

*Subject:* Contingent Fee Arrangement in the Practice of Family Law.

*Conclusion:* Except in extremely rare situations, it is ethically improper for an attorney to enter into a contingent fee arrangement in family law and domestic relations cases. The potential of a monetary award under § 20-107.3, Virginia Code, provides no exception to the general prohibition.

*Discussion:* Contingent fee agreements in divorce proceedings and in negotiating property settlement agreements have long been disfavored by the courts and the bar. Such arrangements create tension between the attorney's ability to earn a fee in the particular case and society's desire to preserve the integrity of the marriage. Given the human relationships involved and the unique character of domestic relations cases, the Supreme Court of Virginia has long held that contingent fees in these cases are rarely justified. Rules of Court, Part 6:§II: EC:2-22, \_\_Va.\_\_(198\_\_).

Some jurisdictions have a *per se* prohibition against contingent fees in any domestic relations matter. Also, the Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, provide in Rule 1.5(d):

“(d) A lawyer shall not enter into an agreement for, charge, or collect any fee:

(1) in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof;

While the Virginia Code of Professional Responsibility does not contain a *per se* prohibition against contingent fees in domestic relations matters, the Standing Committee on Legal Ethics has on several occasions held that contingent fees in domestic relations cases are inappropriate. See LE Op. 573, now renumbered LE Op. 423, and LE Op. 469, now renumbered LE Op. 363. See also *Rules of Court*, 6:II: DR:2-105, \_\_Va.\_\_(198\_\_). In LE Op. 423 it was stated that “it is ethically improper for an attorney to enter into an employment agreement with his client where the attorney's legal fee would be based upon a percentage of the Court-awarded sum awarded to the client as a lump sum property settlement” and in LE Op. 363 it was stated “it would be ethically improper for an attorney to accept a suit to recover arrearages in child support and/or determination of future support rights on a contingent fee basis.”

The only current informal legal ethics opinion which has not been either withdrawn or rescinded by the Legal Ethics Committee allowing a contingent fee in domestic relations cases is LE Op. 546, now renumbered LE Op. 405, where it was stated that “it would not be improper for an attorney to represent a wife in a suit to obtain alimony arrearages on a contingency basis for the amount of alimony that has been fixed previously by Court order and the arrearages have continued for a period of seven (7) years if the wife is otherwise indigent.” In reaching its opinion that a contingent fee would not be inappropriate in this case, the Legal Ethics Committee in its letter to the inquirer stressed that its opinion was based on the following assumptions:

“(1) that the lengthy period during which payment of alimony has not been made precludes the continued existence of any meaningful human relationship which might be undermined by litigation handled on a contingent fee basis;

(2) that the client is not able to pay reasonable attorney's fees charged on an hourly basis;

(3) that any attorney's fees awarded by the Court will be credited against the contingent fee; and

(4) that the contingent fee charged would be fair and reasonable under all the circumstances.”

In light of the recent changes in the Virginia law whereby the Court may grant a monetary award to a party based on the property rights of the parties pursuant to § 20-107.3 of the Code of Virginia, some have suggested that the usual prohibition against contingency fees be removed and the attorney be allowed to enter into an agreement whereby the attorney's fees would be based on a percentage of any monetary award granted by the Court to his/her client. It should be noted that the *res* under which contingent fees are suggested to be paid out of is not a “new asset” such as in the personal injury area but rather is proposed to come out of the marital assets already in existence. Additionally, the fact that there may be a *res* out of which the contingency could be paid does not alter the fact that the attorney would still have a financial conflict of interest should reconciliation at any time during the period of representation become a possibility and further, “the human relationships involved and unique character of” domestic relations proceedings still remain. Additionally, since a monetary award is only a portion of the overall matter for which the attorney has been employed, a financial conflict of interest exists if the attorney's fee is based on the amount of the monetary award, as there will always exist a financial influence or pressure on the attorney to concentrate his/her best efforts on large monetary awards for his client at the possible expense of other areas involved in the proceeding such as periodic monthly spousal support, child support and child custody. It should be noted that the possibility of an equitable distribution has obviously not affected the rule adopted by the American Bar Association *per se* prohibiting contingent fees in domestic relations cases, since most states have had some form of equitable distribution or community property rights long before the State of Virginia passed its equitable distribution statute.

For the foregoing reasons, the Council of the Virginia State Bar is of the opinion that except in rare situations, it is ethically improper for an attorney to charge a fee contingent upon the award that may be granted his/her client pursuant to § 20-107.3, Virginia Code. The Council further reiterates the general proposition found in Ethical Consideration 2-22 [EC:2-22]: “Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.”

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**Legal Ethics Committee Notes.** – Rule 1.5(d)(1) and Comment [3a] codify the circumstances in which lawyers may handle family law matters on a contingent fee basis.