

ADVISORY ETHICS OPINION 95-12

SYNOPSIS:

An attorney may enter into a contingent fee agreement with the custodial spouse for collection of delinquent child support and spousal maintenance payments. The details of the contingent fee agreement must be made known to the court from which the appropriate order issues. Such agreements based on the value of future payments are not categorically prohibited by the Disciplinary Rules but should be limited to a reasonable percentage of the payments when they are received by the client.

FACTS:

The custodial spouse has retained attorney to collect delinquent child support payments due under a final divorce decree. The attorney has asked the Committee whether or not he can represent the custodial parent on a contingent fee basis and whether or not the agreement can apply to future payments of child support as well as to arrearages. The attorney also asks whether such arrears may be collected from the estate of the delinquent party.

DISCUSSION:

The pertinent Disciplinary Rule is DR 2-106. EC 2-20 reads as follows:

“**EC 2-20** Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptances are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings, contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee.”

This Committee has previously held in Opinion 91-17 that an attorney may accept employment on a contingent fee basis to represent a client seeking past due temporary total disability payments in a worker's compensation case. The attorney in that case was allowed to accept such an agreement because the client was seeking past due temporary total disability payments. The request differed from the circumstances in Professional Conduct Board Opinion 3, where the Board issued a private reprimand to an attorney who entered into a contingent fee arrangement for ongoing temporary disability checks long after the services to secure the payments had been concluded, and in addition to the attorney's contingency segment of the lump sum paid for past due temporary disability payments.

DR 2-106 addresses the issues of fees for legal services and recognizes that contingency fees are an acceptable form of fee arrangement. Accordingly, the Committee concludes that once a divorce is final, an attorney may enter into a contingent fee agreement with the custodial spouse for the collection of delinquent child support and spousal maintenance payments. An action in the appropriate court under the Uniform Reciprocal Enforcement of Support Act or proceedings in the Family Court for contempt of that Court's prior orders would be appropriate mechanisms for enforcement available to the attorney.

Similarly, we see no ethical bar to enforcing collection against the estate of a deceased party.

Since child support payments are generally based on the child's needs, and an attorney who proposes to base a contingent fee on future support payments must not by so doing deprive the child of funds needed for basic living expenses, the Committee believes that the attorney should inform the court of the fee arrangement so that the court will be fully informed when issuing its order relative to delinquent payments.

Further, we believe that fees based on the current value of future support payments should be avoided, since there is a risk that the support payments will not be made. When there is any question that future support payments may not be received or that they may be reduced by court order, it would be unreasonable for the attorney to insist on payment of the fee based on the

current value of those future payments. The only acceptable contingent fee relating to future payments must be based on a reasonable percentage of each payment when it is received.

DR 2-106(B) states that:

“A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.”