NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion #412 - 9/11/75 (41-75)

Topic: Contingent fees in criminal matters.

Digest: Contingent fee arrangements in criminal matters are improper; but non-contingent fee arrangements may properly depend in part upon the results obtained.

Code: EC 2-20
DR 2-106(B), 2-106(C).

QUESTION

May a lawyer enter into a fee arrangement to defend a client in a criminal case where it is contemplated the final fee will take into account, among other appropriate factors, the results obtained?

OPINION

The Code makes it ethically improper to enter into a contingent fee contract in a criminal case. EC 2-20 provides in pertinent part:

> "Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee."

DR 2-106(C) provides:

> "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

Under the former Canons, contingent fee contracts in criminal cases were not treated as being improper per se, although there appeared to be a consensus among commentators that such fee arrangements should be held void as against public policy. ABA Inf. 337; ABA 832 (1965); Restatement of Contracts, (1932), Sec 542(2). MacKinnon, Contingent Fees for Legal Services (1964) states (at p. 52):

> "The third area of practice in which the use of the contingent fee is generally considered to be prohibited is the prosecution and defense of criminal cases. However, there are so few cases, and these are predominantly old, that it is doubtful that there can be said to be any current law on the subject.... In the absence of cases on the validity of contingent fees for defense attorneys, it is necessary to rely on the consensus among commentators that such a fee is void as against public policy. The nature of criminal practice itself makes unlikely the use of contingent fee contract."

OVER---

Although the issue here presented may have legal as well as ethical aspects, we limit our opinion, as we must, to the latter. We hold that the Code prohibition of DR 2-106(C) encompasses, in addition to wholly contingent fees, agreements which provide in addition to a fixed basic fee, a further fixed fee contingent upon some specified result, such as acquittal, probation, fine or minimum term of punishment.

EC 2-20 and DR 2-106(C) do not, however, prohibit fee arrangements for criminal defense work reasonable in amount which appropriately take into account the various factors specified in subdivisions (1) through (7) of DR 2-106(B). Subdivision (4) of that DR specifically recognizes "results obtained" as being a factor bearing on the reasonableness of a fee. It is common practice to give substantial weight to the results factor in determining the final fees in many kinds of civil cases, including tax and antitrust matters. We see no ethical reason why the results factor should not be appropriately taken into account in criminal defense work, where DR 2-106(B) factors form the basis for the fee. Any such fee must of course, be reasonable under all circumstances. Care should also be taken not to give this results factor excessive weight, and thus defeat the policy of DR 2-106(C).