

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion 1990-91/15
Contingent Fee Arrangement for a Domestic Matter
September 12, 1991

RULE REFERENCES:

*Rule 1.5
*Rule 1.5(d)

SUBJECTS:

* Contingent Fees
* Domestic Relations
* Fees

CODE REFERENCES:

* EC 2-10

ANNOTATIONS:

New Hampshire's version of Rule 1.5(d) (prohibiting a contingency fee "in a domestic relations matter") is more stringent and all-inclusive than the ABA Model Rule, and would prohibit representing a client on a contingency fee basis in either (1) collecting of past due property settlement payments or (2) a modification of divorce decree based upon fraud (and where no children were involved).

QUESTION:

May an attorney enter into an arrangement for or charge a contingent fee in a Domestic Relations matter involving collection of payments due under a property settlement and/or potential recovery in an action to modify decree on the grounds of fraud where: a) the final divorce decree was previously entered; and b) no minor children are involved?

INTRODUCTION:

There is currently disagreement among different state bar association ethics committees on the question of whether a contingent fee arrangement is ethically permissible in certain types of cases which involve domestic relations matters. However, New Hampshire's version of Rule 1.5(d) appears to be more stringent than the ABA Model Rule and would appear to blanketly prohibit contingent fees in all domestic relations matters.

RESPONSE:

Prior to 2/1/86, professional conduct in New Hampshire was guided by the NH Code of Professional Responsibility which was based on the ABA Model Code. On January 16, 1986, after the American Bar Association adopted the Model Rules of Professional Conduct to replace the Code, the New Hampshire Supreme Court adopted the NH Rules of Professional Conduct (eff. 2/1/86) which were based on but in several cases were different from the Model Rules.

Rule 1.5(d)(1) of the Model Rules of Professional Conduct states that 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 amount of alimony, support, or property settlement in lieu thereof...*" (emphasis added)

The Model Rule expressly prohibits contingent fee arrangements in most domestic relations matters. ABA/BNA Lawyer's Manual on Prof. Conduct Sec. 41:904. This prohibition represents a more restrictive position than that taken in the former Code of Professional Responsibility which did not contain any express prohibition of same in the Disciplinary Rules of the Code but only indicated in the Ethical Considerations (EC 2-20) that contingent fee arrangements in domestic relations cases are rarely justified.

A. COLLECTION OF PAYMENTS DUE UNDER EXISTING DECREE:

Regarding the inquiring attorney's proposal to charge a contingent fee in collection of amounts past due under the previously entered decree, this arrangement might be held to be permissible in some jurisdiction which had adopted the Model Rules' version of Rule 1.5(d), i.e., it has been held that collection of payments due under a final decree for property settlement is not "contingent upon the amount of alimony, support, or property settlement in lieu thereof..." since liability and the amount has already been established, ABA/BNA Lawyer's Manual on Prof. Conduct 901:7327 (Pa. 90-98).

However, the rule which the NH Supreme Court adopted differs significantly from the Model Rule. Rule 1.5(d) of the New Hampshire Rules of Professional Conduct states 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" (emphasis added).

The exact import of the difference in the wording is debatable (no mention of the difference from the Model Rule and no discussion of same can be found in the New Hampshire comments to Rule 1.5). While it may be an open question as to whether the New Hampshire Rule was meant to be more stringent than the Model Rule, our reading of NH Rule 1.5(d) as drafted leads us to conclude that it is broader in its prohibition than the Model Rule and would therefore dictate against a contingent fee arrangement for even the collection of the amounts owed under the existing decree.

B. FRAUD ACTION:

The proposed fee arrangement in the action to reform the decree for fraud would appear to be prohibited since it is contingent on the amount of the property settlement in lieu of alimony, Rule 1.5(d)(1), ABA/BNA Lawyer's Manual on Prof. Conduct 901:5026 (Minn. 9) even though it is a post decree matter involving a claim of fraud in procurement of the divorce judgement. While Arizona's ethics committee has opined that a lawyer may charge a contingent fee in an action to claim a share of property that was not disclosed or divided in a client's dissolution proceeding (holding that the dissolution had been final for 4 years and the post decree action involved a property claim separate from alimony and child support issues) ABA/BNA Lawyer's Manual on Prof. Conduct 901:1411 (Ariz. 89-2), this position is difficult to reconcile with the Rule since no exception for post decree matters is stated in Rule 1.5(d)(1) or in the comments thereto. Moreover the Arizona committee's finding that the property claim was separate from alimony and child support issues is directly contrary to New Hampshire law which recognizes that support and property division are factually interrelated and difficult to distinguish between. Douglas, 3 NHP *Family Law* §393 (1982). In light of the fact that the Supreme Court adopted a rule prohibiting these fees (without stating any exceptions) where they were not expressly prohibited in the past the committee is of the opinion that the proposed fee arrangement would be held to be improper.

SUMMARY:

It is the opinion of the Committee that the proposed fee arrangement would likely be held to violate New Hampshire Rule 1.5(d)'s prohibition on contingent fees in domestic relations matters.