

Filing fees in bankruptcy
by
Joshua H. Brand, Assistant Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Minnesota Lawyer* (November 5, 2012)

Rule 1.5(a), Minnesota Rules of Professional Conduct (MRPC), provides, in relevant part: “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee ...” As indicated by the eight factors set forth in the subsections of Rule 1.5(a), MRPC, determining what constitutes an “unreasonable fee” under the MRPC sometimes can involve a fact-based and situation-specific analysis. In certain other circumstances, however, a less-rigorous approach can be employed.

Take, for example, the bankruptcy attorney who is retained and paid a flat fee of \$1,500 to represent a client in a personal bankruptcy. The attorney withdraws or is fired one day into the representation, then refuses to refund to the client any portion of the \$1,500. The client ultimately files a complaint against the attorney with the Director’s Office. Upon initial review of the complaint to determine whether it warrants investigation based upon the facts above, it is doubtful that an elaborate analysis under the subsections of Rule 1.5(a), MRPC, will be necessary; rather, a complaint that an attorney fails to refund what reasonably appears to be an unearned fee will likely be investigated under Rule 1.16, MRPC (steps upon termination of representation) on the basis that it has stated “a reasonable belief that professional misconduct may have occurred.” Rule 8(a), Rules on Lawyers Professional Responsibility.

Not all situations are necessarily as clear cut. For example, the same attorney agrees to represent a client through the filing of his or her Chapter 7 bankruptcy petition for \$1,500, but the amount received involves a flat fee of \$1,194 and \$306 for the bankruptcy court filing fee. The representation proves somewhat complex, and the client perhaps needs a disproportionate amount of attention from the attorney and her staff. The attorney has prepared the bankruptcy petition and is about to file the petition when the client abruptly terminates the attorney-client relationship and demands a full refund. Assuming the attorney and her firm indeed invested a considerable amount of time in the client’s matter prior to termination, then the attorney can make a plausible argument that she is entitled to the full \$1,194 fee (or a significant portion thereof) on the basis of *quantum meruit*. Under these facts, the issue of the attorney’s retention of the \$1,194 will likely not be investigated, but the complainant rather will be referred to a fee arbitration panel or the court system for resolution as a fee dispute. If the attorney also refuses to refund to the client the unpaid filing fee, however, then that aspect of the

matter will be investigated as an allegation regarding a failure to remit to the client funds to which the client is entitled. See Rules 1.5(a), 1.15(c)(5), and 1.16(d), MRPC. An attorney can never legitimately claim to have “earned” an unpaid filing fee, nor can an unused cost advance be applied to outstanding fees without client agreement.

May an attorney advance or pay a filing fee on behalf of the client? Again applying this question to the area of bankruptcy, recently the Director’s Office has seen some fee agreements that state that the fee is, for example, the same \$1,500 and that the attorney will pay the filing fee on the client’s behalf. This is problematic under Rule 1.8(e), MRPC, which limits the situations in which an attorney may provide financial assistance to a client, including advancing or paying court costs.

In defense of the appropriateness of such fee arrangements, an argument has been advanced that payment of the filing fee by the attorney on behalf of the client is authorized under Rule 1.8(e)(1), MRPC. Rule 1.8(e)(1), MRPC, states the general rule that “[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation ...” One of the purposes behind Rule 1.8(e), MRPC, is to prevent an attorney from making an offer of an improper inducement meant to unfairly obtain business. The rule then sets out some limited exceptions, including that “a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.”

First, note that the rule identifies advancing costs, not paying them for the client. In general, the client is to remain ultimately liable for the costs. The comment to Rule 1.8, MRPC, more clearly frames the issue of advancing court costs in terms of a loan which will be repaid by the client at the conclusion of the legal matter. The required repayment of such a loan may be made contingent on the outcome, just as is permitted for payment of contingent fees, but otherwise is expected to be paid by the client. Advancing the funds for a filing fee to a bankruptcy client also raises the potential issue that the lawyer should be identified as a creditor of the client in the bankruptcy pleadings and, if so, a conflict of interest may arise. Direct payment of court costs with no requirement of repayment is limited to indigent clients under Rule 1.8(e)(2), MRPC.

The offer of payment of a filing fee by the attorney as set forth in recent fee agreements does not appear to constitute a loan that is intended to be repaid. Thus, either a portion of the \$1,500 needs be designated for the filing fee and held in trust until used (and refunded if not used), or a separate filing fee payment must be collected from the client at some point. Nor should bankruptcy clients be considered legally indigent, despite their financial problems. If truly indigent, and if bankruptcy is an appropriate option for such an individual, a client may request that the court waive the filing fee; that is not the same as the attorney paying it with no expectation of repayment.