

**ETHICS OPINION NUMBER 88
OF THE MISSISSIPPI BAR
RENDERED SEPTEMBER 23, 1983
AMENDED APRIL 6, 2013**

FEES - a lawyer may ethically accept employment to collect past due alimony and/or child support payments on a contingent fee basis, provided that he or she follows the guidance contained in Rule 1.5, MRPC.

The Ethics Committee of The Mississippi Bar has been asked for its opinion on the following question:

Is it unethical for attorneys to charge on a contingency basis on past due child support and alimony?

Mississippi statutory law does not address the propriety of an attorney's accepting and employment on a contingent fee basis to collect past due alimony and child support. However, the Mississippi Rules of Professional Conduct (MRPC) contains specific ethical guidance concerning the fees for legal service. Rule 1.5, MRPC, states in its entirety:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(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 writing 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. 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.

(d) 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; or
- (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- (2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

The Comment to Rule 1.5, MRPC, states “[p]aragraph (d)(1) does not prohibit a contingent fee agreement for the collection of past due alimony or support.”

Contingent fee arrangements in civil cases are allowed by the Mississippi Rules of Professional Conduct. The basic rationale for their existence is that they may provide the only practical means by which a client may be able to afford to obtain a lawyer to prosecute his claim and that the successful prosecution of the claim produces a fund from which the fee can be paid. The Committee notes that the Supreme Court of Mississippi has held that a contingent fee contract between a lawyer and his client conditioned on the lawyer's obtaining a divorce for the client is void as against public policy. *Avant v. Whitten*, 253 So. 2d 394, 396-97 (Miss. 1971). This is the rule among the overwhelming majority of states. 1 S. Speiser, *Attorneys' Fees* 2:6, at 89-90 (1973). The basic rationale for this rule is that public policy should favor reconciliation between husband and wife. However, a contingent fee contract between a lawyer and one client-spouse would place the lawyer in a position of having an economic incentive to oppose such reconciliation.

It is well-settled law in Mississippi that installments of alimony become fixed and vested when they are due and unpaid. *Rubisoff v. Rubisoff*, 133 So. 2d 534, 537 (1961)(collecting authorities). Likewise, past due installments of child support become vested as they become due. *Hambrick v. Prestwood*, 382 So. 2d 474, 476 (Miss. 1980).

Given the reality that the collection of past due alimony and child support obviously occur after a divorce, the Committee is persuaded that an attorney pursuing such collection on a contingent fee basis would not be placed in a position of having an incentive to oppose reconciliation between husband and wife because a divorce would have already been granted. Therefore, the Committee concludes that an attorney may ethically enter into a contingent fee contract with a client to collect past due alimony and child support payments. This view is in accord with the majority of those jurisdictions who have considered this question. *e.g.*, Kentucky Bar Association, Ethics Opinion E-205, reprinted at 43 Ky. Bench & B. 36 (April, 1979); Missouri Bar, Ethics Opinion 114 (Sept. 9, 1977), reprinted in 33 J. Mo. b. 465 (1977); Nebraska State Bar Association, Ethics Opinion 78-8; New York State Bar Association, Ethics Opinion 443 (Sept. 20, 1976), reprinted in 48 N.Y. St. B. J.590 (1976).

Accordingly, the Committee is of the opinion that a lawyer may accept employment to collect past due child support and alimony on a contingent fee basis provided that he or she follows the guidance contained in Rule 1.5, MRPC.