

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 636**

August 2013

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a court-appointed criminal defense lawyer to accept payment from a county based on a fee schedule that authorizes fixed fees based on the stage at which the case is disposed of?

STATEMENT OF FACTS

A Texas county pays court-appointed lawyers for their services representing indigent criminal defendants according to a fee schedule adopted by the District Court judges in the county. The fee schedule permits lawyers to choose in advance either to receive the fee specified in the fee schedule for all services provided in a case or to bill by the hour. The question presented applies only to fees payable pursuant to the fee schedule.

The county's payment schedule provides that the fixed fee for representation in a criminal case varies depending on the type of disposition of the case. For example, the fixed fee for pre-indictment dismissals is one-half of the fixed fee payable if a case is disposed of by guilty plea or dismissal after indictment, and the highest fee is paid if the case is tried.

DISCUSSION

Rule 1.04(e) of the Texas Disciplinary Rules of Professional Conduct provides that "[a] lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

The primary reason for the ban on contingent fees in criminal cases is that "[a] fee based upon acquittal creates a conflict of interest because it may tempt a defense lawyer to push for trial rather than a plea bargain, or to forego mitigating evidence if it could lead to conviction of a lesser-included offense." Annotated Model Rules of Professional Conduct (American Bar Association, 7th Ed. 2011), Rule 1.5 Annotation—Subsection (d): Contingent Fees in Domestic Relations Matters and Criminal Cases at page 125.

In the facts presented, the amount paid pursuant to the county's fee schedule is not based on whether a lawyer obtains a favorable result for the client. Rather, a lawyer is paid the fee specified in the fee schedule without regard to the outcome. The rationale behind the differing fees appears to be that there are normally differences in the amount of time and effort required for representations of criminal defendants that result in different dispositions of the cases. Thus

a pre-indictment dismissal should usually require less time and effort than a guilty plea based on a plea bargain. Similarly, a trial normally will require the most effort. The county's fee schedule reflects these expected differences in time and effort involved in the representation.

The Committee is of the opinion that "an agreement for payment of one amount if the case is disposed of without trial and a larger amount if it proceeds to trial is not a contingent fee but merely an attempt to relate the fee to the time and service involved." ABA Standards for Criminal Justice: Prosecution Function and Defense Function (American Bar Association, 3d ed. 1993) Commentary to Standard 4-3.3 at page 157.

In *Fogarty v. State*, 513 S.E.2d 493 (Ga. 1999), the Supreme Court of Georgia cited the Commentary to ABA Standard 4-3.3 quoted above in support of its holding that an agreement to pay defense counsel \$25,000 in advance, with the fee reduced to \$10,000 if the charges were dismissed before trial, was a valid fee arrangement. The Court reasoned that the "critical element" in a contingent fee contract is the existence of some chance that the lawyer will not receive the fee because of an unwanted result for the lawyer's client. The fact that the agreement in that case provided for a greater or lesser fee depending upon the extent of counsel's services did not make the agreement an improper contingent fee contract. 513 S.E.2d at 496.

In the factual situation here considered, the county's fee schedule does not constitute an impermissible agreement for a contingent fee in a criminal case because the lawyer is paid without regard to the outcome of the case. The county's fee schedule attempts to rationally relate the fees payable to the differences in the amount of time and effort required to represent the client in various dispositions of typical cases. Consequently, the fee schedule does not result in impermissible contingent fees in criminal cases.

CONCLUSION

It is permissible under the Texas Disciplinary Rules of Professional Conduct for a court-appointed criminal defense lawyer to accept payment from a county based on a fee schedule that authorizes fixed fees based on the stage at which a case is disposed of, provided that the amount payable is not contingent upon a successful outcome for the client and the fee schedule is based on an attempt to rationally relate the fee payable to the time and effort involved in the representation.