AMERICAN BAR ASSOCIATION

Young Lawyers Division

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Las Vegas, NV

The Nuts and Bolts of Law Practice Management: Ethical and Malpractice Avoidance

Caesars Palace
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9:15 a.m. – 10:15 a.m.

The Nuts and Bolts of Law Practice Management

Presented by:
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ABA Ethics & Professionalism Committee CLE - May 14, 2011

A Lawyer's Responsibilities

- Comment [13] to the Preamble and Scope of the ABA's Model Rules of Professional Conduct states, "Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship."

COURSE OBJECTIVE

- Formation of the Attorney-Client Relationship
- Fee Agreements
- Follow the Money – Escrow/Trust Accounts
- Conflicts of Interests
- The 5 “C’s” – Most Common Rule Violations
- Tips for Avoiding Grievances and Malpractice
- Reference Materials

The Attorney-Client Relationship

- Client Screening
- Issues related to Prospective Clients
- Managing Client Expectations

Rule 1.2 Scope of Representation

(a) “... a lawyer shall abide by a client's decisions concerning the objectives of representation, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. . . .”

Rule 1.18 Duties to Prospective Clients

- Rule 1.18 sets forth a lawyer's duties to a prospective client
- These duties continue even if an attorney-client relationship is never formed
- Duty of confidentiality
- Duty of loyalty

Types of Fees

Time Basis	The number of hours worked times the per hour charge
Blended Rate	Different hourly rates based on different levels of staff
Contingency Fees	Percentage (usually 25%-40%) of recovery plus out-of-pocket expenses
Value Billing	Higher billing rate if attorneys achieve a favorable result
Non-Refundable Retainer (Engagement Fee)	Advance payment that guarantees attorney availability
Statutory/Probate Fees	Fees set by law
Flat Fee	Set or fixed fee for particular matters (e.g. contract review)

Engagement Fee v. Advanced Fee

Engagement:

- Consideration is paid in exchange for an Attorney's commitment of future availability to provide services.
- These funds may be placed into an operating account, but check your local rules.
- Considered 'earned upon receipt.'

Advanced:

- Pre-payment for future legal services.
- These funds must go into an IOLTA/attorney escrow account.

Fee Agreements

- Rule 1.5(b) states, "[t]he 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…"

Fee Agreements

- Ensure that the client understands the terms of the agreement
  - Many ethical complaints at their core involve fee disputes
- Discuss your rate or fee basis – avoid ‘sticker shock”
  - The client must understand and appreciate the lawyer’s financial expectations; likewise, the lawyer must understand and appreciate the client’s willingness and means to meet such expectation
- Explain policies/penalties for late payments
  - Be sure to comply with local laws; do not exceed the highest level of interest allowed in your state
- Explore alternatives for collecting late payments
  - Examples: use local bar association fee dispute programs, mediation services, use a collection agency, seek civil remedies, etc.

FOLLOW THE MONEY

- LET’S TALK ABOUT THE PAPER TRAIL

Attorney Trust Accounts

- Rule 1.15 governs a lawyer's responsibility as a fiduciary
- Familiarize yourself with any additional rules that your jurisdiction may have regarding attorney trust accounts
- Be aware of the record-keeping requirement in Rule 1.15
- Properly title your account

Attorney Trust Accounts

- Remove attorney’s fees out of escrow ONLY when it is earned – avoid commingling
- Reconcile your escrow account regularly
- Do not borrow or misappropriate client funds
- Protect funds of third parties
- Keep client ledgers

Conflicts of Interests – Rule 1.7-1.10

- You may not represent a client if through that representation you might violate duties owed to current or former clients
- Conflicts exist where:
  - Representation of one client will be adverse to another current client (Rule 1.7)
  - Your actions put your own interests at odds with your client (Rules 1.7/ 1.8)
  - Representation of another person in the same or a “substantially related” matter to a matter for a former conflict (Rule 1.9)
  - Conflicts are “imputed” across all members of law firms (Rule 1.10)

Avoiding Conflicts of Interests

- Avoiding conflicts
  - Invest in a electronic file/conflicts management system that meets the standards of Rule 1.10
  - Must complete conflicts check before <u>any</u> substantive conversation
  - Update any time anything changes—cross-claims, experts, third-parties, change in corporate ownership
- Waivers
  - Must be <u>in writing</u>
  - Each party must agree to waive with “informed consent”
  - Some conflicts are unwaivable (e.g., representation of adverse interests in same litigation)

Termination of Representation

- Rule 1.16 sets forth when an attorney must withdraw from or terminate a representation. It also includes guidance on when it is permissible for an attorney to withdraw from or terminate a representation.
- Important to understand because Rule 1.16 is very technical.

Common Pitfalls of Practice

- Rule 1.1 - Competence
- Rule. 1.4 - Communication
- Rule 1.6 - Confidentiality
- Rule 1.7 - Conflicts of Interest
- Rule 3.3 - Candor

Practical Tips to Avoid Grievances and Malpractice Claims

- Study the applicable Rules of Professional Conduct
- Review court decisions on disciplinary matters
- Attend Continuing Legal Education seminars
- Join Bar Associations
- Find a mentor
- Call the Legal Ethics Hotline of your local bar

More Tips

- Seek advice from your bar’s practice management advisory program
- If you have a drug, alcohol, mental illness or practice problems, contact your jurisdiction’s Lawyers’ Assistance Program
- Carry legal malpractice insurance
- Maintain good health and exercise regularly!

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Reference Books

- *Red Flags: A Lawyer's Handbook on Legal Ethics* by Lawrence Fox & Susan R. Marlyn
- *The ABA/BNA Lawyer's Manual on Professional Conduct*
- *Legal Malpractice* by Ronald E. Mallen, Jeffrey M Smith
- *The Law of Lawyering* by Geoffrey Hazard, Jr. & William Hodes

Bar Counsel

The Case of the Flat Fee: Whose Money Is It Anyway
By Dolores Dorsainvil

The issue of flat fees has been a source of contention for lawyers and disciplinary systems alike. The Office of Bar Counsel has always had the opinion that flat fees are entrusted funds, but among District of Columbia practitioners, the question has always been, "Whose money is it anyway?"

The D.C. Court of Appeals has recently decided this matter in *In Re Robert W. Mance III,*[1] where, for the first time, it addresses Rule 1.15(d) (Safekeeping Property)[2] of the D.C. Rules of Professional Conduct as it relates to flat fees. The court held that when an attorney receives payment of a flat fee at the outset of a representation, the payment is an advance of "'unearned fees' and 'shall be treated as property of the client…until earned unless the client consents to a different arrangement.'"

In other words, all fees, whether characterized as general hourly retainers, flat fees, engagement fees, contingency fees, or advance fees, must be deposited into a trust account upon receipt and can only be withdrawn by the attorney once the fee has been earned. The court's ruling will prove to have the most impact on attorneys who have solo or small practices because it definitively answers the question and provides guidance to those who may have, through tradition, mistakenly believed that flat fees belong to the attorney upon receipt.

The court's opinion stems from a disciplinary matter filed against Mance by the Office of Bar Counsel following a complaint from a father who retained Mance to represent his son, who was sought for first degree murder. Mance told the father that his fee would be a flat fee of $15,000, with an initial installment of $7,500 to be paid "up front." The two agreed that the second installment of $7,500 was to be paid after the son turned himself in to the police. The two had no further discussions about the fee or how the money would be retained, and in December 2003, the father paid Mance the initial $7,500.

Mance placed most of the initial installment ($6,010) into a client escrow account and the remainder into his operating account. Because the son decided not to turn himself in for another month, Mance decided to wait until that time to perform any work on the matter. In early January 2004, the father became frustrated with what he believed to be inactivity on the matter and terminated the attorney–client relationship. Although Mance agreed to return the initial $7,500 payment, he failed to do so until six months later. The father filed a complaint with the Office of Bar Counsel, which investigated the matter and then initiated disciplinary proceedings against Mance, charging him with several rule violations, including misappropriating client funds (Rule 1.15(a)), commingling his funds with client funds (Rule 1.15(a)), failing to treat an advance as client funds (Rule 1.15(d)), and failing to take timely steps to surrender client funds (Rule 1.16(d)).[3]

After a hearing was conducted in the matter, the Hearing Committee concluded that Rule 1.15(d) did not apply to flat fee matters because a flat fee was not an "advance," but rather a fee earned upon receipt regardless of how much or how little work the attorney performed. Further, the Hearing Committee concluded that Mance took timely steps to return the funds to the father. However, the Hearing Committee did conclude that Mance commingled funds because he placed a portion of the $7,500 initial deposit into an escrow account containing funds of other clients.

The Board on Professional Responsibility rejected the Hearing Committee's conclusion that Mance promptly returned the fee and found a violation of this rule. With one member dissenting, the board also found that Mance was not required to treat the flat fee as client funds under Rule 1.15(a).[4] The board then recommended that the attorney be censured for commingling funds[5] and for failing to promptly return the fee under Rule 1.16(d). Bar Counsel took an exception to the board's interpretation of Rule 1.15(d) concerning advances on unearned fees and argued for a harsher sanction.

The court, acknowledging that this is the first time it has addressed the applicability of Rule 1.15 to flat fees, found that flat fees are advance payments of unearned fees and shall be treated as property of the client, absent consent from the client as to a different arrangement.[6] The court stated that its interpretation of Rule 1.15(d) shall be applied prospectively as it is aware of the common practice of attorneys, like Mance, who believe that flat fees belong to the attorney. The court publicly censured Mance.

The court also noted that its ruling is not intended to discourage attorneys from charging flat fees, recognizing that flat fees are helpful to clients as well as attorneys in certain practice areas, but to provide guidance to D.C. attorneys and to make clear their ethical obligation so that they may conform their practice to what is required of them under Rule 1.15 while protecting the interest of the public.[7]

Looking forward, it will be important for attorneys to determine how portions of a flat fee will be deemed earned, and to notify the client of whatever benchmarks are established in the retainer agreement.[8] This will not only help ensure compliance with the ethical obligations set forth in Rule 1.15, but it might also help resolve fee conflicts, should they arise.

To the casual observer, the term “flat fee” might imply simplicity. D.C. attorneys are now on notice that things are more complicated than they seem.

Dolores Dorsainvil is a senior staff attorney with the Intake Division of the Office of Bar Counsel.

Notes

[1] 2009 D.C. App. LEXIS 473 (2009).

[2] Rule 1.15(d) states that:

Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer’s services in accordance with Rule 1.16(d).

[3] Rule 1.16(d) provides:

[i]n connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client’s interest, . . . and refunding any advance payment of fee or expense that has not been earned or incurred.

[4] The Board on Professional Responsibility dismissed four of the six charges, including the charge of misappropriation under Rule 1.15(d).

[5] The court notes that Mance acknowledges commingling funds by placing his own funds in a client escrow account. Typically, commingled funds involve lawyers placing client funds into their own operating account.

[6] Under Rule 1.15(d), a client may waive, by providing his or her informed consent, the requirement that the fees given to an attorney be held in trust. However, regardless of the client’s waiver, in the event that the client terminates the attorney–client relationship, the attorney has an obligation under Rule 1.16(d) to promptly refund any unearned portion of the fee and/or unincurred costs.

[7] The court notes that if flat fees are not entrusted until earned, the client runs the risk of being deprived of his or her funds should a creditor of the attorney attach the attorney’s general operating or personal accounts.

[8] Rule 1.5(b) explains the required elements of a retainer agreement.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Get It Write: Retainer Agreement Do's and Don'ts

By Dolores Dorsainvil

The retainer agreement is by far one of the most important documents that you will use in your legal practice. It also is a deceptively simple concept. Well-written retainer agreements can help minimize risk of misunderstandings in attorney-client relationships and provide protections for attorneys and clients. Retainer agreements that conform to ethical rules also can mean the difference between harmonious attorney-client relationships and possible state bar complaints.

Remembering the following list of do's and don'ts can help your practice and help ensure that you are in compliance with the ABA Model Rules of Professional Conduct (Model Rules).

Do's

- Do communicate the terms of compensation for your legal services in your retainer agreements pursuant to Model Rule 1.5(b). It is your obligation as an attorney to ensure that clients understand how you are to be paid regardless of how your "basis or rate of fee" is determined. For example, your fee could be contingent upon the outcome of the representation, a flat fee, an advanced fee that is earned based on an hourly rate, or a combination of these fees.
- Do clearly communicate "the scope of the representation," in your retainer agreements. You should describe as clearly and plainly as possible your legal services to clients. This portion of your agreements also may mention legal services that are not provided. For example, if you are an immigration lawyer and you are retained only to assist with filing application forms and representing a client at a hearing before the immigration court, you should state clearly in your retainer agreement with the client that your representation does not include any appellate work arising from the case. This can eliminate any confusion if such a client is denied requested relief.

Don'ts

There are some agreements that you should *not* have in your retainer agreements because they may represent ethical violations:

- Do not attempt in your retainer agreements to negotiate literary or media rights to a portrayal based on information related to representation. (Model Rule 1.8(d)). We see more and more high-profile cases that are made into movies and television programs. As an attorney, you have an ultimate duty of loyalty to your clients, and any attempt to "sell their story" is not only a conflict of interest but also a breach of confidentiality.
- Do not attempt to prospectively limit your malpractice liability in your retainer agreements. Malpractice liability limitations in your agreements could violate Model Rule 1.8(h). This Rule is designed to ensure that attorneys do not take advantage of clients who do not seek independent legal counsel to evaluate the desirability of an agreement to settle a malpractice claim *before* a dispute arises. For example, you could be subject to discipline for having a provision in a retainer agreement that generally prohibits a client from filing a civil action against you.
- Do not make an agreement with clients that can improperly curtail or terminate your services to the clients' detriment. For example, under Comment [5] of Model Rule 1.5, it is improper to enter into an agreement to provide legal services up to a stated dollar amount if you know that more extensive services will be required to fulfill a client's objectives. Although under Model Rule 1.2, you may reasonably limit the scope of representation with your client's consent, you do not want to be in a situation where you request to withdraw from representation during a crucial point of litigation and leave your client to fend for himself.
- Do not make an agreement with clients where you divide the fee with another attorney who is not in the same firm without the client's consent. Such an agreement would violate Model Rule 1.5(e). For example, if you are retained to do transactional work and later discover that litigation is necessary, you must consult with your client and obtain client consent prior to the entry of co-counsel. Failure to perform this simple task would violate client trust that you would not disclose confidential information.

Although not every jurisdiction requires you to have a written retainer agreement in every instance, the best practice is to set forth the parties' expectations in writing early on and in accordance with the guidelines offered here. This can help to ensure that both you and your clients understand your respective responsibilities, help avoid any bar complaints or grievance actions, and provide a strong foundation for a mutually beneficial relationship.

Dolores Dorsainvil is a senior staff attorney with the District of Columbia Office of Bar Counsel and an adjunct professor at American University's Washington College of Law. She can be contacted at dorsainvild@dcobc.org.

NEXT STEPS

- Professional Responsibility Reminders (YLD *101 Practice Series*) www.abanet.org/yld/101practiceseries/ethicsprofessionalresponsibility.shtml