Steele v. William A. Hazel: Reeling In The Big One

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- Background

- Case Selection And The Art Of Patience

- Spend The Money
    - Investing In The Future

- Assemble A "Team" of Experts
    - Or, Are You A "One Stop Shop"?

- Treading In Unfamiliar Waters
    - Life Care Plans
    - Medicare Set-Asides
    - Health Care Contracts
    - Special Needs Trust
    - Medivest
    - Guardians/Conservators/Trustees

- Who Is Your Client
    - *Steele:* Claimant, Claimant's Father, Claimant's Parents, Trust/Elder Attorney
    - Potential Conflicts

- Sizing Up The Opposition: Defense Counsel And Adjuster
    - Why does the carrier want to settle?
    - Answer to that question and you're ready to plan your strategy
    - Are defense counsel & the adjuster completely aligned?
    - Will defense counsel sell your theme?

- Develop A Theme
    - Buying the claim v. the cost of shifting the risk
    - Eliminating the carrier's best case scenario as an option
    - Building your fee into the settlement amount

- Negotiations: More Patience
    - Prevent your client from getting wobbly knees
    - Set your goals and stand your ground
    - Postpone mediation if necessary
    - Empower your clients: explain process, goals, strategies
    - Risk/anxiety: more likely defendants will bend than withdraw offer

- Don't Discount the Role of LUCK: When preparation meets opportunity

- Fight For Your Fee: 68 Pages Worth

  Abraham Lincoln famously said "A lawyer's time and advice are his stock and trade." In the context of contingency fee cases, a lawyer is not paid based on a measure of time expended but a percentage of the result achieved. For all of the bombast over the years suggesting that the Fourth Circuit Court of Appeals is a bastion of doctrinaire conservatism, a 2010 decision from the 4th Circuit provides a fierce defense of the sanctity of the contingency fee as a means of allowing clients with limited resources to obtain premium representation.

  Every practitioner should thus familiarize themselves with *In re: Abrams & Abrams, P.A.; St. Martin, Williams and Borque*, 605 F.3d 238 (4th Cir. 2010)(attached) in which the Court overturned a district court's steep reduction of a contingency fee. In reviewing a settlement of $18,000,000 obtained for an incompetent plaintiff the district court reduced the plaintiff's attorney's fee from the $6,000,000 permitted under the contingency fee contract to a fee of $600,000. Thus, the court imposed a 90% reduction despite the fact that it was undisputed that the remainder of the settlement, $12,000,000, was enough to fully fund all of the plaintiff's future medical and financial needs. *Id*. The court arrived at the $600,000 figure by multiplying a **guess** made by counsel that they had expended approximately 2,000 hours by an hourly rate of $300.00. *Id*.

  - The Court found that the district court has abused its discretion by failing to recognize "the significance of the contingency fee in this case."
  - In defending the use of contingency fee, the Court explained that "**contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation. Sadly, a plaintiff sometimes has little to offer a lawyer other than his personal plight**."
  - "**Ignoring reasonable contingent fee arrangements or automatically reducing them would impair claimants' ability to secure representation**." (citing *Wells v. Sullivan*, 907 F.2d 367, 371).
  - "**The point remains that contingency fees are an acknowledged feature of our legal landscape, approved by legislative and judicial bodies alike, that help secure for the impecunious access both to counsel and to court**."
  - "**Successful outcomes often make risks seem less risky in hindsight than they were at the time, and the court should not have ignored those risks merely because at some later point in litigation the defendant found it in its interest to settle**."

    - in *Steele*, it was only after representing the claimant essentially for free for 7 years and paying over $26,000.00 in costs that the substantial result was achieved.

- the Court found that the district court failed to:

  consider the related point that contingency fee agreements transfer a significant portion of the risk of loss to the attorneys taking a case. **Access to the courts would be difficult to achieve without compensating attorneys for that risk**. The risks a lawyer assumes are not dissimilar to those undertaken, for example, by a realtor on commission, who accepts the possibility of no sale as well as the potential reward of a quick transaction. In addition, it may be necessary to provide a greater return than an hourly fee offers to induce lawyers to take on representation for which they might never be paid, and it makes sense to arrange these fees as a percentage of any recovery. "[M]any attorneys are unwilling to accept the risk of nonpayment without a guaranteed contingency percentage of the recovery." *Wells*, 907 F.2d at 371. In other words, **plaintiffs may find it difficult to obtain representation if attorneys know their reward for accepting a contingency case is merely payment at the same rate they could obtain risk-free for hourly work, while their downside is no payment whatsoever**. **Conversely, an attorney compensated on a contingency basis has a strong economic motivation to achieve results for his client, precisely because of the risk accepted**. As the Seventh Circuit has explained, **"[t]he contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains**." *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir.1986). **A contingency fee "automatically handles compensation for the uncertainty of litigation" because it "rewards exceptional success, and penalizes failure**." *Id.* at 326. Because the district court's ruling failed to recognize that contingency fees provide attorneys due consideration for the risk they undertake, it reduced counsel's fee to a level that few attorneys would have accepted at the outset of litigation, when success was by no means assured and the size of any settlement or judgment was unpredictable.

- Applied to case:

  - I took on the risk of representing the claimant and his representatives with no certainty that I would ever earn more than minimum wage when all was said and done. **That is the nature – and the "beauty" -- of the contingency fee**.
  - We all have had cases where because of some misstep by the claimant, or unexpected shenanigans by the carrier the

ultimate fee if divided by the time in the case amounted to less than minimum wage.

- If we must bear that burden – **and if we were unwilling to do so, countless claimants could not and would not obtain the compensation they were otherwise entitled to** – then why should we not likewise receive the benefit or the upside of a contingency fee.

- Arbitrary and unpublished limits on fees saddle the claimant's attorney with all of the risk yet none of the reward as contemplated in *Abrams*.

- Fees should "**reward[] exceptional success**" just as they are allowed to "**penalize[] failure**."