

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-205
Issued: January 1979

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 enter into a contingent fee arrangement for collection of back child support or alimony?

Answer: Yes.

References: Opinion KBA E-168; DR 2-106, 5-103; EC 2-20, EC 5-7, Overstreet v. Barr, 255 Ky. 82, 72 S.W.2d 1014 (1934); Manning v. Edwards, 205 Ky. 158, 265 S.W. 492 (1924)

OPINION

In general, a lawyer may not acquire a financial interest in the subject matter of the litigation he is conducting for a client, DR 5-103. DR 5-103(A)(2) permits a lawyer to make a reasonable contingent fee contract in civil cases. The reason for this is because it may be the only means by which a layman can obtain the services of a lawyer of his choice, EC 5-7.

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 against public policy. This case supports EC 2-20 which stated, "because of the human relationships involved and unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified." The reason why such contracts are held to be contrary to public policy is because of their tendency to deter or prevent a reconciliation between the husband and wife. It is also the statutory duty and responsibility of the court to see that support for children and alimony to the wife are provided in amounts appropriate to their needs and the husband's financial resources. The establishment of a fee by private contract as a percentage of the amount of support, alimony, and other property awarded to a party by the court tends to frustrate the court's action in settling these amounts at appropriate figures.

In a contingent fee for back child support or alimony post judgment, a reconciliation would not be possible and would not fit the rationale of Overstreet v. Barr. Manning v. Edwards, 205 Ky. 158, 265 S.W. 492 (1924), stated, "Where the contingent fee contract calls for legal proceedings between husband and wife to settle property rights, but no divorce action is contemplated, the contract is valid." However, DR 2-106(A) which states "A lawyer shall not enter into an agreement for, charge, or collect a clearly excessive fee" should be followed. One

of the factors to be considered as guides in determining the reasonableness of a fee is whether the fee is fixed or contingent, DR 2-106(B). A lawyer should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client, EC 5-7.

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.