STATE OF VERMONT
CALEDONIA COUNTY, SS.

DENNIS STEINER and CAROL STEINER	:	CALEDONIA SUPERIOR COURT
	:	DOCKET NO. 244-7-03 Casc
v.	:	
CORBY GARY	:	

DECISION

This is a Small Claims case that came before the court for hearing on September 30, 2003 and October 29, 2003. Plaintiffs Dennis and Carol Steiner represent themselves, and Defendant Corby Gary is represented by Steven A. Adler, Esq.

Dennis and Carol Steiner seek return of $1,000 they paid to Attorney Corby Gary for legal work related to their claims of defects in their motor vehicle. Following the conclusion of the evidence on October 29, 2003, the court issued oral Findings and Conclusions on the record, and ruled (1) that the parties did not have a contract, despite the payment of the flat fee of $1,000, because there was no meeting of the minds concerning the purpose and scope of legal work to be done by Mr. Gary,[1] and (2) that the Steiners did not have a claim for attorney negligence, because they could not prove that any harm they suffered was proximately caused by Mr. Gary's work.

The court further stated that although there was no contractual basis upon which Mr. Gary was entitled to keep the $1,000 fee paid, he may be entitled to retain all or a part of the fee based on quasi-contractual principles, such as an implied promise to pay for benefit received, or the prevention of unjust enrichment. The court set a date by which Mr. Gary should submit his time records in support of any claim that he provided services of value and any memo of law he wished to submit, and a date by which the Steiners should file a reply.

Mr. Gary filed a Post Trial Memorandum together with a pre-bill worksheet purporting to show value of $1,775.62.[2] He specified that he does not seek additional payment over the $1,000 already paid, and argued that he provided services with a value at least as high as $1,000. Dennis Steiner filed a Post Trial Answer to Defendant's Memorandum, in which he argued, as he had in court on October 29, 2003, that he received no benefit from Mr. Gary's services and should not have to pay anything for them.

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[1] Contrary to a suggestion in defendant's post-trial memorandum, the court has not characterized the state of affairs as a "rescission."

[2] Attorney Gary submitted a pre-bill worksheet which shows 13.00 billable hours @ $135.00 per hour, for a total of $1,755.00, plus reimbursable expenses of $20.62, for a grand total of $1,775.62.

The remaining issue for the court is whether Mr. Gary is entitled to retain some or all of the $1,000 on a theory of quasi-contract. "Claims for quasi-contract are based on an implied promise to pay when a party receives a benefit and the retention of the benefit would be inequitable." DJ Painting v. Baraw Enterprises, 172 Vt. 239, 242 (2001). In determining the measure of recovery under a theory of quasi-contract, the court may focus on the value of the benefit conferred, or on the reasonable value of the services provided regardless of their value to the client. Id. at 242, n.2. The most significant requirement for quasi contract compensation is whether the Steiners have been unjustly enriched, which requires consideration of the 'totality of the circumstances.' Id. at 243.

Before the Steiners sought help from an attorney in Mr. Gary's office, they had experienced several problems with their 2002 Dodge Ram, and had considered on their own various legal avenues for relief, including filing court claims and "Lemon Law" arbitration. They had gone before the New Motor Vehicle Arbitration (Lemon Law) Board and lost after a hearing. They had ordered a transcript of that hearing and preserved the option for appeal by filing a notice of appeal. They had received notice of an appeal hearing scheduled in Caledonia Superior Court for July 25, 2002. Their first contact with Mr. Gary was on July 3, 2002, when Mr. Steiner and Mr. Gary discussed the history of problems with the vehicle and dealers, and the pending appeal. It was on that day that the $1,000 was paid. This court has found, as stated in the Findings and Conclusions based on the evidence, that the Steiners expected Mr. Gary to evaluate their options, whereas Mr. Gary believed he was hired only to pursue the Lemon Law Board appeal, and for that reason, there was no meeting of the minds.

In the absence of an agreement for the purpose and scope of the legal work that Mr. Gary was to perform on the Steiners' behalf, what work was it reasonable for Mr. Gary to do? It should be work that conferred benefit upon the Steiners, for which it is reasonable for the court to imply a promise to pay, and for which receipt of the benefit without payment would be inequitable. When the work itself is identified, then the amount of the fee can be determined. Under any circumstances, a lawyer's fee must be reasonable. Vermont Rule of Professional Conduct 1.5(a) (hereinafter "Vermont Rules"). "[T]he determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. . . ." Parker, Lamb & Ankuda v. Krupinsky, 146 Vt. 304, 307 (1985) (quoting from Ethical Consideration 2-18 of the Code of Professional Responsibility).[3]

In addressing the scope of the work reasonably to be performed by Mr. Gary under the circumstances, it is helpful to examine the attorney's duties under the Vermont Rules of Professional Conduct. The Rules are "designed to provide guidance to lawyers. . . . They are not designed to be a basis for civil liability." Vermont Rules, Scope, at 620. Nevertheless, a court may consider them as evidence of the standards an attorney must meet in fulfilling his or her duty to his or her clients. Id., Reporter's Notes at 620. Most of the duties "attach only after the client has requested the lawyer

[3] On March 9, 1999, the Vermont Supreme Court replaced the Code of Professional Responsibility by adopting the Vermont Rules of Professional Conduct.

to render legal services and the lawyer has agreed to do so. But there are some duties . . . that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established." Id., Scope, at 618.

In this case, the facts demonstrate that both parties contemplated some form of consultation and advice. The Vermont Rules of Professional Conduct provide the following guidance on the lawyer's duties under such circumstances:

Preamble, at 615:

> "As [an] advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. . . . A lawyer [can act] as evaluator by examining a client's legal affairs and reporting about them to the client or to others."

Terminology, at 621:

> "'Consult' or 'consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

Rule 1.2(a):

> "(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. . . ."

Rule 1.2, Comment on Scope of Representation, at 623:

> "Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives."

Rule 1.4(b):

> "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Rule 1.4, Comment, at 625:

> "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. . . ."

Rule 2.1, Comment on the Scope of Advice given by a lawyer in the role of Advisor, at 660:

> "A client is entitled to straightforward advice expressing the lawyer's honest assessment."

Mr. Gary has submitted a "pre-bill worksheet" showing a total of 13 hours expended at an hourly billing rate of $135 per hour. While no issue has been raised over $135 as a reasonable hourly rate for Mr. Gary's work, at issue is whether, and to what extent, his services were reasonably related to his duties as an attorney, and conferred a benefit upon the Steiners.

Attorney Gary's duties, based upon the Steiners having sought consultation and advice, were to investigate the circumstances and to evaluate the Steiners' claims. He performed those duties by meeting with Mr. Steiner, by reviewing the Steiners' documents and the record of the Board hearing, and by researching the New Motor Vehicle Arbitration Law, 9 V.S.A. chapter 115 (mis-referenced on the pre-bill worksheet as 9 V.S.A. chapter 15). The following entries represent this work:

7/3/02	Meeting with Dennis Steiner re: appeal of Arbitration Board decision, various documents, transcript.	1 hour	135.00
7/5/02	Began review of record on appeal, transcript, documents.	2.3 hours	310.50
7/9/02	Research 9 VSA Chapter 15 and caselaw	.60 hours	81.00

At this point, it would have become apparent to Mr. Gary that pursuit of the appeal to the Superior Court of the Board decision was not likely to be productive. The standard of review for such an appeal is defined by statute and is extremely narrow, and proof must be by clear and convincing evidence. As noted by Judge Cook at the conclusion of the appeal hearing held on July 25, 2002, at pages 12-14 of the transcript, the Steiners' case did not meet the criteria, although there appeared to be grounds for other remedies, such as a lawsuit for breach of warranty, which Judge Cook invited the Steiners to file. Thus, at the point in time when Mr. Gary had reviewed the documents and transcript and researched the statute, it was incumbent on him, before proceeding, to consult with his clients concerning the objectives of representation and the means by which to pursue them (see Rule 1.2 above), and to explain the options in order to permit the Steiners to make informed decisions about their choices (See Rule 1.4 above).

It is not relevant that Mr. Gary understood his assignment to be to pursue the appeal. The court has already ruled that there was no contract by which the Steiners had instructed Mr. Gary to pursue the appeal even if the grounds were weak. Therefore, the attorney was subject to the normal level of responsibility to his clients, under which the duty to inform them of the weakness of the appeal arose when it became apparent. The court is aware that talking with Mr. Steiner about the case had the potential to consume a considerable amount of time because he was very involved with it and the many details it entailed. That does not, however, relieve the attorney of the obligation to inform the clients so that they can make an informed decision, which could have been done in writing in order to limit the time to be taken by extended conversation. Whether the communication took place in person or by telephone or in writing, it was Mr. Gary's obligation to inform his client of the fact that the case was weak on the merits so that they could make an informed decision.

That is not what Mr. Gary did. Instead, he pursued work on the appeal even though it was

unlikely to succeed. According to Rule 1.4, he should have explained to his clients the likelihood of success, so that they could decide if they wished to pursue the appeal or other options. Under Rule 2.1, they were entitled to his honest assessment. Courts from other jurisdictions have recognized an attorney's duty to communicate with the client, to clarify the objectives of the representation, to afford the client an opportunity to ask questions, and to permit the client to make informed decisions. *See* Mays v. Neal, 938 S.W.2d 830, 834 (Ark. 1997). An attorney may violate Rule 1.4 by failing to advise his client of potential problems with a proposed course of action. The attorney's failure of communication "effectively divest[s] his client of the opportunity to assess intelligently the legal environment in which [the client's] case would be argued and to make informed decisions regarding whether to go forward with it." Matter of Thonert, 733 N.E.2d 932, 934 (Ind. 2000). While both parties agree that there was a short telephone call between Mr. Steiner and Mr. Gary on July 11, 2002, no one testified that during that call, Mr. Gary gave an assessment of the likelihood of success of pursuing the appeal, or the comparative merits of other options.

The first question is whether Mr. Gary is entitled to payment of $526.50 for the value of the time he spent on the services, described above, before his duty to communicate with his client attached. The question is whether benefit was conferred upon the Steiners for that work such that they would be unjustly enriched by retaining the benefit of it without payment.

It is difficult to conclude that the Steiners received benefit from that work. Since they were not informed of the results of Mr. Gary's review, it could have had little value to them. They did not learn of the weakness of their appeal until informed of it by Judge Cook at the end of the hearing. If a doctor performs a series of diagnostic tests and assessments, and reviews the results but never informs the patient of those results, it is hard to see how the patient has been benefitted or unjustly enriched by the doctor's work. The same analysis applies here. It is the attorney's communication of the results of his assessment to the client that confers the benefit, because the communication confers upon the client the basis upon which intelligent decisions can be made about the client's objectives. Without that communication, the client lacks the ability to carry out his part of the attorney-client relationship: clarifying the purpose for which he has engaged the attorney, and the objectives to be sought by the attorney on his behalf.

Therefore, as to the work performed by Mr. Gary prior to the point at which his duty to communicate arose, the court must conclude that no benefit was conferred upon the Steiners, since they were given no opportunity to participate in making decisions as to the future course of action. While it is true that Mr. Gary spent the time performing the work, when an attorney performs work that is inconsistent with his professional obligations to his clients, the court will not imply a promise on their part to pay for the time he spent.

The next question is whether the law should imply a promise on the part of the Steiners to pay for legal work undertaken after the point at which Mr. Gary had a duty to consult with them. Much of the work did not confer a benefit upon them. For example, he prepared a memo for a cause with a poor chance of success. This was not work that they had directed him to do after having been informed of probable consequences. On the contrary, the Steiners had not had the opportunity to

review their objectives in light of information about the weakness of the appeal. They were not unjustly enriched by the work that was performed, as it was largely futile. Although he wrote a memorandum of law for the appeal hearing, the unrefuted evidence was that he handed it to the Steiners only at the hearing itself, and then took it back again, not providing them with the opportunity to obtain benefit from it until some time later when it was too late to assist them. Again, while it is true that Mr. Gary spent the time performing the work, when an attorney performs work that is inconsistent with his professional obligations to his client, the court will not imply a promise on their part to pay for the time he spent.

There is one exception, and that is the representation that Mr. Gary provided at the appeal hearing itself and immediately following it. If he had not appeared at the hearing, which he was required to do, the Steiners would have had a valid claim that he had not fulfilled his responsibility to them. Because of his legal training, he no doubt improved their chances of success at the appeal hearing. Moreover, by advocating for them at the hearing, he relieved them of the burden and stress of speaking for themselves in court. This was one of the benefits for which they had previously agreed to pay. In addition, following the hearing, it appears that he provided relevant followup information about appealing, other suits that might be pursued, and arrangements for alternative remedies. This information would have had some value to the Steiners. Therefore, it is reasonable for them to pay for the benefits conferred by the following work:

7/25/02	Attend appellate oral argument; Conference with client; Conference with Defendant and counsel	2.50 hours	337.50
7/25/02	Call from client re: possible appeals, lawsuits, fee quotes, possible repair dates or deadlines for lights	.40 hour	54.00
7/26/02	Draft letter to client re: options; Draft letter to Defendant's counsel	.40 hour	54.00

For the foregoing reasons, the court concludes that Mr. Gary is entitled to retain $445.50 for the value of services that resulted in a benefit conferred on the Steiners, for which the court will imply a promise to pay as a matter of law, and which would otherwise cause them to be unjustly enriched. Plaintiffs are entitled to a return of $554.50 plus interest from July 25, 2002 and costs. Although other services were performed by Mr. Gary, the court cannot conclude that the performance of those services conferred a benefit upon the Steiners, or that the circumstances warrant the law implying a promise to pay, or that compensation is necessary in order to prevent unjust enrichment.

Dated at St. Johnsbury, Vermont, this 19th day of February, 2004.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Judge