

FORMAL OPINION NO 2005-13

Fee Agreements: Contingent Fees, Domestic Relations

Facts:

Lawyer *A* is asked to represent a woman who has cohabited with a man for 10 years and who seeks a division of assets accumulated by the couple during those years. Lawyer *A* would like to charge a contingent fee.

Lawyer *B* is asked to represent Client *B* in enforcing an order for spousal or child support that was previously obtained by other counsel. Lawyer *B* would like to charge Client *B* a contingent fee for this work.

Lawyer *C* is asked to represent a spouse in dissolution proceedings. Lawyer *C* would like to charge a contingent fee based on the value of property awarded to Lawyer *C*'s client or on the amount of spousal or child support.

Lawyer *D* represents Client *D* in a dissolution proceeding and charges a reasonable, hourly fee. Client *D* then asks Lawyer *D* to represent her in an interspousal tort claim against her husband. Lawyer *D* would like to take this additional representation on a contingent fee basis.

Questions:

1. May Lawyer *A* charge a contingent fee?
2. May Lawyer *B* charge a contingent fee?
3. May Lawyer *C* charge a contingent fee?
4. May Lawyer *D* charge a contingent fee?

Conclusions:

1. No.
2. Yes, qualified.

3. No.
4. Yes, qualified.

Discussion:

Pursuant to Oregon RPC 1.5(a),

A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

See also Oregon RPC 1.8(i)(2), which permits a lawyer to “contract with a client for a reasonable contingent fee in a civil case.”

The mere fact that a contingent fee is charged does not make a fee unreasonable or excessive. *See* Oregon RPC 1.5(b) (whether fee is contingent or fixed is one factor, among others, to be considered in determining reasonableness of fee). The only absolute prohibition against contingent fees is set forth in Oregon RPC 1.5(c):

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 spousal or child support or a property settlement; [or]

(2) a contingent fee for representing a defendant in a criminal case.

Lawyer *C*'s proposed contingent fee would clearly violate Oregon RPC 1.5(c). *Cf. Hay v. Erwin*, 244 Or 488, 419 P2d 32 (1966).

The fact that Lawyer *A*'s client is unmarried does not change the result. *Cf. Neely v. Neely*, 95 Or App 403, 404, 768 P2d 947 (1989), discussing the dissolution of a “domestic partnership” in connection with the termination of a relationship between unmarried cohabitants. *See also Beal v. Beal*, 282 Or 115, 120, 577 P2d 507 (1978).

Lawyer *B*'s contingent fee arrangement is proper as long as the fee is reasonable and as long as Lawyer *B* is enforcing an existing support order rather than obtaining an order in the first instance.

Lawyer *D* can charge a contingent fee in the interspousal tort claim only. Even if these two matters are joined for trial, two separate fees must be charged.¹ Lawyer *D* should have separate engagement letters and files, and should separately record time spent on each matter.

Approved by Board of Governors, August 2005.

¹ This opinion makes no statement whether joinder is proper, appropriate, or legal in the above circumstances, or in domestic relations cases in general. *See, e.g.*, ORCP 24 A; Janet W. Steverson, *Interspousal Tort Claims in a Divorce Action in Oregon*, 31 Willamette L Rev 757 (1995).

COMMENT: For additional information on this general topic and other additional subjects, see *The Ethical Oregon Lawyer* § 3.2-2 to § 3.2-4 (limitations on fees), § 3.5-7(a) (acquisition of interest in litigation) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 34–35 (2000) (supplemented periodically); OSB Formal Ethics Op No 2005-45; and Henry H. Drummonds, *The Law and Ethics of Percentage Contingent Fees in Oregon*, 72 Or L Rev 859 (1993).

