

Ethical fee agreements

The start of a new year is a good time to dust off your standard fee agreement to ensure it complies with the ethics rules. Every year attorneys receive discipline for noncompliant fee agreements. Let's make sure it doesn't happen to you in 2020.

The basics

The ethics rules require you to have a written fee or retainer agreement signed by the client in three situations: contingency fee cases, flat fee cases in which you place the advance fee in your business account rather than your trust account, and cases in which you charge an availability fee.¹ In all other cases, written fee agreements are strongly encouraged but not expressly required by the ethics rules.

If you do not have a written fee agreement, you still must communicate to your client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible.² Under the rules, the client must sign the agreement in the cases where written fee agreements are required—not a family member or friend, but the client. And a “signed” writing

can “include[] an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.”³

The content

The rules also establish content requirements and prohibitions. Of course, fees must be reasonable.⁴ And this rule is expansive—it prohibits making an agreement for, charging, or col-

lecting an unreasonable fee. The agreement for an unreasonable fee can itself be an ethics violation, even if it's unpaid.

Describing any fee as nonrefundable or earned upon receipt is expressly prohibited by the ethics rules.⁵ This rule has been in place since 2011, yet every year discipline is imposed for flouting it. Please help us spread the word. If you see anyone with such agreements, remind them of the rules. You do not need to report them to this Office; just help out your fellow bar member. It would be deeply gratifying if 2020 was the year that no one received discipline for violating this rule.

FLAT FEE HINT!

Watch your language:
Telling a client they “might”
receive a refund if all of
the work is not performed
is inconsistent with the
required notification that
the client “will” receive a
refund if all of the work is
not performed.

In the case of a flat fee, you may ethically describe the advance fee payment as the lawyer's property subject to refund, but it cannot be earned upon receipt, unless the client is actually paying after all work has been completed. Ordinarily, all fees paid in advance of legal services being performed must be placed in trust, and only withdrawn as earned with notice to the client.⁶ In order to treat a flat fee paid in advance as the lawyer's property subject to refund (and thus eligible to be placed in a business account and spent rather than placed in a trust account until work is complete), Minnesota's ethics rules require that the written fee agreement

signed by the client notify the client of five specific things.⁷ The required notifications are set forth in the rule, and you must include all five. Please review the text of the rule to ensure your flat fee agreement is compliant. And—hint!—watch your language: Telling a client they “might” receive a refund if all of the work is not performed is inconsistent with the required notification that the client “will” receive a refund if all of the work is not performed. Please do not try to mislead your clients by needlessly wordsmithing the notifications required by the rule.

If you wish to charge an availability fee, please consult the rule,⁸ and do yourself the favor of consulting experienced ethics counsel. I have yet to see a compliant availability fee agreement that someone is willing to pay; too often they are just impermissible attempts to designate a portion of a flat fee as non-refundable. Remember, if you agree to represent someone on a particular matter that is pending, you are already agreeing to be available for representation. Availability fees are separate and apart from any compensation for legal services to be performed, which is why they are rarely valuable to a client.

If you use a contingency fee agreement, make sure to specify the kinds of expenses that will be deducted from any recovery, and whether the expenses will be deducted before or after the contingent fee is calculated.⁹ Most contingency fee agreements we see have the first requirement covered, but attorneys sometimes omit the second. I'm sure it will not surprise you that clients expect you to deduct expenses from the award, and then calculate your percentage recovery on the lower remaining sum, but that is rarely how you plan to do the math. The rule requires you to be specific.

If you plan to charge clients for the cost of copying or retrieving their files, remember that a client must agree to that in writing prior to termination, so your fee agreement is a good place to secure your client's agreement to this expense.¹⁰ You also cannot ask your client to prospectively limit liability for your malpractice unless the client is independently represented.¹¹



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(The rule does not say you should tell your client to consult another lawyer; it expressly requires that the client be represented by someone else in order to make a prospective agreement of this kind.)

You should also take care if you plan to insert an arbitration provision in your fee agreement. In 2002, the ABA opined that it is permissible to require a client to arbitrate fee disputes or malpractice claims, but to be ethical, such a provision should apprise the client of the advantages and disadvantages of arbitration to ensure informed consent.¹² Whether an arbitration provision that does not do so is rendered unenforceable or pre-empted by the Federal Arbitration Act, if applicable, is a subject for another day, but I do recommend that you familiarize yourself with the law and ethics opinions in this area if you wish to include an enforceable and ethical arbitration clause in your fee agreement.

Also take care in attempting to obtain security for payment of fees in your fee agreement (or otherwise). The conflict rules have specific requirements for the manner in which you can acquire a security interest adverse to your client.¹³ You should follow those rules to avoid an unethical business transaction with your client. Nor can you acquire a proprietary interest in the cause of action or subject matter of the litigation, except for an attorney's lien authorized by the law or a reasonable contingent fee.¹⁴

Finally, double-check if you plan to charge interest on your accounts receivable. You must comply with state usury and lending laws regarding the interest you charge, because an illegal fee is an unreasonable fee.¹⁵

Conclusion

Fee agreements are central to the attorney-client relationship. Done well, they provide great clarity to clients and counsel alike. The ethics rules include a lot of information on how you may, or in some cases must, structure your fee agreement. Do not be so focused on contract law that you forget the ethical rules that also apply. Happy 2020, and as always, please call our advisory opinion service at 651-296-3952 if you need ethics advice. ▲

Notes

¹ Rule 1.6(c), Minnesota Rules of Professional Conduct (MRPC) ("A contingent fee agreement shall be in a writing signed by the client...."); Rule 1.5(b)(1), MRPC ("If agreed to in advance in a written fee agreement signed by the client, a flat fee shall be considered to be the lawyer's property upon payment of the fee, subject to refund as described in Rule 1.5(b)(3)."); Rule 1.5(b)(2), MRPC ("Such an availability fee shall be reasonable in amount and communicated in a writing signed by the client.").

² Rule 1.5(b), MRPC.

³ Rule 1.0(o), MRPC.

⁴ Rule 1.5(a), MRPC; *see also* ABA Formal Opinion 93-379 providing guidance on ethically reasonable fees and expenses.

⁵ Rule 1.5(b)(3), MRPC.

⁶ Rule 1.15(c)(5), MRPC ("except as specified in Rule 1.5(b)(1) and (2), deposit all fees received in advance of the legal services being performed into a trust account and withdraw the fees as earned"); Rule 1.15(b), MRPC (requiring withdrawal of earned fees within a reasonable time of being earned as well as written notice of the withdrawal from trust).

⁷ Rule 1.5(b)(1), MRPC.

⁸ Rule 1.5(b)(2), MRPC.

⁹ Rule 1.5(c), MRPC.

¹⁰ Rule 1.16(f), MRPC.

¹¹ Rule 1.8(h), MRPC.

¹² ABA Formal Opinion 02-425 (2/20/2002) ("It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.")

¹³ Rule 1.8(a), MRPC; *see also* Rule 1.8(a), Cmt. [4] ("a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with a client.")

¹⁴ Rule 1.8(i), MRPC.

¹⁵ *See* Patrick R. Burns, *Interest on Legal Fees: Usury is Illegal, Unreasonable, and Just Plain Bad*, Minn. Lawyer, 8/27/2001, available at <http://lprb.mncourts.gov/articles/Articles>.