



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.5. 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. 84-9
January 2, 1985**

**Topic: Contingent fee -
forbearance of criminal fee if related civil suit
unsuccessful**

Digest: Not improper for fee for criminal defense to be paid from award received in related civil action. No contingent fee for criminal defense or acquisition of interest in litigation present where criminal defense fee foregone if civil action unsuccessful.

Ref.: Canons 2, 5; Rules 2-106(c)(4), 5-103(a)(2); EC 2-19; ISBA Opinion No. 246

FACTS

The inquiring attorney proposes to represent a client in defending a criminal charge and also in litigating a Civil Rights claim which the client may have as a result of incidents alleged to have occurred in connection with the client's arrest. (The client has not yet decided whether to pursue the Civil Rights claim.)

The proposed fee arrangement is as follows:

(a) Fees for criminal proceeding: If the Civil Rights action is not pursued, the client will be responsible for payment of the fees in the criminal case. If the Civil Rights action is pursued, the fees for the criminal (as well as for the civil) representation will be paid from the proceeds, if any, of the civil action.

(b) Fees for Civil Rights proceeding (if pursued): a fraction of any recovery, and a greater fraction thereof if an appeal is taken by any party.

QUESTIONS

Whether the fee arrangements would violate Rules 2-106(c)(4) or 5-103, respectively with reference to contingent fee arrangements in criminal cases, and to the acquisition of interest in litigation.

OPINION

(1) Contingent fee arrangements: The inquiry is addressed to a potential violation of Rule 2-106(c)(4); i.e., by the agreement as to the fees for the criminal, as opposed to the civil, proceeding.

Prior to the adoption of the present Supreme Court Rules in 1980, this Committee issued an opinion to the effect that contingent fee arrangements were permissible in criminal cases where the client was willing to pay a higher fee if acquitted of the charge and where the client had adequate means to do so. ISBA Opinion No. 246 (1965).

Present Rule 2-106(c)(4), however, provides that: "No contingent-fee agreement shall be made in respect of the representation of a defendant in a criminal case." Rule 2-106(c)(1) defines a contingent-fee agreement, for purposes of Rule 2-106, as one in which the fee is contingent "upon the successful accomplishment (by settlement or litigation) of the subject matter of the agreement".

Here, the subject matter of the contingent fee arrangement, insofar as it relates to the criminal defense work, is, presumably, the defense of the criminal charge. However, the fee for the criminal defense work is not contingent on the "successful accomplishment" of the criminal charge defense. Rather, it is contingent upon a recovery in the civil proceeding, and it is not contingent at all if no civil proceeding is instituted.

Thus, since the contingency does not relate to the subject matter of the criminal defense fee arrangement, there appears to be no contingent fee agreement as such under the literal terms of the Rule.

With respect to the policy behind the prohibition of contingent fees in criminal cases, EC 2-19 states that such policy is based "largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee". That is, since the client will be in no better financial position following a successful outcome, the fee should be negotiated only with reference to the client's present financial condition.

In the present instance, however, since a *res* will be produced in the event of a successful outcome of the civil action, and since the criminal case fee is contingent only to that extent, the stated policy behind the contingent fee prohibition in criminal cases appears to be inapplicable.

In summary, the proposed fee agreement appears to violate neither the literal terms nor the stated public policy considerations of Rule 2-106(c)(4).

(2) Acquisition of interest in litigation: Rule 5-103(a) provides:

"(a) A lawyer may acquire a proprietary interest in the cause of action or subject matter of litigation which he is conducting for a client only by (1) acquiring a lien granted by law to secure his fee or expenses; or (2) contracting with a client for a reasonable contingent fee in a civil case."

The inquiry does not set out the formula for the contingent fee in the civil action. However, if it meets the reasonableness requirement of the Rule, there appears to be no violation thereof by the fee arrangements since there presumably is no "proprietary interest" to be acquired in the criminal proceedings.

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