

# COMMON ETHICS MISTAKES IN FEE AGREEMENTS

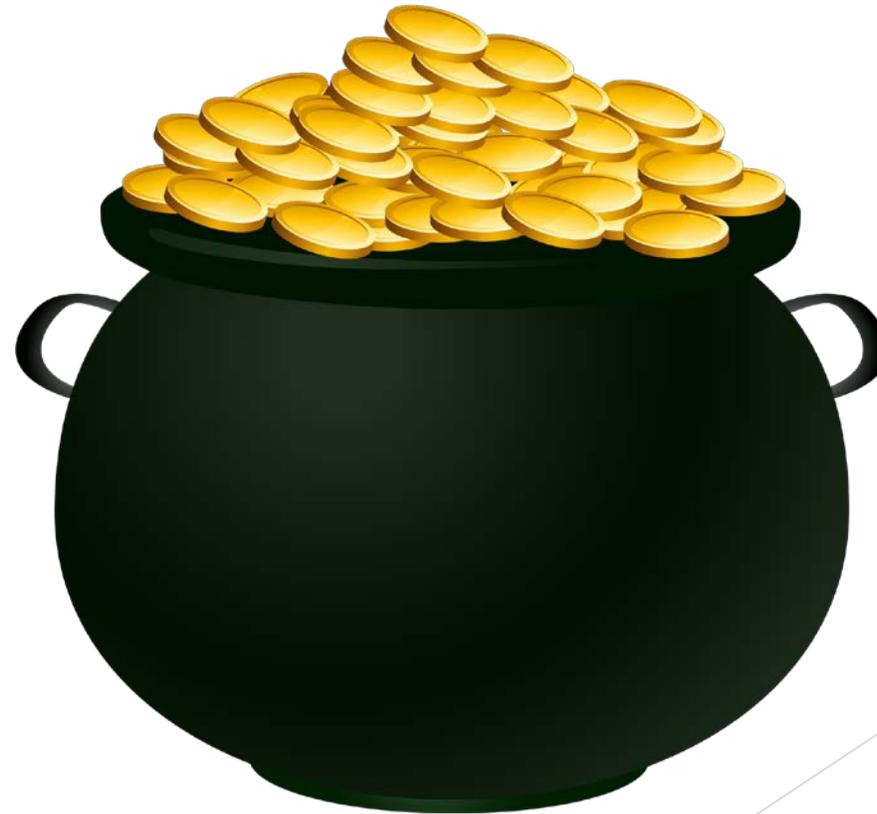
Keshini M. Ratnayake  
Senior Assistant Director  
[Keshini.Ratnayake@courts.state.mn.us](mailto:Keshini.Ratnayake@courts.state.mn.us)

# DEC Investigators



# Ask for a copy of the fee agreement

- ▶ For EVERY investigation
- ▶ Fee Agreements answer ?'s
- ▶ Who was the client?
- ▶ For what purpose was the lawyer hired?
- ▶ What was the scope of the representation?
- ▶ When did representation begin?
- ▶ What was the agreed upon fee?
- ▶ What type of fee arrangement?



# Fee Agreements - Tips for DEC Investigators

- ▶ If you spot issues with the fee agreement, mention it in your report
- ▶ Even if the complaint had nothing to do with the fee agreement
  
- ▶ Authority: Rule 8(a), Rules on Lawyers Professional Responsibility (RLPR)

“....upon a reasonable belief that professional misconduct may have occurred, the Director may make such investigation as the Director deems appropriate as to the conduct of any lawyer...”

# Types of Fee Agreements: Flat Fees

- ▶ Flat fee charged for *specified legal services*
- ▶ Most common in criminal matters
- ▶ Example: \$3K for your DWI
- ▶ Fee constitutes COMPLETE payment for the services
- ▶ Fee may be paid in advance
- ▶ Fee is the lawyer's property upon receipt, IF:

# Flat Fee Agreements, Cont.



- ▶ Agreed to in advance in a WRITTEN fee agreement, signed by the CLIENT
- ▶ Agreement must state:
  1. nature and scope of services
  2. total amount of fee and payment terms
  3. fee will not be held in trust
  4. client has right to terminate
  5. client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.
- ▶ Rule 1.5(b)(1), MRPC

# Common Mistakes in Flat Fee Agreements

- ▶ agreement does not have ALL FIVE of the golden keys
- ▶ agreement says a client “may” be entitled to a refund, instead of “will”

## Common Mistakes in Flat Fee Agreements

Writing “may” be entitled to a refund WILL result in an admonition

# Common Mistakes in Flat Fee Agreements

- ▶ Failing to refund a portion of the fee when representation ends before the agreed upon end point.
- ▶ But I've already earned the whole fee!
- ▶ I only charged 3K and I've put in 8K of work
- ▶ The case ended up being way more work than I thought!



# Common Mistakes in Flat Fee Agreements

- ▶ Risk of flat fees
- ▶ If you didn't complete the agreed upon representation, for any reason, you must refund a portion of the fee, no matter how much work you've already done

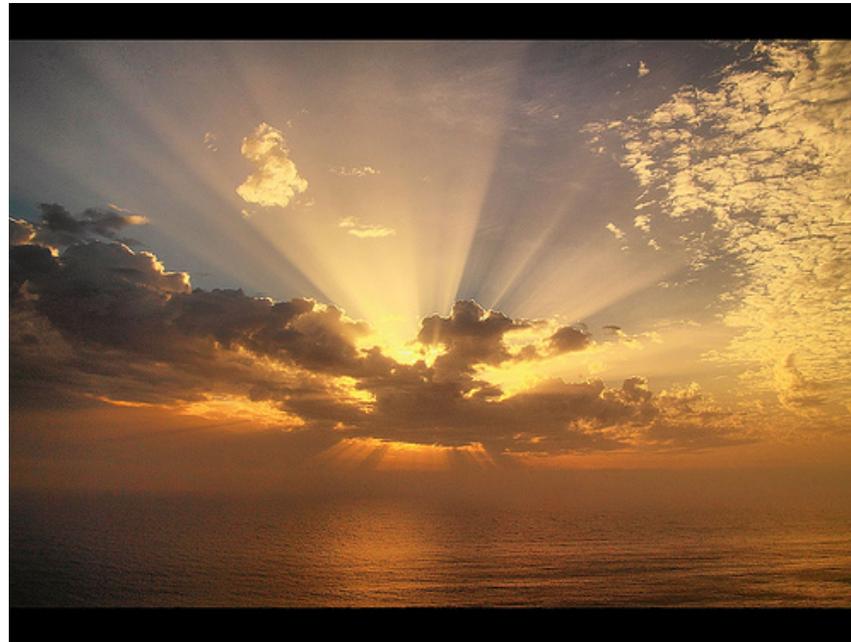


# Common Mistakes in Flat Fee Agreements

- ▶ Using an hourly rate to calculate the refund owed to client
- ▶ Example: normally charge \$350/hr, worked 10 hours on case, client paid 3K flat fee, so no refund owed = INCORRECT → Misconduct
- ▶ CORRECT → Think of the refund in terms of **how far you advanced the client's case**, at the point of termination
- ▶ Fee in a flat fee agreement is not earned until the entire representation is completed.

# Common Mistakes in Flat Fee Agreements

- ▶ You can have a flawed flat fee agreement, but if the money was kept in trust, there is no violation
- ▶ In other words - The flat fee rules apply when you are treating the advanced fee as your own property



# Types of Fee Agreements: Availability Fees



- ▶ Fee charged to ensure the lawyer's availability to the client during a specified period
- ▶ Or on a specified matter
- ▶ Must be entirely separate from compensation for legal services performed
- ▶ Rule 1.5(b)(2), MRPC

# Availability Fee Agreements, Cont. Common Mistakes

- ▶ Fee is unreasonable
- ▶ Not in writing
- ▶ Not signed by the client
- ▶ Doesn't specify that fee is for availability ONLY
- ▶ Doesn't specify that fees for legal services will be charged separately
- ▶ Agreement describes the availability fee as non-refundable
- ▶ **If lawyer isn't available as promised, must refund all or part of fee**
- ▶ Too often just an attempt to collect a non-refundable retainer.



# Types of Fee Agreements: Contingency Fees



- ▶ Fee is contingent on the outcome of the matter for which the service is rendered
- ▶ Rule 1.5(c), MRPC

# Contingency Fees, Cont.

## Common Mistakes

- ▶ not in writing
- ▶ not signed by the client
- ▶ Doesn't state how fee will be determined
- ▶ Doesn't state % to lawyer for settlement, trial, or appeal
- ▶ Doesn't specify expenses to be deducted from recovery
- ▶ Doesn't specify whether expenses are deducted before or after fee is calculated (Most Common Mistake)
- ▶ Doesn't specify that certain expenses are owed even if client doesn't win



# Contingency Fees, Cont. Common Mistakes



- ▶ Can't take a contingency fee if the outcome is securing a divorce
- ▶ Or a certain amount of alimony or property
- ▶ Can't take a contingency fee for representing a criminal defendant
- ▶ Rule 1.5(d), MRPC

# Fee Splitting

- ▶ Lawyers not in the same law firm are prohibited from sharing a fee, unless they comply with Rule 1.5(e):
  - ▶ Fee division must be in proportion to services rendered, or lawyer assumes joint responsibility for representation; and
  - ▶ Client consents to arrangement and proportion each lawyer receives in writing; and
  - ▶ Total fee is reasonable.

Referral or finder's fees are prohibited in MN - Rule 7.2(b), MRPC.



# Fee Splitting, Cont. Common Mistakes



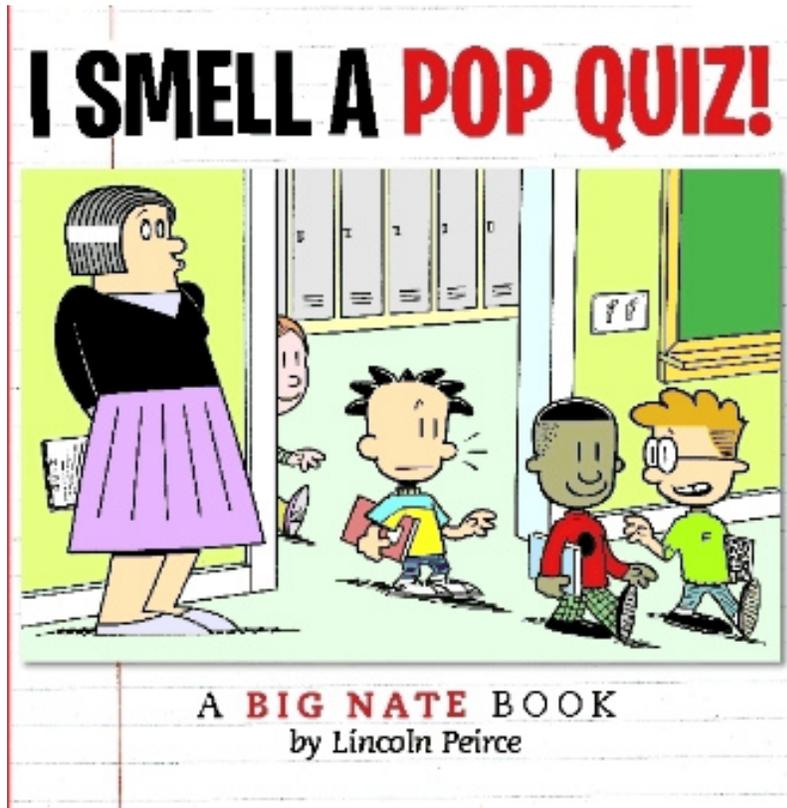
- ▶ Did not obtain the client's **consent** to work with another lawyer
- ▶ Did not obtain the client's consent to the **share each lawyer will receive**
- ▶ Did not confirm client's consent to both issues **in writing**

# Fee Splitting, Cont.

## Common Mistakes

- ▶ Acquiescence is not consent
- ▶ The client knew about it the whole time and never said anything - not consent
- ▶ The client saw on the bill that the fee was being split and paid it - not consent
- ▶ In an email, I referenced that I was going to be working with another attorney, so that was in writing and the client didn't disagree - not consent, not confirmed in writing

# Conclusion



# Which type of fee agreement is required to be in writing?

- ▶ A) Flat fees paid in advance of services
- ▶ B) Contingency fee agreements
- ▶ C) Availability agreements
- ▶ D) (B) and (C)
- ▶ E) All of the above

Lawyer agrees to represent Client in a divorce through judgement and decree. Client pays a flat fee of \$10,000 as complete payment for services. Three months later, Client fires lawyer. Client demands a refund. Lawyer calculates a refund based on the 40 plus hours he's worked on the file at \$250/hour and decides client is not entitled to a refund. Lawyer has a fee agreement compliant with Rule 1.5(b). Is there a rule violation?

- A) No, because the lawyer earned the whole fee already
- B) No, because whether the fee is earned is a fee dispute
- C) Yes, the entire fee hasn't been earned

Client hires Lawyer A to defend a murder charge. Client pays Lawyer A a flat fee of 50K for representation through trial. On the eve of trial Lawyer A realizes he needs a second chair. Lawyer A calls Lawyer B, who works at a different firm, and agrees to pay Lawyer B 15K of Client's flat fee to second chair the trial. Lawyer B Agrees. Lawyer A leaves a voicemail for Client informing him of the arrangement. May Lawyer A share Client's fee with Lawyer B?

- ▶ A) Yes, Lawyer A may exercise his discretion for the benefit of the client.
- ▶ B) Yes, because Lawyer A informed the Client.
- ▶ C) No, because Lawyer A did not obtain Client's consent to the agreement, confirmed in writing.
- ▶ D) No, because Lawyer A did not give proper notice to the court.