

Practical Ethics

Practical Suggestions for Flat Fees or Minimum Fees in Criminal Cases

By the NHBA Ethics Committee

This opinion was issued following a vote by the NHBA Board of Governors on January 17, 2008.

One of the newly-enacted professional conduct rules approved by the New Hampshire Supreme Court that drew comment, if not consternation, especially from criminal defense attorneys, is the rule which affects the management of flat fees or minimum fees. This article is designed to provide guidance and practical suggestions about the management of flat fees or minimum fees.

At first glance, the rule – Rule 1.15(d) seems fairly unobtrusive. The Rule, which is part of a set of rules entitled “Safekeeping Property” states:

“(d) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.”

What could possibly be controversial about the concept that a lawyer should not be paid until that lawyer earns a fee or incurs expenses on behalf of a client?

The problem arises chiefly in criminal cases, where private defense attorneys traditionally seek a so-called flat fee or minimum fee to represent criminal defendants. Flat fees, in particular, are desirable, because the client may or may not have access to funds or assets to pay an attorney as a case winds its way through the justice system. To ensure that there are funds available, a criminal defense attorney will typically charge a flat fee or a minimum fee which may rise or fall based on the nature of the offense and the work that the representation is expected to generate.

However, the New Hampshire Bar Association Ethics Committee, which undertook the initial work and research to revise the rules of professional conduct at the request of the New Hampshire Supreme Court, discovered that many criminal defense attorneys routinely deposit the flat fee or minimum fee directly into their general operating accounts. If, for some reason, all or a portion of the fee must be refunded or returned to a client, then the attorney draws such funds from the general operating account and sends them back. The Committee also learned that many criminal defense attorneys do not maintain trust accounts.

The problem is this: If all or any portion of the fee is subject to a refund or a return during the course of or at the conclusion of the case, then by its very

nature, it has not been earned. And if the fee is not yet earned, then Rule 1.15(d) requires that it be maintained in a client trust account, subject to all of the formalities of New Hampshire Supreme Court Rule 50, until the fee is earned or expenses have been incurred.¹

In fairness to the criminal defense bar, there are other practice areas where lawyers may utilize the same fee arrangement. Fixed fees are typically charged in simple real estate transactions, formations of business associations, bankruptcy filings and the drafting of wills and other advance directives. And some lawyers immediately deposit that fixed fee into their general accounts before work is undertaken.

While listening carefully to concerns from the criminal defense bar that the imposition of client trust accounting would unnecessarily burden their practices and increase their overhead expenses, the Committee felt that of compelling importance was the need to safeguard client funds until fees are earned or expenses are incurred. Yet, it also understood that if practical guidance were not provided, cautious attorneys might not draw on the fixed fee or minimum fee until the case was nearly over, for fear of violating Rule 1.15(d). The result could be devastating on small law offices, which rely heavily on daily or weekly cash flow to meet obligations and expenses.

A Practical Approach: The Comments to Rule 1.15(d)

The best place to start is with the New Hampshire Ethics Committee comments to Rule 1.15(d). They appear following the text of the rule. While the comments, which were developed by the Ethics Committee, have not been adopted by the New Hampshire Supreme Court, they provide useful guidance in interpreting the intent and meaning of the rules. For ease of reading, we have broken up the comments into sections. They state that:

“Rule 1.15 (d) provides that funds may only be withdrawn from a trust account when fees are ‘earned’ or expenses are ‘incurred.’ This new rule, while implicitly recognizing that so-called flat fees and minimum fees are both permissible, raises questions about when such fees have been ‘earned’ for purposes of transfer from a trust account to an attorney’s business or operating account (or perhaps directly into a personal account).

While the commentators offer no clear, universal rule to guide attorneys in this difficult area, they do generally agree that Rule 1.5’s requirement that any fee must be reasonable is the overarching principle governing all fee issues.”

The foregoing portion of the comments is followed by a footnote, which states as follows:

¹ For an excellent, yet simple discussion about how to properly perform client trust accounting, there is an article prepared by Craig Calaman, Staff Auditor for the New Hampshire Supreme Court Attorney Discipline Office. That article has routinely appeared in the New Hampshire Practice Series produced for new admittees, and is available on request.

"Rule 1.5 does not permit a retainer for services that is absolutely non-refundable because such a fee agreement is inconsistent with the Rule's requirement that a fee must always be reasonable. However, the use of a general retainer, sometimes referred to as a 'classic retainer' or an 'engagement retainer,' continues to be recognized as permissible by most commentators. This retainer reflects an agreement between attorney and client in which the client agrees to pay a fixed sum to the attorney in exchange for the attorney's promise to be available to perform, at an agreed upon price, legal services of a specified or general type that arise during a specified time period. Because this retainer is given in exchange for availability and not for the rendition of legal services, it is deemed to be earned when paid."

The Committee's comment continues as follows:

"Because this requirement (that any fee must be reasonable) may necessitate the return of some portion of a flat or minimum fee when the lawyer cannot complete representation because of conflict or other early termination of the attorney/client relationship, many commentators believe that such fees should be considered 'earned' only when work of comparable value has been performed. (Parenthetical supplied).

"This view is based upon a client protection model which is designed to ensure that fees which must be returned under Rule 1.5 are retained in the lawyer's trust account. While recognizing that some commentators favor treating flat fees as 'earned' upon receipt when there is a clear written fee agreement to that effect, the more prudent course is for lawyers to deposit all flat fees or minimum fees into their trust accounts to be periodically withdrawn only upon a determination that the value of services provided is in reasonable proportion to the percentage of the total fee withdrawn."

The Committee's comment includes a citation to a New Hampshire Supreme Court disciplinary case in which the deposit of a flat fee into an attorney's operating account resulted in a violation of the rules of professional conduct. It states:

"The question of non-refundable, earned upon receipt retainers was addressed in *Doherty's Case*, 142 N.H. 446 (1997) in the context of bankruptcy court proceedings. In that case, the bankruptcy court had found that in a bankruptcy proceeding there was no such thing as a non-refundable, earned upon receipt retainer. (The) lawyer's failure to segregate a client's retainer into a separate client trust account violated Rule 1.15(a)(1). The attorney admitted to this violation and the Supreme Court affirmed the referee's ruling that the attorney had violated Rule 1.15(a)-(c)." (Parenthetical supplied).

So, from Rule 1.15(d) and the accompanying comments, we can surmise the following:

1. Legal fees and/or expenses, paid in advance, cannot be withdrawn until such fees are earned or such expenses are incurred.

2. Any earned fee must be reasonable under Rule 1.5.²

3. If a fee is not earned on receipt, it remains property of the client. As such, it must not be placed in the general operating account, and must instead be placed in a client trust account. The client trust account must be maintained in compliance with Supreme Court Rule 50.

4. To ensure that a fee is reasonable, there must be some proportional relationship between the amount of the fee withdrawn and the value of the services provided.

Statements in Fee Agreements

As a result, practitioners who charge fixed fees ought to amend their client agreements or letters of representation to set forth what services will be provided before a portion of the fixed fee is withdrawn. Generally, most practitioners have a fair idea of the investment of time and resources that accompany various stages of a case. With that in mind, the Committee came up with two different examples.

Example 1: A 'Garden-Variety' District Court Criminal Case

The firm of Clarence Darrow will charge you a fixed fee of Five Thousand Dollars (\$5,000.00) to represent you on the criminal charges brought against you arising out of your arrest on February 29, 2007. This fee will be for my representation of you before the District Court [and Superior Court] regarding that arrest. Any fee for a subsequent appeal to [the Superior Court, or] the Supreme Court, or any collateral attack in state or federal court will have to be negotiated separately. The fee will be deposited in our firm's trust account and

² Rule 1.5 provides that a fee is reasonable based on the following factors:

(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.

[will/will not] earn interest for you. We will withdraw portions of that fixed fee as that fee is earned. Please note that any expenses in this case will be billed separately and are payable upon demand. Every case is different but I will make a determination as to what portion of the fee has been earned based upon the following guidelines:

1. Upon meeting you, and/or your family, opening a file, requesting discovery, commencing any necessary investigation, and dealing with any initial issues regarding bail or detention, I will withdraw one third of the above fee.
2. After discovery is received and reviewed, and after negotiations with the prosecutor, if necessary, and discussions with you regarding any proposed disposition, and after the research for and preparation of any necessary pretrial motions, I will withdraw the second third.
3. The remainder of the fee will be withdrawn after the substantial completion of your case. Please note that if, after a final disposition, some work on your behalf still remains to be done, such as a motion to annul your records, presenting proof to the court or prosecutor of your completion of any programs, etc., I will still consider the case to be substantially completed and will not charge you a further fee.

Please note that the benchmarks for withdrawing fees are merely guidelines. Every case is different and I will make a good-faith effort to use my best judgment in determining whether a benchmark has been met. Please also note that the benchmarks set forth are examples of the type of work that may be done on behalf of a criminal defendant but, by this agreement, I am not guaranteeing that every activity set forth above will be necessary for your case.

Example 2: A More Complex Criminal Case

In a more involved, complex case, the pertinent section of an agreement for the defense of a criminal client might read as follows:

"This firm will charge you a fixed fee of Twenty Thousand Dollars (\$20,000.00) to represent you in the charge brought against you pertaining to _____. That fee will be deposited in the firm's trust account and will/will not earn interest for you. We will withdraw portions of that fixed fee as we earn our fees and as expenses are incurred. We will earn the fee as we complete the following:

1. Initial client interview, preparation of letters requesting mandated discovery, determination of investigative needs and retaining investigator if necessary, preliminary assessment of legal issues in case -- 15%.

2. Review of discovery provided in response to initial letters, initial investigation of facts including interaction with private investigator, assessing need for and retaining experts -- 30%.

3. Preparation of pretrial motions, continued development of factual record including identifying and interviewing potential defense witnesses, negotiations with prosecutor -- 30%.

4. Trial preparation, plea discussions with prosecutor, resolution of case by plea or trial -- 25 %.

We will use our good-faith judgment to determine when a particular benchmark has been reached to draw down the fee, and notify you. Our determination will be presumed valid unless you notify us in writing within ____ days of the date you receive notice that the fee will be drawn. The fee you have deposited with us will also be drawn down as expenses are incurred on your behalf no less often than weekly. Please see the Expenses section of this Agreement for the types of expenses that you can expect. This fee does not include appeals on your behalf. If additional charges are brought against you arising out of the same matter, we will need to amend this agreement. If our services are terminated prior to the achievement of a benchmark, we will withdraw a portion of the remaining fee based on the proportionate value of the services we have provided since the previous benchmark."

Obviously, the benchmarks in these sample provisions can be changed based on the case. Different benchmarks – including greater numbers of benchmarks -- may be considered, especially for more complex matters. Because there are so many factors in Rule 1.5 which can affect the reasonableness of a fee beyond that of time, benchmarks are likely to be upheld if there are reasonable efforts to equate the earning of a fee to a result or a difficult piece of work or the involvement of other personnel (experienced senior counsel, expert witnesses, key paralegals or investigators) in the case.

A few final pointers:

1. The Committee recommends that some communication, whether in the form of a bill or letter, be forwarded to the client when the attorney determines that a particular benchmark has been achieved, and therefore, that a portion of the fee will be withdrawn.

2. As a matter of sound practice management, it may make sense to keep track of the time one invests in a criminal matter. First, it helps the lawyer determine whether the fixed or minimum fee the lawyer is charging is adequate. Second, if there are challenges to the fee, either in court or in the attorney discipline system, a thorough set of records will be invaluable in defending against the claim.

3. The Committee had contemplated whether the amount withdrawn

from a fixed or minimum fee could vary, based on the “value” that the attorney produced in the defense of the client. For example, could success on a motion that results in the exclusion of critical evidence act as a benchmark to permit a larger withdrawal of a fee, if this feature is built into the client agreement? However, committee members felt there was a risk that such “value billing” could constitute a form of contingency fee – which is impermissible in criminal cases. *See* NHRPC 1.5(e).

4. It is important to be diligent about removing fees from the trust account once they are earned. Timely removal of earned fees prevents the risk of a different professional conduct violation – the claim that one has permitted a firm’s own funds to become commingled with client funds in the firm’s client trust account. *See* NHRPC 1.15(a); *see also* NHRPC 1.15(c) (permitting an appropriate amount of the lawyer’s own funds to be placed in the trust account to cover the expenses of maintaining the account).

The Committee welcomes suggestions from defense counsel or from other attorneys who charge fixed fees to assist New Hampshire attorneys in creating templates to outline when portions of those fees are earned. Through the sharing of that information, the Committee hopes that it can encourage the creation of practical fee agreements that honor Rule 1.15(d), while appreciating the economics of law practice – especially for criminal defense counsel.

On the website: Interested in how the new Rules of Professional Conduct affect your areas of practice? Visit the “Rewriting the Rules” section of www.nhbar.org in the Ethics area of Legal Links.