

**Louisiana State Bar Association**  
**Rules of Professional Conduct Committee**

**PUBLIC Opinion 05-RPCC-002<sup>1</sup>**

April 4, 2005

**Contingency Fees in Domestic Relations Cases**

*A lawyer may not obtain a fee in a domestic relations case if the fee is contingent upon obtaining the divorce, setting the amount of support, or obtaining a property settlement in lieu of support.*

The Committee considers the ethical concerns arising under Rule 1.5(d) of the Louisiana Rules of Professional Conduct (2004):

*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; ...*

This Rule has remained the same even after review by the Louisiana State Bar Association's Ethics 2000 Committee, the LSBA's House of Delegates, and, finally, the Supreme Court of Louisiana in 2004.

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<sup>1</sup>The comments and opinions of the Committee—public or private—are not binding on any person or tribunal, including—but not limited to—the Office of Disciplinary Counsel and the Louisiana Attorney Disciplinary Board. Public opinions are those which the Committee has published—specifically designated thereon as “PUBLIC”—and may be cited. Private opinions are those that have not been published by the Committee—specifically designated thereon as “NOT FOR PUBLICATION”—and are intended to be advice for the originally-inquiring lawyer only and are not intended to be made available for public use or for citation. Neither the LSBA, the members of the Committee or its Ethics Counsel assume any legal liability or responsibility for the advice and

## Policy Considerations

Before reviewing the various situations which are governed by this Rule, the underlying policy considerations need to be discussed. Rule 1.5 (d) of the American Bar Association Model Rules of Professional Conduct is identical to Louisiana's rule. The annotations to the American Bar Association Model Rule<sup>2</sup> state:

*...Rule 1.5 (d) also prohibits the use of contingency fee agreements in certain domestic relations matters, reflecting public-policy concerns promoting reconciliation and protecting against overreaching in highly emotional situations...*

If the contingency fee were allowed prior to the divorce or prior to setting the amount of child or spousal support, the lawyer's interest in obtaining the fee could influence his advice on reconciliation issues, promoting divorce and hindering reconciliation, and his advice on setting the amount of support, thus creating a conflict of interest with a vulnerable client.

Once the divorce is final and the amount of support is set, there is no public policy consideration prohibiting a contingent fee in collection efforts on a past-due amount, or in community property matters which are not tied to setting support. The contingency fee could be a useful tool for an impoverished client to collect on past-due support or obtain a share of community property. While the client may not be able to hire an attorney by paying an advance deposit with an hourly rate, the client may be able to obtain an attorney who will defer payment until collection of the arrearages or obtaining a share of the property.

Unlike other jurisdictions, Louisiana law does not allow a court to assess post-divorce attorney's fees in community property matters. And, while Louisiana law does allow assessment of attorney's fees and costs in past-due support actions, these are rarely sufficient to cover the fees

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opinions expressed in this process.

<sup>2</sup>American Bar Association *Annotated Model Rules of Professional Conduct, Fifth Edition*, 2003.

incurred. Most Louisiana attorneys require advance deposits in any past-due support or community property cases. Of course, all contingency fees are still subject to the other requirements of Rule 1.5—for example, reasonableness, in writing, etc.<sup>3</sup>

### **Types of Domestic Relations Cases**

Specifically, in what domestic relations cases may a contingency fee be charged? In most cases it is prohibited, but a review of how the Rule applies to each type of case is in order:

#### **A. Divorce**

A contingency fee is not allowable in an action for divorce because it is specifically prohibited and hinders reconciliation.

#### **B. Custody, Paternity and Adoption**

A contingency fee is not permissible in a case involving children. Tying recovery of an asset such as a “401(K)” or piece of property to obtaining custody of children, or disavowing paternity, or adopting children, is clearly against public policy, similar to the securing of the divorce, even though the language of the Rule does not specifically say this.

#### **C. Setting Child Support or Spousal Support Amounts**

A contingency fee is not proper in an action to set the amount of ongoing child support or spousal support because it is specifically prohibited and because these cases involve the rights of vulnerable children and spouses in emotionally-charged cases.

#### **D. Setting and Collecting Support Arrearages**

If the divorce is final and the case involves setting the amount of arrearages in a child support or spousal support case, and collecting them, a contingency fee is allowable because it is similar to

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<sup>3</sup>See Parts (a), (b) and (c) of Rule 1.5 of the Louisiana Rules of Professional Conduct (2004).

other collection of money judgments. The need for an attorney at this point in the litigation outweighs the emotional and any remaining policy considerations that would ordinarily be the basis for prohibiting the contingency fee. Further, it is not prohibited in Rule 1.5 (d) (1).

### **E. Community Property Cases**

If the divorce is finished and there is no possible connection between the community property case and the support case, taking a contingency fee in a community property case is allowable. The prohibition in the Rule specifically refers to obtaining property settlements “in lieu” of alimony or support. Often when spousal support and community property issues are being negotiated or even litigated, the parties, attorneys and courts will tie these issues together. For example, rather than litigate fault and risk paying indefinite final periodic spousal support, one party may offer more than 50% of the net community estate. The other party may accept that offer rather than litigate fault and risk receiving no final periodic spousal support. This linking of issues is what this Rule contemplates when it specifically prohibits a contingency fee contract.

On the other hand, when there are no spousal or child support issues and the divorce is final, there is no reason, policy, or rule prohibiting a contingency fee. This will usually arise in the context of a former spouse seeking a community property partition several years after the divorce, custody, and support issues are resolved. At that time, the parties are “co-owners in indivision” of their assets and co-debtors of their liabilities, both with various reimbursement claims. These co-owners have a right to partition their assets and liabilities. Many times, one spouse does not have the ability to pay the advance deposit required by most attorneys. The only way that spouse has to obtain what is rightfully owed is to find an attorney who will handle the litigation on a contingency fee basis.

### **Conclusion**

In conclusion, the Committee believes that while the general rule prohibits a lawyer from obtaining a contingent fee in domestic relations cases, there are exceptions after the divorce is

final that would allow a contingency fee in setting support arrearages and collecting them, and in community property partitions totally independent of support issues.