Contingent Fee in Marital-Like Case

Ethics Committee Advisory Opinion

10/23/81

The following is an advisory opinion addressed solely to the inquiring attorney and is not to be interpreted as the Committee's endorsement of the use of contingency fee arrangements in domestic relations cases.

Issue: May an attorney enter into a contingency fee agreement with a client where the unmarried client is seeking to be awarded money damages from a former live-in partner, given the marital-like relationship between the parties? The inquiring attorney represents a client in an equitable action brought under the directive of Joan S. vs. John S., 121 N. H. - (March 6, 1981). While the Supreme Court in Joan S. vs. John S. declined to award the plaintiff alimony or any type of property settlement, the court clearly indicated that the plaintiff could proceed on a quantum meriut theory, or petition in equity for a determination of the parties' rights in specific property.

Ethical consideration 2-20 of the 1978 ABA Code of Professional Responsibility states that "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified", (emphasis added). The underlying policy discouraging contingency fee arrangements in marital or domestic relations cases is that such agreements would presumably tend to deter or prevent a reconciliation between the parties. A second rationale is that the property settlement or alimony award is designed to inure to the benefit of a party, and not to that of a third person, i. e., an attorney. DR 2-106 (B) (8) of the ABA Code of Professional Responsibility states that one factor in considering the reasonableness of a fee (in any type of case) is whether it is fixed or contingent.

The recommendation in this case is that a contingency fee arrangement would not be improper, based on the following reasons. First, the ex-partner of the client has remarried and there is no possibility that the parties will become reconciled. An attorney's acceptance of the case under these circumstances would not put her or him in a position of undermining the policy of EC2-20. Secondly, the court's decision in Joan S. vs. John S. reiterated this jurisdiction's position that common law marriages are not recognized, and that the parties to such relationships are not entitled to the financial awards peculiar to the dissolution of formalized marriages.

Furthermore, in this case the parties have no children and the client's claims are based on equitable and contractual theories which are distinct from the purposes of monetary awards where a valid marriage exists. Because the Committee finds that a contingency fee arrangement in this case would not offend the principles underlying EC2-20, a contingency fee agreement in this case would be proper.