

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2011-7
(December 2011)

The inquirer represented a client in a divorce which resulted in a property settlement agreement (“PSA”) over ten years ago. In the course of enforcement litigation which commenced in about 2004, the defendant’s failure to disclose an asset that existed when the agreement was signed and had enormous income potential was discovered. The inquirer’s position in that litigation is that the non-disclosure was fraudulent, and, had full disclosure been forthcoming, the asset and its income potential would have been included in the PSA, to the inquirer’s client’s benefit.

The inquirer filed a petition seeking to reform the PSA, seeking to have the asset declared “marital” and to distribute to the client a percentage of the income generated by the asset since the agreement was signed. The inquirer is seeking as much of the escrow account as the court will agree would have been awarded to plaintiff had the asset been disclosed. Any recovery would be in a lump sum, as the income attributable to the undisclosed asset has been escrowed by court order, subject to final disposition. As the payment stream has been exhausted, there would be no ongoing payments under any scenario. Any recovery would be characterized as alimony, consistent with the treatment of a similar stream of income under the PSA.

All of the services to date were performed pursuant to an hourly fee agreement, which does not specifically address the petition before the court. However, the client has requested that the arrangement be altered to a contingent fee agreement. The inquirer asks whether he may continue this representation on a contingent fee basis.

Pennsylvania Rule of Professional Conduct (the “Rules”) 1.5(d) states, in relevant part:

A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support.

The Rule does not allow any exceptions, nor do the comments to that Rule adopted by the Supreme Court of Pennsylvania provide any further comment on the prohibition.ⁱ The amount of alimony is exactly what is in issue here. Accordingly, representation on a contingent fee basis is prohibited.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

ⁱ Interestingly, the ABA Model Rule of Professional Conduct has a somewhat similar provision but also has an explanatory comment not included in Pennsylvania’s version of the Rules. The Model Rule provides that:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof;

Comment 6:

Prohibited Contingent Fees

Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

While this ABA version leaves somewhat more room for debate, Pennsylvania's Rule does not.