

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-168
Issued: July 1977

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a lawyer properly enter into a contingent fee contract under which, for his services in representing the wife in a divorce action, he is to receive from the wife a stated fraction of the value of the “property recovered” for her in the action?

Answer: No.

References: DR 5-103; EC 2-20, 5-7; Overstreet v. Barr, 255 Ky. 82, 72 S.W.2d 1014 (1934)

OPINION

In general, a lawyer may not properly acquire a financial interest in his client’s cause of action, DR 5-103, because it may compromise the independence of his professional judgment, EC 5-7. The substance of EC 5-7 and the structure of DR 5-103(A) both make clear that a lawyer acquires such a financial interest when he makes a contingent fee contract with his client. Nonetheless, DR 5-103(A)(2) permits a lawyer to make such contracts in civil cases as an exception to the general rule. This exception is made “because [a contingent fee contract] may be the only means by which a laymen can obtain the services of a lawyer of his choice.” EC 5-7.

EC 2-20 says that “[b]ecause of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified.” There are two reasons why this is so.

In a divorce case, either one or both spouses owns substantial property, or neither owns substantial property. If neither owns substantial property, then the kind of contract described in the question is pointless. If either owns substantial property, then the wife will have no difficulty obtaining the services of a lawyer of her choice without resort to a contingent fee contract. Thus the condition which justifies such a contract as an exception to the general rule does not exist.

A divorce case differs from an action for damages in that settlement may take the form of reconciliation of the parties. The kind of contract described in the question may motivate the wife’s lawyer to interfere with possible reconciliation of the parties. In Overstreet v. Barr 255 Ky. 82, 72 S.W.2d 1014 (1934), the court held a contingent fee contract between a wife and her lawyer in a divorce case to be void as against public policy for this reason.

We have concluded that a lawyer may not properly enter into a contract such as that described in the question.

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). The Rule provides that formal opinions are advisory only.