

ETHICS OPINION

RO-91-05

[REDACTED]

QUESTION:

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FACTS: Client's ex-husband is far behind in his court ordered child support. Client wants me to try and collect the same but client has no money to pay a reasonable attorney fee. Client does not have sufficient information to cause a wage withholding order to be issued (in Mobile the client can go directly to the clerk of the court, pay \$15.00 and a wage withholding order will be issued if she knows the name and address of her ex-husband's employer and he is more than 30 days in arrears).

ISSUE: Can I take the case on a contingency fee basis?

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ANSWER:

You may enter into a contingent fee agreement to collect child support where the client is unable to pay a reasonable attorney fee on a non-contingent basis.

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DISCUSSION:

Contingent fees have been condemned and prohibited in divorce cases because they are seen as pitting the lawyer's interests against those of the parties and of society. A fee contingent upon the securing of a divorce gives the lawyer an interest in discouraging or thwarting reconciliation of the parties. A fee contingent upon the amount of support or property settlement has the same effect. In addition, the lawyer would be encouraged to maximize the amount of support or property awarded the client, perhaps sacrificing the client's other interests, such as child custody. (Florida Bar Professional Ethics Committee, Opinion 87-3, 10/87, released 11/87).

The Code of Professional Responsibility of the Alabama State Bar in effect from 1974 until the end of 1990 did not contain a disciplinary rule prohibiting contingent fees in domestic relations matters. The Code did contain, however, an "Ethical Consideration" stating that contingent fee arrangements in domestic relations cases are rarely justified because of the human relationships involved and the unique character of the proceedings. EC 2-20, Code of Professional Responsibility of the Alabama State Bar.

In prior opinions the Disciplinary Commission has noted that the enforcement of contingent fee contracts in a domestic relations case poses primarily a question of law rather than one of ethics. A fee contract contingent upon the amount of alimony an attorney obtains for a client upon the attorney's procuring a divorce is generally held void as against public policy. The major arguments in support of this position are that these agreements give the attorney an interest in avoiding reconciliation. RO-83-22, the Alabama Lawyer, July 1983, pg. 219. Having noted this the Disciplinary Commission concluded that:

"Once a final decree of divorce has been entered awarding alimony and/or child support, the collection of arrearages concerning the same would not discourage reconciliation, promote divorce and therefore violate the public policy against the destruction of marriages. Furthermore, the mechanics of reducing an order for child support and/or alimony to judgment and proceeding to collect the same would not appear to involve "the human relationships" or "the unique character of the proceedings" referred to in Ethical Consideration 2-20." Supra 219.

In subsequent opinions the Disciplinary Commission held that a lawyer could accept representation in a paternity action on a contingent fee basis (RO-87-96) and could represent a wife on a contingent fee basis in an action seeking money damages for breach of an antenuptial contract (RO-88-103)....

Rule 1.5(d) of the Alabama Rules of Professional Conduct, which became effective January 1, 1991, prohibits a contingent fee in a domestic relations matter that is contingent upon the amount of alimony, support or property settlement. This language is broader than the language contained in EC 2-20 and contains no specific exception. The rule reads as follows:

"(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) 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."

The pivotal question here is whether this broadly restrictive language prohibits contingent fee agreements in child support cases under any circumstances. Clearly it would prohibit contingent fees in the initial divorce proceeding where the marriage is terminated and property and support matters are settled. At least one jurisdiction has ruled that a contingent fee may be charged for collecting a judgment for alimony entered in another state. The theory of this decision is that the prohibition against charging contingent fees in domestic relations matters does not apply because the court had already ascertained the amount of alimony and the representation is limited to collecting an existing judgment. (Opinion 90-98 (undated) Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association). Although, under the old rules, the Disciplinary Commission of the Alabama State Bar in Ethics Opinion 170 used similar rationale in a case involving arrearages of unpaid child support. The Commission stated, "although the proceeding originated as a domestic relations matter, once the arrearages of child support were reduced to judgment, the collection of the same was analogous to the collection of any other indebtedness."

There are several reasons for continuing this rationale in our interpretation of new rule 1.5(d). First, where the client cannot afford to pay a reasonable attorney's fee, a strict application of the rule would deny the client the benefits of legal representation. In this situation a contingent fee arrangement would serve the desirable purpose of ensuring that the party with lesser means is able to secure competent counsel to protect that party's interest and, indirectly, the interest of society. (Opinion 87-3, Florida Bar Professional Ethics Committee, supra). Second, the evils that the rule attempts to avoid are not present in this situation. The marriage has been terminated and the contingent fee would not give the lawyer an interest in discouraging or thwarting reconciliation of the parties. Another evil, not present here, is that the lawyer may, because of the contingent fee, influence the distribution of property toward a distribution that favors the lawyer and does disservice to the client and the client's children.

For these reasons, it is our view that it would not be a violation of Rule 1.5(d) to charge a contingent fee in a case involving collection of arrearages in unpaid child support, subject to the following conditions:

- (1) that the fee is fair and reasonable
- (2) that the client is indigent and no alternative fee arrangement is practical, and
- (3) there are no means available to the client (similar to those mentioned in your question) to collect the arrearage.

RWN/clr