The Ethics of Attorney's Fees: The Rules for Charging and Collecting Payment

John C. Martin

John is a frequent author and speaker on issues relating to professional ethics, including ethical issues associated with attorney marketing and fee arrangements. He is a prior chair of the American Bar Association Section of Litigation's Ethics and Professionalism Committee, in which capacity he also served as a member of the working group on Alternative Litigation Financing established by the ABA Commission on Ethics 20/20, and is currently chair of the Chicago Bar Association's Professional Fees committee, in which capacity he arbitrates and mediates attorney fee disputes.

TABLE OF CONTENTS

I. Introduction....1
II. Rule 1.5 and the Essentials of Ethical Fee Arrangements....1
A. The Fiduciary Relationship and Fee Restrictions....1
B. Rule 1.5 and its State Counterparts....2
C. The Reasonableness Touchstone....4
D. Putting Things in Writing....5
E. Sharing Fees....6
III. Ethically Collecting Fees....7
A. Retainers....7
B. Liens....8
C. Special concerns in bringing suit for fees....10

IMPORTANT NOTE: The following materials and accompanying Access MCLE, LLC audio program are for general educational purposes only. Nothing herein constitutes, is intended to constitute, or should be relied on as, legal advice on which you should rely. You should consult with an appropriate professional advisor to determine what may be best for your individual needs and circumstances.

I. Introduction

Attorneys are duty bound to serve their clients. At their outset, the ABA Model Rules of Professional Conduct (referenced herein throughout as the "Model Rules" or, individual, the "Rule") require lawyers to serve their clients with competence (Rule 1.1), diligence (Rule 1.3) and loyalty – requiring them to avoid, or at least disclose, ways in which the attorney's interests may conflict with those of the client. *See, generally,* Model Rules 1.6-1.8. The attorney-client relationship is also commercial, with the attorney typically entitled to demand payment from the client for services rendered. That commercial relationship inherently creates the potential for conflict. No matter how much the client may appreciate the attorney's work, it would always be in the client's best interests to avoid paying for it. Similarly, as much as the attorney may be motivated by genuine respect and admiration for the client, the attorney could always be paid more.

The rules of professional ethics recognize this potential for conflict. As is addressed below, the Model Rules (and their state counterparts) seek to avoid potential difficulties with rules that place broad limits on fee agreements and on how attorneys may pursue claims for payment, while also affording attorneys means of ensuring that clients satisfy their payment obligations. Those rules are not wildly complicated, and should be understood by attorneys to ensure that they are not only paid for their efforts, but do so without invoking the wrath of bar authorities.

II. Rule 1.5 and the Essentials of Ethical Fee Arrangements

A. *The Fiduciary Relationship and Fee Restrictions*

The very factors that make attorneys' services valuable – their knowledge of the law and the specialized training that leads their clients to place trust in them – lead to special scrutiny of attorneys' payment relationships. The attorney-client relationship is a fiduciary relationship and, just as in other fiduciary relationship, the attorney's dealings with the beneficiary – the client – are subject to special legal scrutiny. As one Illinois court has put it:

> The law places special obligations upon an attorney by virtue of the relationship between attorney and client. Those obligations are summed up and referred to generally as the fiduciary duty of the attorney. They permeate all phases of the relationship, including the contract for payment.

Neville v. Davinroy, 41 Ill.App.3d 706, 355 N.E.2d 86 (1976). In the modern era, the interplay between lawyers' fiduciary duties and their interest in getting paid is rarely the subject of free-floating judicial inquiry, but is instead embodied in ethical rules.

B. *Rule 1.5 and its State Counterparts*

The principal source of ethical restrictions on attorney-client fee arrangements is Model Rule 1.5, which provides, in full, as follows:

> **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 or contingent.
>
> (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) 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 (d) 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.
>
> (d) 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.
>
> (e) 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 each lawyer assumes joint 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.

ABA Model Rule of Prof. Conduct 1.5.

Virtually all states have adopted the Model Rules, including Rule 1.5, though some jurisdictions have expanded upon the protections that Rule 1.5 offers. *See, e.g.,* Florida Rule of Professional Conduct 4-1.5 (adding, among other things, specific factors for assessing reasonableness of costs, specific prohibition on fees obtained by improper advertisement or through misrepresentation, and detailed explanation of permissible contingent fees. California, the only state that has *not* adopted the model rules, contains a similar provision in its rules of professional conduct. Like Rule 1.5, California Rule of Professional Conduct 4-200 provides that a member of the bar shall not "enter into an agreement for, charge, or collect" an illegal or unconscionable fee and defines unconscionability with reference to a similar list of factors, though it adds to that list an express consideration of the client's sophistication and informed consent to the fee and omits any reference to custom. *See* California Rule Prof. Conduct 4-200. Yet other provisions of California law parallel other provisions of Rule 1.5. *See, e.g.,* California Bus. And Prof. Code § 6147 (addressing requirements of contingent fee contracts); California Rule Prof. Conduct 2-200 (addressing fee-sharing arrangements).

C. *The Reasonableness Touchstone*

Under Rule 1.5(a) a lawyer may not "make an agreement for, charge, or collect an unreasonable fee." By its terms, the rule requires reasonableness to be assessed not only at the time the fee agreement is entered, but also when attorneys bill for services or attempt to collect the fees they are owed by the client. It is therefore possible to violate Rule 1.5 if an attorney seeks to enforce a fee agreement that, while reasonable at the time, was rendered unreasonable by subsequent events. For example, in *In re Gerard*, 132 Ill.2d 507, 548 N.E.2d 1051 (1989), a lawyer was found to have violated Rule 1.5 after charging a contingency fee based on the value of account assets located for an elderly client. While, at the time the lawyer had been hired, the client had believed accounts were being wrongfully withheld from him, in fact the accounts were not the subject of any adverse claim, but were turned over willingly by the banks holding them once they learned of the client's whereabouts – requiring little in the way of attorney professional services. More generally, fees are frequently found to be unreasonable when the lawyer does not perform competent work, or neglects a matter, but nevertheless seeks to be paid the full fee for which he or she has contracted. *See, e.g., Attorney Grievance Comm'n of Maryland v. Garrett*, 427 Md. 209, 224, 46 A.3d 1169, 1178 (2012); *Rose v. Kentucky Bar Ass'n*, 425 S.W.3d 889, 891 (Ky. 2014).

While Rule 1.5(a) requires fees to be reasonable, however, the factors it considers in assessing reasonableness are extremely broad. A lawyer's experience, the time required, the client's demands, and the local market may all be considered. Indeed, comment 1 to the Rule 1.5 specifically provides that "[t]he factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance." It is worth noting, however, that the enumerated factors do *not* include factors relating to the client. Under Rule 1.5, neither the client's relative sophistication nor its agreement to a fee arrangement are relevant to whether a fee is reasonable – whether the client is a minor or a multinational corporation does not matter. Although the rules in place in some jurisdictions do allow a client's relative sophistication to be considered in fee disputes, *see, e.g.,* California Rule Prof. Conduct 4-200, the focus on the abstract reasonableness of the fee arrangement is in keeping with the lawyer's fiduciary role – requiring the attorney to prove the objective reasonableness of the transaction, just as fiduciaries must generally prove the fairness of transactions with subordinate parties in which the fiduciary stands to benefit.

Rule 1.5 also generally affords lawyers broad discretion in how to structure their fees. Obviously Rule 1.5(a)(8) expressly contemplates both fixed and contingent fees, and contingent fees are generally permitted if they comply with the requirements of Rule 1.5(c) and do not involve the representations addressed by Rule 1.5(d). The reasonableness requirements of Rule 1.5(a) do, however, limit the ability of an attorney to collect a "flat" or "nonrefundable" fee if the attorney withdraws – or is fired – before the contemplated work is completed. Some jurisdictions modify Rule 1.5 to make clear that fees are always refundable to the extent they are unearned. *See, e.g.,* Ariz. Rule Prof. Conduct 1.5(d)(3), Ohio Rule Prof. Conduct 1.5(d)(3) (both prohibiting fees "earned upon receipt" or "nonrefundable" unless client "is simultaneously advised in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund" based upon the value of the representation). Other jurisdictions recognize this as a matter of common law. *See, e.g., Matter of Gilbert*, 346 P.3d 1018, 1025 (Colo. 2015); *In re Disciplinary Action Against Hann*, 819 N.W.2d 498, 507 (N.D. 2012); *In re Kendall*, 804 N.E.2d 1152, 1160 (Ind. 2004).

D. *Putting Things in Writing*

While Rule 1.5(a) does not (in most jurisdictions) require a client's consent to be taken into account in assessing whether a fee is reasonable, Rule 1.5(b) does require both the scope of the representation and "the basis or rate of the fee and expenses for which the client will be responsible" to be communicated to the client, "preferably in writing," either before or shortly after commencing the representation – except under circumstances where the client is regularly represented under the same terms. As the term "preferably in writing" suggests, a written fee agreement is not usually *required* by most jurisdictions under Rule 1.5(b). *But see* Mass. Rule Prof. Conduct 1.5(b)(1) (requiring written communication concerning fees except in limited circumstances). As a practical matter, however, putting a fee agreement in writing is advisable. Oral fee agreements, like any oral agreements, are worth the paper they are written on. At best, they leave room for misunderstanding and create problems of proof in the event an attorney must sue to collect a fee.

A written fee agreement is, however, required in two special circumstances. First, any contingent fee agreement must not only be in writing, but the writing itself must contain minimum information. Under Rule 1.5(c), a contingent fee agreement not only must be in a

writing "signed by the client," but must set forth particulars as to how it will be calculated and address the attorney and client's respective responsibilities for associated costs; in addition, the lawyer must provide an accounting at the conclusion of the representation. Many jurisdictions provide yet further requirements on contingent fee agreements, including caps on the amounts that can be recovered or further details that must be disclosed. *See, e.g.,* Mass. Rule Prof. Conduct 1.5(c) (requiring details concerning contingency upon which compensation will be paid and consideration of what will occur upon discharge of lawyer); Fla. Rule Prof. Conduct 4-1.5(f) (providing, among other things, a statement of rights and responsibilities that must be included in certain contingent fee agreements). Second, Rule 1.5(e) requires a client to be advised in writing if the lawyer intends to divide fees with another lawyer, not in the same firm. The consequences for failing to comply with these writing requirements can be severe. Unsurprisingly, they can lead to disciplinary action. *See, e.g., In re Spak,* 719 N.E.2d 747 (Ill. 1999) (disciplining attorney for unwritten fee agreement, even though client knew fee terms); *In re Bell*, 716 A.2d 205, 206 (D.C. 1998) (imposing discipline for undisclosed fee-sharing). Failure to reduce the agreement to writing may also render the fee agreement unenforceable. *See, e.g., Paul V. Episcope, Ltd. v. Law Offices of Campbell and DiVincenzo.* 869 N.E.2d 784 (Ill. App. 2007) (failure to note division of fees precluded action to recover fees under sharing arrangement); *but see Mullens v. Hansel-Henderson*, 65 P.3d 992, 995 (Colo. 2002), *as modified on denial of reh'g* (Jan. 13, 2003) (oral contingent fee agreement unenforceable, but attorney could recover in quantum meruit).

E. *Sharing Fees*

Rule 1.5(e) not only requires agreements to share fees to be in writing, but also imposes responsibilities upon the lawyers involved. Rule 1.5(e) permits lawyers[1] to share fees across law firms only if they divide fees in proportion to the services they perform *or* they assume joint responsibility for the representation. Although many While the "joint responsibility" provision may allow a lawyer to accept a "referral fee" even if the lawyer performs *no* work, such fees come at a cost. As a comment to the rule notes, "joint responsibility" means financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." Rule 1.5, Cmt. 7. That means that, if the lawyer accepts the fee, the lawyer may also be jointly responsible

[1] Lawyers cannot generally share fees with non-lawyers. *See* Model Rule 5.4(a).

for any misconduct or malpractice by the lawyer who earns it. *See, e.g., Duggins v. Guardianship of Washington Through Huntley*, 632 So. 2d 420, 428 (Miss. 1993); *Aiello v. Adar,* 750 N.Y.S.2d 457, 465-66 (N.Y. Sup. Ct. 2002).

III. Ethically Collecting Fees

While Rule 1.5 imposes general reasonableness requirements on the fees that may be collected, it does not specifically address how an otherwise reasonable fee may be collected. In most jurisdictions, attorneys have a variety of tools at their disposal to ensure that the fees they charge will be collected – including the use of retainers, liens, and lawsuits. Each of these tools, however, brings with it a set of ethical restrictions.

A. *Retainers*

Attorneys commonly use retainers to secure payment of their legal fees and costs. The word "retainer," however, has a variety of different meanings – and those different meanings result in different application of the relevant ethical rules.

In *Dowling v. Chicago Options Associates*, 226 Ill.2d 277(2007), the Illinois Supreme Court provided a useful overview of the different types of retainers employed by attorneys. First, there is a "true," "general," or "classic" retainer – paid by the client simply to secure the lawyer's availability during a specified time or for a specified matter. Such retainers are effectively flat fees to secure the lawyer's services, in whatever quantity, and are rarely used in the modern era (though they are commonly used in mortgage foreclosure defense, with a set fee paid each month unrelated to the quantity of services provided). The second, and most common, retainer is the "security" retainer – intended to secure payment of fees for future services that the lawyer is expected to perform. Under this arrangement, the funds paid to the lawyer are not present payment for future services; rather, the retainer remains the property of the client until the lawyer applies it to charges for services that were actually rendered. The third type of retainer is an "advance payment" retainer – a payment made in exchange for a commitment to provide legal services in the future. While the payment is the property of the lawyer, it (like a flat fee) is typically refundable if the services are not performed. Most jurisdictions restrict the use of advance payment retainers, and some prohibit them altogether. *Compare Dowling,* 226 Ill.2d at 293 (discussing restrictions on use of advance payment retainers) *with Iowa Supreme*

Court Attorney Disciplinary Bd. v. Piazza, 756 N.W.2d 690, 696 (Iowa 2008) (rejecting concept that advance payments could be treated as attorney property).

The distinctions between these retainers is important because of Model Rule 1.15, which governs the safekeeping of property. Rule 1.15(a) generally provides that: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property," further providing that a lawyer must takes steps to keep records of such account funds. Rule 1.15(c) similar provides that a lawyer "shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." Meanwhile, Rule 1.15(b) restricts lawyers from depositing their own funds in a client trust account, except as may be necessary for paying service charges.

Taken together, these provisions mean that different types of retainers must be handled differently. Security retainers, which are acknowledged to be the client's property, must be placed in trust. "True" retainers, which are immediately earned, cannot be – since they belong to the lawyer. Advance payment retainers, when allowed, are usually understood to belong to the lawyer (subject to refund), and therefore cannot be placed in a client trust account. Where advance payment retainers are not permitted, however, it is an ethical violation to treat them as lawyer funds. Indeed, some jurisdictions treat even flat fees as client property until they are "earned" by the lawyer performing the requested service. *See Iowa Supreme Court,* 756 N.W.2d at 698 ("a flat fee is an advance fee that is earned when the services are completed and therefore requires deposit in a client trust account coupled with a contemporaneous accounting to the client prior to withdrawal of such fees from the trust account").

B. *Liens*

Attorneys also can assert liens against client property to secure payment. Those liens fall into two distinct categories: retaining liens and charging liens.

A retaining lien is exactly what it sounds like – a right by the attorney to retain property belonging to the client, but in the possession of the attorney, until amounts due to the attorney are paid. Retaining liens are "possessory" liens – they apply to any property in the lawyer's possession, including not only money, but papers and other documents that may have been entrusted to the lawyer in the course of the employment. To enforce such a lien, the attorney

simply refuses to return the client's property until the amounts due are paid; indeed, once the property is returned to the client, the lien vanishes. The monetary value of the property retained is also generally irrelevant – the only value that matters is the value to the client, since the retained property is effectively held hostage until payment is received. *See generally, Brauer v. Hotel Associates, Inc.,* 40 N.J. 415, 422, 192 A.2d 831, 835 (1963) (describing general characteristics of retaining liens and noting that "intrinsic worth or worthlessness" of property retained is immaterial). Perhaps for that reason, however, retaining liens are sometimes the subject of special ethical scrutiny, with some jurisdictions holding that a lawyer's obligation to take no action prejudicial to the client's interest either limits or eliminates entirely a lawyer's right to assert a retaining lien over client property. *See, e.g., Defendant A v. Idaho State Bar*, 2 P.3d 147 (Idaho 2000); *Ferguson v. State*, 773 N.E.2d 877 (Ind. Ct. App. 2002); Minn. Stat. Ann. Section 481.13, Louisiana Rule of Prof'l Conduct 1.16(d)); North Dakota Rule of Prof'l Conduct 1.19(a); New Jersey Rule of Prof'l Conduct 1.16(d) (2013 amendment).

Charging liens, by contrast, allow the attorney to claim an interest in a judgment or settlement obtained by the client with the lawyer's assistance. Such liens originated as an equitable remedy but are now codified into statue in most jurisdictions. The rationale behind these liens is that the client has benefited from the lawyer's services and therefore the lawyer is entitled to benefit from the judgment the lawyer has secured for the client. *See Len-Hal Realty Inc. v. Wintter & Cummings*, 689 So.2d 1191 (Fla. Dist. Ct. App. 1997). They apply, however, only where there is a recovery to which the lien will attach – absent a judgment or settlement that creates a pool from which fees can be recovered, a charging lien provides no relief. *See, e.g., Goldstein, Goldman, Kessler & Underberg v. 4000 East River Road Associates,* 409 N.Y.S.2d 886 (N.Y. App. Div. 1978) (no proceeds to which lien could attach in matter where client's tax bill was reduced); *McGinley v. United States,* 942 F. Supp. 1239 (D. Neb. 1996) (stock certificates not equivalent to a judgment when ruling in underlying state court action was interlocutory).

The use of liens is, unsurprisingly, also subject to ethical restrictions. Model Rule 1.8(i) provides that a lawyer "shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client," with two exceptions: (1) a reasonable contingent fee in a civil case and (2) "a lien authorized by law to secure the lawyer's fee or expenses." While this provision expressly permits the use of charging or retaining liens to the

extent "authorized by law," attempts to assert liens without complying with statutory or other requirements can lead to discipline. *See, e.g., People v. Razatos*, 636 P.2d 666, 669 (Colo. 1981) (attorney disciplined for taking undisclosed interest in property that was the subject of transaction; noting that attorney had "no legal basis for the assertion of a lien to secure a fee obligation even if any such obligation existed"). Moreover, Rule 1.8(a) generally prohibits lawyers from knowingly acquiring "an ownership, possessory, security, or other pecuniary interest adverse to a client" unless the transaction's terms are fair, reasonable, and fully disclosed to the client in writing, the client is told of the ability to seeks independent advice concerning it, and the client gives informed consent. While obtaining an interest in the fruits of a recovery may be permitted as a charging lien, efforts to obtain security interests in other property are likely to be carefully scrutinized.

C. *Special concerns in bringing suit for fees*

Finally, while attorneys (like any other creditor) can always bring suit to recover unpaid fees, the necessity of bringing suit does not absolve the attorney of their professional responsibilities. Under Model Rule 1.6(b)(5), a lawyer may "reveal information relating to the representation of a client to the extent the lawyer believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client," and comment 11 to this rule explains that a lawyer entitled to a fee is permitted to prove the services rendered in an action to collect it, since a "beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." With that said, the fact that a client has not paid bills does not afford a lawyer free rein to parade a client's many transgressions in the hopes of public embarrassment. Comment 16 to Rule 1.6(b)(5) points out that attorneys should attempt to limit access to the confidential information to the tribunal "or other persons having a need to know it" and appropriate protective orders should be sought to the "fullest extent practicable." Moreover, attorneys are at risk for disciplinary action when they seek to gain an advantage in fee disputes by *unnecessarily* revealing client confidences. *See, e.g., In re Disciplinary Proceeding Against Boelter*, 985 P.2d 328 (Wash. 1999) (lawyer suspended for six months after threatening client in fee dispute, saying he would be "forced" to reveal client confidences in any court documents in fee litigation); *In re Conduct of Huffman*, 938 P.2d 534 (Or. 1999) (lawyer suspended for two years for, among other things, revealing client confidences to client's new lawyer in fee dispute).

Moreover, the need to maintain client confidences may restrict the use of collection agencies. In general, states that have considered this topic caution that disclosure of client information to such agencies must be the minimum necessary for the collection effort and no more. *See, e.g.*, SUPREME COURT OF OHIO BD. OF COMM'RJS ON GRIEVANCES AND DISCIPLINE OP. 91-16 (June 14, 1991); STATE BAR OF ARIZONA ETHICS OP. 2000-07; NEW YORK STATE BAR ASS'N COMM. ON PROF'L ETHICS OP. 608 (1990). Additionally, the *sale* of accounts receivable to a collection agency has been held to be improper under not only Rule 1.6, but also under Rule 5.4 (sharing legal fees with a non-lawyer), since it removes the lawyer completely from the collection process and may involve collection activity that is inconsistent with the lawyer's ethical obligations. *See* D.C. BAR LEGAL ETHICS COMM. OP. 298 (2000).