

## **Fee Miscellany**

**by**

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Most lawyers are at least vaguely familiar with the provisions of Rule 1.5(a) of the Minnesota Rules of Professional Conduct prohibiting unreasonable fees. Most are also familiar with the rules requiring a written retainer agreement when charging a contingency fee or an advance payment of nonrefundable fees to secure a lawyer's availability for a specific period of time or a specific service. There are, however, other rules that come into play in the charging, payment, securing and collection of fees that may not be so familiar.

### **Charges for reimbursement of expenses**

In addition to requiring that a lawyer's fee for services be reasonable, Rule 1.5(a) also prohibits the charging of an unreasonable amount for expenses. While there are few publicly reported cases that deal directly with this issue, the American Bar Association, in Formal Opinion 93-379, set forth some guidelines.

As to general overhead expenses such as maintaining a library, securing malpractice insurance, renting office space, purchasing utilities and the like, the ABA opines that absent disclosure to the client in advance of the engagement of your intent to charge these costs, they are generally considered to be subsumed within the charges the lawyer is making for professional services.

As to actual out-of-pocket costs incurred, those should be passed through to the client without markup or surcharge unless the lawyer has incurred additional expenses beyond the actual cost of the disbursement item. As to charges for in-house services such as photocopying and computer research, the ABA posits that a reasonable cost consists of the actual cost of the item provided plus a reasonable allocation for overhead. In cautioning lawyers not to get carried away in this regard the ABA states, "[I]n the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services."

### **Third party payment of fees**

It is permissible for lawyers to accept payment of their fees from someone other than the client. The danger in this is that the payer may assume that because they control the payments, they should stand in the shoes of the client when it comes to directing the provision of the legal services. Two rules – 1.8(f) and 5.4(c) of the MRPC – address this situation.

Rule 1.8(f) prohibits acceptance of compensation from someone other than the client unless (1) the client gives informed consent or the acceptance of compensation from another is impliedly authorized by the nature of the representation (think insurance defense), (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and (3) information relating to the representation remains protected in accord with the rule on confidentiality.

Rule 5.4(c) mirrors Rule 1.8(f) to the extent that it advises lawyers to not permit a person who recommends, employs or pays the lawyer to provide legal services for another to direct or regulate the lawyer's professional judgment in rendering the legal service.

### **Fee agreements that grant the lawyer a security interest**

Lawyers will occasionally include in their written retainer agreements language to the effect that the client is, by signing the agreement, granting to the lawyer a security interest in certain property to secure payment of fees to be incurred. Sometimes the property securing the fee is specified and sometimes it is simply generally described as property that is the subject matter of the representation.

While it is true that Minn. Stat. sec. 481.13 grants lawyers an attorney's lien on certain properties under certain circumstances, the statutory grant of an attorney's lien does not require the client's consent. The Legislature gave attorneys that lien and they may assert it as appropriate. When attorneys ask their client to voluntarily give them a security interest, they are acquiring a security interest adverse to the client and they will have to comply with the provisions of Rule 1.8(a). That rule requires, in general terms, that

- the transaction be fair and reasonable and the terms of the transaction be set forth in a writing that can be reasonably understood by the client;
- the client be advised in writing of the desirability of seeking the advice of independent counsel and be given the opportunity to do so; and
- the client give informed consent in a separate document signed by the client.

### **Settling fee disputes where the client has alleged malpractice**

Unfortunately, from time to time clients are unhappy with the fee charged by their lawyer. Frequently these clients will allege that the fee is unwarranted because the lawyer's services were inadequate and constituted malpractice. Quite often these fee disputes are resolved by negotiations between lawyer and client.

In documenting the settlement of the dispute, careful lawyers might be tempted to ask the client to execute a release of claims in exchange for a reduction in the fee charged. Even if phrased as a general release, this can be problematic.

Rule 1.8(h) provides that a lawyer shall not settle a claim or potential claim for malpractice liability with an

unrepresented client or former client unless that person is advised in writing of the desirability of seeking independent legal advice and is given the opportunity to do so. The hidden pitfall here is that the lawyer may believe he or she is merely settling a fee dispute, but if the client has alleged malpractice and the release sought from the client would include malpractice claims, Rule 1.8(h) will be implicated.