



ETHICS ADVISORY OPINION

12-02

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

A client has approached attorney, and without solicitation on attorney's part, has proposed that attorney take on certain title litigation over real property for him. The nature of the litigation is most akin to a quiet title action. In return, he wishes to compensate attorney with an ownership portion of the land (33 1/3 percent) if the litigation is successful. If the litigation is not successful, there will be no legal fees.

Question Presented:

May an attorney ethically provide for a contingent fee in a quiet title action in which the contingency consists of a partial ownership of the piece of land at issue in the action?

Summary of Opinion:

A contingent fee payable to the lawyer as a partial ownership interest in real property with the client may be permissible subject to the contingency fee arrangement complying with the requirements of: Rule 1.8(a), regarding entering into business transactions with a client; Rule 1.8(i), regarding acquisition of a proprietary interest in the subject matter of litigation; Rule 1.5(c), regarding contingency fees; and Rule 1.5's reasonableness requirement. Contingent fees are allowed because they provide a means for individuals to gain access to justice regardless of their economic status. Money and real property both constitute property.

Opinion:

Rule 1.8(i) states:

“(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) Acquire a lien authorized by law to secure the lawyer’s fee or expenses; and
- (2) Contract with a client for a reasonable contingent fee in a civil case.”

Comment [17] provides in pertinent part:

“In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exceptions for certain advances in the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer’s fees or expenses and contracts for reasonable contingent fees.”

Rule 1.5, cmt. 4 specifically states that “[a] lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing it does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i).” As noted above, a contingent fee – in this particular case, a contingent ownership interest in property – is consistent with the exception set forth in Rule 1.8(i)(2).

Comment 4 goes on to say, however, that “a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with a client.” Here, if the action is successful, the result will be that the lawyer and his client remain in relationship as joint owners of the property with all the potential rights and privileges incident to such joint ownership, such as partition and transfer of the interest to others. Consequently, in entering into a contingent fee arrangement involving the acquisition of a joint interest in real property, a lawyer is advised to comply with the requirements specified in Rule 1.8(a) governing business transactions with clients.

The Lawyer must also comply with the written fee agreement requirements of Rule 1.5(c).

Finally, all fee agreements, including a contingent fee agreement involving the acquisition of a co-ownership interest with the client in real property, are subject to Rule 1.5(a)’s requirement of reasonableness under the circumstances. See also Rule 1.5, cmt. 3.