

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-411
Issued: January 2000

Question: May an attorney ethically represent a client on a contingency fee basis when the matter is an appeal of the dissolution of marriage decree as it relates to classification of certain property as non-marital?

Answer: No.

References: Kentucky Rule of Professional Conduct (KRPC) 1.5(d) (Kentucky Supreme Court Rule 3.130(1.5(d)(1))); Wisc. Op. E-89-2 (1989); In the Matter of Jarvis, 869 P.2d 671 (Kan. 1994); Overstreet v. Barr, 72 S.W.2d 1014 (Ky. 1934); Liciardi v. Collins, 536 N.E.2d 840 (Ill. Ct. App. 1989); State exrel. Oklahoma Bar Ass'n v. Fagin, 848 P.2d 11 (Okla. 1992).

OPINION

Kentucky Rule of Professional Conduct (KRPC) 1.5(d) (Kentucky Supreme Court Rule 3.130(1.5(d)(1))) states:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) 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 alimony, maintenance, support, or property settlement, provided this does not apply to liquidated sums in arrearage.

This Rule prohibits contingency fees in the enumerated domestic matters and makes no exception for domestic matters on appeal. There is no doubt that a contingency fee arrangement in an appeal regarding the characterization of property in a dissolution is a "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 alimony or support, or property settlement." The Rule clearly prohibits such a fee arrangement. See also Wisc. Op. E-89-2 (1989)(1.5(d)(1) prohibits contingent fee agreements for appeal of divorce judgments); In the Matter of Jarvis, 869 P.2d 671 (Kan. 1994) (public censure for violation of Rule 1.5 of an attorney who entered into a contingency fee agreement with a client for modification of maintenance award; contingency fee entered into after divorce granted).

Generally, contracts for contingency fees in domestic relations matters have long been void as against public policy as a matter of contract law in Kentucky and sister states. See Overstreet v. Barr, 72 S.W.2d 1014 (Ky. 1934); Liciardi v. Collins, 536 N.E.2d 840 (Ill. Ct. App. 1989); State exrel. Oklahoma Bar Ass'n v. Fagin, 848 P.2d 11 (Okla. 1992).

Often the ethical proscription and the contract doctrine are explained as preventing the attorney from having an incentive to thwart reconciliation. One might urge that matters handled after the dissolution of the marriage are not within the policy and should not be interpreted to be within the prohibition stated in 1.5(d). Yet, post-dissolution matters are within the words of the Rule's prohibition. In addition, there are other reasons for prohibiting contingency fee

arrangements in these situations such as eliminating the "potential for overreaching or undue influence in a highly emotional situation." In the Matter of Jarvis, 869 P.2d 671, 674 (Kan. 1994).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides: "Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act."