

Ethics Opinion

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FACTS: Attorney has been contacted by a potential client who has requested that attorney establish a parent and child relationship for her daughter under section 40-6-107, MCA. In addition to that determination, the mother has requested that the attorney establish the amount, if any, of back child support she would be entitled to. The daughter is eighteen years old and the mother has never received any support from the father.

QUESTION PRESENTED: May an attorney enter a contingent fee agreement for the establishment of a parent and child relationship and the amount of past due child support owed under Rule 1.5 of the Rules of Professional Conduct?

SHORT ANSWER: Yes, under the facts specified, an attorney may enter into a contingent fee agreement for the establishment of a parent and child relationship and the amount of past due child support owed, given that the policy justification for the general prohibition does not apply and that an hourly fee arrangement would be cost prohibitive and potentially bar the mother from effectively pursuing child support. However, the lawyer must disclose all of the billing options available to the client in collecting child support arrearages, including the sliding fee service available through the Child Support Enforcement Division.

DISCUSSION: Rule 1.5 (d) of the Montana Rules of Professional Conduct prohibits contingency fees in any "domestic relations matter." The rationale behind the prohibition is a public policy concern that a lawyer-client fee arrangement should not discourage reconciliation between the parties. This rationale has limited applicability in child support arrearage cases, and most states allow attorneys to collect child support arrearage on a contingency fee basis where the right for child support has already been judicially established and the sole purpose of the representation is to collect past due payments. Arizona Ethics Opinion 93-04 (1993); Alabama Ethics Opinion 98-01 (1998); Florida Ethics Opinion 89-2; Oregon Ethics Opinion 1991-13 (1991); Pennsylvania Ethics Opinion 94-05A (1994). The public policy rationale also does not apply in paternity actions, where presumably there is no familial relationship which would be impaired by the contingent fee arrangement. Virginia Ethics Opinion 468 (1983).

The public policy rationale generally applies to the issue of establishing the amount of child support, which is specifically recognized in Rule 1.5(d): "[a] lawyer shall not enter into an arrangement for...(1) any fee in a domestic relations matter, the payment of which is contingent upon...the amount of...support...". However, given the specific facts presented, it is arguable that there is no familial relationship that the contingent fee arrangement could impair.

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 she 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 she fails to produce a recovery for the client. There is risk that the lawyer will receive no fee in this case. The determination of the amount, if any, of past due child support owed is discretionary with the court upon entry of an order establishing a parent and child relationship. Section 40-6-116, MCA. There is the possibility that the court might establish that no past due support is appropriate.

Balancing the public policies - reconciliation as the rationale for the prohibition on contingent fees against access to representation via a contingent fee arrangement - suggests that the prohibition on contingent fees defeats the greater interest: providing financial support to the child of a recalcitrant parent. If pursuit of support is not a viable option due to the financial burden an hourly fee presents, then the greater policy is to open additional avenues permitting that pursuit. We are not unique in reaching this conclusion, for we note that the American Law Institute has tentatively voted to approve contingent fees in family law matters, but only where "reasonably necessary for the client to secure adequate representation", Restatement of the Law Governing Lawyers, section 47(2), Tent. Draft No. 4 (1991).

Our choice favoring access to representation and hence permitting contingent fees is specific to the facts presented: where there is no existing familial relationship, and the parent, due to financial hardship, would be blocked from pursuing child support if it meant paying an hourly fee for the service.

However, before entering a contingent fee agreement, the client must be advised that the Department of Public Health and Human Services Child Support Enforcement Division (CSED) is federally mandated to provide services establishing paternity and arrearage collection services to any parent regardless of his or her economic status (there is a sliding fee scale for this services, section 40-5-210, MCA). Notice of the availability of this service must be given in writing.

There are billing issues a client must balance: the tremendous resources available to the CSED to pursue an action at a potentially less cost weighed against the private practitioner's perhaps more thorough or persistent investigation of assets and timeliness. These are choices to be made by the client after full disclosure of the options: hourly fee, contingent fee or CSED.

Only in rare instances should an attorney accept the representation outlined here on a contingent basis. The determinative consideration should be the best interest of the child, which may not necessarily coincide with the desires or expectations of the custodial parent. An attorney should not enter into a contingency fee agreement under these circumstances lightly, and we caution the attorney to give serious consideration to

whether an hourly or contingent fee is in the best interest of the child. The fee must be fair and reasonable. And of course, all contingent fee agreements must be in writing.

CONCLUSION: With this decision, we carve an exception from the general rule prohibiting contingent fees in child support actions for the reason that the public policy justification for the prohibition, attorney interference with potential reconciliation, does not apply. Our exception is narrow, permitting a contingent fee agreement only after the attorney advises the client in writing of the sliding fee scale services available through CSED, and discusses with the client the ramifications of a contingent fee vs. hourly fee in terms of final costs to the client. We also feel that this fee arrangement not be lightly entered by an attorney, and caution the attorney to give serious consideration to whether an hourly or contingent fee is in the best interest of the child.

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