

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 690 - 5/13/97 (10-97)

Topic: Contingent Fees; Domestic Relations

Digest: Lawyer in domestic relations matter or lawyer's firm may represent client in a tort action against spouse under a contingent fee retainer, even if the tort action is tried as part of the matrimonial proceeding.

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

QUESTION

May a lawyer who represents a wife in a divorce proceeding, or another lawyer in the lawyer's firm, represent the wife in bringing civil assault charges against her husband and charge a contingent fee in the tort action?

OPINION

EC 2-20 has long discouraged contingent fees in "domestic relations" matters:

Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified.

However, the Code does not prohibit contingent fees in all domestic relations matters. Since 1990, DR 2-106(C)(2) has prohibited contingent fees in domestic relations matters only where the matter is contingent on securing a divorce or on the amount of maintenance, support, equitable distribution or property settlement:

A lawyer shall not enter into an arrangement for, charge or collect ... (2) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of maintenance, support, equitable distribution, or property settlement; or (3) A fee proscribed by law or rule of court.

Indeed, this distinction existed even before it was codified in the 1990 amendments to the Code. For at least a century, the New York courts have proscribed retainer agreements providing for a contingency fee dependent upon procuring a divorce or on the amount of alimony obtained. See *Van Vleck v. Van Vleck*, 21 App. Div. 272, 47 N.Y.S. 470 (4th Dep't 1897). However, this Committee has distinguished between actions affecting the marital status of the parties and other actions between the spouses. See N.Y. State 443 (1976) (contingent fee for collection of past due alimony and past due child support not improper, if reasonable; cautionary language of EC 2-20 applies only to actions affecting the marital status of the parties).

On its face, a tort claim does not appear to be included in the matters listed in DR 2-106(C)(2). Nevertheless in a state such as New York, where fault is an element of a divorce proceeding, and the facts underlying the tort claim may be the same as those presented in the divorce proceeding, one might well ask whether a tort claim should be viewed as so separate from the divorce proceeding that it should be exempt from the proscription against contingent fees in domestic relations matters, or whether a civil assault charge brought on behalf of a spouse who is simultaneously suing to dissolve the marriage and for equitable distribution of the marital property is so intertwined with the divorce proceeding that it should be deemed to be the same matter. If the latter were true, the bringing of the civil assault charge on a contingency fee basis might be viewed as an attempt to circumvent the proscription against contingent fees in the divorce proceeding.

There are several important distinctions between the tort action and the action for divorce. Significantly, the two actions have different purposes:

A tort action is not based on the same underlying claim as an action for divorce. The purpose of a tort action is to redress a legal wrong in damages; that of a divorce action is to sever the marital relationship between the parties, and, where appropriate, to fix the parties' respective rights and obligations with regard to alimony and support, and to divide the marital estate. Although a judge in awarding alimony and dividing marital property must consider, among other things, the conduct of the parties during the marriage, the purpose for which these awards are made do not include compensating a party in damages for injuries suffered. The purpose of an award of alimony is to provide economic support to a dependent spouse, that of the division of marital property is to recognize and equitably recompense the parties' respective contributions to the marital partnership.

Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 Fam. L. Q. 127, 131 (Summer 1990) (citation omitted). In addition, divorce claims are tried by a judge and tort claims are decided by a jury. A maintenance award may be modified in the future; tort judgments may not.

There are also, however, several overlaps between the divorce and equitable distribution aspects of a matrimonial matter, on the one hand, and the prosecution of a tort claim, on the other. The facts of the two proceedings may be the same. Similarly, in distributing marital property, the court may consider conduct that "shocks the conscience," which may be the same conduct that forms the basis for the tort claim. *See, e.g., O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1985) (marital fault not considered in determining equitable distribution except in egregious cases that shock the conscience of the court); *Blickstein v. Blickstein*, 99 A.D.2d 287, 472 N.Y.S.2d 110 (2d Dep't 1984). Accordingly, there is an increasing trend to allow, or even require, spousal battery claims to be brought as part of the matrimonial proceeding. *See Maharam v. Maharam*, 177 A.D.2d 262, 575 N.Y.S.2d 846 (1st Dep't 1991) (trial court could properly order that joint trial be held on financial matters relating to divorce and wife's tort claims). *See generally* Schepard, *supra*.

Nevertheless, even where courts have determined that joinder of a tort claim with the dissolution or compensation portions of a matrimonial proceeding is convenient for reasons of judicial administration, they often divide the proceedings into distinct segments for purposes of trying them. *See, e.g. Maharam*, 575 N.Y.S.2d at 847 ("It is clear that before making an equitable distribution award, the court will have to take into account the resolution of the plaintiff's tort claims, as a substantial award thereunder would have a significant impact upon 'the probable future financial circumstances of each party.' Accordingly, . . . the jury shall first render a verdict upon plaintiff's tort claims, and the court shall thereafter determine the plaintiff's equitable distribution and support claims.") (citation omitted).

In our opinion, as long as the tort claim can properly be brought as a separate action, there is no ethical reason why the lawyer for the wife cannot enter into a retainer agreement for a contingency fee in the tort action. DR 2-106(C) prohibits a contingent fee in a matrimonial matter only where the contingency is the securing of a divorce or the amount of maintenance, support, equitable distribution or property settlement. These "contingencies" depend upon the dissolution of the marital unit and the determination of the rights of marriage partners. The amount of a tort judgment compensates one spouse for injury, pain and suffering at the hands of the other. The question of whether the divorce/equitable distribution claims and the tort claim are separate (and may or must be joined in a single action) is a question of law, which is outside the scope of this Committee's jurisdiction.

Allowing the lawyer who represents the wife in the matrimonial matter (which must be charged at a fixed or hourly rate) also to represent her in the tort claim on a contingency fee basis will serve the public policy of ensuring that the wife is able to bring all available claims. It will, of course, require that the lawyer keep scrupulous time records that separate work done on the tort claim from work done in the divorce/equitable distribution matter. As noted above, some of the lawyer's work will be useful for both the matters. The lawyer will need to determine a reasonable basis on which time spent on such matters will be allocated. We believe such determination should be subject to scrutiny by the judge in the matrimonial matter.

CONCLUSION

A lawyer may represent the wife in a domestic relations matter under a retainer providing for an hourly rate, and the lawyer or the lawyer's firm may simultaneously represent the wife in a tort action against the husband under a contingent fee retainer, even if the tort action is tried as part of the same proceeding, as long as the tort claim is one that could be brought separately.
