Terms of Payment

PRACTICE GUIDE

Almost any reasonable business practice can be used when fixing the terms of a fee arrangement so long as a client understands the terms and agrees to them.

Credit cards may be accepted, provided certain conditions are met. Attorneys may also accept payment for services in a form other than money so long as the lawyer complies with professional conduct rules on reasonableness of fees and conflicts of interest.

Moreover, if it is in the client's best interests, lawyers may refer a client who does not have enough cash to legal services to a particular bank or lending institution that is willing to arrange financing for the client's legal needs.

Some types of alternative fee arrangements—such as taking stock in the client or participating in a barter exchange—have been recognized as ethical, so long as the plan does not violate rules governing solicitation, splitting, and conflicts of interest.

BACKGROUND

Model Standards

Neither the ABA Model Rules of Professional Conduct nor the Model Code of Professional Responsibility add a question of what terms lawyers may use in charging fees. The Comment to Model Rule 1.5 simply continues sense of some earlier ABA formal and informal ethics opinions and provides:

"A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. . . . A lawyer accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrar 1.8(b). However, a fee paid in property instead of money may be subject to special scrutiny because it invo questions concerning both the value of the services and the lawyer's special knowledge of the value of the property."

Further, a lawyer should not enter into a fee arrangement the terms of which "might induce the lawyer imp to curtail services for the client or perform them in a way inimical to the client's interest." As an example, the Comment to Rule 1.5 suggests that a lawyer should not agree to provide services to the value of a stated . . . "when it is foreseeable that more services probably will be required."

Credit Cards

According to ABA Formal Ethics Op. 00-419 (2000), lawyers may allow clients to use a credit card to pay fees so long as the lawyer's advertising materials on this topic are not false, fraudulent, or misleading. The opinion abandoned the stance taken in a series of earlier ABA ethics opinions that circumscribed lawyers' ability to credit card payment of their legal fees.

In its most recent pronouncement, the ABA ethics committee withdrew Formal Ethics Ops. 320 (1968) and (1974), and Informal Ethics Ops. 1123 (1969) and 1176 (1971), which suggested that prior bar approval was necessary and that lawyers should not encourage the use of credit cards.


ABA Op. 00-419 does not impose any conditions on the use of credit cards other than to insist that the law advertising concerning acceptance of payment by credit card not be false, fraudulent, or misleading—a pos
shared by a number of the state ethics opinions. E.g., New York State Ethics Op. 709 (1998) ("nothing in the Code prohibits lawyers from accepting payment by credit card as long as fee is not excessive and arrangement does not otherwise violate any Code provision"); Ohio Supreme Court Ethics Op. 91-12 (1991) (noting that ethics boards' "retired" prior opinion that required lawyers to follow strict "guidelines" when accepting credit cards); Utah Ethics Op. 97-06 (1997) ("attorneys may accept payment for fees and costs by credit card in the same way that merchants and service-providers do").

Others states, however, apparently continue to impose special conditions in this context. See, e.g., Nebraska Ethics Op. 94:3 (prohibiting lawyers from "promoting" credit card plan); Michigan Informal Ethics Op. RI-168 (1994) (prohibiting lawyer from charging "additional fees to compensate for the fact that the lawyer will be receiving more than 100% of the client's billings by using the credit card company").

**Advance Fees, Retainers**

Clients' use of credit cards to finance retainers or advanced fees can be problematic for the lawyer in that credit issuers often require that services already be rendered before credit card payment will be accepted. See, e.g., Alaska Ethics Op. 99 (1997) (noting that retainers might not be possible if company requires that services already be performed); Utah Ethics Op. 97-06 (1997) (if credit card is used for advances, counsel must comply with rules requiring safekeeping client property and returning unearned funds).

It has been suggested that a lawyer may use a pre-authorized credit card charge form signed by the client amounts the client has specifically approved, or amounts owed pursuant to a general retainer, so long as the lawyer does not use the form for services to be rendered prospectively unless the client agrees in writing with the amount and method of billing. Nassau County (N.Y.) Ethics Op. 98-4 (1998).

Others have recommended that a law firm that accepts credit cards may offer its clients a form authorizing to charge a set amount directly to the credit card every month. Because the client will incur interest on the firm's charges, the firm must take care to allow the client an opportunity to review the bill before charging the credit card. E.g., South Carolina Ethics Op. 96-07 (1996); see also Missouri Informal Ethics Op. 970040 (1997); and client may set up fee agreement that contemplates hourly billing arrangement where lawyer will wait a period of time after billing client and then bill amount to client's credit card without client's separately signing card slip).

If a credit card payment by electronic transfer of an earned fee cannot be distinguished by the bank from a payment by electronic transfer of an unearned fee, all payments by electronic transfer should be deposited lawyer's trust account, and earned fees should be withdrawn from the trust account promptly, according to South Carolina Ethics Op. 247 (1998).

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**Other Credit Arrangements**


At a minimum, such referrals must be in the client's best interests. E.g., Ohio Supreme Court Ethics Op. 94-19 (1994) (before recommending financial corporation, lawyer should first review whether referral is in client's interest, i.e., whether pro bono representation is possible, client could manage payment through credit card, or lawyer might advance litigation expenses); see also Texas Ethics Op. 481 (1994) (lawyer in firm may own financial service, and finance corporation may not recommend lawyer to potential clients).

A number of ethics committees have also approved lawyers' referrals of clients to "LawCard"—a credit card similar to Visa and Mastercard that extends credit specifically for legal fees based on the client's creditworthiness. Under this arrangement, the credit company advances payment of the lawyer's fees in exchange for keeping 20 percent of the firm's fees as the company's share.

Barter and Exchange

Lawyers may accept payment for legal services in a form other than money so long as the exchange does not interfere with the lawyer's professional judgment, the advertising materials for the exchange comply with ethics rules, and the arrangement otherwise satisfies the rules on reasonableness of fees and on business transactions with clients.

For example, stock-as-fee deals with corporate clients are generally viewed as ethical, so long as the lawyer complies with Rule 1.8(a) governing business transactions with clients, and, when applicable, with Rule 1.5 requiring that a fee for legal services be reasonable. See ABA Formal Ethics Op. 00-418 (2000); District of Columbia Ethics Op. 300 (2000); New York City Ethics Op. 2000-3 (2000); Utah Ethics Op. 98-13 (1998).

Failure to abide by these restrictions could result in a declaration that the alternative fee arrangement is void. Rhodes v. Buechel, 685 N.Y.S.2d 65 (N.Y. App. Div. 1999) (rescinding law firm's acceptance of interest in real estate in lieu of fees, finding that firm didn't adequately disclose other possible fee arrangements and potential conflicts of interest, or bring in independent counsel for purpose of safeguarding clients' interests).

Lawyers may barter their services in exchange for other services provided that they abide by ethics restrict fee-splitting with nonlawyers, advertising, and solicitation. See New York State Ethics Op. 665 (1994) (qua approval of barter exchange membership); Utah Op. 97-05 (1997) (same); see also Florida Ethics Op. 84-4 (attorney may participate in barter exchange when [1] membership fee is flat annual fee rather than per case fee, derived from representation; [2] exchange furnishes members list of attorney members rather than recommending any particular attorney, and [3] membership in exchange does not interfere with attorney's regarding conflicts of interest and confidentiality).

Note, however, that lawyers may not participate in barter exchange organizations if the arrangement in such a case for the lawyer to pay for referrals or share legal fees with nonlawyers. See South Carolina Ethics Op. 42 (1995) (scheme deemed unethical where lawyer would be paying nonlawyers commission to funnel referrals to lawyer and thus violate rule against fee-sharing with nonlawyers); Texas Ethics Op. 435 (1986) (solicitation of nonlawyers to bar lawyer from joining barter exchange arrangement in which lawyer's name is provided to other exchange members in return for lawyer's payment of membership fees and portion of trade credits paid to exchange; Virginia Ethics Op. 1035 (1988) (plan unethical where barter association charged 10 percent fee for acting as clearinghouse for trade).
Fee Agreements

PRACTICE GUIDE

The fee agreement between attorney and client is usually the lawyer’s first and best opportunity to clarify the services the lawyer will render and how the client will pay for them. More than simply recording the details of compensation, the fee agreement presents the occasion for the lawyer and client to ensure that they have a true meeting of minds on all significant aspects of the incipient representation. This understanding is important so that the parties can start off on the right foot and minimize the chances of disagreements arising between them as the representation progresses.

The fee agreement should always be reduced to writing as soon as possible—preferably before any services have been rendered. This is not an ethical requirement in most jurisdictions (except for contingent fee contracts); however, many states’ rules express a preference for written contracts. In any event, putting the agreement in writing can avoid the differing recollections that can arise if discussions about fees are not memorialized.

For most representations, it is essential that the lawyer and client include certain subjects in their fee contract. These include:

- the identity of the client(s);
- the services to be rendered and scope of the representation;
- the lawyer’s compensation, as well as costs and expenses that may be incurred; and
- the client’s responsibilities regarding payment, including how the client will be billed and whether security payment of fees is required.

The fee contract also may cover such additional topics as whether lawyer-client disagreements under the contract will be arbitrated, and how the lawyer will be compensated if the lawyer is discharged before the anticipate completion of the attorney-client relationship. However, ethical considerations affect the extent to which lawyers may protect their interests through such contractual terms. Provisions in a fee agreement may not limit the exclusive right to decide whether to settle with another party, or impair the client’s right to change counsel, or extend time and for any reason.

BACKGROUND

Model Rules

"RULE 1.5 FEES"

"(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencement of the representation, except when the lawyer will charge a regularly represented client on a contingent fee basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client in writing.

"(c) ... A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly name the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

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Comment

Comment [2] to Rule 1.5 provides further guidance on the lawyer's communication of the "basis or rate of fee":

“When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements incurred in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.”

2002 Amendments

The 2002 amendment to Model Rule 1.5(b) added a clause calling on lawyers to outline for the client the "basis or rate of the fee or expenses." The amendment also clarifies that the lawyer must communicate any changes in the rate of the fee or expenses.

The ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") proposed Rule 1.5 also be amended to require that lawyers always notify clients in writing about how their fees and expenses will be calculated. The House of Delegates rejected this recommendation, and instead retained the existing language expressing a preference that the agreement be reduced to writing. Some states, however, do require the fee agreement be put in writing.

Purposes of Fee Agreements

An agreement in which the client retains an attorney's services should serve several purposes beyond recording the details of the compensation arrangement the parties have selected. The contract should delineate the client's expectations and obligations arising from the representation—a function that furthers the ethics related to avoiding misunderstanding in the professional relationship.

See, e.g., Portsmouth Redevelopment Authority v. BMI Apartments Associates, 851 F. Supp. 775 (E.D. Va. 1994); agreement negates client's subsequent unilateral attempt to redefine scope of representation and fee arrangement); McLendon v. Cont'l Group Inc., 872 F. Supp. 142 (D.N.J. 1994) (client's notes of telephone conversation with attorney did not establish client's claim that attorney consented to client's understanding of fee arrangement), aff'd, 129 F. 3d 1255 (3d Cir. 1997); Loveless v. Sun Steel Inc., 424 S.E.2d 805 (Ga. Ct. App. 1992) (written contract for payment of lawyer's hourly charges prevents client from maintaining that payment was conditional upon recovery from opposing party); Starkey, Kelly, Blaney & White v. Estate of Nicolsen, 796 A.2d 238, 18 Law. Man. Prof. Conduct 298 (N.J. 2002) (writing avoids misunderstandings that arise in averting fraud); Feingold v. Pucello, 654 A.2d 1093 (Pa. Super. Ct. 1995) (lawyer not entitled to compensation because he began work before sending putative client copy of proposed contingent fee contract, which was rejected receipt); Wisconsin Ethics Op. E-91-2 (1991) (if engagement letter states firm's hourly amount, it must also state whether rate can be increased and whether different rates apply for work performed by various firm personnel).
hour, personal injury representations, workers' compensation matters, transactional services, and criminal work.

Nevertheless, in any type of representation there are items that should be considered essential elements of agreement, even though each recommended list of these elements is likely to differ from others to some extent: Compare Beard & Judd, Written Fee Agreements Enhance Client Relations, 27 Md. B.J. 26 (July/August 1995); Kressman, Using Written Fee Agreements, 63 Wis. Law. 12 (December 1990), and Samuels, Practicing Law Making Money (With Forms), 40 Pract. Law. 15 (July 1994), with J. McRae, Legal Fees & Representation Agreements at 42-44 (ABA 1983), and I R. Mallen & J. Smith, Legal Malpractice at 124-25 (2005 ed.).

Identity of Client

The identity of the client or clients needs to be clear. Especially when a lawyer is approached by more than one person regarding a representation, or by a person acting in a representative capacity, or when a lawyer with an individual who is affiliated with a corporation or other organization, it is important to confirm in writing which interests the lawyer will represent. E.g., Stern v. Wonzer, 846 S.W.2d 939 (Tex. Ct. App. 1993) (lawyers retained by parents of injured employee were not entitled to fees in action brought on behalf of child by grandparents represented by different attorney, where fee contracts listed parents as clients only in their individual capacity with no mention of "next friend status").

Failure to reach an unambiguous agreement on this key element of the attorney-client relationship can come haunt the lawyer in the form of a disqualification motion or even a malpractice suit. E.g., Rosman v. Shapiro, F. Supp. 1441 (S.D.N.Y. 1987) (lawyer who advised both shareholders of corporation may not later represent against the other); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. Ct. App. 1991) (employer's attorneys promised confidentiality to employee and then revealed his statement to district attorney); Bohn v. Cody, 71 Wash. 2d 417 (1979) (lawyer warned clients' parents that he did not represent them, but gave them advice anyway); Manion v. Nagin, 394 F.3d 1062, 21 Law. Man. Prof. Conduct 30 (8th Cir. 2005) (attorney hired to organize corporation may have established lawyer-client relationship with founder by giving him personal legal advice not making clear that lawyer represented entity only); Meyer v. Mulligan, 889 P.2d 509 (Wyo. 1995) (ques fact whether attorney for corporation also represented its incorporators).

If the lawyer decides not to represent one or more potential clients, that should be expressly stated in a nonengagement letter that cautions the recipient to seek advice from another lawyer and to do so before a applicable time limitations may expire. See 1 R. Mallen & J. Smith, Legal Malpractice at 179-80 (2005 ed.); also Richard v. Colucci, 2004 Ohio App. LEXIS 1045, 20 Law. Man. Prof. Conduct 145 (Ohio Ct. App. 2004) rejecting malpractice claim, court said nonengagement letters from lawyer established that there was no actual relationship; Kansas Ethics Op. 91-4 (1991) (recommending that lawyer who wants to avoid potential conflicts should send nonengagement letter if declining representation); South Dakota Ethics Op. 2002-03 (same); Virginia Ethics Op. 1794, 20 Law. Man. Prof. Conduct 384 (2004) (same).


For more information on the ways in which the interests of putative "nonclients" sometimes intrude upon themselves or form the basis for a lawyer-client relationship, see the Establishment of Relationship chapter behind the Lawyer-Client Relationship tab; the Corporate: Client Identity chapter behind the Types of Practice tab; and Liability to Nonclients chapter behind the Malpractice tab.

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Services to Be Performed

The fee agreement should specify what the lawyer has agreed to do for the client. Connecticut Informa Op. 92-31 (1992); Iowa Ethics Op. 96-13 (1987). For example, an attorney was hired by a workers' compensation claimant also expected to investigate whether the client has any claims against nonemployer third persons: Keef v. Widuch, 747 N.E.2d 992, 17 Law. Man. Prof. Conduct 244 (III. App. Ct. 2001) (lawyers hired to pursue workers' compensation claim have implicit duty to advise client about other potential causes of action against parties and accompanying statutes of limitation); Nichols v. Keller, 19 Cal. Rptr.2d 601 (Cal. Ct. App. 1993) (California lawyers have duty either to investigate possible third-party claims or advise client to seek other

for this task).

It also may be prudent for law firms to include a provision advising the client how the matter will be staffed avoid later disputes on this subject. See Garnick & Scudder PC v. Dolinsky, 701 N.E.2d 357, 14 Law. Man. Conduct 532 (Mass. App. Ct. 1998) (lawyer could not recover fees charged to client by other law firm even since engagement letter could be read as existing solely between lawyer and client).

The ABA Business Law Section Task Force on Lawyer Business Ethics, Statement of Principles in Billing for Services (1995) advised that "[s]taffing should be discussed with the client if the client has expressed an interest in such information and must be disclosed if the attorney has created an expectation that the matter will be handled by a particular attorney or experience level of attorney and such is not in fact the case." Cf. Witt v. Desmarteau, 614 A.2d 116 (N.H. 1992) (client sued law firm unsuccessfully on theory that firm breached promise to assign case to its "renowned partner")..

When it comes to using attorneys with less experience whose time will be billed to the client rather than at the firm's rate as part of the lawyers' "learning curve," the task force advised that "[t]he lawyer is strongly encouraged to communicate with the client regarding the reasons for each lawyer's involvement and, if appropriate, to explain to the client how such time will or will not be billed."

If the firm intends to farm out work to a contract attorney, it may be a good idea to put the client on notice of possibility as well. See In re Wright, 290 B.R. 145, 19 Law. Man. Prof. Conduct 281 (Bankr. C.D. Cal. 2003) (firm that failed to seek debtor-client's consent before shipping out work to contract attorney in bankruptcy proceeding is barred from collecting fees independent contractor's time).

However, as a general principle, notice or consent is not necessary if the independent lawyer works under the firm's supervision. See Illinois Ethics Op. 98-2 (1998) (lawyer who hires independent lawyer and pays her on an hourly basis need not disclose arrangement to clients if work is performed under counsel's close supervision); Maricopa Ethics Op. 2001-31, 17 Law. Man. Prof. Conduct 636 (2001) (same; see also ABA Formal Ethics Op. 00-42 (Law. Man. Prof. Conduct 695 (2000) (opining that no provision in Model Rules requires disclosure, but suggesting that notice is good idea if "the work of the contract lawyer will not be supervised within the justifiable ex parte of the client"); cf. California Ethics Op. 2004-165 (client consent not required to hire contract lawyer where contract lawyer's fee is billed as "cost" and fee is separately identified on bill).

In some instances, it may be advisable to spell out what is expected of the client as well. See Alaska Ethics Op. 2004-3 (2004) (advising that problem of what to do with case when client disappeared and deadline for filing suit loomed could have been solved by spelling out scope of engagement in written limited representation agreement that required client to remain in contact with lawyer as express condition of continued representation).

Limited Representation

Equally important as the description of what the lawyer will do is an expression of any limits the lawyer and firm have placed on the services to be provided. See Lerner v. Laufers, 819 A.2d 471, 19 Law. Man. Prof. Conduct 695 (N.J. Super. Ct. App. Div. 2003) (dismissal of malpractice suit affirmed; court upholds agreement limiting representation to surface analysis of mediated settlement); New York State Ethics Op. 604 (1989) (criminal defense lawyer may use retainer agreement that limits scope of representation to discrete matter or stage of grand jury proceedings); Colorado Formal Ethics Op. 101 (1998) (lawyers may provide "unbundled" legal services so long as lawyer clearly explains limits of representation, including kinds of services not being offered and probable effect of such limits on client's rights and interests).


For purposes of anticipating and heading off misunderstandings, it is better to record at the outset the limit reviewed and agreed to by the parties than to use a fee agreement that is silent concerning potential ancillary related services, such as appeals, that the client might simply assume are part of the bargain. Although this may seem rare on the elliptical contract—e.g., Joseph E. DiLoreto Inc. v. O'Neill, 1 Cal. Rptr.2d 636 (App. 1991); Nassau County (N.Y.) Ethics Op. 94-1 (1994); Los Angeles County Formal Ethics Op. 476 (1995) (lawyer generally not obligated to render additional services once terms of retainer agreement have been

fulfilled)—the goal is to prevent hard feelings from arising in the first place. Cf. Subel v. Sutley, 565 So. 2d (Ala. 1990) (lawyer’s promise in accepting case that he would “put up one hell of a fight no matter what the outcome” was not a representation that lawyer would represent client through end of case without further payment).

Obviously, a lawyer may not so limit the scope of the representation that the client will receive less than competent advice. Comment [77] to Model Rule 1.2 states that “an agreement for a limited representation does not extinguish the duty to provide competent representation.” See Arizona Ethics Op. 86-13 (1986) (inappropriate for lawyer to consent to limited representation).

Limitations on the representation also cannot take the form of restrictions on the client’s right to settle or change counsel, both discussed later in this chapter. Moreover, restrictions that amount to prospective limitations on the lawyer’s liability to the client are in most circumstances proscribed. E.g., California Ethics Op. 489 (1976).

- See the Agreements to Limit Liability chapter behind the Conflicts of Interest tab.

Furthermore, lawyers cannot agree to a restriction on their right to practice law in future cases. E.g., ABA Informal Ethics Op. 94-381 (1994) (corporate lawyers may not promise that in future they will never represent any person against corporation, even in unrelated matters).

- See the Restrictions on Right to Practice chapter behind the Conflicts of Interest tab. See also the Scope of Representation chapter behind the Lawyer-Client Relationship tab.

Compensation

A fee agreement, not surprisingly, should explain the arrangements the parties have made to compensate lawyer for his services. See Restatement (Third) of the Law Governing Lawyers §39 (2000) (lawyer must communicate fee rate within reasonable time after beginning representation). Failure to do so can cause a client to haunt the lawyer. See Thibaut, Thibaut, Garrett & Bacot v. Smith & Loveless Inc., 576 So. 2d 532 (La. Ct. App. 1990) (client wins swearing contest on question whether fee arrangement was hourly or contingent, where never executed formal written contract or confirmed agreement in letter to client).


Communication with the client regarding fees—resulting in a mutually understood agreement on terms—is more critical if the arrangement is not out of the ordinary, such as a hybrid fee—Nevada Ethics Op. 4 (1987); N.Y. County (N.Y.) Ethics Op. 99-4 (1999)—or reverse contingent fee charged to a defense client—ABA Formal Op. 93-373 (1993); Kentucky Ethics Op. E-359 (1993).

For example, in Brown & Shurm v. Frederick Rd. Ltd. P’ship, 768 A.2d 62, 17 Law. Man. Prof. Conduct 188 Spec. App. 2001, the court invalidated a reverse contingent fee contract because, in part, the lawyers—already begun representing the clients in settlement talks—threatened to withdraw if their clients didn’t agree to the unusual reverse contingency terms.

Other popular alternatives to straight hourly billing include: fee limits or caps, discounted hourly rates, unbundled fees for discrete tasks, and sliding scale contingency rates. See Rotunda, Moving From Billable Hours to Fix Fees: Task Based Fees and Legal Ethics, 47 U. Kan. L. Rev. 1 (1999).

The fee contract should specify not only how much the lawyer will charge but also how the client will be billed. Here, too, clarity of communication is important. The ABA’s ethics committee referred to the duality of this obligation in ABA Formal Ethics Op. 93-379 (1993), which advises:

At the outset of the representation the lawyer should make disclosure of the basis for the fee and any other charges to the client. This is a two-fold duty, including not only an explanation at the beginning of engagement of the basis on which fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed.

See the Collection chapter behind this tab for more on billing practices.

**Hourly Fees**

Neither Model Rule 1.5, which prohibits "unreasonable" fees nor DR 2-106 of the Model Code, which prohibits "clearly excessive" fees, contains specific advice about the proper use of hourly fees. What can be said, however, is that, like any other form of fee, the hourly fee must be reasonable in relationship to the services performed by the lawyer, as well as in regard to the other factors specified in Rule 1.5(a) and DR 2-106(B).

As with all types of fee agreements, lawyers need to make sure that clients understand what the per-hour compensation system entails. Obviously, the client should be told what the lawyer's hourly rate will be. If the lawyer may change over the anticipated course of the representation, this should be made clear to the client. See *Weber, Berke & Melichor v. Bollinger*, 1 Cal. Rptr.2d 531 (Cal. Ct. App. 1991).

If more than one lawyer in the firm may work on the client's matter, that fact, plus the billing rates charged by each lawyer, should be communicated. "The hourly rates or range of fees for attorneys involved (or expected to be involved) in performing work for the client should be disclosed to the client. This does not mean, however, attorney must provide a complete schedule of the hourly rates of all attorneys at the law firm, unless every attorney in the firm is expected to work on the matter."


If nonlawyers' time will be billed by the hour, the client should be informed of the types of services that will be provided, and at what rates. Los Angeles County Ethics Op. 391 (1981); New Mexico Ethics Op. 1990-4 (1990); Los Angeles County Ethics Op. 431 (1984) (law firm may charge reasonable flat hourly rate for services performed regardless of whether provider is lawyer or nonlawyer, if firm identifies what portion of fee is for work performed by nonlawyers). But see Iowa Ethics Op. 84-11 (1985) (lawyer may not hire secretary at hourly rate and have her secretary bill clients directly for time spent on particular cases).

- Requirements of disclosure when lawyers not in the same firm will work on a client's matter are examined in the Division Among Lawyers chapter behind this tab.

**Multiple Clients**

ABA Formal Ethics Op. 93-379 (1993) warned lawyers of several instances in which it is unethical to charge the same hourly rates to multiple clients. A lawyer cannot, for instance, attend a motions hearing on behalf of several different clients and charge the full amount of time to each client individually. "A lawyer who spends four hours on behalf of three clients has not earned twelve billable hours," the committee explained.

Furthermore, an attorney should not bill time to a client for producing a document or other work product if the attorney had already created the same item for a previous client. "A lawyer who is able to reuse old work product that has not re-earned the hours previously billed and compensated when the work product was first generated without recouping the cost of producing that product for the previous client." The committee offered the further advice that the same opinion also advised lawyers who bill by the hour for the benefit of another client on a different matter. ABA Ethics Op. 96-4 (1996); California Ethics Op. 1996-147; Nassau County (N.Y.) Ethics Op. 95-4 (1995); Oregon Ethics Op. 2002-170, 18 Law. Man. Prof. Conduct 406 (2002); see also Nassau County (N.Y.) Ethics Op. 95-10 (1995) (lawyer who performs work for one client while traveling on behalf of another client may not travel expenses between clients; lawyer must bill them only to client on whose behalf lawyer is traveling).

**Travel Time**

Otherwise, travel time is, of course, a legitimate item that can be billed to a client for whose benefit the travel was undertaken, although this should be made clear to the client.

The ABA Business Law Section's Task Force on Lawyer Business Ethics, in its Statement of Principles on billing policies, recommended that time spent traveling on behalf of a client should be billed at the lawyer's standard travel rate.
offered this advice:

As a general matter, it is not inappropriate for attorneys to bill for the opportunity cost of time that could not be spent on other matters, including travel time. For example, absent some other arrangement with the client, travel time may be billed at normal hourly rates to the client for whom the travel is being conducted (unless the attorney is working for and billing another client while traveling...). Lawyers should be mindful, however, that clients may be justifiably upset if lawyers within the same law firm do not follow a consistent policy with respect to billing for hours spent traveling. Accordingly, law firms should consider establishing a firm-wide written policy that can be handed to clients and followed by lawyers in the firm.


Contingent Fees

For contingent fees, Model Rule 1.5(c) specifies the minimum details that the lawyer must include in the written agreement. E.g., In re Anonymous, 655 N.E.2d 67 (Ind. 1995) (workers’ compensation board’s fee schedule not obviate ethics rule’s requirement that lawyer provide client written contingent fee agreement).

Primary among these details is “the method by which the fee is to be determined, including the percentage percentages that shall accrue to the lawyer in the event of settlement, trial or appeal.” (Expenses must also be explained, as is discussed below.)

It has been held that an attorney must include these details even when the lawyer has regularly represents the client in other matters and the client already knows the drill. Statewide Grievance Comm. v. Dixon, 772 A.2d 17 Law. Man. Prof. Conduct 299 (Conn. App. Ct. 2001).

Generally, it is ethical for a lawyer to charge a higher percentage as each successive stage of representation achieved, such as 25 percent if settlement is achieved before trial and one-third if the case is settled during by judgment. ABA Formal Op. 94-389 (1994). The same opinion also indicated that, absent law to the contrary, a lawyer may charge an ascending-scale contingent fee whose percentage increases as the amount recovered goes up—for example, 15 percent on the first $100,000 recovered, 20 percent on the next hundred thousand, and 25 percent on everything thereafter. Accord Colorado Ethics Op. 100 (1997).

If a lengthy attorney-client relationship is anticipated and the rate of the lawyer’s fee could increase during representation, the contract should specify that the fee may go up, and of course the lawyer should give the client some notice when increase will go into effect. It is not a good idea to spring them on unsuspecting clients. See Severson, Werson, Berke & Melchior v. Bolinger, 28th Cal. Rptr.2d 531 (Cal. Ct. App. 1991) (fee agreement which firm charged client its “regular hourly rates” did not permit firm to increase rate initially quoted to client without first giving notice). Cf. Cummings v. Pinder, 574 A.2d 843 (Del. 1990) (lawyer liable for punitive damages for misconduct that included unilaterally increasing amount of agreed contingent fee).

One type of controversy concerns a lawyer’s ability to use a fee agreement that allows the lawyer to choose between collecting a contingent fee or an hourly fee, whichever is greater, at the end of the representation. This arrangement has been condemned as unethical on grounds that it inevitably results in an unreasonable fee lawyer has no basis for charging a contingent fee if he reserves the right to convert his compensation to an hourly fee. Ohio Supreme Court Ethics Op. 95-7 (1995); Belzer v. Bollela, 571 N.Y.S.2d 365 (Sup. Ct. N.Y. Cnt 1990); see also Texas Ethics Op. 518 (1996) (contract may not provide that lawyer receives greater of two or percentage of recovery absent unusual circumstances that would make such arrangement reasonable).

Other authorities, however, have refused to rule out lawyers’ use of this type of fee contract. In Marcus v. 611 A.4d 859 (Conn. 1992), the court held that a fee agreement calling for payment of the greater of a $100 hourly fee or a one-third contingent fee for representing a client in a personal injury matter had not been violative of any rule of professional conduct, so that the lawyer was entitled to damages for the client’s breach of the contract. See also Maine Ethics Op. 160 (1997) (contingent fee agreement may provide for fee to be predetermines percentage of any monetary recovery or hourly rate for services rendered); Michigan Informal Ethics Op. RI-6 (1989) (stating conditions for contract of this sort, including reduction in hourly or flat fee rate).
percentage fee to reflect lower risk of nonpayment); cf. Virginia Ethics Op. 1081 (1988) (approving contract allows lawyer to charge one-third contingent fee from which previous hourly charges would be deducted).

- So-called "alternative billing" methods, which extend beyond traditional hourly or contingent fees, are discussed in the Amount of Fee chapter behind this tab.

- As for the types of payment arrangements that may be made, see the Terms of Payment chapter behind this tab.

Costs and Expenses

In addition to explaining the lawyer's fees, the fee arrangement should also explicate what costs and expenses the client will be responsible for paying. This is ethically required by Model Rule 1.5(c) in contingent fee agreements for all others, the "basis or rate of the fee and expenses" as well as any changes to the basis or rate must be communicated to the client, at least verbally, except for clients the lawyer regularly represents. In all fee agreements, it is a good idea to explain responsibility for the payment of expenses.

Types of disbursements that should at least be considered for inclusion in a fee agreement's provisions on costs and expenses include charges for expert witnesses, investigators, and stenographers; transcription costs (including per-page charge and whether a separate overhead charge will be made); messenger service fees; employee overhead; travel expenses (what type of accommodations, class of air fare and automobile rental, and so forth); meals; telephone calls; computer-assisted research; and typing/printing charges. See Business Law Section Task Force on Lawyer Business Ethics, Statement of Principles in Billing for Disbursers and Other Charges (1995).

See also Alaska Ethics Op. 95-4 (1995) (written communication required if client is to be charged for in-house services such as photocopying and overhead items); Connecticut Informal Ethics Op. 96-3 (1996) (lawyer may charge client for online computerized legal research under contingent fee arrangement so long as the fee agreement spells it out); Illinois Ethics Op. 86-1 (1986) (lawyer may include hourly charge for paralegal's services as part of charge for legal services but may not bill such time to client as "expense"); Maryland Ethics Op. 1993 (may bill client for reasonable charges of outside legal research organization paid by lawyer); Massachusetts Ethics Op. 94-1 (1994) (client may need to be informed that lawyer has received frequent files through extensive travel that was billed to client); Philadelphia Ethics Op. 87-23 (1987) (contingent fee must be informed that expenses will include computer-aided research); Rhode Island Ethics Op. 93-5 (1993) (lawyer should specify in writing that client will pay filing costs). Cf. Rhode Island Ethics Op. 92-92 (1993) (permissible to agree that recovery in one case will pay for expenses remaining from previous matter).

This topic of disbursements was also addressed in ABA Formal Ethics Op. 93-379 (1993), which reminded the committee not to add a surcharge when billing clients for costs and expenses, and to pass along any discounts the law firm has been given in obtaining the services or products for which the client was billed. See also Nassau County Ethics Op. 94-25 (1994).

The ABA ethics committee added that law firms should not try to profit on in-house costs such as photocopying, couriers, or meals eaten while working on a client's case. The client may be billed the reasonable cost for these items, but no more. The committee stated:

Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead [such as the salary of the photocopy machine operator] should pass ethical muster. On the other hand, in 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 themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.

Whether lawyers ethically may charge a flat periodic fee or lump sum to cover disbursements is a matter of controversy. It would appear that such an arrangement is permissible in any particular case if it does not produce an unreasonable amount of compensation and if the client has given informed consent to the arrangement. Alabama Ethics Op. 89-109 (1989); Arizona Ethics Op. 94-10 (1994) (disbursements calculated as percentage of fee); Nassau County (N.Y.) Ethics Op. 94-25 (1994). But where the same charge would be made in each case because the practice has been disapproved; clients' matters are too diverse to justify a standard charge for costs that will vary from case to case. Connecticut Informal Ethics Op. 94-24 (1994) (flat "administrative expense" that would vary would be arbitrary and therefore unreasonable under Rule 1.5).

Cf. Philadelphia Ethics Op. 93-10 (firm may agree with frequent client to charge uniformly higher-rate cont
Modifications to Fee Agreement

Circumstances may change after the inception of the attorney-client relationship, necessitating changes to contract. These are allowable so long as they reflect an agreement by the client as well as the lawyer to supplant their original understanding on fees. E.g., Lugassy v. Indep. Fire Ins. Co., 536 So. 2d 1332 (Fla. 1988) (lawyer and client may bargain for alteration of fee contract, provided new consideration is given, at any time before verdict is reached in client’s litigation); Brodsky v. Brodsky, 539 N.W.2d 386, 18 Law. Man. Prof. Co 126 (Minn. Ct. App. 2002) (court rejects client’s claim that contract was modified by lawyer’s oral guess that could run as high as $50,000; written contract clearly stated that fees were hourly and cautioned that it was impossible to estimate final tally). Cf. Suffolk County (N.Y.) Ethics Op. 87-5 (firm may not increase agreed-upon hourly fee in response to client’s significantly late payment of bills).

But the lawyer typically bears the burden of establishing that the new agreement was fairly negotiated. Thus, that the client both understood the proposed modifications and freely agreed to them without acting under or as a result of the lawyer’s undue influence.

Judges and ethics committees realize that clients may feel inordinate pressure to accept the changes their puts forth, fearing that the lawyer may withdraw or render substandard services if the clients don’t go along with the new plan. That is why—especially when the representation reaches a critical stage—they tend to view retainers modifications with skepticism. See In re Hefron, 771 N.E.2d 1157, 18 Law. Man. Prof. Conduct 53 (2002) (lawyer suspended for refusing to do more work until client agreed to change per-hour fee arrangement contingent fee deal when lawyer found out there was good chance of sizeable recovery); In re Thayer, 745 207, 17 Law. Man. Prof. Conduct 260 (Ind. 2001) (lawyer disciplined for presenting client on day of schedule settlement with new fee agreement upping take to 50 percent of settlement); McConwell v. F MG of Kansas Inc., 861 P.2d 830 (Kan. Ct. App. 1993) (lawyer’s threat to withdraw from representation on eve of trial without sufficient evidence that modification was obtained under duress, warranting rescission of alteration); Chica Ethics Op. 93-1 (lawyer must overcome presumption that modified agreement is fraudulent and unenforceable); North Carolina Ethics Op. 166 (1994) (firm may seek renegotiation of fee agreement so long as firm does not abandon or threaten to abandon client in order to cut losses or coerce higher fee).

Of course, this is to be distinguished from the scenario in which a lawyer is confronted with a client’s unexpected failure to pay outstanding legal fees. One ethics committee has stated that in such a situation, the lawyer should revisit the existing fee arrangement and ask the client to pay interest charges on any future delinquencies condition to performing any further legal work. District of Columbia Ethics Op. 310, 17 Law. Man. Prof. Con 742 (2001).

• For further discussion of changes to fee agreements during the representation, see the Amount of Fee charged behind this tab.

Avoid Ambiguities

The intent of a retainer agreement or other fee contract is to put into writing the understanding that the lawyer and client have reached about the details of the representation. Clearly, the lawyer should strive to avoid uncertainties in the agreement about the services to be provided (or not to be provided) and the compensation to be paid. This is advisable not only to head off disagreements with clients as to what their agreement with the law firm is, but also to protect the lawyer’s own interests in the event of disputes with clients regarding the services provided.


The rule of first resort, it appears, is that the court should construe the contract to give effect to the intent parties as expressed objectively in the document itself. E.g., Flanders & Medeiros Inc. v. Bogosian, 868 F. 412 (D.R.I. 1994), rev'd on other grounds, 65 F.3d 198 (1st Cir. 1998); Eagle Indus. Inc. v. Thompson, 90 475 (Or. 1995) ("the court's first inquiry is what the words of the contract say, not what the parties say about the contract.") Stern v. Winter, 846 S.E.2d 939 (Tex. Ct. App. 1993). A reading of the contract that produces a harsh or result is to be avoided. Blecher & Collins PC v. Nw. Airlines Inc., 858 F. Supp. 1442, 1459-60 (C.D. Cal. 19

Most Frequent Problems

Certain topics recur in disputes about fee agreements that are put to courts and ethics committees. For the topics especially, lawyers should ensure that their clients understand what is expected of them, and what the reasons for being expected by the attorney.

Generic Words, Phrases

First, use of generic words or phrases to describe services or compensation may be inappropriate given the circumstances of the representation. In Husbands v. Rosenberg, 10 Law. Man. Prof. Conduct 348 (N.Y. Sup Queens Cnty. 1994), a contract in the form of a confession of judgment for legal services) that made the flat fee for a criminal defense representation due in full when "trial" began was held ambiguous because the lawyers' contention as to when the trial began was, under the circumstances, a "legal nicety" and not a matter could be readily understood by the client.

A California law firm discovered after the fact that it was not a good idea, in representing clients over a period of several years, to use a fee agreement stating that the firm would base its fees on the firm's "regular hourly rate". The court held in Severson, Werson, Berke & Melchior v. Bolinger, 1 Cal. Rptr.2d 531 (Cal. Ct. App. 1991), language did not give the clients sufficient notice that the firm might increase its hourly rates over the course of the representation and bill the clients at higher rates without calling their attention to this change.

In Data-Stream AS/RS Techs. LLC v. China Int'l Marine Containers Ltd., 2003 U.S. Dist. LEXIS 19903, 20 Law Man. Prof. Conduct 221 (S.D.N.Y. 2004), a New York law firm found out that an agreement to "cap" its fee: $10,000 meant that the firm could charge no more than $10,000. The court rejected the firm's argument that putting quotation marks around the word "cap" meant that the ceiling was not necessarily ironclad. Even if discussion of a fee "cap" could be viewed as ambiguous, the court said, basic principles of contract law dict the ambiguity be construed against the lawyer who drafted the agreement.

Costs and Expenses

Second, the lawyer should spell out the client's obligations regarding payment of costs and expenses. Ethic contingent-fee lawyers are required by Model Rule 1.5(c) to clarify in writing the client's obligations. See G Bar Ass'n v. Brooks, 721 N.E.2d 23, 15 Law. Man. Prof. Conduct 650, (Ohio 1999) (lawyer suspended for bi "expenses" that were in reality effort to recoup costs of lawyer's secretary and law clerk).

Contingent-fee lawyers are also required to specify whether their percentage change on the client recovery or on the net amount remaining after costs and expenses have been deducted. Arizona Ethics Op. (1994); see Olmsted v. Emmanuel, 783 So. 2d 1122, 17 Law. Man. Prof. Conduct 209 (Fla. Dist. Ct. App. 2 (rejecting client's challenge to fee, pointing out that contract defined "recovery" as including "the gross pro before any deductions, including court-awarded attorney's fees but not including court-awarded costs").
It was held in *Baker v. Whitaker*, 887 S.W.2d 664 (Mo. Ct. App. 1994), that a fee contract in which the client promised to pay her lawyers half of the "amounts paid by judgment or settlement of her claim was am because it did not specify whether the lawyers were required to deduct the client's considerable medical expenses in addition to the litigation expenses, before calculating their 50 percent fee.

Some authorities suggest that, if the fee agreement does not specifically provide otherwise, a firm's entitle a percentage of "any amount received" by the client in settlement or judgment must be calculated based on net—not the gross—amount of the client's recovery. *Levine v. Bayne, Snell & Krause Ltd.*, 40 S.W.3d 92, 1 Man. Prof. Conduct 82 (Tex. 2001). See generally *Restatement (Third) of the Law Governing Lawyers* §35 (1997) (absent prior agreement to contrary, "the amount of the client's recovery is computed net of any offset, such as recovery by an opposing party on a counterclaim").

**Scope of Services**

Third, for litigation clients, the contract should spell out whether the lawyer's fee includes appellate service. *York City Ethics Op. 1986-6* (1986). Generally, if the contract is silent on this topic, it will be construed to include such services as part of the bargain. *Maryland Attorney Grievance Comm'n v. Korotki*, 569 A.2d 1224 (Md. Ct. Spec. App. 1989) (lawyer must continue representation unless client obtains new court permits withdrawal).


**Nonrefundability**

Finally, there is the subject of "nonrefundable" retainers and fees. Apart from a true general retainer—which is earned on receipt, see *Ryan v. Butera, Beausang, Cohen & Brennan*, 193 F.3d 210, 15 Law. Man. Prof. Conduct 501 (3d Cir. 1999)—it is arguable that there is no such thing as a fee that is absolutely nonrefundable. *Alabama Ethics Op. 93-21* (1993) (lawyer may not characterize fee as nonrefundable); *Iowa Ethics Op. 95-15* (1996) (lawyer may not use retainer agreement that provides for nonrefundable minimum fee that must be deposited once "substantial work" is done for client); see *In re Kendall*, 804 N.E.2d 1152, 20 Law. Man. Prof. Conduct 122 (Ind. 2004) (lawyer may not declare advance fee payments to be "nonrefundable"); *In re Dawson*, 8 P.3d 642 (Wash. 2000) (nonrefundable unearned fees are not reasonable as required by Rule 1.16(e) (d) (and were required by equivalent language in the Model Code's DR 2-110(A)(3)) to refund advances for services that have not been earned. See Minnesota Formal Ethics Op. 15 (1991), Ohio Informal Ethics Op. 176 (1990), Virginia Ethics Op. 1322 (1990), and Washington Ethics Op. 186 (1990) (explaining difference between availability retainer, which is earned upon receipt, and advance fee payment, which isn't).

Nonrefundable retainers are not forbidden by the *Restatement (Third) of the Law Governing Lawyers* (2000) comment g to Section 38(3)(c) indicates that lump-sum fee payments are presumed to be a deposit against services and not an "engagement retainer." The Reporter's Note to Section 38 indicates that nonrefundable arrangements have been rejected by a number of courts and commentators, and cautions that nonrefundable retainers violate the ethics rules that call for lawyers to return all unearned fees.


- For further exploration of the nonrefundability question, see the *Collection chapter* behind this tab.
Collection

PRACTICE GUIDE

The collection of payment for legal services is an integral part of every lawyer’s practice, but it is scarcely addressed directly in the ethics rules. The subject, for the most part, is relegated to the related but unmen activity of the business of lawyering.

Both the Model Rules and the Model Code, however, urge lawyers not to sue clients or former clients for payment of fees except when litigation becomes absolutely necessary for the lawyer to avoid an unbearable financial loss. Lawyers are encouraged instead to resolve fee disputes amicably, perhaps by resorting to fee arbitration or mediation. Some states have made fee arbitration mandatory if the client chooses it, and a comment to Model Rule 1.5 recognizes that a lawyer is required to participate under such circumstances.

Notwithstanding the relative lack of definite rules on fee collection, lawyers have clear ethical obligations with respect to the manner and type of compensation for their services. The following are the important rules to keep in mind: the prohibition of excessive fees and the requirements that any advance payment of fees that has not been earned at the time of the lawyer's withdrawal or discharge from the representation. Moreover, if there is a dispute over a fee, the lawyer must keep in trust the disputed amount until the disagreement is resolved.

While a true “retainer” becomes the lawyer’s property immediately upon receipt and is not subject to repayment, a retainer is limited to instances in which the client has paid solely to secure the lawyer’s availability and not in connection with the advance payment of fees for legal services, and this type of “retainer” is subject to the refund rule. Lawyers have had very little success in trying to hold onto the full amount of “nonrefundable” fees when they have discharged the client before completion of the representation.

A lawyer never has an absolute right to suspend performance of legal services, or to withdraw from the representation, by reason of the client’s nonpayment of fees. The ethics rules demand protection of the client's interests even when the lawyer has not been paid; withdrawal is permitted only if the lawyer takes steps to prejudicing the client’s interests.

When a client discharges the lawyer before the representation has been completed, the lawyer’s compensation usually is measured not by the fee contract but by principles of quantum meruit, which entitle the lawyer to a reasonable value of his services rendered up to the time of discharge.

Most jurisdictions allow lawyers to charge interest on unpaid legal fees, although typically the client must agree to such terms. There is also general ethical approval of the use of commercial debt collection agencies to recover payment have failed.

A lawyer may ask the client to provide security for payment of the lawyer’s fees, but there are ethics restrictions on such a transaction if the lawyer effectively acquires a pecuniary interest adverse to the client. The most established form of security is the attorneys’ lien.
Retainer or Advance?

A true retainer fee is an amount a lawyer charges the client not for specific services but to ensure the lawyer's availability whenever the client may need legal services. Compare Ryan v. Butera, Beausang, Cohen & Brei 193 F.3d 210, 15 Law. Man. Prof. Conduct 501 (3d Cir. 1999) (million-dollar nonrefundable general retainer enforceable, despite lawyer's discharge 10 weeks later, where sophisticated corporate client conceived arrangement to attract and secure lawyer's unrestricted availability to defend client in anticipated flood of litigation), with Cuyahoga County Bar Ass'n v. Okocha, 697 N.E.2d 594 (Ohio 1998) (lawyer disbarred for repeatedly charging clients nonrefundable retainers that served neither as advance payment nor as general retainer to make counsel available or preclude him from providing services to client's competitor).

The true retainer becomes the lawyer's property as soon as counsel receives it, may not be placed in a client account, and is generally nonrefundable, subject at the very least to the rule that in any set of circumstances the lawyer's fee must be reasonable. See generally Hawaii Formal Ethics Opinion 29 (1985); Michigan Informal Opinion RI-10 (1989); New York State Ethics Opinion 599 (1989); Oregon Ethics Opinion 509 (1986); Penn Ethics Opinion 85-120 (1985); Tennessee Formal Ethics Opinion 92-F-128(a) (1992); Texas Ethics Opinion (1986); Utah Ethics Opinion 136 (1993)

The retainer fee must be distinguished from an advance payment of costs and fees a client makes for specific services and accompanying expenses. Advances, which unfortunately are often included under the generic "retainers," remain the property of the client until the lawyer performs the services, or incurs the expenses which the payments were made.

Most jurisdictions require advance fees to be deposited into trust accounts and to be withdrawn as the fees earned. DiPippa, Lawyers, Clients, and Money, 18 U. Ark. Little Rock L. J. 95, 106 (1995); Brickman, The Advance Fee Payment Dilemma: Should Payments Be Deposited to the Client Trust Account or to the General Office Account, 10 Cardozo L. Rev. 647, 650 n. 29 (1989) (stating that by almost two-to-one margin, authorities deposit of advance fee payments into client trust account); see, e.g., Maryland Ethics Op. 92-41 (1992); O Ethics Op. 1991-88 (1991); Tennessee Formal Ethics Op. 92-F-128(a) (1992); Utah Ethics Op. 118 (1992); Wisconsin Ethics Op, E-86-9 (1986); see also Iowa Supreme Court Board of Professional Ethics & Conduct

Apland, 577 N.W.2d 50, 14 Law. Man. Prof. Conduct 232 (Iowa 1998) (lawyers accepting advance fee payr cannot withdraw money until they notify clients in writing of time, amount, and purpose of withdrawal); In
Lochow, 469 N.W.2d 91 (Minn. 1991) (advance payments for future services must be placed into trust acc

The ABA made clear when it revised Model Rule 1.15 in 2002 that advance payments of fees must be treat
the client’s property until earned. Rule 1.15(c) states: “A lawyer shall deposit into a client trust account leg
and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or ex
incurred.”

What lawyers must avoid, then, is treating an advance payment as a retainer fee. To do so runs afoul not of
Rule 1.15(c) but also of the rules requiring clients’ funds to be held separately from the lawyer’s own acco
Model Rule 1.15(a) and DR 9-102(A). In re Sather, 3 P.3d 403, 16 Law. Man. Prof. Conduct 268 (Colo. 200

41:

‘Nonrefundable’ Fees

An advance payment is at least partially refundable if the client terminates the representation before the la
has performed sufficient services to merit his collecting the entire amount of the advance. Rule 1.16(d) spe
that “[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable t
a client’s interests, such as ... refunding any advance payment of fee or expense that has not been earned incurred.” The Model Code’s DR 2-110(A)(3) is to the same effect.

Although a true retainer fee immediately becomes the lawyer’s property, it has proven difficult for lawyers
successfully to defend an unequivocally “nonrefundable” fee because courts and ethics panels are quick to
reasons why lawyers must return the “unearned” or “excessive” portion of a nonrefundable fee if circumsta
dicate. The reason expressed most often is that lawyers are always bound by the rule that any fee charged
collected must be reasonable under the circumstances. See In re Connelly, ___ P.3d ___, 18 Law. Man. Prof.
(Ariz. 2002) (counsel may not insist on collecting entire nonrefundable $50,000 fee where criminal defense
did not turn out to be as complex as originally anticipated); Jennings v. Backmeyer, 569 N.E.2d 689 (Ind. 1
1991) (client died before lawyer performed services sufficient to merit retention of entire fee); Texas Ethic
431 (1986) (“nonrefundable” fee must be refunded to extent it is excessive if lawyer withdraws or is dischca

It has also been said that completely nonrefundable fees interfere with the client’s right to discharge the la
re Cooperman, 633 N.E.2d 1069 (N.Y. 1994); Federal Savings & Loan Ins. Corp. v. Angell, Holmes & Lea, 395 (9th Cir. 1988), violate the rule against charging excessive fees, Iowa Supreme Court Board of Profess
Ethics & Conduct v. Apland, 577 N.W.2d 50 (Iowa 1998), and encourage clients to litigate in order to get th
money’s worth from the lawyer, Alaska Ethics Op. 87-1 (1987). This last reason has been said to be an es

In any event, the conditions of a nonrefundable fee must be very carefully explained to the client, In re Loc
469 N.W.2d 91 (Minn. 1991), and should include a clarification of circumstances that will render the fee

41:

Billing

Just as important as the fee agreement is the method of billing for one’s services. The client is entitled to
comprehensible statements that facilitate an understanding of what the client owes and what he owes it for
Burche, 770 P.2d 174 (Wash. 1989) (lawyer failed to give client itemized statement after request for one);
Rosenfeld, 601 A.2d 972 (Vt. 1991) (lawyer suspended for threatening to increase bill if client insisted on il
statement).

Obviously, outright misrepresentation of the lawyer’s charges is a disciplinary offense. E.g., Florida Bar v. I
521 So. 2d 1118 (Fla. 1988) (lawyer overstated fees in order to understate costs); Maryland Attorney Grie
to recoup discount previously promised to client who proved to be obstinate and demanding); In re C
606 N.W.2d 173 (Wis. 2000) (attorney added thousands of dollars in fake charges to bill in order to recapti
lost when client successfully challenged previous billing).