

(LES 2851J)

ETHICS ADVISORY PANEL
Opinion #92-34, Request #254
Issued August 12, 1992

An attorney seeks Panel advice regarding the following circumstances. The attorney represents a husband in a divorce action. The wife is represented by separate counsel. Following a trial, the Family Court ordered the marital home sold and the proceeds split equally between husband and wife. A buyer was found and a purchase and sale agreement entered into. The buyer subsequently defaulted. The husband retained the requesting attorney to pursue a remedy against the defaulting buyer. A settlement was reached whereby the defaulting buyer paid damages of \$4,000, funds which the attorney now holds. The attorney seeks a fee of one-third of this settlement. The husband is agreeable. The wife, through counsel, objected to the payment of any fee from her portion of the settlement proceeds. The attorney asks whether it is proper to collect a fee equal to one-third of the total settlement proceeds, splitting the remaining proceeds equally between husband and wife.

Rule 1.5(c) and the comments thereto address contingent fee arrangements. In pertinent part, the rule states that:

A fee may be contingent on the outcome of the matter for which the service is rendered . . . a contingent fee agreement should be in writing and should state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated
(emphasis supplied).

The requesting attorney finds himself faced with this dispute as a result of his failure to enter into a fee agreement with the wife prior to undertaking the breach of contract representation. While the husband and wife are adverse in the Family court matter, their interests were aligned with respect to the breach of contract matter. The requesting attorney represented the interests of the wife in that matter without first entering into a contingent fee agreement, hence the dispute.

Rule 1.15, entitled "Safekeeping Property," states that:

When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claims interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

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The comment to Rule 1.15 states as follows:

Lawyers often receive funds from third parties from which the lawyers' fee will be paid. If there is a risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, the lawyer may not hold funds to coerce a client to accepting the lawyers' contention. The disputed portion of the funds should be kept in trust and the lawyers should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

The Panel agrees that the requesting attorney should suggest methods of resolving this conflict with the wife's counsel. Since a Family Court order for sale of the marital home is at issue, it may be appropriate to return to the court for guidance. In the alternative, the fee arbitration program established by the Bar Association may provide a means for resolving the matter. In the interim, the claimed fee should be kept separate by the requesting attorney until the dispute is resolved, and the undisputed portion of the settlement should be promptly tendered in accordance with the court order.