second question, assuming the court has not specifically restricted your ability to share the fees received from the fee petition with another lawyer, it is ethically permissible to share a portion of those fees with a referring lawyer. Under Rule 1.5(e), Alabama Rules of Professional Conduct, a division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if:

- (1) Either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;
- (2) The client is advised of and does not object to the participation of all the lawyers involved;
- (3) The client is advised that a division of fee will occur; and
- (4) The total fee is not clearly excessive.

You have indicated that you received the case at hand via a referring lawyer and that it was taken as a contingency fee matter with a written agreement from the client. Since this case was taken as a contingency fee matter, payment of court awarded fees would be permissible under Rule 1.5(e)(1)(c), even though the fee included a court award. Furthermore, if the referring lawyer agreed to accept joint responsibility for the case, in writing, even though he did not perform any work, the referral fee could be paid under Rule 1.5(e)(1)(b).