

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Advisory Opinion #1987-88/15  
**Contingent Fees in Property Divisions and Custody Disputes Between Unmarried Persons**  
July 12, 1988

RULE REFERENCES:

\*Rule 1.5(d)

STATUTORY REFERENCES:

\*RSA 458-A

\*RSA 460

\*RSA 546-A

SUBJECTS:

\*Contingent Fees

\*Domestic Relations

\*Fees

CODE REFERENCES:

\*EC2-20

ANNOTATION:

Representation on any issue involving child custody, child support or child visitation may not be provided on a contingency fee basis. (Rule 1.5(d))

"Domestic relations matter" in Rule 1.5(d) includes any representation where the issues of establishment of child custody, support or visitation are involved. (Rule 1.5(d))

**QUESTION:**

The question presented by this inquiry is whether an attorney may represent an unmarried client on a contingency fee basis in connection with a dispute with a former live-in partner involving property division and child custody, support and visitation.

**RESPONSE:**

Rule 1.5(d) provides that "[a] lawyer shall not enter into an arrangement to charge or collect any fee in a domestic relations matter, the payment or amount of which is contingent." The Rule does not define the term "domestic relations matter". In the absence of a definition, the meaning of the term must be gleaned from the purpose of the Rule. The Rule is intended to safeguard New Hampshire's public policy that promotes the *marital* relationship and favors reconciliation. These policies would tend to be thwarted if an attorney has a vested interest, through a contingent fee agreement, in the demise of a marriage. See NH Op dated 10/23/81 *Contingent Fee in Marital-like Case*, (construing EC 2-20 of the former Code); Arizona Ethics Committee Opinion 82-9 (May 28, 1982) (same).

The State does not, however, have a public policy favoring unstructured domestic relationships. See *Bisig v. Bisig*, 124 N.H. 372, 374-75 (1983). New Hampshire law does not grant to the cohabitant any rights in the accumulations of the other, *id.* at 375, absent an agreement to the contrary. See generally C. Douglas, 3 *New Hampshire Practice, Family Law* §53 (1982). In the context of a dispute where only property division is at issue, the Committee believes that the purpose of the Rule would not be frustrated by a contingent fee arrangement to secure an equitable division of property acquired during a period of cohabitation. Compare Maryland Ethics Opinion 84-29 (Dec. 28, 1983) (recovery of interest in jointly-owned property not a "domestic relations case").

Representation regarding issues of child custody, support and visitation involves different considerations. Regardless of the marital status of the biological parents, the paramount consideration in resolution of each issue is the future welfare of the child. See RSA 458-A (custody); *Locke v. Ladd*, 119 N.H. 136 (1979) (visitation); RSA Chs. 460 and 546-A (child support). It is logical to construe the term "domestic relations matter" in Rule 1.5(d) to include child custody, support and visitation matters involving children born both in- and out-of-wedlock, in light of the similarity, if not the identity, of the legal rights of the children and the controlling legal principles. The public policy favoring the best interests of the child might be imperiled if a lawyer has a vested interest in the outcome of these issues. Therefore, the Committee believes that representation on any issue involving the setting of child custody, child support or child visitation may not be provided on a contingency fee basis. Representation in these issues should be handled pursuant to a separate, non-contingent fee arrangement. (It should be noted that this opinion does not address contingent fee collection for past due child support or past due property settlement.)

The remaining question is whether one attorney may represent an unmarried client on a contingency fee basis with respect to property division while at the same time representing the same client on a non-contingent fee arrangement with respect to issues involving child custody, support or visitation. The Committee answers this question in the negative. As a practical matter, the issues involved in a property settlement are likely to be inextricably intertwined with the economic and other implications of resolution of child custody, support and visitation disputes. Furthermore, the potential for conflict of interest, both real and perceived, is substantial with respect to one or more aspects of the representation if the same attorney is being compensated both on a contingent and non-contingent fee basis. Therefore, the Committee opines that the term "domestic relations matter" in Rule 1.5(d) includes any representation where the issues of establishment of child custody, support or visitation are involved. In such cases, the Rule prevents representation on a contingency fee basis, even with respect to that aspect of the overall dispute which involves a property settlement.