

Practice Pointer: Fee Agreements

by Kate A. Toomey

Attorneys are sometimes surprised to learn that except for contingency fee arrangements,¹ the Rules of Professional Conduct don't require written fee agreements between attorneys and clients. What the rule requires, in some circumstances, is written notice of the rate or basis of the fee. Neither the client nor the attorney is required to sign it, and it need not be before or simultaneous with the commencement of the relationship. "Within a reasonable time after commencing the representation" will do. Nevertheless, I urge anyone with a private law practice to have a fee agreement for every representation undertaken. Here's why.

Rule 1.5 and Its Requirements

Rule 1.5 of the Rules of Professional Conduct² provides as follows:

When the lawyer has not regularly represented the client, and it is reasonably foreseeable that total attorneys fees to the client will exceed \$750.00, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

Rule 1.5(b) (Fees). Note that the rule doesn't require a written agreement – it just requires a written communication – and the lawyer can provide it after the representation starts. Arguably, a bill or statement for your services would even suffice; the Comment following the rule provides that "[f]urnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth." Comment, Rule 1.5 (Fees). But I wouldn't advise you to rely on such a minimalist approach. Some attorneys even limit their fees to \$750 so they can avoid the writing requirement(!),³ but here again, I wouldn't advise it.

For one thing, it's just good client relations to let the client know at the outset if it's a flat fee, and what the rate of the fee will be if you charge on an hourly basis. Even though you probably explained it to the client orally, having it in the form of an agreement you both sign gives the client something to refer to after your meeting, and diminishes the possibility of misunderstandings

and memory lapses.

For another, having a written agreement gives you an opportunity to specify what you will and won't do for the fee you charge. If you intend to limit your role,⁴ the written agreement is an excellent place to establish exactly what you'll do – settlement negotiations but not trial; trial but not appeal, and so on. You can also specify the circumstances under which you may terminate the representation.

Finally, having a fee agreement protects you in the unpleasant event that the client files a Bar complaint against you. Many complaints, especially those focusing on the scope of representation, are more easily resolved when the attorney produces a copy of a fee agreement signed by both parties.

Contingent Fees

If you accept cases on a contingent fee basis,⁵ the Rules *require* a written fee agreement. *See* Rule 1.5(c) (Fees). The relevant portion of the rule provides:

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.

Rule 1.5(c) (Fees).

Flat Fees, Advance Fees, and "Nonrefundable" Fees

Attorneys can charge flat fees for their services, and often do so in

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connection with a requirement that the fee be paid in advance of the commencement of the representation. This sort of fee arrangement is common in practices that focus on criminal representation, domestic relations, and some types of bankruptcies – all areas in which collecting a fee after the representation ends is problematic.

There's nothing wrong with this, so far as the Rules are concerned. As always, though, it's wise to have the terms specified in a fee agreement that you and the client both sign. *See* Rule 1.5(a) (Fees); Utah Ethics Advisory Opinion No. 136 (1994).⁶ Moreover, if there are conditions under which you anticipate the need to increase the amount of the flat fee, or shift from a flat fee to an hourly fee – if an uncontested divorce becomes contested, for example – it's wise to spell these out in the agreement. The Comment provides guidance on this:

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in any way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.

Comment, Rule 1.5 (Fees).

Keep in mind that under some circumstances, you may have to refund fees paid in advance. The Comment states that “A lawyer may require advance payment of a fee but is obligated to return any unearned portion.” Comment, Rule 1.5 (Fees). This is because the Rules prohibit attorneys from charging or collecting an excessive fee. *See* Rule 1.5(a) (Fees). You might want to include a paragraph in your fee agreement explaining to the client that if the representation terminates before you've earned the entire fee, the manner in which you will determine how much of it you are entitled to keep.⁷

“Nonrefundable fees” aren't actually non-refundable. Regardless of the term you use to characterize the fee, it's still subject to the prohibition against charging a clearly excessive fee. What this means is that there are circumstances under which you may have to return an unearned portion. *See* Rule 1.5(a) (Fees); Utah Ethics Advisory Opinion No. 136 (1994). If, for example, you accept a fee from a family member of a defendant in a criminal case who meanwhile is appointed a public defender and your

services are terminated before you have performed any, or only a little, work, you may have to refund all or some of the fee. The Ethics Advisory Opinion identifies other examples.

The Elements of Good Fee Agreements

Fee agreements can take many forms and there isn't just one correct approach. Still, attorneys often seek guidance on what to include to best protect the interests of their clients and at the same time reduce the possibility of conflict later. Here are my bare-bones suggestions,⁸ which are intended to satisfy the basic requirements of the Rules and then some, but obviously do not address other essential elements specific to the case:

1. Title the agreement.

For example: “Attorney-Client Fixed Fee Contract;” “Attorney-Client Hourly Fee Contract;” “Attorney-Client Contingency Fee Contract.”

2. Identify the scope of the representation.

An example for a fixed fee contract: “The attorney will provide all legal services in connection with criminal charges arising from the client's arrest on [date]. The representation will terminate when all proceedings in the District Court have concluded. The representation does not include appealing any adverse decisions.”

An example for an hourly fee contract: “Client hires Attorney to provide legal services in connection with the client's divorce action.”

An example for a contingency fee contract: “The attorney will provide all legal services in connection with the client's breach of contract action against the defendant in District Court. The representation will terminate when settlement is reached, or the District Court or arbitration proceedings have concluded. The representation does not include appealing any adverse decisions.” It's smart to explicitly note that your representation is limited to the matter identified in the agreement, and does not include independent or related matters that may arise, and that any such matters may be negotiated under a separate fee agreement.⁹

3. Define the type of fee.

A fixed fee contract states that the fee is a set amount, identifies the amount, and specifies when it must be paid. The agreement must also specify the conditions under which all or a portion of the fee will be returned and how the amount returned will be assessed. An hourly fee agreement states the hourly rate and identifies the amount of any deposit required. It's wise to include a section stating that the client will pay for legal services at the rates identified in the agreement. If they differ, include the rates

of associates and partners, and identify any other firm personnel who may work on the case, along with the rate you will charge for their time.

A contingency fee agreement explains that your fee depends upon recovery of a settlement or judgment. Describe the structure of the contingency fee. For example, identify the percent of the net recovery if settlement is reached before filing a lawsuit, versus the percent of the net recovery if settlement or judgment is reached after a lawsuit is filed. Identify which of you is responsible for paying for necessary expert witnesses, consultations, or investigators. If the client has the final say on whom to hire, explain this; alternatively, if you retain control of those decisions, make it clear. Explain what will happen to any future recovery if the representation is terminated. For example, “If the attorney withdraws before completing the representation, the client may be entitled to a refund of any unused deposit. The attorney is entitled to a reasonable hourly fee based upon the amount of time expended on the case.” Notify the client that if an award of costs is made, this may not cover all actual costs to which you are entitled, and the client remains responsible for the difference between what was awarded by the court and what you are owed. Explain that you will not make any settlement without obtaining the client’s prior approval.¹⁰

4. Specify who will pay costs and when.

Under an hourly fee agreement, if the client will pay costs and expenses, include that, as well. For example, “In addition to the hourly fee, the client shall reimburse the attorney for all costs and expenses incurred by the attorney, including fees fixed by law, long distance telephone calls, messenger and delivery fees, postage, photocopying, parking, mileage at \$___ per mile, consultants’ fees, and other similar items.”

Under a contingency agreement, for example, “The attorney will advance any sums necessary for costs and expenses, but the client shall reimburse the attorney for all such costs and expenses, including fees fixed by law, long distance telephone calls, messenger and delivery fees, postage, photocopying, parking, mileage at \$___ per mile, consultants’ fees, and other similar items.”

Consider including a provision that requires you to contact the client before incurring costs exceeding a specified amount, and another requiring the client’s consent before retaining outside consultants. Doing this sometimes avoids surprises that lead to conflicts later.

5. Specify any initial deposit or retainer fee you require.

Include the client’s authorization to withdraw sums under the terms specified in the agreement. Explain that you will keep the money in a trust account until you use it for costs and expenses as they arise, or until you earn it if you’re charging an hourly rate. It’s a good idea to regularly send your client a written statement letting them know the status of their deposit. State what will happen if the deposit is used. For example, “When your deposit has been depleted, I will require you to pay all remaining sums owing, and will expect you to advance an additional deposit in the amount of \$_____.” Explain that you will refund any unused portion of the advance deposit at the end of the representation. You might also consider a provision informing the client that unless the client notifies you within a specified period of disputes concerning the statement, that you will withdraw the money from the trust account.¹¹

For hourly agreements, include a section stating that you will send the client periodic statements accounting for hours spent and costs incurred, and stating that such an accounting will be made promptly, say within ten days, of the client’s request.¹² Statements should include the date work was performed, who performed it, what was done, and how long it took. Specify when payments are due, and if you intend to charge interest on the unpaid balance, state what the rate of interest will be.

6. Termination of the relationship before the conclusion of the legal matter.

Describe when and how the attorney/client relationship may be terminated. For example, “The client may discharge the attorney at any time.¹³ The attorney may withdraw with the client’s consent or for good cause.” Articulate what you mean by “good cause.” *See* Rule 1.16(a), (b) (Declining or Terminating Representation).

Explain what will happen to the client’s money if the representation is terminated. For example, “If the attorney withdraws before completing the attorney’s duties under this agreement, the client may be entitled to a refund of some or all of the fixed fee. The attorney is entitled to a reasonable hourly fee based upon the amount of time expended on the case.” Explain that unpaid charges are due and payable upon the termination of representation.

7. The file.

Identify what will happen to the client’s file when the representation ends. *See* Rule 1.16(d) (Declining or Terminating Representation), and the Comment thereafter, for guidance on protecting the client’s interests “to the extent reasonably practicable.”

8. Liens.

If you intend to claim a lien on any of the client's claims or causes of action, add a section explaining that your lien will be for any sums owed you at the conclusion of the representation, and will attach to any recovery the client obtains.

9. Disclaimer.

Explain that attorneys cannot guarantee results in the client's matter. This is helpful in defending yourself against claims that you promised the moon and failed to deliver it.

10. Signatures and dates.

Sign and date it yourself; have the client sign and date it; give the client a copy. Keep your copy in the client file.

What Happens If Things Go South?

Unfortunately, even the most explicit, fair contract doesn't make an attorney-client agreement bullet-proof. Many attorneys deal with fee disputes by simply writing off the uncollected fee, but others either cannot afford this course or are unwilling to walk away from their fees. The Rules stop short of addressing disputes over fees, but the Comment provides that "[I]f a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer should conscientiously consider submitting to it." Comment, Rule 1.5 (Fees). The Utah State Bar offers a fee arbitration program for assisting in resolving such disputes. Aside from the Comment's exhortation, you might consider arbitration as a means of swiftly and inexpensively moving beyond conflicts with your clients.

Vetting Your Agreement

It's a good idea to have a trusted colleague review your form contracts, particularly if you're a small or solo practitioner or new to practice. If you don't feel comfortable running it by a friend, retain a qualified lawyer! The OPC lacks the resources to review individual contracts, but if you have specific questions about a provision you contemplate including, you can discuss it with an OPC attorney on the Ethics Hotline. The number is 531-9110.

⁷ One method is to charge an hourly rate for your services to the point the relationship ended. This entails keeping time records, or at least being able to make a reasonable estimate concerning the time you spent on the matter. Many attorneys don't think it's worth the paperwork to keep time sheets, trading a more streamlined office practice for the potential of having to refund more of the fee.

⁸ The OPC makes no express or implied representations or warranties concerning these suggestions.

⁹ Bar complaints sometimes allege that the attorney represented the client in all sorts of legal matters other than the one for which the attorney was originally retained. A provision such as the one suggested goes a long way toward protecting the attorney in such a situation.

¹⁰ Attorneys sometimes impermissibly attempt to circumvent the requirement that "a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter" by including a provision giving the attorney permission to make that decision. Rule 1.2(a) (Scope of Representation).

¹¹ This can help you avoid violating Rule 1.15(c) (Safekeeping Property).

¹² The Rules don't require billing statements at regular intervals, but in my opinion they're another useful client relations tool. In any event, the Rules do require a full accounting upon request of funds in your control belonging to a client or third party. *See* Rule 1.15(b) (Safekeeping Property).

¹³ The Rules provide that "A lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if . . . the lawyer is discharged." Rule 1.16(a) (Declining or Terminating Representation). This means that a client can discharge a lawyer at any time. Lawyers sometimes attempt to circumvent this by adding language to the effect that the client can only discharge the attorney "for cause," but this will not avoid a rule violation if you keep working despite being fired without cause.

¹ Contingent fees are discussed below.

² All references herein are to the Rules of Professional Conduct unless otherwise indicated.

³ The idea is to avoid the expense of preparing the fee agreement.

⁴ The Rules permit a lawyer to "limit the objectives of the representation if the client consents after consultation." Rule 1.2(b) (Scope of Representation).

⁵ Criminal defense and divorces can't be charged on a contingent fee basis. *See* Rule 1.5(d) (Fees).

⁶ The Utah Ethics Advisory Opinions are available on the Utah State Bar's website: www.utahbar.org.