

## MORE DOLLARS & SENSE

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The lawyer discipline system does not usually investigate matters that can best be described as fee disputes between client and lawyer (e.g., my lawyer couldn't have earned his fee; I didn't win). However, there are a number of situations involving attorneys fees where the discipline system does get involved. Last month, this column discussed unreasonable fees and inadequate communication regarding the basis or rate of fees. Other common fee issues that have resulted in discipline are inappropriate contingent fees, attorney-to-attorney referral fees, and nonrefundable retainers. Many lawyers in Minnesota could avoid the potential for confusion and conflict with their clients about fees, as well as possible discipline, by reviewing the pertinent Minnesota Rules of Professional Conduct ("MRPC") and Lawyers Professional Responsibility Board Opinions (which can be found in *West's Rules of Court* after the professional rules) that deal with fees.<sup>Ftn 1</sup> What follows is a brief overview of Minnesota requirements.

### CONTINGENT FEES

Contingent fees are addressed in Rules 1.5(c) and (d), MRPC. Contingent fee arrangements, which are utilized most commonly in plaintiff's personal injury and medical malpractice cases, may not be utilized in certain other types of cases--domestic relations matters or criminal cases--as set out in Rule 1.5(d). Contingent fee agreements have certain basic requirements. The fee agreement *must* be in writing; the agreement must inform the client *how* the fee is to be determined, e.g., the percentage or percentages that will be owed to the lawyer at settlement, trial or appeal of the case. The agreement must also specify whether litigation and other expenses will be deducted from the recovery and *when* such expenses will be deducted: before or after the contingent fee is determined. If expenses will be charged regardless of the outcome in the case, the agreement must so state.<sup>Ftn 2</sup> At the conclusion of the representation the lawyer must provide the client with a *written* statement indicating the outcome of the matter and, if there was a recovery, showing the money due and owing the client and how it was determined.

Rule 1.5(c) requirements are not simply technical and it is no defense to an ethical complaint to argue otherwise. These requirements are mandatory, not permissive, and lawyers' failure to adhere to them has usually resulted in private discipline. Most frequently lawyers run afoul of the rule by failing to put the contingent fee agreement in writing. It must be remembered that contingent fees, like all other fees, must be reasonable under Rule 1.5(a).<sup>Ftn 3</sup>

### REFERRAL FEES

The legal periodicals these days are filled with advertisements for referrals from one attorney or firm to

another. The ads contemplate the following: the CEO of a lucrative corporate client calls and says a family member has been involved in a car accident. Will you handle the case? The law firm has a longstanding policy not to do contingent fee or plaintiff's personal injury work. You inform the client of that policy and offer assistance in referring the case. The case is referred to a well-known personal injury attorney to whom you have referred matters before with good results, and the matter is ultimately settled. Can the referring lawyer share in the fees?

Rule 1.5(e) governs the division of fees among lawyers not in the same firm. Such a division may be made only if:

- 1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
- 2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and
- 3) the total fee is reasonable.

Accepting a fee simply for referring the case, but doing no work or assuming no responsibility, is unethical under Rule 1.5(e). Thus, if the above attorney simply made the referral, but did nothing else, he could not ethically accept a division of the fee.<sup>Ftn 4</sup>

The MRPC differs from the former Code of Professional Responsibility (which applied in Minnesota from 1970 to 1985), by the use of the word "or" in subsection (1), making it easier to accomplish an ethical fee split than it was under the Code. The Code required that the lawyers who agreed to the fee split each assume responsibility and provide services to the client. The MRPC allows a lawyer not performing actual services to share in the fee if, with the written consent of the client, the attorneys share "joint responsibility" for the representation. Neither the Code nor the MRPC, however, defines the concept of "joint responsibility." The ABA has provided some guidance as to the term in ABA Informal Opinion 86-1514 (1985), which defines the term "joint responsibility" as including the "financial responsibility" for the action to the extent a partner would have ethical responsibility for the actions of other partners in the firm in accordance with Model Rule 3.1.<sup>Ftn 5</sup> The Comment to Rule 1.5(e), MRPC, affirms that in Minnesota "joint responsibility" imposes obligations coextensive with those "stated in Rule 5.1 for purposes of the matter involved." So what does that mean? At a minimum, "joint responsibility" means potential assumption of financial liability for the representation. While not particularly helpful to those seeking definitive answers to ethical questions within the parameters of the professional rules, the Comment to Rule 5.1 states that, "Whether a lawyer might be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules."

In Minnesota, pursuant to Rule 1.5(e)(2), the client is entitled to know specifically the share of the fees each lawyer is to receive (at least if the fees of both are conditional and/or contingent).<sup>Ftn 6</sup> Simply being informed that some division of fees will be made is plainly insufficient. Two lawyers who agreed among themselves as to the division of fees were recently admonished for failing to advise the client of their respective shares of the fees:

A client retained two lawyers from different law firms to represent the estate of a relative in a medical malpractice action. The client entered into a contingent fee agreement signed by the

client and the two lawyers. The agreement required immediate payment of a nonrefundable fee retainer which would be credited against moneys recovered. The retainer stated that "the fees provided for herein will be proportioned between the law firms identified herein in accordance with an agreement between said firms that will properly reflect each individual firm's contribution of time and service." The lawyers later came to an agreement as to allocation of fees, but neither advised the client as to the division. After a complaint by the client, both were disciplined for violating Rule 1.5(e), MRPC, as well as certain other rule violations.

Further, under the rule the client has the right to "object," not necessarily to the share each lawyer is to receive, but "to participation of all the lawyers involved." Nonetheless, a lawyer would be ill-advised to go against the wishes of the client as to the division of fees, particularly in a situation where client consent to the fee split is required under Rule 1.5(e)(1).

### **NONREFUNDABLE RETAINERS**

Another area where Minnesota lawyers often run into trouble with clients, and the discipline system, is nonrefundable retainer agreements. Nonrefundable retainers, or flat fees, are permissible in Minnesota, so long as they comply with Lawyers Professional Responsibility Board Opinion 15 and Rule 1.5(a), MRPC. Opinion 15 set out specific criteria that must be met for a retainer agreement to be considered nonrefundable, so as not to require that the funds be placed in a client trust account and withdrawn only as earned. The retainer must be in writing and signed by the client. The agreement must have a paragraph informing the client that the funds will not be held in a trust account and the client may not receive a refund of the fees if the client later chooses not to hire the lawyer or chooses to terminate the lawyer's services. The paragraph advising the client must be the final paragraph of the agreement, directly above the client signature. Failure to comply with these requirements often results in discipline.<sup>Ftn 7</sup>

Lawyers who require nonrefundable retainers would do well to remember that such fee arrangements must also comply with Rule 1.5(a), which imposes the requirement of reasonableness of fees. Importantly, the fee must be reasonable both at the time the retainer is signed and when the lawyer concludes the representation.<sup>Ftn 8</sup> If, for example, a criminal defense counsel has required a substantial nonrefundable retainer to represent a defendant in a federal drug trial, the amount may be reasonable when the retainer is signed. If, however, the lawyer is discharged two days later, the reasonableness requirement would ordinarily require a refund for the fee to be reasonable. In New York, retainers that are totally nonrefundable are prohibited outright, on the rationale that they interfere with the client's absolute right to "walk away" from the attorney-client relationship.<sup>Ftn 9</sup> A Pennsylvania bar association committee has concluded that where a lawyer who has used a nonrefundable retainer agreement is discharged prior to completion of the representation, the prudent course is for the lawyer to "err on the side of caution" and return the excess amount and any earnings to the client or submit the matter to fee arbitration.<sup>Ftn 10</sup>

One might think that two Director columns devoted to fees is excessive. Perhaps it is. But every lawyer wants to be paid the fair value of services performed for a client. It seems reasonable to assume that no lawyer wants to needlessly invite an ethics complaint. Reviewing the professional rules on fees and putting them into practice can assist with both.

### **NOTES**

<sup>1</sup> See e.g., *Lawyers Professional Responsibility Board Opinions 11 and 14*.

<sup>2</sup> See also, *Rule 7.2(e), MRPC, which states:*

*(e) Advertisements and written communications indicating that the charging of a fee is contingent on outcome must disclose that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable.*

<sup>3</sup> See e.g. *In re Teichner*, 104 Ill. 2d 150, 161 (Ill. 1984) (*contingent fee arrangements, just as fixed fee agreements are always subject to the supervision of the courts as to reasonableness*).

<sup>4</sup> See also: *ABA Comm. on Ethics and Professional Responsibility, Formal Op. 204 (1940)* ("Where an attorney merely brings about the employment of another attorney, but renders no service and assumes no responsibility in the matter, a division of fees is improper."); *ABA Comm. on Ethics and Professional Responsibility Informal Op. 1932 (1977)* (*a flat percentage fee for referring clients is improper*).

<sup>5</sup> *Robert A. Merrick Jr., "The Jurisdictional Split on Referral Fees," 3 Compleat Lawyer 18 (1986)*.

<sup>6</sup> See *James M. Fischer, "Why Can't Lawyers Split Fees? Why Ask Why, Ask When!," Geo. J. Legal Ethics 1, 40 (Summer 1992)* (*The source of the funds to pay the second lawyer must be examined. If the second lawyer's fee is paid by the referring lawyer regardless of outcome, it may not be treated as a fee split at all.*)

<sup>7</sup> *Opinion 15 states that all fees paid at the beginning of the representation shall be presumed to be advance fee payments unless a written fee agreement signed by the client states otherwise. Advance fee payments must be deposited into a client trust account in accordance with Rules 1.15(a)(2).*

<sup>8</sup> *William J. Wernz, "Opinion 15: Retainer Fees," 48 Bench & Bar 10 (November 1991), at 11.*

<sup>9</sup> *In re Cooperman*, 591 N.Y.S.2d 855 (A.D. 2 Dept. 1993).

<sup>10</sup> *Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Opinion 93-201 (June 30, 1994)* as referenced in *10 ABA/BNA Lawyers Manual on Professional Conduct, No. 18 at 292 (October 5, 1994)*.