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 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. 95-16
May 17, 1996

Topic: Contingent Fee Agreement; Post-Judgment Dissolution of Marriage

Digest: A contingent fee agreement in post-judgment dissolution of marriage, collection and bankruptcy proceedings, if written and reasonable in amount, is not in violation of the Rules of Professional Conduct.

Ref.: Illinois Rules of Professional Conduct, Rule 1.5
In re Gerard, 132 Ill.2d 507, 538 (1989).
Licciardi v. Collins, 180 Ill.App.3d 1051 (1st Dist. 1989).
In re Marriage of Malec, 205 Ill.App.3d 273 (1st Dist. 1990).
Fletcher v. Fletcher, 227 Ill.App.3d 194 (4th Dist. 1992)
ABA Annotated Model Rules of Professional Conduct, Second Edition, Rule 1.5, pages 68-82.

FACTS

Mr. and Mrs. B were divorced and the judgment provided Mr. B would pay a $500,000 lump sum settlement over 20 years and maintain a life insurance policy until Mrs. B was paid in full. Mr. B's business failed and he stopped paying and let the policy lapse. Mrs. B retained lawyers on a contingent fee basis whereby 50% of all amounts collected from Mr. B, including any life insurance proceeds, would be paid.

Post-judgment proceedings determined Mr. B's obligation was non-modifiable, which was affirmed on

appeal. In Mr. B's bankruptcy the obligation was held to be "in the nature of alimony" and not dischargeable. Mrs. B's lawyers handled all of this litigation and negotiated a settlement with Mr. B regarding how the obligation is to be fulfilled.

QUESTION

Is there anything improper about the aforesaid contingent fee agreement?

OPINION

We will assume, since the facts are silent on the point, that the contingent fee agreement is in writing, as specifically required by Rule 1.5(c) and sets forth the "method by which the fee is to be determined," i.e., 50% of amounts collected, in the event of "settlement, trial or appeal." This agreement must also specify whether expenses are to be deducted from the recovery and whether this is "before or after the contingent fee is calculated."

Rule 1.5(a) provides the overriding principle that "a lawyer's fee shall be reasonable." The Rules' "terminology" defines "reasonable" to denote "the conduct of a reasonably prudent and competent lawyer." Rule 1.5(a) lists eight factors to be considered in determining reasonableness. The history here includes post-judgment litigation, an appeal, bankruptcy and trial proceedings, and settlement negotiations which, together with the contingent nature of the fee, the continued monitoring of payments and insurance coverage and the apparent completely successful results obtained in the representation of the client.

However, great caution is warranted. In the event that the eight factors to determine a "reasonable fee," to suggest the fee amount is unreasonable, the Supreme Court has advised lawyers to utilize their own "common sense" to reduce that fee after consulting with their client as to the work performed and to re-negotiate a lower percentage to produce an amount which is reasonable. In re Gerard, 132 Ill.2d 507, 538 (1989) (excessive contingent fee led to one-year suspension).

Turning to that portion of Rule 1.5(d)(1) which we presume to be at the heart of this inquiry, that subsection provides:

> A lawyer shall not enter into an arrangement for, charge, or collect: (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 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. [Note, this language is the same as the Model Rule 1.5(d)(1) except for substituting "dissolution of marriage" for "divorce," "maintenance" for "alimony," and the addition of the "provided, however..." phrase.]

In Fletcher v. Fletcher, 227 Ill.App.3d 194 (4th Dist. 1992), the Appellate Court held that "contingent fee agreements relating to collection of back child support and back maintenance are enforceable" and construed Rule 1.5(d)(1) to permit contingent fees as to legal matters which follow final judgments in dissolution cases. 227 Ill.App.3d at 198. The court's comments regarding Section 508 and whether the written contingent fee agreement should or must be made a part of the record in the enforcement case should also be noted. 227 Ill.App.3d at 200.

Here, the final judgment of dissolution, maintenance, support and property settlement had occurred. It was only after the failure of Mr. B's business and his stoppage of the payment obligations that the

contingent fee contract was entered. We believe the last clause of Rule 1.5(d)(1), added in the Illinois Rule from the Model Rule's language, constitutes just this exception to prohibition of contingent fee agreements in matters such as Mr. B's bankruptcy or post-judgment petition and appeal which are "subsequent to final judgments." Therefore, on the basis of the language of Rule 1.5(d)(1), a contingent fee agreement in a fact situation as here, assumed to be in proper written form and objectively reasonable in amount, should be permitted under the Illinois Rules of Professional Conduct. We express no opinion as to whether a 50% contingent fee in this case is reasonable.

This opinion would be incomplete without a note of two cases of the Illinois Appellate Court which reach a result contrary to the rule and which, as such, this Committee has declined to follow. 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." [From EC 2-20 as quoted in the Comment to Rule 1.5(c), Annotated Model Rules of Professional Conduct, Second Edition, page 78.] 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 agreement should not discourage reconciliation between parties." [Comment to Rule 1.5(d) Annotated Model Rules of Professional Conduct, Second Edition, page 81]. 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.

In Licciardi v. Collins, 180 Ill.App.3d 1051 (1st Dist. 1989), the Appellate Court rendered a decision that a contingent fee agreement was unenforceable and the lawyer was not entitled to a quantum meruit fee for work done in a domestic relations matter. Decided under Supreme Court Rule 2-106(c)(4), the precursor to Rule 1.5(d)(1), the trial and appellate courts determined that the lawyer's representation was "tantamount to procuring a [post-decree] modification of a property settlement agreement and therefore made it in respect to procuring a property settlement that arose out of a dissolution of marriage," hence it was unenforceable. 180 Ill.App. 3d at 1055. While the lawyer contended the contingent fee agreement was to obtain enforcement of the agreement not to procure a property settlement and the contingency contract was signed and the action was filed in 1986--seven years after the "divorce on January 29, 1979" [180 Ill.App.3d at 1053]--the Appellate Court determined it was the "nature of the services which the attorney provides to the client [which] is dispositive." 180 Ill.App.3d at 1056.

The same division of the Illinois Appellate Court decided In re Marriage of Malec, 205 Ill.App.3d 273 (1st Dist. 1990), and summarized its Licciardi holding as:

> ...an illegal contingency fee agreement in a dissolution case bars recovery even under a theory of quantum meruit. We there stated that we believed that the underlying policy behind disallowing contingency fee arrangements in dissolution cases is 'so important that, as long as an attorney's services are employed with respect to the division of marital property, the rule bars contingent fees therefor.'" 205 Ill.App.3d at 289.

Although the Appellate Court determined that a preceding "original fee agreement" (non-contingent) was a proper basis for the lawyer to receive fees for work performed, it again held that the unwritten contingent fee agreement alleged in the case was illegal and not enforceable in domestic relations matters.

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