FAMILY LAW AND CONTINGENCY FEES; TIME TO RECONSIDER?

By: Marshal S. Willick, Esq.

I. The *Tomkins* (Marquis & Aurbach v. Dist. Court) Opinion, 122 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 97, Nov. 30, 2006), *en banc*

Andrew and Judy Tomkins divorced in 1973 after an 11-year marriage. Their stipulated decree divided property and contained a convoluted provision paying principal and interest on a note payable to Judy, with the interest denominated "alimony," apparently for tax reasons. Under the agreement, Judy could delay taking principal indefinitely, thus prolonging the payments of interest/alimony.

25 years later, she had still not taken the principal, was still getting interest/alimony payments, and in 1998 Andrew, fed up, filed a motion to set aside the agreement. Judy hired Marquis & Aurbach to defend it, and insisted on a contingency fee agreement, after being offered the opportunity to hire the firm on an hourly basis. The firm negotiated a large lump-sum payment to Judy (in excess of her specified minimum terms) in exchange for termination of the payment stream, and was paid its contingency fee.

Some months later, Judy's son was appointed as Judy's conservator, learned all of the above, and initiated a fee dispute to retrieve the fee. After proceedings not relevant here, the matter reached district court, which ultimately upheld the fee award. The son filed a writ to the Nevada Supreme Court, which struck down the fee award and remanded for rendition of a "reasonable fee" based essentially on the hours worked and results obtained.

The Court found that the contingency fee agreement violated prior SCR 155 (current RPC 1.5), which prohibits such fees in "a domestic relations matter, the payment or amount of which is contingent upon the securing of the divorce or upon alimony, child support, or property settlement in lieu thereof." The Opinion incorrectly states that new RPC is identical to the prior rule; it is not, but it has the same substantive prohibition.

Noting that the agreement was entered into 25 years post-divorce, the Court found that settlement of Andrew's attempt to terminate the payment stream violated the "plain language" of the rule since it was "partially contingent upon a modified amount of alimony." The Court found that "domestic relations matters" can be the subject of litigation post-divorce, and that alimony and the division of community property are "domestic relations concepts."

The Court agreed that contingency fees are permissible in domestic relations actions to collect past-due payments (so long as the fee is reasonable, any fees court-awarded were credited against the contingent fee, and the client was advised of the options of hiring counsel hourly or seeking services from the district attorney's office). Further, the Court apparently approved contingency fees in actions to modify property settlements "independent of support issues," taking the time to disagree with Ethics and Professional Responsibility Committee Formal Op. 16 (1993), which had indicated

that ***any*** property settlement modification "necessarily" affected alimony, making contingent fees impermissible.

Here, however, Judy wanted to and did negotiate for a lump sum which necessarily terminated the payment stream she had been receiving labeled "alimony." The Court found that a contingency fee agreement to pay counsel was therefore simply prohibited, under various cases and ethics opinions. Without questioning – or even reciting – the public policies implicated, the Court casually noted that the rule "does raise some concerns with respect to certain individuals' ability to retain an attorney in domestic relations cases." The Court also noted, without comment, that the Restatement (Third) of the Law Governing Lawyers § 35 (2000) provides that contingency fees are prohibited only when they are contingent on a specific result in a divorce proceeding or concerning custody of a child.

Dissenting, Justice Gibbons noted that the fee agreement was entered into at the insistence of the client, who was offered and rejected an hourly billing option. Since this litigation was post-divorce, he asserted, a contingency fee option should be available, and he urged the Court to modify the rule to permit such agreements.

II. Public Policy & Modern Reality

The anti-contingency-fee-in-domestic-relations-cases ethics rule is derived from the majority common law position established many years ago. The usually-cited public policy consideration is the State's strong interest in promoting and preserving marriage, which is supposed to be served by prohibiting attorneys from taking divorce cases on contingencies, thus preventing counsel from "promoting divorce" and "hindering reconciliation" because of the attorney's (contingent) financial interest in the divorce proceeding. *See*, *e.g.*, *Myers v. Handlon*, 479 N.E.2d 106 (Ind. App. 1985).

Even where this view has not been re-examined on its merits, courts have allowed the concept of fees based upon "results obtained" or "reasonable value of result achieved" in domestic litigation cases and concluded that such fees do not constitute impermissible contingent fees. *See*, *e.g.*, *Eckell v. Wilson*, 597 A.2d 696 (Pa. Super. 1991); *In re Marriage of Malec*, 562 N.E.2d 1010 (Ill. App. 1990); *contra*, *State ex rel. Oklahoma Bar Association v. Fagin*, 848 P.2d 11 (Okla. 1992).

In fact, *Tomkins* itself is such a case – the first fee dispute panel found that the straight hourly value of the time put in by Marquis & Aurbach was $23,000, but that a "reasonable fee" would be $75,000. The only reasonable construction of the $50,000 additur was that it was added under the "novelty, difficulty, and skill," and "amount involved and results achieved" subsections of RPC 1.5.

The problem with such a resolution is that it leaves all parties uncertain as to their rights and obligations throughout the case, determining the value of the work by the retrospective opinion of strangers to the original agreement. If such factors are to be legitimately considered, as apparently they can, then persons should be able to contract relating to them with specificity as to the amount that would be owed based on a particular result achieved, ***before*** the fact.

In view of the result ultimately reached, it apparently would have been perfectly appropriate for the law firm to have contracted for their hourly rate, plus an additional $50,000 if they reached Judy's original target settlement, so long as they phrased the fee as a results-achieved bonus rather than a contingency percentage.

It seems incongruous for ethical propriety to hinge on a matter of semantics. A lawyer eligible to receive a "results achieved" bonus would have precisely the same incentive to "promote divorce" or "hinder reconciliation" as one with a contingency agreement, and as Justice Gibbons points out in *Tomkins*, the entire question is nonsensical in the context of post-divorce actions. In that case, a quarter century post divorce, it could safely be said that the form of Judy's retainer agreement with her attorneys could have no possible impact on the public policy of promoting marriage.

The Supreme Court in *Tomkins* properly criticized Formal Op. 16 for limiting the power of parties to contract for legal services beyond the plain language of the ethics rule, but stopped short of examining the policies supposedly served by the rule itself to see if they merited continuation.

The fine-line drawing calls into the question the ends that are supposed to be served by the prohibitions embedded in our ethical rules, and whether the public policies that are implicated are served by allowing or prohibiting either results-achieved bonuses, ***or*** regular contingency agreements, given the place of divorce in modern American life. Put another way, is there still a legitimate purpose to be served by preventing counsel from being retained other than on a strictly hourly basis in cases involving alimony, or any other domestic relations matters?

It is true that in that in the recent updating of the ethics rules in the Ethics 2000 initiative, the substance of the old prohibition on contingency fees in domestic matters was not addressed. But this was because the Standing Committee on Ethics and Professional Responsibility already had under submission a request to revisit Formal Op. 16 and the world of results-achieved bonuses and contingency fee agreements in domestic relations cases. The Committee, in turn, could not act because it was aware of pending litigation (*Tomkins*) on the same subject matter.

Now that the Opinion has been issued, the time has come for an honest review of public policy and modern realities, both socially as to the fact of divorce in modern culture, and economically as to the ability of persons to hire their counsel of choice – which our Court has recently proclaimed is itself a right deserving of substantial deference and protection as a matter of public policy. *See Millen v. Dist. Ct.*, 122 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 105, Dec. 21, 2006).

III. Bounds of Advocacy/American Academy of Matrimonial Lawyers Position

The American Academy of Matrimonial Lawyers ("AAML") was founded in 1962, by highly regarded domestic relations attorneys "To encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." There are some 1600 AAML Fellows in 50 states.

It is a difficult organization to join, requiring an examination on wide-ranging issues pertaining to family law, admission to the Bar for 10 years, a 75 percent specialization in matrimonial law (subject to certain exceptions), certification as a family law specialist if available, and a minimum of 15 hours of continuing legal education in each of previous five years, plus interviews by a state board of examiners and review by other matrimonial law practitioners in the state, and other requirements.

The qualifications for admission are sufficiently exacting that when the Board of Governors of the Nevada Bar approved Standards for Certification of Family Law Specialists in February, 2005, it recognized the existing Nevada Fellows of the AAML as certified specialists. This created a group able to draft standards and create a specialist certification test for other family law practitioners in Nevada.

The national AAML has for many years had working groups dedicated to review of the ethical codes governing family law practice, and conceived the idea for what would become known as the "Bounds of Advocacy" in November, 1987. The Committee, which canvassed the entire AAML for its collective wisdom and experience, included Gary Silverman of Reno; the proposed text was vetted and reviewed by academics and judicial authorities for years before its publication in 1991.

In 1995, at the urging of the Nevada Bar Family Law Section, the Nevada Supreme Court made compliance with the standards of conduct embodied in the 1991 Bounds an aspirational goal of every lawyer and pro se litigant involved in family law cases in Clark County, by adoption of EDCR 5.04.

The first version of the Bounds had only five guidelines addressing fees:

2.1 Fee agreements should be reduced to writing.
2.2 An attorney should provide periodic statements of accrued fees and costs.
2.3 All transactions in which an attorney obtains security for fees should be properly documented.
2.4 An attorney may withdraw from a case when the client fails to honor the fee agreement.
2.5 If the client fails to honor the fee agreement, an attorney may properly take all steps necessary to effect collection, including mediation, arbitration or suit.

The AAML continued studying the issue, and a decade after the first edition, published a substantially updated and expanded version of the Bounds in 2000. The newer version includes an extensive discussion of the propriety of various fee arrangements, and setting out in summary form the research and commentary supporting the Bounds. The Family Law Practice Manual includes both versions of the Bounds for reference.

The new Bounds express the opinion that the enhancement of an attorney's hourly fees by a "results achieved" bonus is ***not*** a contingent fee and is not prohibited by any model rule, past or present. Bound Standard 4.4 (2000 ed.)

They also suggest a dramatic change in such rules, expressly stating that contingent fees should be permitted in most domestic relations matters. Bound Standard 4.5 (2000 ed.):

> An attorney should not charge a fee the payment or amount of which is contingent upon: (i) obtaining a divorce; (ii) custody or visitation provisions; or (iii) the amount of alimony or child support awarded. An attorney may charge a contingent fee for all other matters, provided that:
>
> (a) the client is informed of the right to have the fee based on an hourly rate; and
> (b) the client is afforded an opportunity to seek independent legal advice concerning the desirability of the contingent fee arrangement.

The comments to Bound 4.5 contain extensive discussion of the traditional policy bases for prohibiting contingency fees, and citations to authorities indicating why the traditional blanket prohibition on such arrangements are inappropriate. The comments debunk the notion sometimes expressed that contingent fees are "unnecessary" to enable poorer parties to obtain qualified counsel because of the power of the courts to compel a spouse with greater assets to pay fees, and instead state that the expressed public policy bases are not served by a contingent fee ban.

The commentary states that such a ban undermines the freedom of attorneys and informed clients to enter into fee arrangements that best suit the nature of particular cases and interests of both attorney and client, and notes that in the real world, the inability of poorer clients to pay the hourly fees accrued if they do not win their cases produces exactly the same economic result as a contingency fee in any event.

The proposed rule would limit the ban on contingency fees to those aspects of divorce cases supported by the historic policy bases, and in all other cases give informed clients the same ability to choose a contingent fee arrangement as clients in other civil matters. Finally, the Bounds advocate that: "Jurisdictions that completely ban all contingent fees should be urged to adopt a rule similar to this Goal."

IV. Conclusions

Clearly, the question of what is considered proper in terms of retainer and fee arrangements in domestic relations matters is a topic on which authorities vary, and in which a long-ago expressed blanket rule may have outlived its legitimate bases for existence. The reality is that many legitimate cases for poorer people simply cannot be pursued if they are difficult, or novel, on a flat fee or hourly basis.

Footnote 30 of the *Tomkins* Opinion obliquely notes this economic fact, and footnote 28 correctly notes the excesses set out in Formal Opn. 16. Justice Gibbons' dissent in that case makes precisely the same "client should be allowed a choice" point made by the Bounds, and the Court in the meantime (in *Millen*) has restated the importance of permitting clients to be able to secure counsel of their choosing.

Given the force of the policy conclusions in the Restatement and the Bounds, clients should be able to secure qualified counsel of choice whenever that goal can be achieved without sacrificing any legitimate public policy goal of equal magnitude. RPC 1.5 should be amended in such a way to squarely address both results-achieved bonus provisions and contingency-based fees in domestic

relations matters in the modern world, to avoid the limitations and uncertainty suffered by client and counsel in the *Tomkins* case.

The AAML position, as stated in Bounds of Advocacy Nos. 4.4 and 4.5, seem appropriate rules, for the reasons set out in the commentary. The Standing Committee on Ethics and Professional Responsibility should propose such a revision, and the Nevada Supreme Court should act on it.

Marshal S. Willick, Esq. is the Principal of the WILLICK LAW GROUP, an A/V-rated Las Vegas family law firm. Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2198. Phone: (702) 438-4100; fax: (702) 438-5311; e-mail: Marshal@WillickLawGroup.com.