WONG·FLEMING
ATTORNEYS AT LAW

February 9 2013 Issue 3

The Gavel
Diverse Viewpoints in the Law

Ian S. Clement

Former Cocounsel Must Share the Fruits of Their Labor

By Ian S. Clement, Litigation News Contributing Editor – January 23, 2013

The Colorado Supreme Court permitted a firm that had withdrawn in a contingency fee case before recovery by its clients to pursue a quantum meruit claim against its former cocounsel for a share of attorney fees even though Colorado law prohibited recovery from its former clients. The court examined the divergent paths taken by New York and California courts concerning the accrual of counsel-versus-counsel quantum meruit claims, aligning itself with the California approach and illustrating the potential risks of failing to address the consequences of withdrawing in agreements to co-represent litigants.

The Colorado Supreme Court Decision
In Melat, Pressman & Higbie L.L.P. v. Hannon Law Firm, L.L.C., multiple firms entered a written contingency fee agreement to govern their representation of plaintiffs in litigation related to contamination from a uranium mill. Their agreement did not address if or how a firm would be paid if it withdrew during the course of the litigation. Because of a strained relationship with one of the other firms, The Hannon Law Firm, L.L.C. withdrew mid-representation.

Six years later, the plaintiffs settled the litigation, with the remaining firms sharing the one-third contingency fee. They paid Hannon for its costs but would not share the contingency fee. As Colorado law precluded Hannon from recovering legal fees from its former clients because the engagement agreement did not disclose that possibility, Hannon filed a quantum meruit claim against its former cocounsel.

Withdrawn Counsel May Pursue Quantum Meruit Claim Against Cocounsel
The Colorado Supreme Court held that Colorado law did not bar the firm from recovering in quantum meruit from its former cocounsel, even if it could not maintain an action against its client, because the Colorado law does not restrict fee sharing or equitable recovery between attorneys. The court reasoned that the legislature intended Colorado law concerning contingency fees to protect clients, not co-counsel.

The court additionally discussed the split among state courts as to when a quantum meruit claim accrues in the context of disputes over contingency fees. Following the California rule as set forth in Fracasse v. Brent, the court ruled that a withdrawn counsel's claim accrues when that attorney knew or should have known of the occurrence of a judgment or settlement resulting in the payment of attorney fees. Reasoning that, in a contingent fee case, counsel do not expect to recover fees or costs unless the client recovers, the court concluded that a quantum meruit claim accrues when the expectation to recover legal fees has been frustrated. The court additionally considered the value of attorney fees in contingency cases to be too speculative to require that a quantum meruit claim be filed before settlement or judgment.

By following the California court's lead, the court in Melat eschewed the New York rule, accrual of a quantum meruit claim occurs immediately upon the attorney's withdrawal or discharge. The court in Melat found that alternative approach would force remaining counsel to pay withdrawn counsel out of their own pockets and would not encourage attorneys to work through their differences for the good of the client.

Other Courts Weigh In

The California and New York courts presented only two approaches to address quantum meruit claims filed by disgruntled counsel. The Georgia courts take an even more restrictive approach than New York. In Kirshner & Venker, P.C. v. Taylor & Martino, P.C., the Georgia Court of Appeals held that an attorney discharged before a contingency occurred could not later recover in quantum meruit from his former cocounsel.

Some courts additionally divide litigation proceeds subject to quantum meruit claims on a pro rata basis, while others take a qualitative look at the particular tasks completed. Like the court in Fracasse, the Tennessee Court of Appeals ruled in Johnson v. Hunter that a quantum meruit award is based upon the value of the benefits conferred to the client instead of simply the time expended by counsel.

Get It in Writing While the Firms Are in Love

"At a minimum, the Melat opinion confirms the importance of written agreements in contingent fee cases," says Gregory R. Hanthorn, Atlanta, cochair of the ABA Section of Litigation's Ethics and Professionalism Committee. "Attorneys should take the same care in drafting co-representation agreement as they do in drafting retainer agreements," says Barry E. Cohen, Washington, D.C., chair of the Multi-jurisdictional Practice subcommittee of the Section of Litigation's Ethics and Professionalism Committee.

In drafting those agreements, "attorneys should consider all probable contingencies and incorporate solutions for those possibilities in their fee sharing agreements," says Cohen. Firms should be thorough at the outset, when relationships are amicable; "after positions harden, it naturally becomes harder to negotiate," says Hanthorn. "Specifically, firms and clients should consider specifying how the appropriate quantum meruit allocation or fees will be calculated after withdrawal," Hanthorn continues.

"Prior to withdrawal, counsel should keep the same type of time records that they would on hourly rate cases; this attention to detail should aid withdrawing lawyers in challenges before the court from co-counsel who have remained," says Hanthorn. "Counsel should also consider periodically sharing the details of time spent on particular tasks with cocounsel. This way, should withdrawal happen, the withdrawing counsel will be able to certify that cocounsel were aware of and accepted the benefit of withdrawing counsel's earlier efforts."

After withdrawal, counsel also might consider filing a charging lien or other procedures available under local law to "put the parties and other lawyers on notice that the withdrawing counsel claims an interest in the proceeds of the litigation," he recommends. "Counsel also could consider sending the remaining firm periodic letters reminding them that withdrawn counsel has an interest in the litigation."

"Moreover, to the extent possible, withdrawn counsel should monitor the litigation for a recovery and be wary of the applicable statute of limitations," says Hanthorn. "Reducing difficulties in co-representation situations can come down to a firm's effectiveness in two areas: communication and documentation," he warns.

Keywords: quantum meruit, cocounsel, withdrawal, fee agreements, unjust enrichment, contingency fee

Related Resources

- » 51 Am Jur 2d Limitations of Actions §§ 127, 139.
- » Fracasse v. Brent, 6 Cal. 3d 784 (1972).
- » Tillman v. Komar, 181 N.E. 75 (N.Y. 1932).
- » Kirshner & Venker, P.C. v. Taylor & Martino, P.C. 277 Ga. App. 512 (Ga. Ct. App. 2006).
- » Johnson v. Hunter, 2001 Tenn. App. LEXIS 795 (Tenn. Ct. App. Oct. 25, 2001).