

**ETHICS OPINION**  
**040804**

**FACTS:**

Attorney has completed a divorce and property settlement for his client, but believes client's ex-spouse intentionally failed to disclose assets in violation of section 40-4-253, M.C.A. This statute requires disclosure of all marital assets in a dissolution and imposes upon a party who hides an asset a possible penalty of forfeiture of the undisclosed asset.

Attorney's client has no money to pursue an investigation into the existence or whereabouts of the putative assets. Client's ex-spouse has practiced family law and is sophisticated in financial matters.

**QUESTION PRESENTED:**

Can an attorney, following the finalization of a dissolution, enter into a contingent fee agreement with a client to pursue putative non-disclosed marital assets under Montana Rule of Professional Conduct 1.5(d) when client's financial means permit no other way of recovering non-disclosed assets?

**SHORT ANSWER:**

Yes, under the facts specified, an attorney may enter into a contingent fee agreement to pursue putative non-disclosed assets following final judicial resolution on all matters involved in the dissolution, given that the policy justification for the general prohibition of Rule 1.5(d) does not apply and that an hourly fee arrangement would be cost prohibitive and bar the client from pursuing the action. However, an attorney using a contingent fee agreement must disclose the billing options and restrictions of Rule 1.5(c) and (d) to comply with Rule 1.0(g) requiring informed consent.

**DISCUSSION:**

Rule 1.5(d) of the Montana Rules of Professional Conduct provides:

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...  
[Emphasis supplied.]

The rationale behind the Rule's prohibition is that if a lawyer is permitted to charge a contingent fee on the amount recovered for a client in a divorce proceeding, the lawyer would be less inclined to counsel the client regarding reconciliation and might be inclined to overreach in what

often is a highly emotional situation.<sup>1</sup> But the facts in this opinion do not fall within this rationale. The dissolution is final, as is the property settlement. The divorce is secure.

The Committee struggled with the issue of whether the action proposed is actually the re-opening of the property settlement in the divorce and should be addressed according to sections 40-4-253(5) or 40-4-255(3):

Section 40-4-253(5): In addition to any other civil or criminal remedy available under law for the commission of perjury, the court may set aside the judgment, or part of the judgment, if the court discovers, within 5 years from the date of entry of judgment, that a party has committed perjury in the final declaration of disclosure.

Section 40-4-255(3): If a party fails to comply with any provision of 40-5-251 through 258, the court shall, in addition to any other remedy provided by law, order the noncomplying party to pay to the complying party any reasonable attorney fees or costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

In light of the rationale behind the Rule's prohibition, the logic that the divorce is secure holds. The parties are far beyond reconciliation when searching for potential assets hidden during the divorce. Under the statutes, the court has the *option* of setting aside the judgment. This takes as a given that the judgment is entered and the property settlement is final. Implicit within the concept of re-opening is the fact that the case was once closed.

Further, while the statute contemplates fees, it does not specifically address the hourly/contingent issue. Traditionally, the contingent fee has served as a means by which clients who cannot afford to pay an hourly or fixed fee can obtain the services of counsel by pledging to pay the lawyer a share of whatever financial recovery is produced for the client through the lawyer's efforts. The fact that the lawyer might earn more money charging a contingent fee than he would as a fixed fee or at an hourly rate is balanced, by Rule 1.5(a)(9), against the risk that the lawyer will receive no fee at all if he fails to produce a recovery for the client. There is a risk that the lawyer will receive no fee in the situation presented here.

The Ethics Committee also struggled with the potential for abuse by unscrupulous attorneys. Allowing a contingent fee in the situation described could arguably allow a lawyer to use less than full effort to discover "hidden" assets in the initial action, waiting to bring a second action under a contingent fee agreement once the divorce is "secured." However, there exist at least two barriers for nefarious use of this opinion: the court and the client. The statute gives the court broad discretion in defining the court's role with regard to attorney fees when assets are hidden. The client has his or her own power. The client presumably provides the initial facts or

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<sup>1</sup> We have dealt with this public policy constraint in an earlier Ethics Opinion, 990119, where we allowed a contingent fee to establish a parent and child relationship and the amount of past due child support owed.

suspicion of hidden assets. Furthermore, the client has the protection of Rule 1.5(c) which defines the limitations for contingent fee agreements:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

An attorney confronted with the facts in this situation must, by the language of Rule 1.5(c), explain the distinctions and limitations imposed upon him or her by Rule 1.5(c) and (d): an hourly fee to secure the divorce, custody, support or property settlement; a contingent fee to pursue suspected hidden assets once the other matters are complete. It would be improper to anticipate the necessity of a contingent fee in the original hourly fee agreement for handling the divorce and we caution attorneys against this.

While recognizing the contingent fee exception in this opinion, this Committee advises any attorney entering a contingent fee agreement under these circumstances to do so carefully, sparingly and fully cognizant of the consequences of their potential or perceived manipulation or misuse.

The Committee in this opinion is engaging in a balancing of policies: access to litigation via contingent fee versus potential misuse of the contingent fee by an attorney in this circumstance. Our choice is to favor access to representation and permit contingent fees in the facts presented. We rely on the separate energies of the court and the client to confirm that attorneys do not manipulate or abuse this exception.

## **CONCLUSION:**

Under the specific facts presented here, an attorney may enter a contingent fee agreement to pursue putative non-disclosed assets following final judicial resolution on all matters involved in the dissolution. However, an attorney so choosing should fully explain the alternatives and constraints of Rule 1.5(c) and (d) to their client. This exception is narrow and we caution attorneys contemplating use of the exception to give serious consideration as to whether an hourly or contingent fee is in the best interest of their client. We further caution attorneys against anticipating the necessity of a contingent fee in the original hourly fee agreement for handling the divorce.

**THIS OPINION IS ADVISORY ONLY**