NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion #390 - 5/21/75 (30-75)

Topic: Contingent Fees

Digest: Contingent fees are not improper per se

Code: EC 2-20, 5-7; DR 2-106(B)(8)

QUESTION

May an attorney be compensated on a contingent fee basis to process an application for a rate increase before an administrative agency or other public body?

OPINION

Unless prohibited by statute, rule, regulation or ordinance contingent fees under appropriate circumscribed circumstances are not improper. Cf. Judiciary Law, Sec. 474. EC 2-20 provides:

> "Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee."

Even though the historical rationale for permitting contingent fees relates primarily to making legal services available to those who might otherwise not be able to afford them, contingent fees have

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become an accepted practice. See e.g., MacKinnon, Contingent Fees for Legal Services 35-61 (1964). So long as the fee arrangement is openly arrived at by parties knowledgeable about such matters, there is no impropriety. EC 5-7 provides in pertinent part:

> "The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation....although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client."

Whether a contingent fee arrangement gives rise to some other breach of professional responsibility depends on such other conduct and not on the fee being contingent. For example, in determining the reasonableness of a fee, its contingent nature should be taken into account. DR 2-106(B)(8).

If the stringent criteria set forth in EC 2-20, EC 5-7 and DR 2-106 are met, it is not improper to enter into a contingent fee arrangement.
