NEW YORK COUNTY LAWYERS' ASSOCIATION
Committee on Professional Ethics

Opinion 714

TOPIC: CONTINGENT FEES IN CRIMINAL CASES

DIGEST: A LAWYER MAY NOT CHARGE CONTINGENT FEES IN CRIMINAL CASES, INCLUDING CASES IN WHICH CORPORATE DEFENDANTS ARE SUBJECT TO LARGE FINES BUT WHERE NO INDIVIDUAL FACES INCARCERATION.

CODE: DR 2-106(A) and (C)(1); EC 2-20; EC 5-1; EC 5-2; EC 5-7.

QUESTION:

The inquirer asks whether the prohibition against charging contingency fees in criminal cases applies to corporate criminal defendants where the corporation may be subject to large fines but where no individual faces incarceration.

OPINION:

The categorical ban on contingent fee arrangements in criminal cases is a well-established feature of the professional ethics of attorneys. All states forbid the practice and consider the arrangements unethical and illegal.[1] Although many persons, both within and without the legal profession, have debated the legitimacy and practicality of contingent fees, it is not the function of this Committee to rewrite any rules or pass upon questions of law.

DR 2-106(C)(1) provides that "a lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." The disciplinary

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[1] Pamela S. Karlan, Contingent Fees and Criminal Cases, 93 Colum. L. Rev. 595, 595 (1993) (citing Model Rule 1.5(d)(2); DR 2-106(C); Standards Relating to the Prosecution Function and the Defense Function: Defense Function § 3.3(e) (Am. Bar Ass'n 1971); Geoffrey C. Hazard, Jr. & Susan P. Koniak, The Law and Ethics of Lawyering 508 (1990); and Peter Lushing, The Fall and Rise of the Criminal Contingent Fee, 82 J. Crim. L. & Criminology 498, 500 & n.1 (1991)).

rule does not name specific types of criminal cases. Rather, it is a general, all-encompassing prohibition.

Various reasons are advanced to justify the ban against contingent fees in criminal cases. First, arrangements based on acquittal create a conflict of interest and may lead to the potential for compromised representation. Defense attorneys, for example, may be tempted not to plea bargain in order to go to trial and obtain the contingent fee. The ban on such arrangements, therefore, removes the incentive for lawyers to act contrary to the client's best interests.

Second, the prohibition prevents defense attorneys from taking advantage of criminal defendants who may be willing to pay exorbitant and excessive fees. See DR 2-106(A) (prohibiting a lawyer from receiving an excessive fee).

Finally, DR 2-106(C)(1) enforces the general ethical proscriptions against lawyers acquiring a financial interest in the client's cause and against becoming a joint venturer with the client in the case. See EC 5-1 ("The professional judgment of a lawyer should be exercised . . . free from compromising influences and loyalties."); EC 5-2 ("A lawyer should not accept proffered employment if the lawyer's personal interests or desires will . . . [likely] affect adversely the advice to be given or services to be rendered the prospective client."); EC 5-7 ("The possibility of an adverse effect upon the exercise of free judgment by the lawyer on behalf of the client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of the client or otherwise to become financially interested in the outcome of litigation.").

EC 2-20 presents the public policy reason underlying DR 2-106. In particular, the ethical consideration explains that "legal services in criminal cases do not produce a res with which to pay the fee."

This Committee is well aware that, in contrast to the policy rationale embodied in EC 2-20, contingent fee arrangements are permitted in many civil cases which do not produce a res (e.g., civil rights suits). The Committee also realizes that arguments can be hypothesized in favor of allowing contingency fees for corporate criminal defendants. For example, an acquittal or negotiated outcome in criminal cases involving financial wrongdoing and asset forfeiture might provide a defendant with a substantial res, which would in turn allow the defendant to pay the lawyer's fee.

DR 2-106, however, is clear. The rule explicitly states that an attorney may not charge a contingent fee in a criminal case. Criminal violations by corporate defendants, regardless of whether an individual is subject to incarceration, are criminal offenses.[2] Accordingly, no argument can overcome the fact that the ethics rule is currently in effect and valid.

CONCLUSION:

A lawyer is prohibited from making contingent fee agreements in any criminal case. This prohibition against contingent fees in criminal cases also applies to cases involving corporate criminal defendants subject to large fines but where no individual faces incarceration.

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[2] Currently, there is great debate as to whether a violation in which no individual is subject to incarceration should be considered a criminal offense. Many persons argue that the statutes are ambiguous and do not really raise such incidents to criminal status. Yet, until the law is changed and these violations are expressly considered something other than criminal offenses, these cases are to be considered criminal for purposes of applying DR 2-106.