

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- and
- (8) whether the fee is fixed, contingent, or some type of retainer.

(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 commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees is prohibited.

(d) Common Types of Fee Agreements

(1) **Fixed Fees:** A fixed fee, also described as a "flat" or "lump-sum" fee, is a sum of money paid by a client to the lawyer to provide a specific service for a fixed amount. The fixed amount constitutes complete payment for the performance of the described services and may be paid in whole or in part in advance of the lawyer providing those services. A fixed fee may not be deposited in the lawyer's client trust account.

(2) **Contingent Fees:** A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (c) or other law. 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 notify 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.

(3) Engagement Retainers: An engagement retainer, also described as a “general,” “classic,” or “true” retainer, is a fixed sum of money paid by a client to the lawyer to ensure a lawyer’s availability during a specified period of time or for a specified matter. Funds received as an engagement retainer are earned when paid and immediately become property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. A lawyer is compensated separately for any legal services actually rendered by the lawyer. Funds received as an engagement retainer may not be deposited into a client trust account.

(4) Security Retainers: A security retainer, also referred to as a “security payment retainer,” describes funds paid to the lawyer intended to secure payment of fees and expenses for future services and costs the lawyer is expected to perform or incur. Funds received as a security retainer remain the property of the client and, therefore, must be deposited in a client trust account and kept separate from the lawyer’s own property until the lawyer applies the retainer to charges for services that are actually rendered. The term “security retainer” should be used in any written agreement describing the retainer.

(5) Special Purpose Retainers: A special purpose retainer, also referred to as an “advance payment retainer,” describes funds paid to the lawyer intended by the client to be present payment to the lawyer in exchange for the commitment to provide legal services in the future and may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. Ownership of a special purpose retainer passes to the lawyer immediately upon payment and is generally the lawyer’s property and, therefore, may not be deposited in the lawyer’s client trust account. An agreement for a special purpose retainer shall be in a writing signed by the client that uses the term “special purpose retainer” to describe the retainer, and states the following:

(i) the special purpose for the special purpose retainer and an explanation as to why it is advantageous to the client;

(ii) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer’s general account;

(iii) the manner in which the retainer will be applied for services rendered and expenses incurred;

(iv) that any portion of the retainer that is not earned or required for expenses will be refunded to the client; and

(v) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving a special purpose retainer, the agreement must so state and provide the lawyer’s reasons for that condition.

(e) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

- (f) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
 - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.

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Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] 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 in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Fixed fees are generally not subject to the obligation to refund any portion to the client if the lawyer completes the agreed-upon services; however, fixed fees are subject, like any other fees, to the reasonableness standard of paragraph (a) of this Rule, and when circumstances so warrant, the attorney is obligated to return the portion that is not earned pursuant to Rule 1.16(d).

[4] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative

basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[5] In *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007), the Court distinguished different types of retainers. It recognized advance payment retainers (referred to in this Rule as special purpose retainers) and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a “true,” “engagement,” or “classic” retainer) is paid by a client to the lawyer in order to ensure the lawyer’s availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a “security” retainer, secures payment for future services and expenses, and must be deposited in a client trust account pursuant to Rule 1.15B(b). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties’ intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

[6] A special purpose retainer, identified in *Dowling* as an advance payment retainer, is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer’s own property. However, any portion of a special purpose retainer that is not earned must be refunded to the client. A special purpose retainer should be used sparingly, only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. A special purpose retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (d)(5). A special purpose retainer is distinguished from a fixed fee (also described as a “flat” or “lump-sum” fee), where the lawyer agrees to provide a specific service (*e.g.*, defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike a special purpose retainer, a fixed fee is generally not subject to the obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.

[7] The type of retainer that is appropriate will depend on the circumstances of each case, and any written retainer agreement should clearly define the kind of retainer being paid. The guiding principle in the choice of the type of retainer is protection of the client’s interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, and if the parties’ intent is not evident, an agreement for a retainer will be construed as providing for a security retainer. Any unapplied funds of a security retainer are refunded to the client under Rule 1.16(d).

Terms of Payment

[8] A lawyer may 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 contrary to Rule 1.8 (i). However, 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 the client.

[8A] Rule 1.5 allows fee agreements that are not on an hourly rate, for example, fixed fee arrangements, so long as the fee charged or collected is reasonable for the services performed as allowed under Rule 1.5. Where appropriate, lawyers should consider alternative arrangements to deliver affordable representation. In structuring any fee agreement, lawyers should strive to make the cost of legal services transparent and predictable, with the goal of reducing misunderstandings and avoiding fee disputes with clients.

[9] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[10] Paragraph (e) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of postjudgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[11] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, or referral of a matter where appropriate, and often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or, where the primary service performed by one lawyer is the referral of the client to another lawyer, if each lawyer assumes financial responsibility for

the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (d)(2) of this Rule. Joint financial responsibility for the representation entails financial responsibility for the representation as if the lawyers were associated in a general partnership. See *In re Stornent*, 203 Ill. 2d 378 (2002). A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[12] Paragraph (f) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm, or payments made pursuant to a separation or retirement agreement.

Disputes over Fees

[13] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by law or rule, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

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