ILLINOIS STATE BAR ASSOCIATION
ISBA Advisory Opinion on Professional Conduct

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Citations corrected August 25, 1997

Opinion No. 91-13
(11/22/91)

Topic: Contingent Fees; Advertising

Digest: It is not professionally improper for attorney to represent corporate client under stated "contingent"fee arrangement, provided said arrangement violates no other laws; advertising such "contingent" fee arrangements, within limits imposed by Rules, is also not professionally improper.

Ref.: Illinois Rules of Professional Conduct, Rules 1.5(a), (c) and (d); 1.8; 7.1; 7.2
ABA Model Rules 1.5 and 1.8

FACTS

An attorney practicing in the corporate and securities fields has been asked by a corporate client to prepare and undertake all necessary steps to properly and successfully register client's securities offering. Client proposes to pay attorney a specific percentage of such securities, "contingent" upon the successful registration of same.

QUESTIONS

1. Do the Illinois Rules of Professional Conduct prohibit such a "contingent fee" arrangement?
2. Do the Illinois Rules of Professional Conduct prohibit a combination of hourly fees and "contingent" fees?
3. Do the Illinois Rules of Professional Conduct prohibit the advertising of such arrangements?

OPINION

The Preamble to the Illinois Rules of Professional Conduct (Rules) defines "Contingent fee agreement" as denoting "an agreement for the provision of legal services by a lawyer under which the amount of the lawyer's compensation is contingent in whole or in part upon the successful completion of the subject matter of the agreement, regardless of whether the fee is established by formula or is a fixed amount." In the instant case, the lawyer would be paid, either solely or partially, upon the successful registration of his client's securities. It would appear, therefore, to be a form of "contingent fee" arrangement as contemplated by the Rules.

Rule 1.5(c) permits an attorney to set a fee based upon a contingency and sets forth the requirements of such an arrangement. Such an arrangement must be in writing, shall state the method by which fees are to be determined, how expenses are to be handled, and a written statement of disbursements must be provided to the client upon conclusion of the contingent matter.

There are three specific prohibitions contained in the Rules against contingent fee agreements. Rule 1.5(d) prohibits such an arrangement generally in domestic relations matters and in criminal defense matters. Additionally, Rule 1.5(c) prohibits such arrangements if they are prohibited by other law.

The attorney should also be aware of the general requirement that attorney's fees shall be reasonable and the factors to be used in determining what is "reasonable" contained in Rule 1.5(a).

ABA Model Rule 1.5 contains virtually identical language to its Illinois counterpart.

The attorney should also be directed to review the language contained in Rule 1.8 and ABA Model Rule 1.8, which discuss the obligations of attorneys who may anticipate or receive a proprietary interest in the subject matter of their work for a client. In the instant case it appears that the attorney will be receiving actual securities rather than monetary fees and the above-referenced Rules should be considered. However, the comments following ABA Model Rule 1.8 clearly indicate that contingency fee agreements may be employed in non-litigation contexts. For example, Todd v. City of Visalia, 254 Cal.App.2d 679, 62 Cal.Rptr. 485 (1967). But, since such matters generally involve less uncertainty than litigation, the reasonableness of the contingent fee may, therefore, be more closely scrutinized by the courts. For example, Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969); ABA Model Rule 1.5(a)(8); ABA Model Code DR 2-106(B)(6).

Therefore, it would not be professionally improper for the attorney to undertake representation under the contingent fee arrangement contemplated.

Using the same analysis as above, there similarly would appear to be no prohibition against a "combination" of hourly and contingent fees as proposed.

If, as indicated, the contingent fee arrangement(s) described are not improper, then the attorney may advertise such arrangements, provided that the Rule provisions pertaining to advertising and to communications are followed. Rule 7.1 prohibits an attorney from making false or misleading communications about the attorney or the attorney's services, and further defines what is "false and misleading". Under this Rule, and ABA Model Rule 7.1, it would be improper, for example, for the attorney to imply that the attorney could assure the successful registration of securities offerings.

Rule 7.2 and ABA Model Rule 7.2 address advertising of an attorney's services and should also be reviewed by the inquiring attorney.

For the foregoing reasons, it would appear that it is not professionally improper for the inquiring attorney to represent the corporate client under the described "contingent" fee arrangement, provided that such an arrangement violates no other laws, such as Federal and Illinois securities regulations. Further, that proper advertising of such arrangements, within the limits imposed by the Rules, is also professionally proper.

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