67 CONTINGENT FEE ARRANGEMENT IN CHILD SUPPORT AND SPOUSAL MAINTENANCE CASES

Adopted March 16, 1985.
Addendum issued 1995.

Syllabus

A lawyer may ethically enter into a contingent fee arrangement to collect past due child support or past due spousal maintenance (support).

A lawyer may not ethically enter into a contingent fee arrangement for the collection of future child support or future spousal maintenance.

Facts

A lawyer is requested by a client to collect past due child support or past due spousal maintenance owed to the client under a prior order of support (permanent order in domestic relations case, or support order in parentage or support case from juvenile court). May the lawyer ethically contract with the client to collect the child support or spousal maintenance arrearages on a contingency fee basis?

Opinion

The Code of Professional Responsibility DR 5-103(A)(2) provides that a lawyer may contract with the client for a reasonable contingent fee. *See* DR 2-106 (reasonableness of fee). C.R.Civ.P. Chapter 23.3 (1980) sets forth the rules an attorney must follow concerning all contingent fee agreements. Courts retain authority to review the reasonableness of contingent fee agreements. *Anderson v. Kenelly,* 37 Colo. App. 217, 547 P.2d 260 (1975); EC 5-7; *Brillhart v. Hudson*, 169 Colo. 329, 455 P.2d 878 (1969).

Contingent fee arrangements in civil cases have historically been accepted because ". . . (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid." EC 2-20. Contingent fee contracts in civil cases are met with approval if the arrangement benefits the client, and the client is fully informed of all relevant factors. EC 5-7; EC 2-20.

The creation or augmentation of a *res* out of which a fee can be paid does not occur in domestic relations cases when potential property division or support awards are undetermined. "No contingent fee arrangement shall be made . . . in respect of the procuring of a dissolution of marriage, determination of invalidity of marriage or legal separation, ..." C.R.Civ.P. Chapter 23.3 (1980). "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." EC 2-20.

Courts have uniformly held that an attorney may not, on a contingent fee basis, negotiate or litigate a property settlement, property division, or divorce decree. *Wall v. Lindner*, 159 Colo. 83, 410 P.2d 186 (1966); *In re Smith,* 42 Wash.2d 1988, 254 P.2d 464 (1953); *Morfeld v. Andrews*, 579 P.2d 426 (Wyo. 1978); *I. S. Speiser Attorneys' Fees* § 2.6 (1973). Contingent fee agreements based upon a percentage of an expected child support, spousal maintenance, or property award create tension between an attorney's ability to earn a fee in that particular case, and society's desire to preserve the integrity of the marriage.

A contingent fee agreement for the collection of *past due* child support or *past due* spousal maintenance, however, does not contravene this public policy. Collection of past due child support or past due maintenance can occur only *after* a court has determined the status of the marriage or the existence of the parent-child relationship. Therefore, an attorney pursuing such a collection on a contingent fee basis would not be placed in a position in conflict with the public's policy or the law's requirements.

It is well-settled law in Colorado that installments of child support or spousal maintenance become fixed and are judgments as each such installment comes due. *Carey v. Carey*, 29 Colo. App. 328,

486 P.2d 38 (1971); *Schaffer v. District Court*, 172 Colo. 43, 470 P.2d 18 (1970). Collection of non-domestic relation judgments is permitted under contingent fee agreements. Contingent fee agreements are employed in civil collection matters where, but for the lawyer's efforts, the debt would go unpaid. There is little risk of a 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 (liquidated) obligation.

The Committee is of the opinion that a contingent fee contract for services rendered in collecting *past due* child support or *past due* spousal maintenance is ethically proper, provided the attorney complies with the rules set forth in the Colorado Rules of Civil Procedure and the Disciplinary Rules contained in the Code of Professional Responsibility. The required advice to the client regarding other collection/fee alternatives under the Rules and the Code continues. Due to the unique remedies accorded to collecting child support and spousal maintenance, full advisement regarding collection alternatives and fee alternatives must occur (including but not limited to, the availability of the services of the offices of the district/county attorneys; the availability of contempt proceedings; and the authority of the court to award attorney fees and costs for the collection).

Accordingly, a lawyer may accept employment to collect *past due* child support or *past due* maintenance on a contingent fee basis. This opinion is in accord with the majority of those jurisdictions considering this question. Kentucky Bar Ass'n., Ethics Opinion E-205 (1979); Maryland State Bar Ass'n., 2 Informal Opinion Docket 80-34; Mississippi State Bar Ass'n., Ethics Opinion No. 88 (Sept. 23, 1983); Missouri Bar Administration, Formal Opinion No. 114 (Sept. 9, 1977); Montana State Bar Ass'n*., reprinted in part* 11 *Montana Lawyer* (June 1981); New York County Lawyers Ass'n., Answer to Question No. 660 (May 4, 1984); Virginia State Bar Ass'n., Legal Ethics Opinion No. 189 (February 17, 1984); West Virginia Bar Ass'n., L.E.I. 82-1 (June 18, 1982).

This opinion does not approve of contingent fee contracts to collect *future* child support or *future* spousal maintenance.

Note

While the Committee does not purport to give rules for constructing such agreements, nor to list all potential problem areas, our research showed at least two areas in which the lawyer must be wary:

(1) The assignment of a claim for support or maintenance will permit the claim to be discharged in bankruptcy under the current law. 11 U.S.C. § 523(a)(5)(A) (1984).

(2) A private collection effort was enjoined by the welfare department when the collecting parents were, or had been, receiving public assistance, since the effort would compromise the claims of the government to reimbursement for support payments. *See County of Santa Clara v. Support Incorporated*, 89 Cal. App. 3d 687, 152 Cal. Rptr. (1979).

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.8(j) (permitting reasonable contingent fees in civil cases) and Rule 1.5 (reasonableness of fees).