

## LAWYER ETHICS AND MONEY MATTERS

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When most people think about ethics rules for lawyers, they might assume such rules deal exclusively with a lawyer's performance and relationship with their client, plus contain some basic rules of integrity, such as not lying or stealing. Not surprisingly, rules dealing with these themes constitute a major portion of the Rules of Professional Conduct. Rules on competence, diligence, communication, confidentiality, conflicts of interest, candor to the tribunal and safekeeping client property all echo these fundamental themes. Most complaints and public disciplinary cases also deal with these subjects.

The Rules of Professional Conduct regulate some aspects of the business of law as well, or what loosely may be called money matters. Of course, money matters to most of us and making money, and even caring about making money, is not necessarily unprofessional. The rules just create some limits to the methods, that's all. For example, rules exist for fees and fee agreements, fee splitting, dealing with disputed fees, charging interest on unpaid fees, securing fees with mortgages or liens, cost advances to clients and letters of protection, plus others.

Every year, lawyers who would never receive a disciplinary complaint about the quality of their lawyering or their personal ethics still run afoul of the rules dealing with these business-related money matters. Many others are wise enough to call the Director's Office for an advisory opinion on these topics before getting in trouble. Therefore, to assist compliance, a quick overview of a few selected standards may prove beneficial.

### **Fees, Fees, Fees**

Rule 1.5(a), Minnesota Rules of Professional Conduct, requires a lawyer's fee to be reasonable and sets out a non-exclusive list of factors to consider in determining whether a fee is reasonable, including whether the fee is contingent. In most cases, contingent fees are allowed by Rule 1.5(c). All contingent fee agreements must be in writing and must state the percentage of any fee the lawyer will receive and if that percentage is to vary if the case is settled, tried or appealed. Such an agreement also must inform clients whether litigation costs will be deducted before or after the percentage is calculated.

The percentage the attorney receives on a contingent fee may vary according to the amount of work anticipated or the difficulty or novelty of the work. A potentially profitable but difficult or high risk case may justify a higher percentage for the lawyer willing to undertake such a case. Usually, this will be negotiated with the client. Likewise, sophisticated clients may seek to negotiate downwards the standard one-third percentage charged by most lawyers. Some clients may retain separate counsel simply to handle such negotiations, if the case warrants such treatment. Statutory limits on the percentage, such as in workers' compensation, of course must be followed.

Contingent fees are prohibited by Rule 1.5(d) for representing criminal defendants and in many family law cases. Some confusion exists about the "family law" prohibition, in particular whether an attorney may agree to a contingent fee to collect past due child support payments. If the amount of past due payments has been adjudicated and reduced to a money judgment, then a lawyer may seek collection of the judgment for a contingent/percentage fee, just as with any other money judgment.

Lawyers may charge an advance fee or a non-refundable flat fee for a particular legal service. Lawyers Professional Responsibility Board Opinion No. 15 governs these situations.[Ftn 1](#) Advance fees must be deposited into a lawyer's trust account and withdrawn only after they have been earned. A written accounting of all such withdrawals must be provided to the client, which usually will be part of any monthly or quarterly billing statement. Agreements for non-refundable fees must be in writing, as with contingent fees, and contain a clear statement, right above the client's signature, explaining the non-refundable nature of the payment.

If a dispute arises over the amount of the attorney's fees, can the lawyer still take her share? Funds belonging in part to the client and in part to the lawyer (a typical personal injury settlement check, for example) must be deposited into a trust account, unless the payor will issue separate checks. The portion belonging to the attorney should be withdrawn from trust unless the client disputes the fees, in which case the disputed portion must be kept in trust until the dispute is resolved. Even if a dispute arises, if there is an undisputed portion to which the lawyer is clearly entitled, the lawyer must withdraw that portion. "Undisputed" must mean just that, however (*e.g.*, "I determined the client's dispute claim was frivolous. Therefore, these funds were not legitimately in dispute, so I paid myself my share." This is not acceptable).

How are referral fees handled? When can they be paid? Rule 1.5(e) sets out the standard for dividing fees between lawyers not in the same firm.[Ftn 2](#) Lawyers can either divide fees 1) in proportion to the work actually done by each lawyer, or 2) if both lawyers assume joint responsibility for the representation, the client is advised of the share each will receive and agrees in writing. This latter choice is the only way that a classic "referral fee" (a third of a third) may be paid. The "joint representation" requirement places limitations on referral fees. Proponents of such a requirement believe it is important to encourage the referring lawyer to seek out only highly qualified lawyers to refer their clients to, and to seek out lawyers with malpractice insurance. Sometimes this requirement even may prohibit payment of true referral fees, such as when the client is referred by an out of state lawyer not licensed in Minnesota or by a lawyer who has a conflict of interest, since the referring lawyer cannot in fact assume the necessary joint responsibility for representation in Minnesota. Therefore, a referral fee cannot be paid. Suspended or disbarred lawyers likewise cannot share prospectively in a fee with a lawyer who takes over a case. The suspended or disbarred lawyer may be entitled to their earned fees up to the time of the Court's order which restricted their right to practice, however.

If the client does not pay their fees promptly, can a lawyer charge interest on the unpaid balance? Yes, but with some restrictions which lawyers often continue to ignore. LPRB Opinion No. 16 allows lawyers to charge interest of 6 or 8 percent, the amount depending on whether the client has consented in writing in advance. Interest in excess of 8 percent requires compliance with applicable truth-in-lending disclosures. It is highly likely that many lawyers charging interest in excess of 8 percent do not in fact meet this standard.

Can a lawyer secure her unpaid fees with a mortgage on a client's property. A mortgage to secure fees is a business transaction between a lawyer and client which must comply with Rule 1.8(a). The terms

must be fair to the client and the client must have a realistic opportunity to seek independent counsel before agreeing. Problems in using mortgages can arise. In dissolutions, for example, couple's homestead or other property may be the major asset at issue and the lawyer's independent advice may be compromised in an effort to ensure that the lawyer's client retains title to property on which the lawyer has a mortgage, as opposed to a lien or other assets of equal value. The amount of any mortgage should be limited to the amount of unpaid fees actually past due, rather than an amount which includes future fees, because a client may discharge a lawyer at any time and not incur the anticipated fees. In such a case, a foreclosure action on the fully secured amount could be deemed coercive or frivolous.

Attorneys' liens to protect an unpaid fee are governed by statute (Minn. Stat. § 481.13). LPRB Opinion No. 14 prohibits the filing of a lien on client's homestead unless a separate written waiver is obtained from the client.

### **Other Money Matters**

During a pending case, Rule 1.8(e), allows lawyers to advance court costs and actual expenses of litigation, such as deposition transcript costs or for obtaining medical records, and agree to make repayment of those costs and expenses contingent on the outcome of the case. Lawyers may not offer to pay costs, win or lose, as an inducement to being retained, however. Direct loans to clients also remain prohibited. Minnesota allows a lawyer to guarantee a loan to a client for some limited purposes, under Rule 1.8(e)(3). The ABA Model Rules and most states would not allow even that much.

Letters of protection or medical liens are a frequent device used in personal injury litigation to allow an injured person to be free of collection efforts for past or ongoing medical services, or other related bills, while their case is pending. Even though payment of these bills ultimately remains the client's obligation, lawyers who directly promise to withhold funds from any settlement to pay the provider, and then fail to do so, may be disciplined. Remarkably, many lawyers sued by an unpaid medical provider, or court reporter, default in a civil suit (often in conciliation court) and then become liable themselves for the debt. Non-payment of the resulting judgment against the lawyer also may result in discipline.[Ftn 3](#)

Many of the above rules seem to have little to do with a lawyer's "ethics" in any meaningful way. Nevertheless, failure to follow them can carry just as much disciplinary risk as more traditional performance-based rules.

### **NOTES**

1. See also *In re Lochow*, 469 N.W.2d 91 (Minn. 1991). Lawyers Board opinions are printed in the Court Rules volume of the Minnesota Statutes or Statutes Annotated and in West Publishing's Rules of Court. Copies of the opinions can also be obtained from the Office of Lawyers Professional Responsibility.

2. Rules also exist governing the sharing of fees with or other payments to non-lawyers. See Rules 5.4 and 7.2(c), MRPC.

3. See *In re Pokorny*, 453 N.W.2d 345 (Minn. 1990).