

Alabama Rules of Professional Conduct

Client-Lawyer Relationship

Rule 1.5.

Fees.

(a) A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee. In determining whether a fee is excessive the factors to be considered are 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;

(8) Whether the fee is fixed or contingent; and

(9) Whether there is a written fee agreement signed by the client.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(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 writing 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. 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 fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if:

(1) Either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer;

(2) The client is advised of and does not object to the participation of all the lawyers involved;

(3) The client is advised that a division of fee will occur; and

(4) The total fee is not clearly excessive.

(f) Without prior notification to and prior approval of the appointing court, no lawyer appointed to represent an indigent criminal defendant shall accept any fee in the matter from the defendant or anyone on the defendant's behalf. A lawyer appointed to represent an indigent criminal defendant may separately hold property or funds received from the defendant or on the defendant's behalf which are intended as a fee for the representation, as provided for by Rule 1.15, only if the lawyer promptly notifies the appointing court and promptly seeks its approval for accepting the property or funds as a fee.

Comment

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an

earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). 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(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

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. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

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, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraphs (e)(1)(a) and (b) permit the lawyers in any type of matter to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. Paragraph (e)(1)(c) permits the lawyers in a contingency fee matter to divide the fee without restriction other than disclosure to the client. Paragraphs (e)(2) and (3) do not require disclosure to the client of the share that each lawyer is to receive. However, Rule 1.5(b) does require the extent of the division to be disclosed upon request. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved. Paragraph (e)(4) requires that the total

fee of both lawyers not be clearly excessive. That the total percentage applicable to a contingency fee arrangement is increased when a matter is referred does not indicate that the fee is excessive. Nor is excessiveness shown merely because the receiving lawyer would have accepted the matter for a lesser total fee had that lawyer been the only lawyer receiving a fee.

Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, 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.

Fees for Indigent Representation

Lawyers appointed by a court to represent indigent criminal defendants are typically paid by the government, under various state or federal programs providing for the representation of indigent criminal defendants. When a criminal defendant, upon the basis of indigency, receives representation by a lawyer through a court appointment, the lawyer may not accept any fee from the defendant or from anyone acting on behalf of the defendant, unless the lawyer obtains the prior approval of the court. This prohibition prevents the defendant from abusing the system of court appointments. Furthermore, a lawyer who accepts a court appointment does so with the expectation that any fee in excess of the amount approved through the appointment system will be subject to further scrutiny by the court. When a criminal defendant is indigent at the time of appointment but is later able, through family, friends or other sources, to pay a fee to the lawyer, the lawyer may deposit the proffered fee, which may be kept separately in trust according to the Rules regulating the holding of property for clients or third persons. When the appointing court approves the acceptance of a fee from the defendant or on his behalf, then the Rules generally applicable to the disbursement of such property or funds apply. Otherwise the fee shall be disbursed first as the appointing court directs.

Comparison with Former Alabama Code of Professional Responsibility

Rule 1.5(a) has no counterpart in the Disciplinary Rules. In 1974, Alabama did not adopt Model DR 2-106(A) which provided that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee" and Model DR 2-106(B), which provided that a fee is "clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." Instead, these considerations were included in the prior EC 2-18. The factors to be considered in determining whether a fee is excessive in Rule 1.5(a) are substantially identical to

those listed in EC 2-18, with two modifications. The factor of “the responsibility, financial or otherwise, assumed by the lawyer,” as previously contained in EC 2-18, is omitted. And, a new factor is added at Rule 1.5(a)(9): “Whether there is a written fee agreement signed by the client.” EC 2-17 states that a lawyer “should not charge more than a reasonable fee”

There was no counterpart to paragraph (b) in the Disciplinary Rules. EC 2-19 stated that it is “usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent.”

There was also no counterpart to paragraph (c) in the Disciplinary Rules. EC 2-20 provided that “[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States,” but that “a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee”

With regard to paragraph (d), DR 2-107(A) prohibited “a contingent fee for representing a defendant in a criminal case.” EC 2-20 provided that “contingent fee arrangements in domestic relation cases are rarely justified.”

With regard to paragraph (e), DR 2-107(A) permitted division of fees only if: “(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.” Alabama had rejected the other subdivisions of the Model DR which also required that “(2) The division is in proportion to the services performed and responsibility assumed by each” and “(3) The total fee does not exceed clearly reasonable compensation” Further, in a provision unique to Alabama, as found in DR 2-103, it was said: “Nothing contained herein shall prohibit the division of fees with a forwarding lawyer.” A similar provision was added to the Model Rule at Rule 1.5(e) by the phrase “including a division of fees with a referring lawyer.”

There is no counterpart to paragraph (f) in the Disciplinary Rules. EC 2-29 stated that “[i]t is not unethical for an appointed attorney to receive a fee voluntarily paid by the defendant, or persons interested in him; but any appointed attorney receiving such payment shall forthwith advise the appointing court of such fact.”