

OCDC SPOTLIGHT

Attorney's Fees: An Ethical Primer

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"Far and away the best prize that life offers is the chance to work hard at work worth doing."

— Theodore Roosevelt

While the satisfaction that comes from providing quality legal services, and from helping clients navigate the strange and daunting world of "the law" is a good reason to practice law, the paycheck is a nice second prize. The arrangements we make to get paid for our legal work can, however, raise all kinds of ethical issues. It is good to review the very basic concepts from time to time, and to turn the spotlight on a common practice that may not pass ethical muster.

A GLOSSARY

Half the battle in the struggle to transact fee arrangements ethically is in acknowledging a common definition for words and terms. The following glossary is offered as one disciplinary counsel might use in analyzing attorney fee arrangements.

Fee: Recompense for professional legal services performed.

General Retainer: Fee paid by client in exchange for lawyer's agreement to make the lawyer available, typically for a specified period of time, to perform legal services for the client as the need may arise. Also known as an availability, or classic, retainer.

Special Retainer: More accurately called an advance fee. It is an advance payment of fees for a specific service. Usually a partial pre-payment turned over to the lawyer at the commencement of the representation.

Flat Fee: An agreed upon single fee to be paid for all the legal services to be performed for a specified matter,

regardless of length or complexity. Commonly offered for routine or standardized work.

Contingent Fee: Recompense for legal services contractually tied, in writing, to a percentage of the recovery obtained for the client.

Nonrefundable Fee: In most cases, an oxymoron. See discussion below.

RULES OF PROFESSIONAL CONDUCT

Missouri's lawyer ethics rules speak to attorney fees, and the closely-related subject of client funds and property, in several different rules and from several different angles. As this is only a primer, the following discussion is not intended to be exhaustive.

Rule 4-1.5 is the "Fees" rule. It requires that all fees be reasonable, and lists factors to be taken into consideration in reasonability analysis. The rule also enunciates requirements and limitations unique to contingency fee contracts, and provides the ethics guidelines to be followed when fees are divided between lawyers not in the same firm.

Rule 4-1.8(f) sets boundaries the lawyer must follow if the attorney fee is being paid by an entity other than the client. Rule 4-1.8(j) prohibits acquisition by the lawyer of a proprietary interest in the client's cause of action or the subject matter of litigation, except to the extent of a legal lien or a contingency fee contract. Rule 4-1.15(a) mandates that the lawyer "shall hold property of clients . . . separate from the lawyer's own property." Those of us who have been around awhile know this as the rule against commingling. Subsection (c) of that same rule specifies that when, in the course of representation, the lawyer comes into possession of property in which both the lawyer and another person claim interest,

the property must be kept separate "until there is an accounting and severance of their interests."

And finally, Rule 4-1.16(d) states as an absolute that upon termination of representation, the lawyer "shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned."

PRACTICE APPLICATION

The case of *In re Richards*, 333 Mo. 907, 63 S.W.2d 672 (banc 1933), established once and for all that the Supreme Court of Missouri is the final arbiter in our state of what constitutes professional misconduct by Missouri lawyers. It is to that Court's opinions, then, that we turn in reviewing lawyer fees and professional ethics.

Attorney fee arrangements are a component of an employment contract.¹ That contract, however, is not one that can be "lumped together with those of ordinary trades." *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 56 (Mo. banc 1982). The attorney employment contract is not subject to dispute resolution solely by reference to employment or contract law.

Consideration for a lawyer's professional services, as provided for in the employment contract, is subject to constraints imposed by the attorney-client relationship. The attorney-client relationship is personal – it is one of trust and confidence. It is a fiduciary relationship, requiring a very high degree of fidelity and good faith by the lawyer to the client. *In re Oliver*, 365 Mo. 656, 285 S.W.2d 648 (Mo. banc 1956).

While the connection may not be readily obvious, any discussion of fee agreements and ethics must include recognition that a client has the right to choose his or her attorney. The client's choice of attorney, particularly in civil matters, is "near absolute." *In re Cupples*, 952 S.W.2d 226, 234 (Mo. banc 1997). Concomitantly, there can be "no doubt of the right of a client to discharge his lawyer." *In re Downs*, 363 S.W.2d 679, 686 (Mo. banc 1963). The client's right to discharge a lawyer at any time is recognized as desired public policy; it is a right that promotes confidence in the profession and in the attorney-client relationship. The right to discharge a lawyer is one that the client should be allowed to exercise without undue burden and in a manner that is not prohibitive. *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 60 (Mo. banc 1982).

The discharged lawyer is entitled to payment for services rendered up to the point of discharge. That right, however, is tempered by the need to protect the client's right to change counsel. *International Materials Corp. v. Sun Corp., Inc.* 824 S.W.2d 890, 894 (Mo. banc 1992). In a contingency contract situation, the discharged lawyer may recover the reasonable value of services rendered, not to exceed the contracted fee, payable only on occurrence of the contingency. *Plaza Shoe Store*, 636 S.W.2d at 60. The reasonable value of services rendered is not calculated solely by multiplying time spent by hourly rate. The "services must have enriched the client in the sense of benefits conferred." *International Materials*, 824 S.W.2d at 895.

If there is no fee agreement, courts will find an agreement to pay the attorney the reasonable value of the services rendered. *Roberts v. Sweitzer*, 733 S.W.2d 444, 447 (Mo. banc 1987). Trial judges serve as experts at valuing attorney fees. Rule 4-1.5(a) lists factors that can be taken into account in calculating a reasonable fee. See also *German Evangelical St. Marcus Congregation of St. Louis v.*

Archambault, 404 S.W.2d 705 (Mo. 1966). Once a fee agreement is set and the attorney-client relationship is established, any agreement that would increase the lawyer's compensation is subject to scrutiny for fairness and reasonableness.

The lawyer bears the burden of establishing that no advantage was taken by reason of the confidential attorney-client relationship. *In re Conrad*, 340 Mo. 582, 105 S.W.2d 1 (1937).

A legal fee for which no services are performed is excessive. *In re Connaghan*, 613 S.W.2d 626, 632 (Mo. banc 1981). Concomitantly, lawyers should be "ready and willing to make full disclosure" to the client at any time regarding what services have been performed in a representation. *In re Sullivan*, 494 S.W.2d 328, 335 (Mo. banc 1973). And, it goes without saying that it is professional misconduct to retain fees for which services are not thereafter performed. *In re Murphy*, 732 S.W.2d 895 (Mo. banc 1987); *In re Maier*, 664 S.W.2d 1 (Mo. banc 1984); *In re Lang*, 641 S.W.2d 77 (Mo. banc 1982); *In re Pendergast*, 525 S.W.2d 341 (Mo. banc 1975).

A NOTE OF CAUTION ON THE "NONREFUNDABLE FEE"

The Supreme Court of Missouri has not yet addressed the contentious issue of whether a lawyer can ethically charge a client a fee that is labeled "nonrefundable." The reasons why such a "fee" is subject to ethical attack are many and include the following. A fee, with the rare exception of a true general retainer, is not reasonable unless and until services are performed to earn it. To state otherwise in a fee agreement could be misleading, possibly subjecting the lawyer to a separate charge of professional misconduct. Purporting to have the right to retain a fee, even if the client exercises his or her "near absolute" right to discharge the lawyer at any time, imposes an impermissible constraint and chilling effect on the client's right to discharge. Claiming a fee as "earned when employed" and consequently depositing it to the lawyer's operating account puts the client at the impermissible risk of

being unable to recover the money because the lawyer has spent it or a third party has levied on the lawyer's operating account. If the legal services for which the fee was paid are not subsequently performed, then the client is clearly entitled to a refund of unearned fees, regardless of how the lawyer has characterized the fee in the retainer agreement. The concept of a "nonrefundable fee" also runs directly counter to the lawyer's Rule 4-1.16(d) obligation to refund promptly any advance payment of fee not earned.

Courts outside Missouri have considered the issue of whether a "nonrefundable fee" violates ethical rules. A New York court held nonrefundable retainer agreements contrary to public policy and therefore void. *In re Cooperman*, 187 A.D.2d 56, 591 N.Y.S.2d 855 (1993). New Mexico's Supreme Court held that the "Rules of Professional Conduct . . . do not permit lawyers to charge nonrefundable unearned fees." *In re Dawson*, 129 N.M. 369, 8 P.3d 856, 859 (2000). Colorado's Supreme Court held that "an attorney cannot treat advance fees as property of the attorney and must segregate all advanced fees by placing them into a trust account until such time as the fees are earned. An attorney cannot label advance fees 'non-refundable' because it misleads the client and risks impermissibly burdening the client's right to discharge his attorney." *In re Sather*, 3 P.3d 403, 405 (Colo. Sup. Ct. 2000). In *State ex rel. Special Counsel for Discipline v. Fellman*, 267 Neb. 838, 678 N.W.2d 491, 497 (2004), the Nebraska Supreme Court stated that "advance fees are payments made by a client for the performance of legal services and belong to the client until earned by the attorney." The court noted that an advance fee must be deposited in the lawyer's trust account until earned.

To those who would argue that a flat fee should be excepted from the constraints imposed on advance fee payments, the Iowa Supreme Court had the following answer: "We see the flat fee as nothing more than an advance fee

payment which a majority of authorities now agree must be deposited in a client trust account. . . . Funds remain the property of the client until the attorney earns them.” *Iowa Supreme Court Board of Professional Ethics and Conduct v. Aplan*, 577 N.W.2d 50, 55 (Iowa. Sup.Ct. 1998). The Indiana Supreme Court, somewhat conversely, found that flat fees need not be segregated from an attorney’s operating expenses. *In re Kendall*, 804 N.E.2d 1152 (Ind. Sup.Ct. 2004). The court also concluded, however, that “[i]f the legal services covered by a flat fee are not provided as agreed, an attorney must refund any unearned fees.” *Kendall*, 804 N.E.2d at 1160. If the money has not been segregated and protected in a trust account, however, the “refund” may be a hollow demand.

Resolution of whether a special retainer or a flat fee, however the lawyer may designate it, is the lawyer’s property, which he is free to spend on

receipt, or is client property, which must be segregated, awaits the proper case and decision by the Missouri Supreme Court.² In light of the highly fiduciary character of the attorney-client relationship, and our Court’s continuing recognition of the importance of preserving unfettered the client’s right to discharge an attorney, the lawyer would be well-advised to err on the side of caution by depositing fees for which services have not yet been performed into the trust account and withdrawing funds only as they are earned. *See also* Rule 4-1.15(c); A. Rothrock, *The Forgotten Flat Fee: Whose Money Is It And Where Should It Be Deposited?* 1 Fla. Coastal L.J. 293 (1999).

Footnotes

¹ Lawyers are strongly encouraged to put all fee, not just contingency fee, agreements in writing. *See Craig v. Joe B. Gardner, Inc.*, 586 S.W.2d 316, 324-25 (Mo. banc 1979); Comment, Rule 4-1.5.

The Missouri Bar has produced a booklet called “Sample Fee Agreement Forms and Comments” that is very helpful and available for the asking.

² Some lawyers impose a charge to “intake” a case. An intake charge is justified, it is said, for the reasons that there is an administrative cost associated with opening a file, and to compensate the lawyer who may be “conflicted out” of a case by a client who then chooses to use a different lawyer’s services. Such an “intake charge” would not fit the definition of “flat fee” provided in this article. As all financial transactions between lawyer and client are subject to the same ethical constraints, the more reasonable such a charge is, and how clearly its purpose and unique characteristics are explained to the prospective client, would be important in judging whether the lawyer could ethically “not refund” such a charge.

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