

ETHICS OPINION

RO-96-01

QUESTION:

"I have been employed to represent the wife of a physician in a county approximately one hundred miles from Montgomery, Alabama. The parties entered into an antenuptial agreement which is subject to legal attack as to the validity of the agreement in that there was no financial disclosure and the wife did not have independent counsel. The agreement references that there did occur a financial disclosure and in fact names a lawyer who provided independent counsel to the wife at the time of her signing. Under the terms of the agreement the wife would be entitled to only \$2,000 per month for 24 months. She estimates the marital estate to be worth between \$3 million and \$4 million. If she is bound by the agreement she will not receive any division of the estate. She also alleges physical abuse and I have advised her concerning her rights for a separate tort claim with jury trial or for the matter to be decided by the divorce court. She has advised me that reconciliation is a remote possibility and only then under certain circumstances and parameters.

It appeared to me under the facts of this case as pertains the contract of the antenuptial agreement and the damages claim that a fee utilizing a percentage contingency as a guideline with an offset for any fees actually paid on hourly charges would be appropriate. I am enclosing herewith my fee agreement for your review and presentation to any commissioners. Please advise if this contract would be approved as an exception to the prohibition against charging contingent fees in domestic relations matters. I have drafted the agreement taking into consideration recent opinions and discussions concerning these issues."

* * *

ANSWER:

A lawyer may not enter 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.

DISCUSSION:

PREAMBLE

The Disciplinary Commission of the Alabama State Bar, in formal opinion RO-88-103, concluded that a lawyer could represent a spouse on a contingent fee basis in an action for breach of an antenuptial contract, said action seeking money damages. The Commission, deciding the matter pursuant to DR 5-103(A) and EC 2-20 of the former Code of Professional Responsibility,

acknowledged the pending adoption of Rule 1.5(d), Alabama Rules of Professional Conduct, and its direct prohibition of contingent fees in domestic relations matters. The Commission noted a prior opinion (RO-83-22) which had listed the only approval of a contingent fee contract in a domestic relations matter, that being collection of child support or alimony arrearage in a completed divorce.

REASONING:

Rule 1.5(d)(1), prohibits a lawyer from entering into an arrangement for, 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. Under the former Code of Professional Responsibility, DR 2-107(A) prohibited "A contingent fee for representing a defendant in a criminal case." EC 2-20 provided that "Contingent fee arrangements in domestic relation cases are rarely justified." According to the Annotated Model Rules of Professional Conduct, Second Edition, Rule 1.5(d) reflects the public policy concern that an attorney-client fee arrangement should not discourage reconciliation between the parties. The Annotated Model Rules also points out that the counterpart provision in the predecessor Model Code discouraged but did not flatly prohibit such agreements. Several illustrative cases are set forth in the Annotated Model Rules:

A contingent fee agreement that gave a lawyer a percentage of property received on behalf of a client in excess of that negotiated in a settlement at the time of separation was improper - Coons v. Kary, 263 Cal. App.2d 650, 69 Cal. Rptr. 712 (1968).

Lawyer forfeits rights to collect any fee, including quantum meruit, by representing client under contract that included contingency fee and action for modification of divorce judgment and property settlement - Licciardi v. Collins, 180 Ill. App. 3rd 1051, 536 N.E.2d 840, 129 Ill. Dec. 790 (1989).

Arrangement whereby lawyer would receive contingent fee of \$60,000 from settlement proceeds improper - Shanks v. Kilgore, 589 S.W.2d 318 (Mo. Ct. App. 1979).

Contingent fee contracts for legal services are generally permitted in actions brought by one spouse to recover property from other spouse or to settle property rights among spouses, including equitable distribution proceeding separate from divorce action: Agreement may not be used in action for child support - Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19 (1986).

While predecessor Model Code had no disciplinary rule prohibiting lawyer from representing client in action for breach of prenuptial agreement on contingency basis, Model Rules make such agreement unethical. Ala. Bar,

Implied agreement between lawyer and client for reasonable fees in connection with client's divorce not voided by subsequent invalidation of contract because of contingency fee - Morfeld v. Andrews, 579 P.2d 426 (Wyo. 1978).

The historical perspective on Rule 1.5 is enunciated in the Law of Lawyering by Hazard and Hodes:

"The rule against contingent fees in domestic relations matters is of more recent origin, and may have a sounder public policy rationale. Basing a lawyer's fee on the amount of alimony or support recovered seems no more objectionable than basing it on the amount of a jury verdict. Public policy is offended, however, when the fee is made contingent upon the lawyer's obtaining a divorce for his or her client, for the lawyer would then have no incentive to help bring the parties to a settlement that might preserve the marriage.

Rule 1.5(d)(1) does not engage in such fine distinctions, but provides that lawyers may not use contingent fee arrangements in any domestic relations matter. Since questions of alimony and support are inextricably intertwined with the question of whether the marriage itself will continue, this broadened ban seems reasonably related to the purposes of the rule."
Section 1.5: 501

According to Wolfram's Modern Legal Ethics, Practitioner's Ed. (1986) most American jurisdictions hold that it is improper for a lawyer to charge a fee in a divorce case that is either contingent on a favorable judgment or settlement or proportional to the recovery of a certain amount of alimony or property settlement. Section 9.4.4. This is consistent with the first Restatement of Contracts that a promise by a spouse to pay a lawyer a contingent fee to obtain a divorce or annulment is illegal and thus void as a matter of contract law. Restatement, Contracts §542(2) (1932). The Second Restatement of Contracts states that:

"A promise that undermines [the marriage] relationship by tending unreasonably to encourage divorce or separation is unenforceable." Restatement (Second), Contracts §190, Comment C (1979).

One basis upon which the prohibition may be justified is that a contingent fee contract would place strong economic pressure on the lawyer to assure that reconciliation did not occur. However, this approach should not be so absolute as to prohibit contingent fees in all domestic relations litigation, as indicated below.

The second basis for the prohibition concerns the ability of a client to employ counsel. Contingency fee arrangements enable financially strapped

litigants to obtain counsel. The argument can be made that such need does not exist in a divorce matter. The spouse in possession of the majority of the marital assets should have no difficulty retaining counsel. The spouse with little or no assets would be protected in most jurisdictions by the court's ordering the spouse with the greater assets to pay the other spouse's attorney's fee.

Another point of concern is that a lawyer's taking a percentage of any property or monies awarded to a client by the court would unnecessarily and unfairly skew the division of property as envisioned by the court independent of such contractual attorney's fee. This could possibly place the lawyer at odds with his client, as well as the client's children, in that the lawyer's fee would diminish the court's award of support, alimony, or property.

Where a separate tort, contractual or fraud claim exists independent of the divorce matter representation of the client could be undertaken on a contingency fee basis. However, where these claims are so intertwined with the divorce matter that they are inseparable and so related to one another not only with regard to the legal rights of your client, but also as to the computation and assessment of your fee, then the contingent fee provisions of the contract would be prohibited.

Rule 1.5 is very absolute in its terms. If the fee in any way is contingent upon the granting of the divorce then such would be prohibited by Rule 1.5. It appears from your contract that if the antenuptial agreement is upheld, then you will be compensated on an hourly basis per the terms of the contractual arrangement with the client. If, on the other hand, you are successful in having the antenuptial contract set aside or invalidated, your fee would then be contingent upon the assets which the client could receive from the divorce in the event one is granted. This would violate the letter and purpose of Rule 1.5. While the rules allow a "fee plus" arrangement as stated in your contract whereby you would be compensated above and beyond your hourly fee basis based upon those factors enumerated in the contract, such cannot be contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

The contract which you have submitted for review concurrent with your ethical inquiry appears to establish a contingency fee for your representation of the client in the divorce proceeding. The antenuptial agreement is

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so interwoven with the divorce matter that the two cannot be distinguished or separated sufficient to allow a conclusion that the contingent fee as proposed does not violate Rule 1.5.

JAM/vf

2/29/96