

Advisory Opinion 1988-4(R)

Questions Presented:

An attorney has two questions for the Advisory Opinions Committee.

1. Under the Rules of Professional Conduct which became effective on January 1, 1987, may an attorney accept a contingent fee in a domestic relations case where a year or more after the divorce is finalized, the client seeks a share of retirement pay which was not requested at the time of the divorce?
2. May an attorney accept a contingent fee in a case where the client seeks to collect child support?

Answer:

Under the Rules of Professional Conduct, an attorney is precluded from entering into an arrangement for, charge or collect a fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof. The Committee thinks the attorney in this particular instance is entitled to his fees under the facts and for the reasons stated below.

Facts:

The attorney has two cases which relate to the first question presented. In the first case (Case I), the wife sought out the attorney two years after her divorce for domestic relations assistance. The attorney inquired and determined that the wife did not receive an interest in her husband's military retirement at the time of the divorce. The attorney was of the opinion that the wife had a community interest in the retirement, but that there was some question whether she would be awarded an interest in the retirement pay given that so much time had elapsed since the divorce. The attorney agreed to handle the matter on a contingent fee basis. The attorney took the case to the Supreme Court and prevailed. From the attorney's request, it appears that all of the work done on the case was prior to January 1, 1987.

In the second case related to the first question presented (Case II), the attorney was handling a workmen's compensation case for the wife. Apparently, during the course of that representation, the attorney learned that the wife had been divorced for about a year and that her ex-husband was an employee of the federal government. The wife told the attorney that she was having a difficult time financially. The attorney inquired whether the wife had been awarded an interest in the ex-husband's government retirement and found that she had not, although it is not clear from the request whether she tried to get it at the time of the divorce. The attorney accepted her case on a contingent fee basis and also took that case to the Supreme Court. That case is now pending on the district court level and the attorney still has a contingent fee arrangement with the client.

Discussion:

Prior to 1987, the Disciplinary Rules did not proscribe charging a contingent fee in domestic relations matters, but such fees were disfavored. Ethical Consideration 2-20 stated:

Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

Even though there was no specific proscription in the rules, many courts prohibited contingency fee contracts in divorce proceedings for public policy reasons. The reasons for prohibiting a contingent fee in a divorce action were twofold: first, no pecuniary interest of the lawyer should interfere with the public policy preference for marital reconciliation over marital dissolution and second, as to support, the public had an interest in maintaining the societal obligation which arose out of the marriage--namely the implied obligation of support. See, e.g., *In re Fisher*, 15 Ill. 2d 139, 153 N.E.2d 832, 840 (1958).

Despite the strong policy against contingency fees in divorce cases, courts distinguished between fee agreements in the original dissolution proceedings and fee agreements in post-decree proceedings to enforce a judgment and to collect arrears. Compare *Fisher with Zagar v. Zagar*, 56 Ill. App. 2d 175, 205 N.E.2d 754 (1965); see *Stoller v. Onusko*, 10 Ill. App. 3d 598, 295 N.E.2d 118, 119 (1973). Similarly, many ethics committees which considered the question also

distinguished between an initial proceeding and a proceeding to collect arrearages. See Comm. on Prof. Ethics, Birmingham (Alabama) Bar Association, Op. No. 15 (April 9, 1982), *reported at, ABA/BNA Lawyers' Manual on Professional Conduct* (hereinafter *Manual*), 801:1123 (contingent fees to collect past due child support is permissible where client is unable to pay a reasonable fixed fee); Colorado Bar Ass'n Ethics Comm., Op. No. 67, *reported at, Manual* 801:1905 (permissible to enter into a contingent fee arrangement to collect past, but not future, child support and alimony); Prof. Ethics Comm., Kansas Bar Ass'n Op. No. 84-5 (July 23, 1984), *reported at, Manual* 801:3818 (action for past due child support is a collection matter and contingent fee permitted); Comm. on Ethics, Maryland Bar Ass'n Op. No. 80-34, *reported at, Manual* 801:4302; Michigan Bar Comm. on Prof. & Jud. Ethics, Inf. Op. No. CI-1050, *reported at, Manual* 801:4888; Miss. Bar Ethics Comm., Op. No. 88 (Sept. 23, 1983), *reported at, Manual* 801:5106; Ethics Comm. of State Bar of Mont., Op. 23 (June, 1981), *reported at, Manual* 801:5404; N.Y. County Lawyers' Ass'n, Comm. on Prof. Ethics, Op. 660 (May 4, 1984), *reported at, Manual* 801:6501. The reason for the distinction was explained by the Arizona Committee:

Although contingent fee arrangements are generally not allowed in domestic relations cases, a narrow exception exists where the policy reasons underlying the rule cannot be substantiated by the facts of the particular domestic relations matter. Where the attorney, by virtue of the contingent fee, has a vested interest in the demise of the marriage, the public policy in favor of reconciliation may be imperiled. This policy is less compelling months after a dissolution decree has already been entered and the legal services to be rendered concern post-dissolution decree matters.

Comm. on Rules of Prof. Conduct, State Bar of Arizona, Op. No. 82-9 (May 28, 1982), *reported at, Manual* 801:1312-13.

The present rule, as codified in the Rules of Professional Conduct, states that a lawyer is prohibited from charging or collecting:

any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

SCRA 1986, 16-105(D)(1).

On the one hand, the specific inclusion of a proscription in the rule (unlike the former situation in which the proscription was only an Ethical Consideration) may have been intended to strengthen the policy against contingent fees and may give rise to an inference that prior distinctions between pre- and post-decree proceedings no longer apply. On the other hand, nothing in the Model Rule suggests it was meant to protect public policy considerations beyond those protected by the prior Ethical Consideration and court-adopted prohibition, and nothing in the Model Rule suggests it meant to abolish the well-established exception permitting a contingency fee arrangement to collect arrearages.

The Committee believes that the distinction between the original proceedings and post-judgment survives the adoption of the Model Rule and that contingent fee arrangements are permissible in post-decree proceedings to enforce a judgment. Thus, with respect to the child support case, the attorney properly entered into a contingency fee arrangement and may collect his fee. In making this response, the Committee notes that there is a public policy in favor of enforcing judgments, particularly those designed to provide child or spousal support. In many instances, a person will be able to obtain private legal representation only if a contingency fee arrangement is permitted. Thus, the contingent fee serves to enhance, rather than to denigrate, society's interest in maintaining the support obligation. See *In Re Fisher*.¹

The attorney presents two other cases which involve postdecree proceedings to divide military or government retirement. To answer the attorney's inquiry as to these proceedings, one must remember that retirement pay in New Mexico is community property. Retirement benefits are divided as any other community property is divided, and the award of a portion of the retirement to the spouse is *not* alimony, support or a settlement of property in lieu of support. Rule 16-105(D)(1) on its face does not apply. See generally *In Re Cooper*, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

A strict reading of Rule 16-105(D)(1), like that in the preceding paragraph, is not entirely consistent with the policy behind the rule. A lawyer's interest in property division may impair his motive to urge reconciliation as much as an interest in alimony might. Therefore, it is the Committee's opinion that because both Case I 2 and Case II involve independent actions which support fee arrangements separate from the original proceedings, the contingent fee is appropriate. Cf. Comm. on Rules of Prof. Conduct, State Bar of Arizona, Op. No. 82-9 (May 28, 1982), *reported at, Manual* 801:1312. Where, however, the post-divorce action for division of retirement may result in an attack on the divorce decree, a contingency fee would be inappropriate.

1 The Committee is not persuaded by the Standing Comm. on Legal Ethics of the Virginia Bar, Op. No. 796 (May 1, 1986), reported at, Manual 901:8706, which limited contingent fee arrangements in cases to collect arrearages to situations in which the child is near majority age. Such a limitation creates a barrier to obtaining private representation during the child's early years when support may be most needed and encourages people to delay enforcement of support awards.

2 In any event, Case I was entirely concluded before January 1, 1987, when Rule 16-105 became effective. The Committee is persuaded that a contingent fee was appropriate under the facts related because the circumstances were of the sort which Ethical Consideration 2-20 contemplated would justify a contingent fee.