# STATE BAR OF NEVADA
# STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITIY

## Formal Opinion No. 16
## October 22, 1993

**QUESTION** - In a situation where there has been a property settlement agreement which was not merged in a subsequent decree of divorce, can an attorney represent one spouse on a contingency fee basis in that spouse's attempt to rescind the property settlement agreement and seek a greater share of the community property through an independent action?

**ANSWER** - Even though a decree of divorce has already been entered, a lawyer may not represent one souse on a contingency fee basis in a subsequent independent action seeking to alter or otherwise attack a property settlement agreement related to the original divorce action.

**AUTHORITIES RELIED ON**
Nevada Rule of Professional Conduct (Supreme Court Rule) 155; Daniel v. Baker, 106 Nev. 412, 794 P.2d 345 (1990); Gilbert v. Warren, 95 Nev. 296, 594 P.2d 696 (1979); Meyers v. Handlon, 479 N.E.2nd 106 (Ind. Ct. App. 1985); Stepp, Groce, Pinales & Cosgrove v. Thompson, 319 SE2d 315 (NC App. 1984).

DISCUSSION

**INTRODUCTION**
The Nevada Rules of Professional Conduct clearly prohibit an attorney from representing a client in an action to secure a divorce, alimony or support on a contingency fee basis. This is also true of representation related to a property settlement agreement settling such matters. However, this Opinion addresses the situation where a divorce has already been entered into which was a merged with the divorce decree, and one of the spouses wishes to attack the agreement in a independent action.

**SUPREME COURT RULES**
The Nevada Supreme Court Rules state that "[a] lawyer shall not enter into an arrangement for, charge, or collect: (a) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof." S.C.R. 155(4) Under this rule it is clear that a lawyer cannot represent a client on a contingency fee basis in helping that client secure a divorce, alimony or support. The rules appears at face value only to apply to property settlement agreements when they are in lieu of an action for divorce, alimony or support. However, in most cases, the property settlement is inextricably intertwined with the amounts agreed upon for alimony or support. For example, the Nevada Supreme Court has recently held that it was an abuse of discretion for a court not to consider the wealth of the husband in making an award of alimony. Daniel v. Baker, 106 Nev. 412, 794, P.2d 345 (1990). Almost every property settlement agreement is in lieu of an action for divorce, alimony or support.

**DISCUSSION**
The issue presented is whether the status of a property settlement agreement which has not been merged with the divorce decree offers a loophole to the ban on contingent fee agreements. The nonmerged agreement stands as an independent contract which may not be modified by the district court, but may be enforced or challenged as other written contracts in an independent action. See, Gilbert v. Warren, 95 Nev. 296,594 P.2d 696 (1979).

The ethical rule is derived from the majority rule of common law that contingent fee cases in domestic relations cases are void as against public policy. See, Stepp, Groce, Pinales & Cosgrove v. Thompson, 219 SE2d 315 (NC App. 1984). The rule in Nevada, while somewhat specific, expresses public policy and

should not be thwarted by superficial appearances. The reality of any subsequent attack on a property settlement agreement is that it is an action in a domestic relations matter which seeks to change the parties settlement of the amount of alimony and/or support. The fact that the challenge comes after entry of divorce does not eliminate the public policy concerns behind the rule.

In Meyers v. Hanlon, 479 N.E.2nd 106 (Ind. Ct. App. 1985), the Indiana Court of Appeals specifically address the situation where an attorney took a case, on a contingency fee basis, involving the distribution of marital assets after a divorce degree had already been issued. The Meyers Court held that this arrangement went against public policy and that therefore the contingency fee contract was void. Id. At 111. In reaching this conclusion, the Meyers Court discussed several reasons for prohibiting contingency fee agreements in divorce related cases. The Committee agrees with this court's analysis.

Generally speaking the state has a strong interest in promoting and preserving marriage. Because the policy of the state is to promote marriage, the rationale for prohibiting attorneys from taking divorce related cases, on a contingent fee basis, is that it prevents attorneys from promoting divorce and hindering reconciliation between spouses as a result of the attorney'' financial interest in the divorce proceeding. Id at 108.

Even when a divorce has already been obtained, several factors suggest that contingent fee arrangements are still undesirable. As suggested by the Meyers court, if contingent fees are permitted in the property distribution portion of bifurcated divorce proceeding, a lawyer might encourage his client to seek a bifurcated hearing and then negotiate a separate contingency fee arrangement covering the subsequent property settlement action. Under this situation, an attorney might be inclined to encourage delay as a tactical device to pressure an opposing party to make a financial decision that would ultimately enhance the attorney's contingent fee. This course of action by an attorney is particularly undesirable in the matrimonial context where the interests of society and the parties is best served by expediting an end to hostilities and the unfreezing of the marital estate. This prompt end to litigation permits the parties to resume normal and productive lives.

In addition, the nature of a contingency fee agreement in general dictates that this type of arrangement is not desirable in most domestic relations cases. The all-or-nothing risk to the attorney which justifies a contingent fee agreement does not exist in most divorce proceedings. In fact, each spouse generally has a statutory right to an equitable share of the marital property and also a possible award of attorneys fees. Id. at 110.

Finally, the trial court's duty to provide an equitable property settlement and establish support for minor children or a disabled spouse might be hampered by the existence of a contingent fee arrangement-especially where the court has not been informed of the contingency fee. In this situation, a court's effort to make suitable provisions for one spouse might be severely frustrated if ultimately a contingent fee is deducted from the court awarded amount. Id. at 111.

**CONCLUSION**

Under Nevada Rule of Professional Conduct 155, an attorney is prohibited from taking a domestic relations case on a contingency fee basis. For the public policy reasons explained in the Meyers case, Rule 155 should be interpreted to prohibit attorneys from accepting contingency fees not only in the original divorce action, but also in any subsequent independent action that seeks in any manner to alter alimony or support or the terms of enforceability of a related property settlement agreement.