ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.5(d)(1). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 02-03
November, 2002

TOPIC: Contingency Fee

DIGEST: An attorney may enter into a contingent fee agreement to represent a client in post-judgment proceedings to determine property rights in a dissolution of marriage case where one of the former spouses has died, provided the fee agreement is written and reasonable in amount.

REF.: Illinois Rules of Professional Conduct, Rule 1.5(d)(1)

ISBA Opinion No. 95-16

Licciardi v. Collins, 188 Ill. App. 3rd 1051 (1st Dist. 1989)

In re Malec, 205 Ill. App. 3rd 273 (1st Dist. 1990)

Fletcher v. Fletcher, 227 Ill. App. 3d 194 (4th Dist. 1992)

Vol. I, *Hazard & Hodes,* The Law of Lawyering, 3rd Ed., §8.14 (2001)

FACTS

Wife (W) and Husband (H), who had no children together, obtain a judgment of dissolution of their thirty-year marriage. Maintenance is not in issue. The judgment of dissolution reserves division of their marital property for further hearing. H dies without agreement or hearing on the division of property. W's attorney agrees to represent her on a contingent basis in a claim against H's estate. The probate proceeding discloses assets in H's estate that may have derived from marital property of W and H. W moves for a property distribution hearing in the dissolution action.

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QUESTION

Does the contingency fee agreement violate Illinois RPC 1.5(d)(1) under these circumstances.

OPINION

As we did in Opinion 95-16, we begin by assuming, absent stated facts, that the contingency agreement in question is in writing, sets forth the method by which the fee is to be collected, and specifies whether expenses are to be deducted from the recovery (and, if so, whether before or after the contingent fee is calculated.) Further, we assume that the contingent fee is reasonable, considering the factors enumerated in Rule 1.5(a).

Rule 1.5(d)(1) states:

> (d) A lawyer shall not enter into an arrangement for, charge, or collect:
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> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution of marriage or upon the amount of maintenance or support, or property settlement in lieu thereof, provided, however, that the prohibition set forth in Rule 1.5(d)(1) shall not extend to representation in matters subsequent to final judgments in such cases[.][1]

Initially, we question whether there remains a "domestic relations matter" in the foregoing factual situation. It would appear that all that is left is a probate claim against H's estate, in which case the court may deny the motion for hearing to determine property rights in the dissolution matter. Assuming, however, that the court grants the motion for hearing, the plain language of this section appears to prohibit a contingent fee under the facts before us,

[1] At least one published version of the Illinois Rules of Professional Conduct incorrectly omits the words "in lieu" from Rule 1.5(d)(1). Our Opinion 95-16 also omitted this language from its recital of the Rule, although the error was not relevant to our analysis or conclusion in that matter.

because the fee is contingent upon settlement of property rights arising out the parties' marriage, and there never was a final judgment regarding those property rights in the dissolution action between H and W.

The facts in Opinion 95-16 were different. There, a final judgment, including property settlement, had been entered. The husband stopped paying on his obligations, and his ex-wife retained attorneys on a contingent basis to enforce his obligations in post-judgment proceedings. Our opinion stated that the last clause of Illinois Rule 1.5(d)(1)provided "just this exception to prohibition of contingent fee agreements" that would permit enforcement of an otherwise proper contingent fee agreement.

In reaching our conclusion in Opinion 95-16, we considered, but declined to follow, two Illinois Appellate Court decisions that had reached a contrary result. Licciardi v. Collins, 180 Ill. App. 3d 1051 (1st Dist. 1989); In re Malec, 205 Ill. App.3d 273 (1st Dist. 1990).

In declining to follow these two decisions, Opinion 95-16 cited extensively to the *ABA Annotated Model Rules of Professional Conduct, Second Edition, Rule 1.5*. The opinion said:

> "In general, the public policy underlying contingent fee agreements and supportive thereof is that such 'arrangements…often…provide the only practical means by which [one party] can economically afford, finance, and obtain the services of a competent lawyer…and successful prosecution of the claim produces a *res* out of which the fee can be paid.'[Citation omitted.] The policy underlying the prohibition of contingency fee arrangements in domestic relations matters is said to reflect 'a public policy concern that a lawyer-client fee arrangement should not discourage reconciliation between the parties.' [Citation omitted.] It appears that this expressed policy is consistent with the Illinois rule's last phrase which permits such arrangements 'in matters subsequent to final judgments' where reconciliation is presumably unavailable."

As the inquirer in this matter points out, the traditional rationale disfavoring any action that either encourages divorce or discourages reconciliation has no application where one of the former spouses has died. Reconciliation is no longer merely "presumably" unavailable; it is irreversibly so.

Where a former spouse has died, therefore, we can discern no practical difference from the situation in Opinion 95-16, where the former spouse survived, but the court's judgment had become final. The universally final judgment in the facts before us has finished the work that the trial court was not able to complete. An inflexible adherence to the strict language of Rule 1.5(d)(1) under these facts benefits no one, except, perhaps, the deceased former husband's estate.

The inquirer also notes that Rule 1.5(d) prohibits a lawyer from charging or collecting a fee that is contingent upon securing a property settlement **in lieu of** securing a) a dissolution of marriage; b) maintenance; *or* c) support. As none of these three events is now possible, the inquirer argues that a contingency fee is permitted. We likewise find this logic persuasive.

> "Prior to August 1, 1990, the applicable provision under Rule 2-106(c)(4) of the Code of Professional Responsibility provided, in part, as follows:
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> 'No contingent-fee agreement shall be made in respect of the procuring of a dissolution of marriage, declaration of invalidity of marriage, or legal separation, or the custody or adoption of children, or property settlement in or arising out of any of the foregoing; provided, however, that the prohibition set forth in this sentence shall not extend to representation in matters subsequent to a final judgement [sic], such as the collection of arrearages in maintenance or child support.'" Fletcher v. Fletcher, 227 Ill. App. 3d 194,197-98 (4th Dist. 1992.)

The language of former Code of Professional Responsibility Rule 2-106(c)(4) was absolute in its prohibition of contingent fee arrangements before final judgment in domestic relations matters. Rule 1.5(d)(1), with its "in lieu of" language, eases that prohibition.

The Restatement of the Law Governing Lawyers, §35.1, differs from Rule 1.5(d)(1), in that the Restatement's prohibition against contingent fees in domestic relations cases "extends only to achieving a 'specific result,' which means obtaining a divorce or a particular disposition in a custody matter. If, post-divorce, there is dispute over the amount or payment or alimony or child support, a contingent fee would be permitted under the Restatement's approach." Vol. I, *Hazard & Hodes,* The Law of Lawyering, 3rd Ed., §8.14 (2001). As these commentators note:

> "The rule against contingent fees in domestic relations matters is of more recent origin [than in criminal cases], and in general has a more sound public policy rationale. If a fee is contingent upon the lawyer obtaining a divorce for his or her client, for example, the lawyer would have a disincentive to urge the client to consider counseling or mediation or other interventions that might preserve the marriage. Even in an era of no-fault divorce, where preservation of each marriage is not as compelling a public policy concern as it once was, there is still value in leaving reconciliation as an option that is not automatically foreclosed. Furthermore, where child custody is at issue it seems wrong to give lawyers a financial incentive to ensure the destruction of nuclear families – even troubled nuclear families.
>
> On the other hand, once one spouse or the other has taken the step of hiring a lawyer for the specific purpose of obtaining a divorce or child custody, the chances that the lawyer would instead be a significant factor in saving the marriage are slim. Thus, the rule, while having a sound public policy basis,

> will be only marginally effective in promoting the policy of saving marriages. Moreover, basing a lawyer's fee on the *amount* of alimony or child support awarded or recovered seems no more objectionable than basing it on the amount of a jury verdict in a tort suit. As noted earlier, on this reasoning the Restatement of the Law Governing Lawyers §35 would permit contingent fees where a domestic relations matter has been reduced to this kind of pure financial dispute." *Id.*

We do not agree with the broad principles set forth in the Restatement. But where, as here, death has intervened in the proceedings and rendered all the arguments against a contingent fee arrangement ineffective, we believe that all that remains is a "pure financial dispute." In such a matter, an otherwise properly made contingent fee agreement is permissible.

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