

**FILED**

DEC 17 2007

STATE BAR COURT  
CLERK'S OFFICE  
LOS ANGELES

**NOT DESIGNATED FOR PUBLICATION**  
**REVIEW DEPARTMENT OF THE STATE BAR COURT**  
**IN BANK**

In the Matter of )

**MARK B. SCOTT,** )

A Member of the State Bar. )  
\_\_\_\_\_ )

**Case No. 01-O-05066**

**ORDER RE. MODIFICATION  
OF OPINION**

Having considered the motion for reconsideration of respondent, and upon the court's own motion, the type-scripted opinion on review, filed September 5, 2007, is hereby modified as set forth below.

1. On page 5, line 13, change the word "thus" to "also" and delete the words "payment of" so that the sentence reads:

The Second Agreement also changed the point in time when respondent's contingency fee accrued by expressly providing that his fee had been "earned" as of March or April 1995.

2. On page 5, lines 15-16, after the phrase "Under the Initial Fee Agreement, respondent's right to his fee accrued" delete the words "only after the commencement of litigation, and then" so that the sentence reads:

Under the Initial Fee Agreement, respondent's right to his fee accrued only after respondent had obtained a recovery "by means of settlement, judgement, or award.

3. On page 7, beginning at line 21, after the phrase "*all amounts paid* by Principal Mutual," add the following language: "as a result of the prosecution of the action"

and delete the following phrase: “whether obtained from a future settlement, mediation, arbitration or litigation” so that the sentence reads:

The Third Agreement carried forward the definition of “gross recovery” as expanded by the Second Agreement and further expanded the definition by providing “for a contingency fee equal to one-third of *all amounts paid* by Principal Mutual as a result of the prosecution of the action.” (Italics added.)

4. On the last line of the second full paragraph on page 9, after the phrase “any subsequent litigation against Principal,” delete the following: “for all amounts paid by Principal” so that the sentence reads:

The Fourth Agreement again expanded the basis for respondent’s contingency fee to include “any future lump-sum or other recovery of benefits for [Mr. Harvey]” plus the gross recovery of “any parties who may become involved in any subsequent litigation against Principal . . . .”

5. On page 17 at lines 4 - 9, delete the entire paragraph beginning with “We first observe . . . .” and substitute the following:

We first observe that respondent charged part of his contingency fee based on medical payments for Mr. Harvey’s care at NCS between April and July 1995, even though Principal agreed in January 1995 *before* Mrs. Harvey had retained respondent to continue the payments until May 1995, and then after respondent was hired, Principal voluntarily extended those benefits until mid-July 1995 in order to assess Mr. Harvey’s medical needs. Respondent charged Mrs. Harvey a contingency fee of approximately \$29,000 based on \$87,500 in medical benefits that were paid from April to mid-July 1995, which was unconscionable since there was no consideration supporting his claim of attorney fees.

Moreover, in seeking authorization from the Marin County Probate Court for payment of his contingency fee, respondent overstated the value of the insurance benefits paid by Principal as the result of the TRO and preliminary injunction, claiming that from the date of the issuance of the injunction in mid-July 1995 until the parties reached their interim settlement in mid-October 1996, Mr. Harvey received \$450,000 for his care at NCS. In fact, the benefits paid during this period were only \$375,000. Respondent thus overstated the value of the medical payments by \$75,000 and, concomitantly, he overstated his contingency fee by \$25,000.

6. On page 18, delete the text of footnote 21 in its entirety and insert the following text as a new footnote 21:

Although we find that respondent charged an unconscionable fee, we do not agree with the State Bar's allegation that respondent's fee was unconscionable because of "'block billing,' 'bulk billing,' or 'lumping' costs based on 'estimating lump sums' or charging flat fees." His contingency fee was based on a percentage of the recovery; it was not based on an hourly rate.

7. On page 21, line 8, delete the phrase "after the commencement of litigation" from the end of the sentence so that the sentence reads:

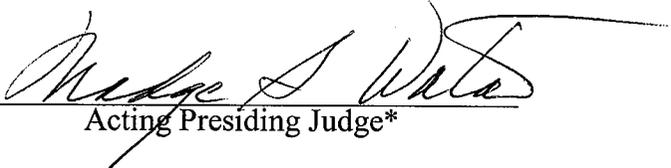
The Initial Fee Agreement stated that he would be entitled to his fee when a recovery was obtained "by means of settlement, judgement, or award."

8. On page 21, lines 8-9 at the end of the sentence "The four fee agreements were modified repeatedly after the occurrence of successive unforeseen events," insert the following paragraph as a new footnote 24:

Respondent argues that his attorney fee would not change regardless of the language changes to the various agreements because the amount of his fee was “always” limited by the amount of the medical reimbursements paid by Principal. This argument ignores the fact that his contingency fee was not limited solely to the recovery of medical reimbursements, but also was based on the recovery of punitive damages, as well as recovery of damages for breach of the covenant of good faith and fair dealing, insurance bad faith, fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress. Indeed, respondent pursued all of these avenues of recovery on behalf of the Harveys. Moreover, he ultimately claimed he was entitled to a percentage of the two million dollars that Mrs. Harvey obtained in a settlement with Principal after respondent was discharged, even though the settlement funds were not applied to medical reimbursements for Mr. Harvey, who died shortly thereafter.

All subsequent footnotes are therefore sequentially renumbered.

In all other respects, respondent’s motion for reconsideration is denied. The clerk is hereby directed to file the modified opinion reflecting the revisions ordered herein.

  
Acting Presiding Judge\*

\*Presiding Judge Joanne Remke is recused.