

# Professional Responsibility

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## Attorney Fees & Client Property

### 1 Attorney Fees

#### 1.1 Reasonable Fee

Rule 1.5(a)

- Factors
  - Time & labor required, novelty & difficulty of issue; skill required to perform service
  - Opportunity costs to lawyer
  - Customary fees in the locality
  - Amount at stake in case and results obtained
  - Time limits imposed by client or circumstances
  - Nature and length of attorney-client relationship
  - Attorney's experience, reputation & ability
  - Nature of fee: fixed v. contingent

*Example*

- Matter of Fordham
  - Criminal defense attorney, fee agreement provided for hourly billing
  - At outset, attorney told client fee would be between \$3000 and \$10,000
  - Actual fee was \$50,022.– based on 2 hours
  - Stipulated that attorney performed the work diligently and in good faith

#### 1.2 Communication of Fee

Rule 1.5(b)

- Rule says “preferably in writing”
  - Some jurisdictions mandate written fee agreement
- Fee agreement is (written or oral) contract, subject to rules of contract interpretation
  - See *Telex v. Brobeck Phleger*

#### 1.3 Contingent Fees

Rule 1.5(c)

- Must be in writing
- Must explain method of calculation
- Must explain what expenses are payable by client, and whether they are deducted off the top or after calculation of fee
  - e.g. contingency, recovery of \$100,000 with \$10,000 in expenses incurred
  - Expenses off the top: \$100k-\$10k=\$90k. Fee = 30% of \$90k, or \$30k
  - Expenses after fee: Fee = 30% of \$100k, or \$33k; client pays expenses out of remainder

*Example*

- *Telex v. Brobeck*
  - Fee agreement provided for \$1 million fee in case of “wash” settlement
  - Client challenged fee as excessive
  - 9th Circuit upheld fee, under deferential California standard

- Risk of bankruptcy to client
- Fee was contingent
- Fee was negotiated by client's in-house counsel
- Lead attorney was highly experienced and prominent in field

Where client fires lawyer before contingency occurs, lawyer may have based on work completed (e.g. quantum meruit)

- Accrual of attorney's claim varies by jurisdiction:
  - Immediately
  - Only after contingency is satisfied (i.e. if client wins case)

### 1.3.1 Limits on Contingent Fees

Rule 1.5(d)

- Domestic relations
  - Fee may not be contingent on obtaining divorce, nor on amount of alimony or property settlement
  - Policy: special concerns about lawyer's incentives in divorce cases
  - Exception: lawyer may take contingency fee for collecting already-secured alimony/support or enforcing property division
- Criminal case
  - Contingent fees prohibited
  - Policy: may discourage plea bargain, because lawyer won't get paid

## 1.4 Fee Sharing

### 1.4.1 With Other Lawyers

Rule 1.5(e)

- Must be proportionate to attorneys' services (or each attorney assumed joint liability)
- Client must consent in writing
- Total fee must be reasonable

### 1.4.2 With Non-Lawyers

Rule 5.4(a)

Splitting fees with non-lawyers is prohibited.

- May pay non-lawyers for their services
- Payment may not be based on percentage of attorney's fee

## 1.5 Advances/Retainers

Permissibility of non-refundable retainer varies by jurisdiction

*Matter of Cooperman* (NY)

- Non-refundable fees are impermissible

*Ryan v. Butera Beusang Cohen & Brennan* (3d Cir. 1999) (applying Pa. law)

- Non-refundable fee reasonable under the circumstances, including firm's opportunity costs in taking case, fact that fixed up-front fee limited client's risk of greater fees going forward, and fact that client chose to fire lawyers

## 1.6 Problems

Client would like to retain Lawyer to represent him in litigation.

- Assuming Client agrees to the fee, may Lawyer charge more than her regular hourly rate based on the following:
  - The case involves complex issues of law and fact.
  - Lawyer is an experienced litigator in this field.
  - The urgency of the litigation.
  - The amount at stake in the litigation.
  - Lawyer's success rate in prior cases.
  - The amount charged by other lawyers in town.
- May Lawyer include clause in her retainer agreement providing for an increase in her hourly rate of 10% if Client prevails in the litigation?
- Must the fee agreement be in writing?
- May Lawyer increase her hourly rate during the representation?

Attorney wants to make it easier for her clients to pay their bills for fees. Which of the following would be proper for Attorney?

- Accept credit cards.
- Arrange for clients to get bank loans.
- Install an ATM machine in Attorney's lobby.
- Allow clients to make installment payments.
- Accept livestock as payment.

Are there goods or services that an attorney may not accept as payment?

- MSNBC.com (Sept. 19, 2008) CHICAGO - An attorney has been suspended for more than year for accepting nude dances from stripper as partial payment for the legal fees she owed him. The Illinois Attorney Registration and Disciplinary Commission on Thursday said Scott Robert Erwin will begin serving 15-month suspension for misconduct next month. Erwin, who practices in the northern Illinois city of DeKalb, and his client mutually agreed that she'd perform nude dances for him in his office as way to reduce her legal fees, the commission's report said. He credited her for \$5 toward his bill for services of various legal matters, the report said.
- Cal. Bar Journal (July 2010: JAMES MICHAEL KUMMERER [#50944], 63, of Columbus, Ind., was suspended for four years, stayed, with an actual two-year suspension and until he proves his rehabilitation, and he was ordered to take the MPRE and comply with rule 9.20. The order took effect Nov. 13, 2009.
  - In 2008, Kummerer was convicted in Indiana of one count of felony cocaine possession, a crime that involved moral turpitude. He accepted crack cocaine from a client as payment of a \$175 bill. Kummerer asked for an "eight ball," known to be an eighth of an ounce, or 3.5 grams, of cocaine.
  - In mitigation, he had no discipline record in 35 years of practice. He did not participate in the bar's disciplinary proceedings.
  - According to Wikipedia, an Eight Ball of cocaine retails for about \$250-300. That's substantially more than the \$175 that the client owed. By failing to deposit the surplus cocaine in the client's trust account, did the lawyer also violate Model Rule 1.15(c)?

Potential new client seeks to hire Attorney to represent Client in litigation. Attorney agrees to represent Client. At their first meeting, Client asks Attorney, "what are your fees?" Attorney responds, "Don't worry. My fees are always reasonable." Over the next few months, Client renews his question concerning fees, but each time the Attorney simply states, "My fees will be fair."

- If Attorney's fees turn out to be reasonable, has Attorney violated the Rules?

Lawyer is an experienced criminal defense attorney. In recent newspaper advertisement, Lawyer stated: "If I represent you in your DUI or DWI case and you are convicted, I will give you new bicycle for free."

- Is it proper for Lawyer to give new bicycle to convicted client?

Client agrees to retain Lawyer to represent Client in personal injury case. Client signs Lawyer's standard retainer agreement which describes the fee as follows: "If Client prevails in the litigation, Lawyer is to receive 1/3 of the recovery."

- Assuming this is the entire provision related to fees, is the agreement proper?

Client was an experienced oil and gas developer. The client asked an attorney for representation in suit to establish the client's ownership of certain oil and gas royalties. The client did not have available the necessary funds to pay the attorney's reasonable hourly rate for undertaking the case. The client proposed instead to pay the attorney an amount in cash equal to 20% of the value of the proceeds received from the first year royalties the client might recover as result of the suit. The attorney accepted the proposal and took the case. Is the attorney subject to discipline?

- Yes, because the agreement gave the attorney proprietary interest in the client's cause of action.
- Yes, unless the fee the attorney receives does not exceed that which the attorney would have received by charging reasonable hourly rate.
- No, because the client rather than the attorney proposed the fee arrangement.
- No, because the attorney may contract with the client for reasonable contingent fee.

Which of the following domestic relation matters may an Attorney handle on contingent fee basis:

- An action to obtain divorce.
- An action involving child custody.
- Pre-divorce action to divide marital property.
- Post-divorce action to collect unpaid maintenance and child support.

Client hired Lawyer to represent Client in personal injury lawsuit. Client agreed in writing to pay Lawyer 1/3 of any recovery. After two years, Client fired Lawyer without cause, replacing Lawyer with Lawyer B. The case then settled for \$100,000.

- Is Lawyer entitled to fee and, if so, how much?

Client hires Lawyer to represent Client in real estate transaction. Lawyer has little experience in real estate deals, so Lawyer would like to refer the case to Lawyer B, who is an experienced real estate attorney in another law firm. Lawyer A, however, wants to share in the fees.

- Assuming the overall fee is reasonable, may Lawyer do so?
- What if Lawyer B was member of Lawyer A's firm?

## 2 Handling Client Funds & Property

### 2.1 Duty of Care

#### 2.1.1 Lawyer holds client funds and property as fiduciary

Rule 1.15

- Must keep client property separate from lawyer's own property
- Must keep records of client account funds and property
  - Time for retention varies by jurisdiction
- When lawyer receives client funds or property from third person:
  - Must promptly notify client
  - Must promptly deliver to client
  - Must provide accounting if requested by client or third person
- If there is a dispute over ownership of property
  - Must keep it separate from lawyer's property
  - Must distribute any portion not subject to dispute

*Swift, Currie, McGhee & Hers v. Henry*

- Documents in legal file belong to the client
- In suit by attorney to recover unpaid fees, client was entitled to review and make copy of documents prepared by attorney in course of representation
  - Attorney may not assert work-product doctrine against client as basis for withholding documents from production in discovery

## 2.1.2 Client funds & trust accounts

### Client funds

- Money received from client
- Advances against attorney fees and expenses remains the client's until the attorney has earned the fee, or the expense has been incurred.
  - Fee agreement governs:
    - when attorney earns fees
    - when client owes payment for expenses
- Funds to be used in transaction or other purposes
  - Belongs to the client until disbursed for intended purpose
- Money received from third persons for the client's benefit
  - E.g. Judgment or settlement proceeds, payments received as part of transaction

### Requirements under Rule 1.15

- Must be kept in a separate account maintained in the state where the lawyer's office is situated (or elsewhere by agreement)
- May use one trust account for multiple clients' funds.
- Must keep track of each client's funds (i.e. individual ledgers)
- May not use one client's funds to pay another client's fees or expenses
- Separate account may be required or advisable where attorney is serving as estate administrator or similar fiduciary capacity

### Trust accounting rules

- See N.C.R.P.C. 1.15; far more detailed than Model Rule 1.15.
- Most violations result from negligence, rather than intentional misconduct
- Careless violations are still subject to discipline
- See NC State Bar, Lawyer's Trust Account Handbook (2011)

### IOLTA

- NC Rule 1.15 requires general trust accounts to be interest-bearing. See 27 N.C.A.C. 1D, Rule .1316, IOLTA Accounts; NC State Bar, Lawyer's Trust Account Handbook at 8
- Attorneys may use designated IOLTA accounts at eligible banks
- Interest goes to help fund legal services for needy individuals

### Deposits and Withdrawals

- Lawyer may deposit own funds in trust account to pay bank service charges
- Advances on fees and expenses must be deposited into trust account
- Withdrawn only as fees are earned or expenses incurred

## 2.1.3 Other client property

### Rule 1.15(a)

- Client property must be identified appropriately safeguarded.

## 2.1.4 Lawyers' Fund for Client Protection

Established "to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer."

- North Carolina: Client Security Fund, administered by NC State Bar Council
- Participation is mandatory in some jurisdictions (including NC), voluntary in others

## 2.2 Disputes Over Client Funds & Property

### Disputes Between Client and Attorney

- Attorney must turn over any undisputed amount to the client

- Attorney may hold disputed amount in escrow pending resolution

#### Disputes Between Client and Third Party

- Attorney may hold funds/property in escrow pending resolution

## 2.3 Problems

An attorney represented client in personal injury action against the driver of the car in which the client was injured while passenger. The personal injury action was settled, and the attorney received check in the amount of \$10,000 payable to the attorney. The attorney deposited the check in her clients' trust account. One day later, the attorney received letter from bank, which had heard of the settlement of the personal injury lawsuit. The bank informed the attorney that the client had failed to make his monthly mortgage payments for the last three months and demanded that the attorney immediately release \$900 of the proceeds of the settlement to the bank or the bank would institute mortgage foreclosure proceedings against the client. The attorney informed the client of the bank's letter. The client responded: "I don't care what the bank does. The property is essentially worthless, so let the bank foreclose. If the bank wants to sue me, I'll be easy enough to find. I don't think they'll even bother. You just take your legal fees and turn the rest of the proceeds over to me." Is the attorney subject to discipline if she follows the client's instructions?

- Yes, if the client does not dispute the \$900 debt to the bank.
- Yes, because the attorney knew that the client was planning to force the bank to sue him.
- No, unless the attorney had reason to believe that the client would not have sufficient funds to pay any subsequent judgment obtained by the bank.
- No, because the bank has no established right to the specific proceeds of the client's personal injury judgment.

An attorney and her client entered into written retainer and hourly fee agreement that required the client to pay \$5,000 in advance of any services rendered by the attorney and that required the attorney to return any portion of the \$5,000 that was not earned. The agreement further provided that the attorney would render monthly statements and withdraw her fees as billed. The agreement was silent as to whether the \$5,000 advance was to be deposited in the attorney's clients' trust account or in general account. The attorney deposited the entire fund in her clients' trust account, which also contained the funds of other persons that had been entrusted to the attorney. Thereafter, the attorney rendered monthly progress reports and statements for services to the client after services were rendered, showing the balance of the client's fee advance. However, the attorney did not withdraw any of the \$5,000 advance until one year later when the matter was concluded to the client's complete satisfaction. At that time, the attorney had billed the client reasonable legal fees of \$4,500. The attorney wrote two checks on her clients' trust account: one to herself for \$4,500, which she deposited in her general office account, and one for \$500 to the client. Was the attorney's conduct proper?

- Yes, because the attorney deposited the funds in her clients' trust account.
- Yes, because the attorney rendered periodic and accurate billings.
- No, because the attorney's failure to withdraw her fees as billed resulted in an impermissible commingling of her funds and the client's funds.
- No, because the attorney required an advanced payment against her fee.

Dan retained Attorney to appeal Dan's criminal conviction and to seek bail pending appeal. The agreed fee for the appearance on the bail hearing was \$per hour. Attorney received \$800 from Dan of which \$300 was deposit to secure Attorney's fee and \$500 was for bails costs in the event that bail was obtained. Attorney maintained two office bank accounts: "Fee Account," in which fees were deposited and from which office expenses were paid, and "Clients' Fund Account." Attorney deposited the \$800 in the Clients' Fund Account the week before the bail hearing. Attorney expended six hours of time on the bail hearing, but the effort to obtain bail was unsuccessful. Dissatisfied, Dan immediately demanded return of the \$800.

- What should Attorney do?

Lawyer represents Client in personal injury case. The case settles for \$25,000. On the day before Lawyer receives the settlement check, Lawyer receives signed letter from Client's treating Physician. The letter states that Client owes Physician \$2,000 for medical treatment. Enclosed with the letter is document entitled "Assignment" by which Client assigned any potential settlement/judgment proceeds to Physician. The Letter requests that Lawyer send \$2,000 of the settlement proceeds to Physician? Client tells Lawyer not to pay Physician.

- What should Lawyer do?

Agnes Jackson is mid-level associate at large law firm. She is under constant pressure to bill hours to clients. She is boarding plane for five-hour cross-country trip to attend deposition on behalf of the client. She is prepared for the deposition and does not need to work on the plane on that case. Her firm's agreement with the client provides that it can bill for her travel time. She has brought her laptop computer and another client's file with her.

- May Agnes spend her time on the plane working for the second client and bill both clients for the same five hours?

Grant Sowell is an attorney whose specialty is initial public offerings of stock. He has been asked by group that formed company to do the legal work necessary for them to make an initial public offering. These owners have asked Grant to take some of the stock as his fee.

- Under what conditions, if at all, may Grant do so?

Lawyer represents Client in replevin action to recover Client's \$25,000 mink coat from Z. At 5:p.m. on Friday, Z's lawyer delivers the mink coat to Lawyer's office. Lawyer knows that Client is out of town until Monday. What should Lawyer do with the coat?

- Arrange for the coat to be kept by secured fur storage company.
- Leave it in the law firm's closet.
- Wear it to dinner Saturday night.
- Sell it.

Attorney is partner in the Charlotte office of national law firm. The firm is headquartered in Chicago and maintains its client trust fund account at Chicago bank. Attorney agrees to represent Client, North Carolina resident. Client pays Attorney \$5,000 retainer fee, which Attorney wishes to deposit in the Chicago-based trust account.

- May Attorney do so?