KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-359
Issued: July 1993

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at http://www.kybar.org), before relying on this opinion.

Question: Is it ever permissible for a defense lawyer to charge a contingent fee in a civil case?

Answer: Yes.

References: Wolfram, Modern Legal Ethics 9.4 (1986); Hazard & Hodes, The Law of Lawyering 1.5:401 (1991); Wunschel Firm v. Clabaugh, 291 N.W.2d 331 (Iowa 1980); ABA Formal Op. 93-373 (1993).

OPINION

The question is presented by a lawyer who has been approached by an insurance company to defend its insureds, but pursuant to an unconventional fee arrangement.

The traditions of the bar have long recognized the propriety of a lawyer charging contingent fees in cases in which the lawyer's work will generate a res, and in which the client might not be able to pay on an hourly basis. The rules do prohibit contingent fees in criminal and divorce cases. See Rule 1.5.

Neither the Rules nor the earlier Code contain any prohibition of all contingent fees for lawyers defending civil cases. See Wolfram, Modern Legal Ethics 9.4 (1986); Hazard & Hodes, The Law of Lawyering 1.5:401 (1991).

Professor Wolfram puts it this way: "If a client, fully advised about the matter by a lawyer, prefers to have the lawyer share some risk of loss in return for a higher fee payment, which will be the usual trade-off, it is hard to see why the rich should not have what the poor are forced by circumstances to accept." Yet, elsewhere in his treatise there appear hints that even Professor Wolfram would concede that just because ballroom dancing is legal, that that is no reason for someone to take it up.

With that last thought in mind, we stress that the lawyer who would charge a contingent fee or bonus for result should also expect to bear the burden of proving that the method of computing the charge, and the amount of the fee, are reasonable and rational under the circumstances and are settled in writing at the outset of the representation. Rule 1.5.

For example, in Wunschel Firm v. Clabaugh, 291 N.W.2d 331 (Iowa 1980), the Court concluded that it should not enforce a contingent fee agreement relied upon by a law firm representing a defendant in a defamation case, since the fee claimed was based on a percentage (33 1/3%) of the difference between the unliquidated damages claimed in the complaint and the amount ultimately awarded or provided by any settlement

agreement. Given the fact that the amounts claimed by plaintiffs routinely bear little relation to ultimate recoveries, the method of computation was deemed irrational, and likely to result in fee charges more or less unrelated to risk and effort.

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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.