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ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

OPINION 717

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

***RPC* 1.5(d)(2) -- Contingency Fees in Criminal and Quasi-Criminal Matters**

The Committee on Attorney Advertising (CAA) referred an inquiry to the Advisory Committee on Professional Ethics (ACPE) regarding attorney advertisements. The CAA noted that municipal court practitioners increasingly are offering a form of contingent fee arrangement in motor vehicle cases. These fee arrangements generally offer to refund the legal fee if the motor vehicle charge is not reduced to a lesser-point or no-point offense. The CAA preliminarily permitted attorney advertisements offering this type of contingent fee in motor vehicle cases but was then asked by an inquirer whether an attorney may offer a similar fee arrangement to represent defendants in municipal court who are charged with ordinance violations, petty disorderly persons offenses, or disorderly persons offenses. The CAA asked the ACPE to review the matter, as the ACPE is the proper Committee to consider whether such an arrangement complies with the *Rules of Professional Conduct*.

RPC 1.5(d)(2) provides that an attorney "shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case." Contingent fees in criminal matters "have long been considered impermissible on public policy grounds." Michels, *New Jersey Attorney Ethics*, Section 33:3-1, p. 785 (Gann 2009). The potential conflict

that can arise when a contingent fee is charged in a criminal matter has been succinctly described:

> If an attorney gets paid only if she obtains an outright acquittal or dismissal of all charges, she may experience a conflict of interest when faced with a plea bargain: her client might be better off pleading guilty to reduced charges, but the lawyer will lose her fee if he does. Similarly, at trial, if the attorney asks for instructions on lesser-included offenses, her client may avoid conviction on the top count, but again she will lose her fee.
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> [Karlan, P., *Contingent Fees and Criminal Cases*, 93 *Colum. L. Rev.* 595, 611 (April 1993)].

Hence, a contingent fee agreement in a criminal case can pose a conflict between the attorney's financial interests and the client's best interests. *RPC* 1.5(d)(2) presumably reflects the determination that this potential conflict justifies a blanket ban on contingent fees in criminal matters.

Municipal courts are "courts of limited jurisdiction." *N.J. Const.* (1947), Art. 6, sec. 1, par. 1. These courts are established by statute, *N.J.S.A.* 2B:12-1a, and exercise jurisdiction over motor vehicle and traffic violations; disorderly persons, petty disorderly persons, and other non-indictable offenses; local ordinance violations; and certain other matters. *N.J.S.A.* 2B:12-17. "[T]he municipal court is exercising quasi-criminal jurisdiction when it adjudicates non-indictable and motor vehicle offenses." Pressler, *Current N.J. Court Rules*, Comment to Rule 7.1, p. 2177 (Gann 2009).

In quasi-criminal matters, basic rights of criminal defendants are protected and certain principles of criminal procedure are followed, such as the burden of proof beyond a reasonable doubt, presentment in the name of the State, prohibition against double jeopardy, and the like. *State v. Widmaier*, 157 *N.J.* 475, 494 (1999) (double jeopardy and other fundamental criminal law protections attach to quasi-criminal motor vehicle matter); *State v. Laird*, 25 *N.J.* 298, 303

(1957) (the term quasi-criminal "has reference to the safeguards inherent in the very nature of the offense, the punitive quality that characterizes the proceeding, and the requirement of fundamental fairness and essential justice"); *State v. Francis*, 67 *N.J. Super.* 377, 381 (App. Div. 1961) (defendants charged with quasi-criminal offenses "are entitled to the same protection[s] as are normally accorded one accused of a criminal offense"). *See generally* Richard and Burns, *N.J. Municipal Court Practice*, Section 6:1, page 92 (Gann 2008).

The ACPE finds that the contingency fee prohibition in *RPC* 1.5(d)(2) applies to cases in municipal court. There is no principled reason to differentiate "criminal" matters from "quasi-criminal" matters when considering the potential conflict that may arise when an attorney charges a contingency fee. The primary difference between the two types of matters is the forum in which they are heard and the severity of the penalty. The potential conflict that is the subject of *RPC* 1.5(d)(2) may arise in either criminal matters or quasi-criminal matters.

The ACPE recognizes that this potential conflict does not present itself in all matters heard in municipal court. For example, in motor vehicle cases, the interests of the attorney and the client usually are aligned. Many clients do not seek a full acquittal of motor vehicle charges and expect the attorney to negotiate an agreement imposing a lesser sanction than that of the original charged offense.

RPC 1.5(d)(2) as currently written, however, is a bright line, prophylactic rule, flatly prohibiting an attorney from offering or collecting a contingent fee in a criminal (or quasi-criminal) matter. The benefit of a bright line rule is its clarity and ease of administration. This *Rule* reflects the Court's administrative rule-making decision that in many (though not all) cases, contingent fee arrangements can affect the objectivity and independence of judgment of defense lawyers and may permeate legal consultations on plea bargaining and trial strategy.

Accordingly, the Committee finds that *RPC* 1.5(d)(2) prohibits contingent fees in quasi-criminal matters in municipal court, including motor vehicle cases, driving while intoxicated cases, ordinance violations, petty disorderly persons offenses, and disorderly persons offenses. Attorneys may not offer a contingency fee in such cases. More specifically, attorneys may not offer to refund legal fees if, for example, a motor vehicle charge is not reduced to a lesser-point or no-point offense.

As noted above, the Committee recognizes that the potential conflict addressed by *RPC* 1.5(d)(2) is not present in many municipal court matters and the *Rule* may be fairly criticized as overbroad. Accordingly, the Committee has invited the Supreme Court, in its administrative capacity, to evaluate this *Rule* and consider whether a revision would be appropriate.