

FILED
July 27, 2006

released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring:

I write separately to underscore what should be, but unfortunately isn't always, readily apparent: an attorney is entitled to collect a *reasonable* fee – *not* a windfall fee -- for the representation of a client - whether the fee is determined by a statutory fee award, a contingent fee agreement, or on a per-hour basis. Indeed, counsel should be reminded that it is not the court's duty alone to ensure a reasonable fee in a case. It is first and foremost the professional obligation of the attorney to do so. Rule 1.5 of our *Rules of Professional Conduct* mandates that a lawyer's fee be reasonable.¹ By enforcing this Rule, courts protect

¹ Rule 1.5. Fees.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and results obtained;
- (5) the time limitations imposed by the client or by the circumstances;

(continued...)

¹(...continued)

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. 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. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representations;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

(4) The requirements of “services performed” and “joint responsibility” shall be satisfied in contingent fee cases when:

(1) a lawyer who is regularly engaged in the full time practice of

(continued...)

everyone's access to justice, regardless of financial circumstances.

To protect the fairness and integrity of our judicial system, courts must ensure that a fee such as that at issue in this case be reasonable based on such factors as the difficulty of the work performed, the degree of success achieved, the amount of work reasonably needed to achieve the result, the societal benefit to bringing and/or defending the action, the prevailing local rate for comparable professional services, and so on.² Since a primary purpose for so-called fee-shifting statutes is a hoped-for societal benefit, I think the degree of success achieved is necessarily a primary component in a court's determination of an appropriate fee. While the application of a percentage formula by a court may be arbitrary, the degree of success achieved in a given case may include considerations of the actual benefit to the recovering plaintiff; the likely, not simply "possible", benefit which society will receive; and the number of actual people who will benefit from the result in the

¹(...continued)

law evaluates a case and forwards it to another lawyer who is more experienced in the area or field of law being referred; (2) the client is advised that the lawyer who is more experienced in the area or field of law being referred will be primarily responsible for the litigation and that there will be a division of fees; and, (3) the total fee charged the client is reasonable and in keeping with what is usually charged for such matters in the community.

² A complete list of the factors determining reasonableness in this jurisdiction is set forth in syllabus point five of the majority opinion. *See also*, W. Va. R. Prof. Cond. 1.5, n. 1, *supra*.

case. The court, I believe, may likewise consider such factors as how efficiently the recovering side prosecuted its case in relation to the difficulty and novelty of the issues raised. In this instance, professional fees awarded pursuant to fee-shifting statutes, ought not become incentives for attorneys to waste judicial resources by use of “shotgun-style” pleadings, unnecessary discovery, and related unneeded actions.³ A court is, in my opinion, duty bound to insure that fees are fair, reasonable and that they do not exploit either the parties or the judicial system⁴

It is within a court’s inherent power to supervise the collection of attorney fees, including monitoring contingent fee agreements for reasonableness and examining the same in light of statutory fee awards. *Jenkins v. McCoy*, 882 F.Supp. 549, 553-5 (S.D.W.Va.

³ The determination of reasonable fees may, however, properly include the court’s consideration of the degree to which a recovering party was forced to respond to frivolous and otherwise vexatious strategies utilized by the non-recovering party.

⁴ It has correctly been said that:

Courts can open their doors to the public, but they must rely on lawyers to guide the litigant through the passageways. In entrusting the litigant to the legal profession, courts recognize the possibility that a self-serving lawyer may ignore the best interests of the courts and his clients. Attentive to the demands of the public interest, courts retain supervisory power over the attorney-client relationship. Fees are central to that relationship, and contingent fee arrangements are therefore subject to the courts’ supervision.

Jenkins v. McCoy, 882 F.Supp. 549, 555 (S.D.W.Va. 1995), *quoting*, *Cooper v. Singer*, 719 F.2d 1496, 1505 (10th Cir. 1983).

1995). In any fee dispute, it is the attorney's burden to demonstrate the reasonableness of the fee claimed. *Jenkins*, 882 F.Supp. at 553. When an attorney seeks a statutory fee award, he or she has both a legal and ethical duty to disclose the existence of any contingency agreement so that it may be considered in analyzing the appropriate statutory award to be made, if any. *Id.* at 558. Such a disclosure is mandated to protect the public confidence in the judicial system⁵ and to ensure the reasonableness of any fee obtained by the attorney.

In *Jenkins*, then-Chief Judge Charles Haden,⁶ considered a situation similar to that posed in the instant case. In *Jenkins*, a statutory attorney fee award was ordered in a civil rights action brought pursuant to 42 U.S.C. § 1988. After the award was made, the court learned that the plaintiff's attorney (who was initially appointed to represent the plaintiff by the court) had also received more than forty percent of the jury award from his

⁵ An attorney has a recognized personal interest in a statutory fee award. As noted by then- Chief Judge Haden in *Jenkins*,

where the lawyer has a heightened personal interest in the outcome of litigation, as he does in pure fee litigation, greater, not lesser candor, is to be expected of counsel. Although the right to pursue the fee belongs to the client, the public perception is that the lawyer has a vested interest in the fee, so maintenance of the integrity of the judicial system demands a greater level of candor from the lawyer. "The [judicial] system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end." *United States v. Shaffer Equipment Co.*, 11 F.3d at 457-58.

⁶ Chief Judge Haden was also a former Justice of this Court from 1972 to 1975.

client. In negating the contingency fee agreement, Chief Judge Haden had the following appropriately harsh words for attorneys seeking a windfall fee recovery by taking advantage of both statutory and contingent fee awards:

The Court emphasizes it exercises its inherent powers over attorney fee agreements reluctantly. Such matters are, in all but rare instances, left to the parties. However, the Court must be mindful of its duties to oversee lawyers, who are its officers after all. When lawyers seek to take unfair advantage of unsophisticated clients and then conceal such shenanigans from the Court, all in an effort to gain financially at a client's expense, the Court vigorously must protect the integrity of the system of civil justice by utilizing its inherent oversight authority.

Lawyers perform an important societal function, acting as advocates for those unschooled in the law. Among the most noble and admired services a lawyer can provide is representation to an indigent. Such representation deserves reasonable compensation and Congress has given its encouragement by enacting § 1988 and similar fee providing statutes. [An attorney] is to be commended for agreeing to appointment as counsel for the Plaintiff and his success in this case has been and is applauded by the Court. He was entitled to reasonable fees under § 1988. But by violating the trust of both the Plaintiff and this Court he unfortunately tarnishes the profession as a whole, encouraging the conventional wisdom that lawyers are greedy and self-serving.

Id. at 559-60 (internal citations omitted).

This Court appropriately negated the fee initially awarded by the circuit court

herein. An attorney is not entitled to both a statutory fee award and a contingency award absent appropriate offsets which insure the reasonableness of the total fee obtained. Upon remand, I strongly encourage the circuit court to consider the reasonableness of the *total* fee to be obtained by counsel. Absent special circumstances, such as protecting the fundamental rights of citizens against governmental discrimination or intrusion, an attorney's recovery of fees by court order should not be grossly disproportionate to the actual relief obtained on the client's behalf.