

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 94-02
January 27, 1994

The Ethics Committee has received a request from [REDACTED]
North Dakota, for an opinion on the following question:

May an attorney enter into a contingent fee arrangement to collect arrearages in spousal support for a client whom the attorney represented in the divorce action in which the spousal support was awarded?

I. North Dakota Rule.

Rule 1.5(d)(1) of the Rules of Professional Conduct provides that a lawyer shall not enter into an arrangement for, charge, or collect 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 of property settlement in lieu thereof.

The rule has its genesis in numerous cases holding contingent fee contracts in divorce proceedings to be void as against public policy because they tend to promote divorce and discourage speedy and efficient resolution of domestic relations disputes. A further reason is that contingent fees are unjustified because the all-or-nothing risk does not exist in most divorce proceedings, where each party has the statutory right to an equitable share of the marital estate.

The answer to [REDACTED] question appears to hinge on whether legal proceedings directed at collecting judicially determined arrearages in spousal support subsequent to a divorce constitute a "domestic relations matter" or are so closely tied thereto as to be governed by Rule 1.5(d)(1).

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II. Opinions of Other Jurisdictions.

Alabama, Michigan, Rhode Island, Kansas, Pennsylvania and Oregon all have issued ethics opinions on rules similar to our Rule 1.5(d)(1) condoning contingent fee contracts relating to post-divorce collection proceedings. All, however, have imposed one or more of the following conditions: (1) the fee is fair and reasonable, (2) no alternative fee arrangement is practical because of the client's indigency, (3) the client has no other practical means of collection, and (4) any court-awarded fees are credited against the contingent fee.

III. Conclusion.

Post-divorce proceedings to collect court-awarded spousal support arrearages are not domestic relations matters as contemplated by Rule 1.5(d)(1), and since the parties were divorced and the amount of spousal support established in prior actions, the public policy reasons against contingency fee contracts do not apply.

Accordingly, subject to the rule on fees, an attorney may enter into a contingent fee arrangement with a client for collection of spousal support previously reduced to judgment either in a divorce decree or separate subsequent action.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the State Bar Association of North Dakota shall not be subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Robert A. Wheeler, and was unanimously approved by the Ethics Committee on January 27, 1994.


Michael J. Mads, Chairman

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SYNOPSIS OF OPINION

An attorney who has represented a client to obtain a divorce decree in which spousal support was awarded is not precluded by Rule 1.5(d)(1) of the Rules of Professional Conduct from entering into a contingent fee contract with the client to collect arrearages in spousal support.


December 15, 1993

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BY DISCIPLINARY
COUNSEL

DEC 20 1993

DISCIPLINARY BOARD

Vivian Berg
Attorney at Law
P.O. Box 2297
Bismarck, North Dakota 58702

RE: REQUEST FOR ETHICS OPINION

Dear Vivian:

I am requesting an opinion of the ethic's committee pertaining to the following facts.

I am presently representing an individual for the purpose of collecting and enforcing a spousal support award in a divorce judgement. I have now reduced the spousal support arrearage, which is temporary and rehabilitative in nature, to a Judgment. Collection attempts have now moved to the point of having an execution issued and the bringing of a Fraudulent Transfer Action against the spousal support obligor and a third party to whom he has transferred assets pursuant to the provisions of N.D.C.C. 13-02.1.

It is my desire to provide my client with a fee arrangement that is most beneficial to her, which at this time, would appear to be a contingent fee. Rule 1.5(d)(1) provides that "a lawyer shall not enter into an arrangement for, charge of collect 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." This provision, at first glance, would seem to prohibit a contingent fee. Upon closer examination, however, the provision regarding alimony or spousal support in the rule would seem to be referring to the initial award and the actual amount of alimony so awarded. I am well beyond that point in this case.

Would you please advise me if a contingent fee arrangement may be entered into with the client in conjunction with the Fraudulent Transfer Action and the ultimate collection of spousal support, either through that proceeding or execution and levy. The amount of the spousal support arrearage judgment, if relevant, is \$16,300.00. It is my desire to apply either an hourly fee or a contingent fee, which ever is less.

Sincerely yours,
