New York State Bar Association

Committee on Professional Ethics

Opinion 747 – 11/5/01

Overrules: N.Y. State 443
Modifies: N.Y. State 690

Topic: Contingent Fees; Domestic Relations

Digest: Lawyer may not agree to a contingent fee retainer to collect maintenance, child support and/or alimony due based upon an already rendered final judgment following a divorce.

Code: DR 2-106(B), 2-106(C)(2), 2-106(D); EC 2-1, 2-20; Definition 10.

QUESTION

May a lawyer enter into an arrangement for, charge or collect a contingent fee in a post-divorce action to collect unpaid maintenance, child support and/or alimony under a final judgment previously entered (hereinafter a "matrimonial collection action")?

OPINION

This Committee first confronted this question in N.Y. State 443 (1976). In that opinion, the Committee opined that under the then-current provisions of the New York Lawyer's Code of Professional Responsibility ("Code") there was nothing improper in entering into a contingent fee retainer to collect past due alimony and past due child support payments. In reaching that determination, the Committee observed that EC 2-20 cautioned that "contingent fee arrangements in domestic relations cases are rarely justified," but it expressly distinguished "actions affecting the marital status of the parties," the apparent focus of EC 2-20, from "cases solely for the collection of past due alimony and of past due child support payments."

Thereafter, the ethics committees of two other bar associations in New York State reached the same conclusion. In N.Y. County 660 (1984), the committee approved a contingent fee arrangement to collect past due alimony and child support, finding that "[i]n such collection matters there is little risk of conflict of interest since the financial relationship between the parties has already been set and the lawyer's duty is merely to enforce the pre-fixed obligation." Nassau County 90-18 reached the same conclusion about an action to collect past due maintenance and a distributive award

under a final judgment of divorce previously entered. The committee viewed such an action, in essence, as no different from a standard collection case:

> [S]ince the "domestic relations" case has already been terminated by a judgment, any enforcement proceedings are technically not a part of the earlier "domestic relations case," and, practically, do not involve the "unique character" of a domestic relations case. Enforcement proceedings would, rather, involve the standard collection mechanisms afforded to any judgment creditor under the Civil Practice Law and Rules. Successful collection of the sums would, additionally, produce a fund out of which the fee can be paid. Finally, a divorced client, who by the very nature of the requested representation is being denied both past-due maintenance and a distributive award, might be unable economically to afford competent representation if a contingent fee is unavailable.

A few years ago, this Committee cited N.Y. State 443 with approval in N.Y. State 690 (1997). In that opinion, the Committee concluded that a lawyer who represents a wife in a divorce proceeding may represent the wife in bringing a tort action for assault against her husband and charge a contingent fee in that tort action. The Committee cited N.Y. State 443 for the proposition that actions affecting the marital property can be distinguished from other actions between the spouses.

Despite N.Y. State 690's passing reference to N.Y. State 443 and the concurrence of two other ethics committees in New York State, the subsequent history of the Code and its interplay with the Appellate Division rules governing procedures for attorneys in domestic relations matters (22 NYCRR Part 1400) (hereinafter "Part 1400") require us to conclude that N.Y. State 443 must be overruled.

In 1990, the Code was amended to add DR 2-106(C)(2), a provision based upon Model Rule 1.5(d). The 1990 version of DR 2-106(C)(2) prohibited a lawyer from "enter[ing] into an arrangement for, charg[ing] or collect[ing] … 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." Consequently, in 1990, for the first time, the Code contained a disciplinary rule expressly prohibiting a contingent fee in certain domestic relations matters.

In November 1993, the Appellate Division of the New York State Supreme Court adopted the rules contained in Part 1400. The scope provision of these rules is very broad, covering not only the initial proceedings to obtain a divorce, custody, child support, and/or maintenance, but also subsequent proceedings "to enforce or modify a judgment or order in connection with any such claims, actions or proceedings." Rule 1400.2 requires an attorney to provide a prospective client in such a domestic relations matter with a statement of client's rights and responsibilities that includes the following sentence: "Your attorney may not request a fee that is contingent on the securing of a divorce or on the amount of money or property that may be obtained."

Effective July 14, 1994, the Appellate Division amended DR 2-106(C)(2) to clarify, among other things, that the scope of the prohibition on contingent fees in domestic relations matters was limited to "domestic relations matters to which Part 1400 of the joint rules of the Appellate Divisions is applicable."

In 1999, the Code provisions prohibiting contingent fees in domestic relations matters were amended again. First, subdivision 10 of the Code's Definitions was added to define "domestic relations matters," incorporating the following language from the scope provision of Part 1400:

> *Domestic relations matters* means representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings.

Second, DR 2-106(C)(2) was amended by replacing the word "upon" with the phrase "in any way determined by reference to," so that DR 2-106(C)(2)(a) now reads:

> (C) A lawyer shall not enter into an arrangement for, charge or collect:
>
> (2) Any fee in a domestic relations matter:
>
> (a) The payment or amount of which is contingent upon the securing of a divorce or in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement.

That change in DR 2-106(C)(2)'s language was recommended by the New York State Bar Association, and adopted by the Appellate Division, "to confirm the breadth of the prohibition against result-based attorneys' fees in matrimonial cases." NYSBA Special Committee to Review the Code of Professional Responsibility Report to the House of Delegates 31 (Feb. 29, 1996). As a result of that change, "the dollar amount of maintenance, support, equitable distribution, or a property settlement cannot even be a factor, much less the sole determinant, of the amount of the legal fee in a domestic relations matter." Roy D. Simon, Jr., *Simon's New York Code of Professional Responsibility Annotated* 182 (2001).

Thus, the literal language of the Code, as amended in 1999, prohibits an attorney from entering into a contingent fee retainer in a matrimonial collection action. The Code's definition of a domestic relations matter would encompass such a collection action, because it would be an action "to enforce . . . a judgment or order in connection with [prior] claims, actions or proceedings" for maintenance, child support, and/or alimony. Further, the amount of the legal fee would be predicated, at least in part, upon

the amount of maintenance, child support, and/or alimony recovered, in violation of the literal language of DR 2-106(C)(2).

We question, however, whether prohibiting a contingent fee in a matrimonial collection action serves the public policies animating DR 2-106(C)(2)(a). First, the rule supports the institution of marriage by prohibiting a fee arrangement that would create an economic incentive for a lawyer to fight against reconciliation of the husband and wife and that encourages "bitter and wounding court battles." *See V.W. v. J.B.*, 165 Misc.2d 767, 629 N.Y.S.2d 971, 973 (N.Y. Co. 1995), *rev'd sub nom Weinstein v. Barrett*, 640 N.Y.S.2d 103 (1st Dep't 1996). *See generally* Wolfram, Modern Legal Ethics § 9.4.4 (1986); Restatement (Second) of Contracts, §190(2). Second, it supports the interests and autonomy of the represented spouse and the children by prohibiting a fee arrangement that would create an economic incentive for a lawyer to seek a distribution of property that favors the lawyer, possibly sacrificing the interests of the client and the client's children. *See generally* Wolfram, Modern Legal Ethics § 9.4.4 (1986).

Arguably, neither of these policies is undermined when a lawyer enters into, charges or collects a contingent fee retainer in a matrimonial collection action. First, the fee award is not predicated upon securing a divorce or any other result inconsistent with reconciliation or preservation of the marriage. A matrimonial collection action, as defined above, only arises after a divorce decree already has been rendered. Second, in a matrimonial collection action, a court has already entered a final judgment fixing the amount of maintenance, child support and/or alimony to be paid. Thus, in theory at least, the interests of the client and the client's children could not be sacrificed by the lawyer's pursuit of the largest fee.[1] Viewed from that perspective, the matrimonial collection action is nothing more than a supplemental proceeding to enforce a judgment that, in this situation, happens to be a judgment that originated in a domestic relations matter.

The majority of ethics committees in other states that have considered the propriety under Model Rule 1.5 of a contingent fee retainer in a matrimonial collection action have reached that conclusion, determining that a contingent fee arrangement in a matrimonial collection action is not contrary to the public policies underlying Model Rule 1.5.[2] *See e.g.*, Arizona Op. 93-04; North Carolina RPC 155 (1993); Kansas Op. 92-13; South Carolina Op. 92-05; Oregon 1991-13; Pa. Inf. Op. 90-98; New Jersey Op. 618 (1988); Colorado Op. 67 (1985; updated for change to the Model Rules in 1995). *But*

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1 The Committee is aware, however, that the previously-ordered amount of maintenance, child support and/or alimony may be the subject of overall settlement negotiations when, as sometimes happens, the matrimonial collection action causes the defaulting spouse to seek a future modification of those fixed amounts.

2 We note, however, that the language of Model Rule 1.5 differs from the language of DR 2-106(C)(2)(a) because of the Code's definition of a "domestic relations matter." Therefore, unlike DR 2-106(C)(2)(a), Model Rule 1.5 does not literally prohibit a contingent fee arrangement in a matrimonial collection action.

see New Hampshire Op. 1990 - 91/15 (1991) (interpreting New Hampshire Rule 1.5(d) to prohibit a contingent fee arrangement for the collection of past due amounts of a property settlement owed under an existing divorce decree).

Moreover, contingent fee arrangements may make available to the public legal services that otherwise could not be afforded, thus serving a lawyer's duty to make legal services fully available. EC 2-1. There is some basis to believe that, at least in some cases, the availability of a contingent fee arrangement might make available to the public attorneys who otherwise might not be willing to take on a matrimonial collection action. *See, e.g.*, Nassau County 90-18.[3]

There is no "legislative history" regarding the adoption of the broad definition of "domestic relations matter" in Part 1400 or the definition's subsequent incorporation into the Code. Consequently, we cannot say whether the specific issue of contingent fee agreements in matrimonial collection actions – as opposed to other domestic relations actions – was considered in connection with the definition's adoption. Because contingent fee agreements in collection actions may not undermine the public policy of DR 2-106(C)(2)(a), and in light of other states' favorable treatment of such agreements, we believe that the prohibition on such fees should be reviewed and reconsidered. At present, however, we are constrained to read the Code in accordance with its literal language. Because that language so clearly prohibits a contingent fee arrangement in a matrimonial collection action, we conclude that such a contingent fee arrangement is prohibited by DR 2-106(C)(2)(a). We therefore overrule N.Y. State 443 and modify N.Y. State 690 with respect to its passing reference to N.Y. State 443.

CONCLUSION

Under DR 2-106(C)(2)(a), a lawyer may not enter into an arrangement for, charge or collect a contingent fee in a post-divorce action to collect past due maintenance, child support and/or alimony based upon a final judgment previously entered.

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3 Domestic Relations Law §237(c) and §238, which provide for the delinquent spouse's payment of the other spouse's attorneys' fees in certain situations, may limit the circumstances in which a contingent fee arrangement might be necessary to obtain an attorney willing to represent a client in a matrimonial collection action.