Committee Opinion
October 25, 1989

LEGAL ETHICS OPINION 1298

CONTINGENT FEE AGREEMENTS – DIVORCE: PROPRIETY OF CONTINGENCY FEE IN REPRESENTATION OF EX-WIFE IN APPEAL OF PROPERTY CLASSIFICATION.

You have advised that your client is a divorced woman, now living in California, who wishes to appeal the court's equitable distribution order classifying certain of her ex-husband's property as non-marital, thereby eliminating any partial distribution to her. You indicate that the woman is unable to pay customary (hourly or flat-rate) legal fees and wishes for you to pursue the appeal of the property classification on a proposed contingency fee arrangement which would apply only to any award out of any reclassified property. You indicate that no contingency fee would be taken from the trial court's monetary award.

You have asked the Committee to opine on the propriety of such a contingency fee arrangement based strictly upon any reclassification of the marital assets which would benefit your client above the existing trial court's monetary award.

Although the specific mandatory disciplinary rule applicable to contingent fee arrangements, DR:2-105(C), would not specifically prohibit such arrangements in domestic relations cases, the aspirational nature of Ethical Consideration 2-22 [EC:2-22] indicates that, because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are not appropriate. The Committee believes that the disfavor with which contingent fees in domestic relations matters are viewed is based upon the public policy intent to assist in the preservation of marital harmony where reconciliation is possible. Were contingent fees permissible at the original trial court level, such arrangements might be construed as promoting divorce.

It has been the longstanding opinion of this Committee that such arrangements are improper except in rare circumstances. L E Op. No. 189 sets forth the reluctance of this Committee to approve contingent fees in domestic relations cases and finds that such fees are only appropriate in those situations where the impact on human relationships will clearly not be adversely affected. The Committee has in the past opined that contingency fees for the collection of spousal or child support arrearages were not improper if the special conditions set forth in L E Op. No. 189 were present. (See L E Op. No. 667, L E Op. No. 405). The Committee has conversely found that no such special circumstances existed to permit contingent fee arrangements based upon a percentage of the court-awarded lump sum property settlement (LE Op. 423) or for representation of a divorced spouse's claim against her husband's military retirement pay (L E Op. No. 568). More recently, however, the Committee has opined that a contingent fee arrangement was permissible for an attorney's representation of a divorced spouse with regard to a valuable

asset that belonged to the parties but had been neither contemplated nor included in the settlement agreement since its very existence had been forgotten by the client at the time the property settlement had been negotiated. (See LE Op. 1062)

If the client is unable to pay reasonable fees, the Committee is of the opinion that, since the parties are in fact divorced and it does not appear that any human relationships would be adversely affected, a contingent fee arrangement would not be improper if based only upon any reclassification of the marital assets which would result in additional monies available to the wife above the trial court's award.

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Legal Ethics Committee Notes. – Rule 1.5(d)(1) and Comment [3a] codify the circumstances in which lawyers may handle family law matters on a contingent fee basis.