



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1202 (10/01/2020)

Topic: Legal fees

Digest: A lawyer may charge a fixed fee for a matter as long as it is not excessive, and the lawyer specifies the services that are included in the engagement. The client must remain liable for costs, other than as permitted by Rule 1.8(e). The lawyer may require advance payment of fees, which is not to be considered a minimum fee unless specified in the retainer agreement. Although a lawyer may charge a non-excessive minimum fee, the lawyer may not charge a non-refundable fee. If the lawyer is discharged, the lawyer must return any unearned fees. The lawyer may agree with the client that the client need not pay a portion of the legal fee if the client believes the lawyer's services do not merit the additional amount.

Rules: 1.5(a), 1.5(b), 1.5(d)(4), 1.8(e), 1.16(e)

FACTS

1. The inquirer is starting an immigration law practice and is considering how to structure client payment obligations based upon a flat fee. Two possible arrangements are proposed. In the first proposal, 50% of the fee would be payable up front, when the client signs the retainer agreement. The remaining 50% would be payable in two equal payments – one to be billed halfway into the engagement, and the final payment to be billed upon completion of the engagement. In the second proposal, after payment of an initial retainer, the balance would be paid in monthly installments, with final payment payable upon completion of the engagement. In both arrangements, the client would remain responsible for filing fees and other costs, and in both arrangements the retainer agreement would provide that, in full satisfaction of the client's fee obligation, the inquirer would accept payment for some designated portion of the final balance in an amount that the client unilaterally determined that the legal services had been worth.

QUESTION

2. What ethical considerations apply to inquirer's proposed fee agreements?

OPINION

3. Rule 1.5 of the New York Rules of Professional Conduct (the “Rules”) – the fee rule – prohibits a lawyer from charging a fee that is illegal or excessive, and it explicitly recognizes fixed fees in its listing of the considerations that determine whether a fee is excessive. *See* Rule 1.5(a)(8) (“whether the fee is fixed”). *See also* N.Y. State 942 ¶ 11 (2012) (whether a flat fee is excessive depends on the facts; a flat fee is not necessarily excessive but neither is it necessarily reasonable); N.Y. City 2015-2 (a flat fee is ethically permissible if it satisfies the other requirements of Rule 1.5). A fixed fee is often appropriate in matters frequently performed by the lawyer, where it is possible for the lawyer to accurately estimate the cost of performing the services. It is beneficial to the client since the client knows in advance the cost of the services and is not subject to inefficiencies that may increase the fee in the case of hourly billing. As in all representations, the lawyer should communicate to the client the services the lawyer will perform for the fixed fee. *See* Rule 1.5(b) (the lawyer shall communicate the scope of the representation).

4. Except as permitted by Rule 1.8(e), the client must remain liable for court costs and the expenses of litigation. The inquirer’s engagement letter under either proposed arrangement here complies with that requirement by specifying that filing fees are not included in the fixed legal fee.

5. The Rules permit advance payment of fees. *See* Rule 1.5, Cmt. [4] (a lawyer may require advance payment of a fee). *See also* N.Y. State 816 (2007) (discussing, under the Code of Professional Responsibility (the “Code”), whether such payments constitute funds of the lawyer or client); N.Y. State 983 (2013) at note 1 (concluding there is no reason that the Rules would lead to a different result).

6. Rule 1.5(d)(4) prohibits a non-refundable retainer fee. *See also* Rule 1.5, Cmt. [4] (a lawyer may require advance payment of a fee, but is obliged to return any unearned portion). *See Matter of Cooperman*, 83 N.Y.2d 465 (1994). *See generally* N.Y. State 599 (1989) (discussing the prohibition against non-refundable fees under the Code and distinguishing between non-excessive minimum fees and non-refundable retainers). N.Y. City 2015-2 (fees paid to a lawyer in advance are nonrefundable only to the extent they have been earned by the lawyer).

7. Nevertheless, Rule 1.5(d)(4) also permits a lawyer to enter into a retainer agreement containing “a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such a fee may be incurred and how it will be calculated.” Comment [4] to Rule 1.5 explains: “A lawyer may charge a minimum fee, if that fee is not excessive, and if

the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4).” A minimum fee could also be justified by a description of services to be performed at the outset of the representation, for which the lawyer claims immediate entitlement to payment, even before the work is commenced or completed, subject to the lawyer’s obligation to refund any portion the lawyer does not ultimately earn. *See* Rule 1.16(e).

8. Rule 1.5(a) identifies the factors relevant for determining if a fee is excessive. These factors apply to a minimum fee. *See* N.Y. State 599 (1989) (listing factors in the former New York Lawyer’s Code of Professional Responsibility, which are nearly identical factors to the factors in Rule 1.5). The factors in Rule 1.5(a), which are not intended to be exclusive, include:

- (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 or made known 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 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 or contingent.

9. Nothing in these factors, or in any other Rule, precludes client satisfaction as an element in determining whether a fee is excessive, and client satisfaction is consistent with and often related to “the results obtained,” which is listed in Rule 1.5(a)(4) as a relevant factor. Generally, a client who gets good results is a satisfied client, and may be willing to express that satisfaction by paying a higher fee.

10. The inquiry does not state whether the initial payment is a minimum fee or a payment on account, but we believe that a fee paid before legal services are rendered is a payment on account unless expressly identified in the retainer agreement as a minimum fee. *See* Restatement (Third) of the Law Governing Lawyers § 38, Com. g (ALI 1998) (an advance fee payment that is not otherwise identified is presumed to be a deposit against future services). If a minimum fee, the lawyer would have to specify the services covered and the circumstances in which it would be earned. *See* N.Y. City 2015-2 (a fee paid in advance for services to be performed on a specific matter — sometimes called a special retainer — is not earned unless the services are performed).

And if the initial payment is not a minimum fee and the inquirer withdraws from the representation or is discharged by the client before the services are completed, then the lawyer must return any unearned fees. *See* Rule 1.16(e) (even when withdrawal is permitted or required, a lawyer shall take steps to avoid foreseeable prejudice to the rights of the client, including promptly refunding any part of a fee paid in advance that has not been earned).

11. As a final matter, the fact that the inquirer has effectively incorporated a discount based on client satisfaction into the retainer agreement does not transform the fee arrangement into a contingent fee within the meaning of Rule 1.5(c), because the fee is not contingent on the “outcome” of the matter, and the amount of the final payment is in the sole discretion of the client. It is not unusual for a lawyer to agree to discount legal fees to resolve a client complaint or to retain client good will, and the provision giving the client discretion to pay some, all, or none of the final payment has that effect.

CONCLUSION

12. A lawyer may charge a fixed fee for a matter as long as it is not excessive, and the lawyer specifies the services that are included in the engagement. The client must remain liable for costs, other than as permitted by Rule 1.8(e). The lawyer may require advance payment of fees, which is not to be considered a minimum fee unless specified in the retainer agreement. Although a lawyer may charge a non-excessive minimum fee, the lawyer may not charge a non-refundable fee. If the lawyer is discharged, the lawyer must return any unearned fees. The lawyer may agree with the client that the client need not pay a portion of the legal fee if the client believes the lawyer’s services do not merit the additional amount. Such an agreement does not transform the fee into a contingent fee.

(22-20)