

## PROFESSIONAL LIABILITY UPDATE

### ATTORNEYS' FEES

By Jennifer A. Becker

#### ***Crockett & Myers v. Napier, Fitzgerald & Kirby* 2011 WL 6288395**

*The Ninth Circuit holds that an attorney who referred a case to other counsel was entitled to have the value of the referral considered in calculating an award of quantum meruit fees.*

The District Court awarded Nevada attorney Brian Fitzgerald \$33,333 as *quantum meruit* fees for his services in a medical malpractice case he referred to Crockett & Myers, Ltd. (Crockett), who received \$500,000 in fees from the case. The district court rejected Fitzgerald's argument that he was entitled to half Crockett's fee pursuant to an agreement or based on the fact that Crockett had a custom and practice of paying a one-third referral fee. In a prior appeal the Court of Appeals held that while Fitzgerald was not entitled to half of Crockett's fee, \$33,333, which was based on a percentage of the savings to the client through Fitzgerald's negotiation on her behalf of Crockett's fee, did not reflect the value of Fitzgerald's referral of the case to Crockett. On remand the district court did not adjust its original fee calculation upward, stating that the amount already reflected the value of the referral.

The Court of Appeal held that the district court failed to make a specific factual finding as to the value of Fitzgerald's referral of a client whose case enriched Crockett by \$500,000, or to consider any established customs in determining that value. The conclusion that the original award considered the value of the referral was not supported by the record. The relevant question was how much of a benefit Fitzgerald conferred on Crockett that the latter unjustly

retained. The prior Court of Appeals panel found that the proper measure for unjust enrichment to Crockett is the value of Fitzgerald's referral. The only evidence in the record was that Crockett customarily pays attorneys who refer clients a fee equal to one-third of Crockett's ultimate recovery from the referred case.

Under the circumstances the initial measure of Fitzgerald's *quantum meruit* award is one-third of Crockett's \$500,000 recovery from the settlement, or \$166,666. However, a reduction is justified to the extent Fitzgerald decreased the overall value to Crockett of the case, that is the reduced contingency fee paid by the client. The Court thus reduced the award by \$66,666 - the additional amount Crockett would have retained but for the lower contingency fee.

*Comment:* This case did not raise the issue of whether Fitzgerald followed Nevada's Rules of Professional Conduct in securing a portion of the fee. Under California law an attorney seeking a referral fee needs to obtain informed, written, client consent. While *quantum meruit* fees are available for attorneys who fail to follow the Rules, a California court would not consider the value of the referral in calculating the *quantum meruit* fee, reasoning that would

defeat the policy of requiring attorneys to follow the Rules of Professional Conduct.