

Ethics Opinion 2010-01

Rule: 1.5
Subject: Contingent fee in contract action between unmarried domestic partners
Summary: Action to recover cash investment in purchase of real property from unmarried domestic partner is not subject to a prohibition against use of a contingent fee

Attorney represents a client who seeks to recover personal property and a cash investment in a home from an unmarried domestic partner. The client is interested in a contingent fee arrangement. Attorney has asked if a contingent fee is permissible in these circumstances.

Rule 1.5(d) precludes the use of a contingent fee agreement in a domestic relations action if the fee is contingent upon obtaining a divorce, the amount of alimony or support obtained, or the value of a property settlement in lieu thereof. The rule is based on a concern that lawyers not have a negative incentive to promoting reconciliation of clients in a divorce action. Here, the issue in litigation is not within the three articulated claims which cannot be subject to a contingent fee. Additionally, since the desired recovery is based on a cash transaction for the purchase of real property, it is much more in the nature of an ordinary contract action than a domestic relations action. It is therefore not subject to the restrictions of Rule 1.5(d), and a contingent fee is permissible.

Neil Fulton, Chair
Ethics Committee
State Bar of South Dakota