

CIVIL PROCEDURE

Major Changes in Minors' Cases

by Stephen Tucci

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Representing injured children is a breeze, isn't it? After all, insurance companies dole out easy money all the time for child injury cases just because "kids are cute," don't they? And they pay extra because they feel bad when kids don't have wage loss claims, right? You never have to worry your 10-year-old client will turn to you in her deposition and blurt out, "Mr. Tucci, you told me . . .," do you? And you absolutely never ever have to worry about a jury blaming your client's mother for his injury, when mom's biggest sin was "breathing the same air" her son was breathing? And because representing injured children is such a breeze, your fees always should be limited to a 25% contingency fee in child injury cases. Right? Wrong!

Effective January 1, 2010, the Judicial Council made major changes to the ways attorney's fees would be handled in matters involving minors and adults with disabilities. These are listed in California Rules of Court, Rule 7.955. A look into the "legislative history" behind the creation of these new rules shows what is out there to help understand these new rules. This shows the Civil and Small Claims Advisory Committee and the Probate and Mental Health Committee, along with a working group of experienced personal injury lawyers for both plaintiffs and defendants, worked for more than a year on a substantial revision of the Rules of Court and Judicial Council forms governing the court approval process for minors' compromises because of concern with a "significant lack of consistency across the state in the application of standards for awards in [minors' compromises]." *Report of Civil and Small Claims Advisory Committee and the Probate and Mental Health Committee, dated August 14, 2009, to the Members of the Judicial Council of California concerning Civil and Probate Practice and Procedure: Compromise of Minors' Claims, Settlement of Actions Involving Minors and Persons With Disabilities, and Disposition of Judgments in Favor of Minors and Persons With Disabilities*, at 7, 8, 10 (hereafter "Report").

The Committees' principal efforts centered on addressing the adoption by many local trial courts of an attorney's fee of 25% of the proceeds of the compromise as presumptively reasonable. "Over time, this percentage had become the default fee awarded in the great majority of cases, particularly when viewed as a ceiling." *Report* at 10. Troubled by this, the Committees stressed the importance of the availability of contingency fee representation to injured minors, as follows:

[M]ost injured persons could not even afford to retain capable counsel under any other fee arrangement. This is an even greater concern for injured minors or persons with a disability because they are likely to have fewer

resources than other injured persons. These vulnerable claimants could face a substantial denial of access to the courts if they cannot obtain representation by competent and experienced counsel in personal injury cases and in minors' compromise proceedings arising from them.

Id. (Emphasis added.)

During the comments phase, the Committees received the following from attorney Charles Tarr:
The custom and practice of most local courts to arbitrarily set fees at 25% is wrong. ***The risks, skills and costs required on cases involving injured minors do not make the attorneys' work worth less than it would be for an adult.*** The value of the services should not be determined by the age of the injured person at the time of the attorney's retention, but instead should be determined by the nature of the case, the attorney's skill, risks, costs, etc. The present arbitrary 25% "rule" makes it difficult for some claimants to find an attorney.

Report at 26 (emphasis added).

In response, the Committees wrote:

The Committees agreed with this comment. The changes proposed for rule 7.955 were to a considerable extent proposed to eliminate the presumptive 25% contingency fee and to replace local rules containing this provision with proper legal standards for courts to fairly evaluate requests for attorney's fees in these cases.

Id. (Emphasis added.)

To effectuate these goals, the Committees proposed due consideration be given to the fee agreement between the attorney for the minor and the minor's representative. The emphasis in the amended rule on the totality of factors affecting reasonable compensation ***should make it more rather than less likely that*** if a percentage of recovery is to be the measure of the fee, ***a higher percentage than 25% may be awarded*** in an appropriate case if the representation agreement provides for the possibility.

Report at 23 (emphasis added)

In all cases involving petitions for minor's compromises, the Judicial Council requires that the court use a reasonable fee standard when approving and allowing the amount of attorney's fees payable from money to be paid for the benefit of a minor. Cal. Rule of Court 7.955 (a) (1). Significantly, the Judicial Council preempted and barred the enforcement of any local rules concerning this field, declaring them null and void. Cal. Rule of Court 7.955 (d). The court is required to give consideration to the terms of the fee agreement between the attorney and the minor's representative in evaluating the fee request. Cal. Rule of Court 7.955 (a) (2).

In determining the adequacy of the consideration for the fee agreement, remember that "[a] contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable." *Rader v. Thrasher* (1962) 57 Cal.2d 244, 253. In *Ketchum v. Moses*, the California Supreme Court ruled:

A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on

such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans." (Posner, *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.) "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (Leubsdorf, *The Contingency Factor in Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct, rule 4-200(B)(9) [recognizing the contingent nature of attorney representation as an appropriate component in considering whether a fee is reasonable]; ABA Model Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof. Conduct, rule 1.5(a)(8).)

Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-1133. "The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." *Id.* at 1137, citing Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?* (1977) 126 U.Pa. L.Rev. 281, 324-325.

Caveat: the new rules do not require that the court rubber stamp any contingency fee agreement, even when all the statutory requirements are met and informed consent has been obtained. However, the opposite is true. If you limit your fee agreement to the old local standard of 25%, you will be limited to that. As a practical matter, many feel it has always been a mistake for attorneys to limit fees by contract to the old local standard, because even the old local standard was 25% "absent extraordinary circumstances." What happens if you happened to have an "extraordinary circumstances" case, but you limited your fee to 25%? No matter how extraordinary the circumstances, you have limited yourself to your contract rate. While you can't change any existing fee agreement, the better course going forward is to negotiate your fee agreement as you would with any other client, obtain the informed consent of the minor's representative, and be sure to include specific language in your agreement that the court will make the final fee determination.

ATTORNEY'S DECLARATION. California Rule of Court 7.955 (b) now contains a list of non-exclusive factors to be considered by the court in setting a reasonable attorney's fee. Pursuant to Cal. Rule of Court 7.955 (c), the minor's attorney is to address the applicable factors before the court in a declaration to the court. It is important that this declaration include all the facts relating to the relevant factors listed in Rule of Court 7.955(b) as well as any other factors relevant to efforts expended in obtaining the settlement. This will make the court's job easier. I have it on very good authority that we can do a better job with delineating the work involved and helping the court understand the fees we believe are appropriate. A thorough and well-written declaration will improve the likelihood of being awarded fees commensurate with the value of the work performed and the risk undertaken in these very important and challenging cases.