

**Opinion Number: 98-01**

**Contingency fee contract in collection of child support arrearage cases impermissible absent extraordinary circumstances.**

**ETHICS OPINION  
OFFICE OF GENERAL COUNSEL**

**RO-98-01**

**QUESTION:**

**In 1991, the Disciplinary Commission of the Alabama State Bar issued formal opinion RO-91-05 which held that an attorney may enter into a contingency fee agreement to collect child support arrearage where the client is unable to pay a reasonable attorney's fee on a non-contingent basis. Since the issuance of this formal opinion, there have been two significant developments which are material to the conclusions reached therein. First, Alabama appellate courts have held in a number of recent child support cases that the money due for support belongs to the child, not the custodial parent. Second, there have been federally mandated changes in child support proceedings which require the Department of Human Resources to provide collection services to any individual regardless of his or her economic status or ability to pay. The question presented is whether, in light of these developments, RO-91-05 continues to accurately reflect the position of the Disciplinary Commission of the Alabama State Bar with regard to the collection of child support arrearage on a contingency fee basis.**

**ANSWER:**

**In view of changes in the responsibilities of the Department of Human Resources for the collection of back child support, the Disciplinary Commission has difficulty envisioning any circumstance under which a contingency fee contract would be in the best interest of the child. However, the Commission does not, at this time, conclusively prohibit such contracts out of concern that unforeseen circumstances could result in a situation where a contingency fee contract is the only means available to the child to collect past due child support and would, therefore, be in the child's best interest.**

**DISCUSSION:**

**Rule 1.5(d) of the Rules of Professional Conduct of the Alabama State Bar prohibits contingency fees in any "domestic relations matter." The rationale behind this prohibition is a public policy concern that a lawyer-client fee arrangement should not discourage reconciliation between the parties. Obviously, 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. However, these states all impose conditions upon the use of contingency fees in arrearage cases similar to the conditions imposed by the Disciplinary Commission in RO-91-05. The concluding paragraph of RO-91-05 provides as follows:**

**"For these reasons, it is our view that it would not be a violation of Rule 1.5(d) to charge a contingent fee in a case involving collection of arrearages in unpaid child support, subject to the following conditions:**

- (1) that the fee is fair and reasonable;**
- (2) that the client is indigent and no alternative fee arrangement is practical, and**
- (3) there are no means available to the client (similar to those mentioned in your question) to collect the arrearage."**

**While RO-91-05 continues to accurately reflect, in substance, the position of the Disciplinary Commission, the Commission is of the opinion that, in light of the changes in DHR's mandate and responsibilities, further restrictions on the use of such contracts would appear to be appropriate. It is, therefore, the opinion of the Disciplinary Commission that an attorney may enter into a contingency fee agreement to collect child support arrearage only when to do so is in the best interest of the child and, even then, subject to the specific conditions discussed below.**

**One of the conditions imposed in RO-91-05 on contingency fees in arrearage cases is that there be "no means available to the client (similar to those mentioned in your question) to collect the arrearage." The opinion request makes specific**

reference to an income withholding order which may be obtained from the court for payment of a modest fee. More significantly, at the time RO-91-05 was issued, the Department of Human Resources provided child support arrearage collection services only to custodial parents who met the department's indigency requirements. It would appear, therefore, that at the time the Disciplinary Commission issued RO-91-05, the Commission intended that an attorney not accept a contingency fee if the custodial parent qualified for the same services to be provided free of charge by DHR. However, since that opinion was issued, there has been a federally mandated change in child support procedures which now requires the Department of Human Resources to provide arrearage collection services to any custodial parent regardless of his or her economic status. It is, therefore, no longer feasible to tie the propriety of contingency contracts to whether the custodial parent would qualify for free DHR services, since all custodial parents may now avail themselves of these services.

In view of the fact that collection of back child support is provided free by the state, the Disciplinary Commission is of the opinion that only in the rarest of instances should an attorney accept such collection cases on a contingent basis. The determinative consideration should always 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 without giving serious consideration to whether an hourly or contingent fee is in the best interest of the child.

The Commission frankly has difficulty envisioning any circumstance under which a contingency fee contract would be in the best interest of the child. However, the Commission does not, at this time, conclusively prohibit such contracts out of concern that certain circumstances, of which the Commission is not cognizant and cannot at this time foresee, could result in a situation where a contingency fee contract is the only means available to the child to collect past due child support and would, therefore, be in the best interest of the child. The Commission emphasizes again, however, that an attorney should not enter into a contingency fee agreement unless the attorney can conclusively make a good faith determination that the interests of the child are best served by such an agreement.

The Disciplinary Commission is further of the opinion that, in those rare instances under which an attorney can make a good faith determination that a contingency contract is in the best interest of the child, the attorney must advise the parent, in writing, that the collection of child support is available at no expense to the parent or child through either the Department of Human Resources or the Child Support

**Collection Division of the District Attorney's Office. In fact, the Disciplinary Commission is of the opinion that the parent should be advised of the free service offered by the state, regardless of whether the representation is on a contingency or set fee basis. The Disciplinary Commission is also of the opinion that failure of the attorney to adequately inform the parent of the availability of DHR or the DA's services, or any attempt by the attorney to discourage or dissuade the parent of using such free services, would constitute a violation of the Rules of Professional Conduct of the Alabama State Bar, including, but not necessarily limited to, Rule 1.4(b). Attached to this opinion as an addendum is an acknowledgment form which gives notice to the parent of the availability of free services and also contains an affirmation by the parent that the attorney has discussed and explained the option of using the Department of Human Resources or the District Attorney's Office to collect the arrearage. The Disciplinary Commission of the Alabama State Bar is of the opinion that Rule 1.4(b) requires every attorney who proposes to enter into a contingency contract or a set fee contract to collect past due child support to obtain the signature of the custodial parent on this acknowledgment.**

Another requirement of RO 91-05 is that the fee must be fair and reasonable. The Disciplinary Commission has serious concerns that, in the absence of significant militating factors to the contrary, any contingency fee which exceeds the actual value of the services rendered by the attorney, when calculated on the basis of a reasonable hourly rate for time actually expended, would be excessive. In fact, the Disciplinary Commission is of the opinion that there should be a rebuttable presumption that any contingency fee which exceeds the actual value of the services calculated on an hourly basis must be deemed excessive. In other words, in those rare instances where a contingency fee is determined to be in the best interest of the child, the fee may not exceed the amount the attorney would receive were he employed on an hourly basis. Any attorney who accepts a child support arrearage case on a contingency fee basis should carefully consider the amount of his fee and should make a good faith determination that the fee is reasonable when measured by the above standard and the factors set forth in Rule 1.5. All attorneys who accept contingency fee arrearage cases should be aware that their fees are subject to scrutiny by the Office of General Counsel and the Disciplinary Commission to determine compliance with the Rules of Professional Conduct and this opinion. Any attorney whose fee is challenged as being unreasonable will bear the burden of showing that the above standard, as well as the criteria in Rule 1.5, have been applied in determining the fee.

The final condition imposed by RO 91-05 is that the client must be truly indigent and, therefore, unable to pay for the legal services on any basis other than a contingency fee. If the client is able to pay the prevailing hourly rate for an attorney's services, the attorney has an ethical obligation to work for an hourly rate fee rather than taking a substantial portion of the back child support which, in virtually every instance, would result in a much higher attorney's fee than would an hourly rate. Again, the determinative criteria is the best interest of the child. When an attorney takes a percentage of back child support as his fee, he deprives the child for whom the child support was intended of obviously needed resources. As referenced in the question, Alabama Courts have held, and repeatedly confirmed in recent decisions, that child support belongs to the minor child, not the custodial parent, and the parent may not, by agreement with the non-custodial parent or others, deprive the child of the monetary support to which the child is entitled. Representative of such cases is *Floyd v. Edmonson*, 681 So.2d 583 (Ala. Civ.App. 1996), which holds, in pertinent part, as follows:

"'Although child support is paid to the custodial parent, it is for the sole benefit of the minor children.' *State ex rel. Shellhouse v. Bentley*, 666 So.2d 517, 518 (Ala. Civ.App. 1995).

**‘Parental support is a fundamental right of all minor children .... The right of support is inherent and cannot be waived, even by agreement.’ *Ex parte University of South Alabama*, 541 So.2d 535, 537 (Ala. 1989). ‘A child has an inherent right to receive support from his parents, and that right cannot be waived by the parents by agreement even if a waiver of support provision is included in the final decree.’ *Davis & McCurley, Alabama Divorce, Alimony & Child Custody Hornbook* § 22-8 at 247 (3d ed. 1993). See also *Ex parte State ex rel. Summerlin*, 634 So.2d 539 (Ala. 1993). It is ‘the public policy of this state that parents cannot abrogate their responsibilities to their minor children by mutual agreement between themselves so as to deprive their minor children of the support to which they are legally entitled.’ *Bank Independent v. Coats*, 591 So.2d 56, 60 (Ala. 1991).’**

**681 So.2d at 585. See also, *State Dept. of Human Res. v. Sullivan*, 701 So.2d 16 (Ala.Civ.App. 1997); *State Dept. of Human Res., ex rel. Nathan v. Nathan*, 655 So.2d 1004 (Ala.Civ.App. 1995). The Disciplinary Commission has serious concerns that the practice of allowing contingency fees in child support arrearage cases can result in a substantial portion, sometimes as much as half, of the funds that should be used to clothe, feed and educate dependent children, going to attorneys in the form of contingency fees. If the custodial parent may not deprive the child of support by forgiving the support obligations of the non-custodial parent, it would appear equally questionable for the parent to deprive the child of support by giving a substantial percentage thereof to an attorney as legal fees. This concern becomes even more compelling if the parent has the ability to pay the attorney from funds other than those designated for support of the child. It is the opinion of the Disciplinary Commission that any attorney who desires to take a child support arrearage case on a contingency fee basis must take all reasonable steps to investigate the financial condition of the custodial parent and make a good faith determination that the parent is, in fact, unable to pay a reasonable hourly rate or to obtain legal representation on any other than a contingency fee basis. It is further the opinion of Disciplinary Commission that an attorney who accepts a child support arrearage on a contingency basis when he knows that the parent is financially able to pay an hourly fee, or an attorney who fails to adequately investigate the financial resources of the parent in order to make such a determination, is in violation of Rule 1.5(d) and is subject to discipline therefor.**

**In summary, it is the opinion of the Disciplinary Commission of the Alabama State Bar that rarely, if ever, are contingency fee contracts in the best interest of the child and that before any attorney enters into a contingency fee contract for the collection of child support arrearage, the following conditions must be satisfied:**

**1. The attorney has made a good faith determination that a contingent fee or hourly fee is in the best interest of the child.**

**2. The attorney has required the custodial parent to sign a written acknowledgment affirming that the parent understands that the same collection services are available from the state at no cost.**

**3. The contingent fee is reasonable and not excessive. There shall be a rebuttable presumption that any contingency fee which exceeds the actual value of the services calculated on an hourly basis must be deemed excessive.**

**4. The attorney has conducted sufficient inquiry to make a good faith determination that the parent cannot pay an hourly rate from funds other than those designated for support of the child.**

**LGK/vf**

**10/27/98**

**ADDENDUM TO RO 98-01**

**I, \_\_\_\_\_ (name of parent) \_\_\_\_\_, acknowledge that I have been informed and understand that the Department of Human Resources, and/or the District Attorney for the Judicial District in which I reside, will collect the past due child support to which my child is entitled at no cost to me or to my child. I further acknowledge that my attorney has explained to me the procedures which I may follow to avail my child of this free service and that my attorney has done or said nothing to discourage or dissuade me from using this service. With full knowledge of the availability of this free service, I hereby make the conscious and informed decision not to take advantage of such free service to collect the support due my child, but instead I have decided to pay my attorney either an hourly rate of \$\_\_\_\_\_ per hour or a percentage of the money due my child in accordance with the terms of the attorney's proposed contingency fee contract. My signature on this acknowledgment affirms that I fully understand my rights and obligations with regard to the back child support due my child.**

**Signed this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ .**

\_\_\_\_\_

**signature of parent**

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