

LEGAL ETHICS OPINION 1748

REPRESENTATION OF CRIMINAL CLIENT ON A
CONTINGENCY FEE BASIS IN A CIVIL FORFEITURE
PROCEEDING TO RECOVER PROPERTY
SEIZED IN CONNECTION WITH CRIMINAL CHARGE

You have presented a hypothetical situation in which a criminal defendant was charged with possession with intent to distribute controlled substances. During the course of the defendant's arrest certain property was seized that was alleged to bear substantial connection with the illegal sale or distribution of controlled substances and subject to being condemned pursuant to the Code of Virginia.

Under the facts you have presented, you have asked the committee to opine as to whether an attorney is able to represent the criminal defendant on a contingent fee basis in a civil forfeiture proceeding to recover the seized property.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.5(c) and Rule 1.5(d)(2) of the Virginia Rules of Professional Conduct, which provide:

Rule 1.5 (c): A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall state in writing the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Rule 1.5 (d): A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(2) for representing a defendant in a criminal case.

The committee has previously opined that contingent fees are generally ethically permissible in any legal matter that generates a *res* from which the fee can be paid, unless otherwise prohibited. One purpose of a contingent fee arrangement is to encourage a lawyer to accept a case which carries inherent risks of nonpayment of legal fees. LEOs 1461, 1606, 1641, 1705.

In the facts you present, the committee believes a contingent fee agreement would not be ethically improper since: (1) the proceeding is actually a civil forfeiture proceeding not a criminal proceeding; (2) it involves a *res* out of which a contingent fee could be paid; and (3) there exists an uncertainty as to the outcome of the legal matter.