SUFFOLK ACADEMY OF LAW
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BETTER BILLING SERIES: Better Billing Practices

Presenters:

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SCBA Center - Hauppauge, NY

SUFFOLK ACADEMY OF LAW
560 Wheeler Road
Hauppauge, NY 11788

GOOD BILLING PRACTICE

Presenter

JEFFREY S. HORN, ESQ.

1. Good billing practices are to ensure that you are paid for the legal services you have agreed to perform. It also helps to ensure that your client understands the parameters and scope of the services to be performed.

2. If possible, retainer agreements and engagement letters should be executed in your office so that you are certain that the client has read the agreement, has had sufficient opportunity to ask any questions they may have with the agreement and so as to ensure a mutual understanding of what legal services are to be performed.

3. A face to face meeting also helps to ensure that the client understands the seriousness of the arrangement and intends to abide by the terms of the agreement.

4. A face to face meeting allows you to advise the client as to your estimate of the total amount of fees that may be expected. This helps prevent client complaints that they expected the fees to be a lot less. Of course, at the early stage, it must be impressed upon the client that there are many variables which may occur which significantly alters the amount of total fees that may be expected.

5. The face to face meetings also allows you to become informed as to the clients expectations whether reasonable or unreasonable. These expectations include litigation outcome as well as fees to be charged and your expectation that bills are to be paid in accordance with the terms of your retainer agreement or engagement letter. Client's without reasonable expectations must be advised that their matters may be prolonged and very expensive. Of course, clients with unreasonable expectations are not likely to pay for the legal services when their expectations are not met.

6. In those cases in which the client is being billed for the time spent on the matter

and where those clients excessively call you to discuss status or certain mundane issues, it is advisable to quickly send a bill so that the client visually sees that telephone calls are billed and may be costly. This will help prevent them from complaining about their bill at a later date.

7. Think twice before discounting a bill before the end of the case. If you do, the client may well expect future discounts before paying future bills.

8. Consider the following to be placed in your engagement letter or retainer agreement:

i. Upon the setting of a trial or hearing date, the payment of an additional retainer;

ii. An agreement authorizing you to run their credit card number when there is a balance due whether for legal services or disbursements;

iii. Providing a provision that the parties specifically waive their right to a *de novo* review of any arbitration award governing fee disputes;

iv. A provision raising the cap of the arbitration proceedings from $50,000.00 to whatever the balance due, or any amount in dispute;

v. Although it is most important to set forth with specificity the services that are to be rendered, insert a provision in which any other services which are rendered are covered under the engagement letter or retainer agreement;

vi. While the Court Rules require itemized billing every sixty (60) days, bill monthly so as to ensure balances due are less likely to shock the client. It also helps with cash flow;

vii. Provide for the engagement letter or retainer agreement to include a provision that the client consents to a security interest in the event they are unable to pay your legal fees. The law firm must have that option, not the client.

viii. Consider a provision that issues regarding fees must be brought to the law firms attention within two (2) billing cycles and if unresolved, the issue must be set forth in writing.

RETAINER AGREEMENTS & ENGAGEMENT LETTERS

22 N.Y.C.R.R. §1400.3 (Retainer Agreements) provides

> An attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered. (See full text annexed at page 10 & 11)

22 N.Y.C.R.R. § 1215.1 (Letters of Engagement) provides

> (a) effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commenting the representation, or within a reasonable time thereafter (I) if otherwise impractical or (ii) if the scope of services to be provided cannot be determined at the present time of the commencement of representation. (See full text annexed at page 12)

9. This section (22 N.Y.C.R.R. § 1215) does not apply where the fee to be charged is expected to be less than $3,000.00 or where the representation are for services which are the same general kind as previously rendered to and paid for by the client or in domestic relations matters or where the representation is by an attorney admitted to practice in another jurisdiction and does not maintain an office within the State of New York or where no material portion of the services are to be rendered in New York.

FEE DISPUTE RESOLUTION PROGRAM

22 N.Y.C.R.R. Part 136 applies to all matters where representation was commenced on or after January 1, 2002. The exceptions are as follows:

I. Representation in criminal matters;

ii. Amounts in dispute involving a sum of less than $1,000.00 or more than $50,000.00 except where the parties have consented otherwise;

iii. Claims involving substantial legal questions including legal malpractice or misconduct;

iv. Claims against an attorney for damages or affirmative relief other than a judgment of the fee;

v. Disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a Court; or where the fee has been determined by Court order;

vi. Disputes where no attorney services have been rendered for more than two (2) years;

vii. Disputes where attorneys are admitted to practice in other jurisdictions and do not maintain offices in the State of New York or where no material portion of the services was rendered in New York;

PROFESSIONAL CONDUCT RULES

Rule 1.5 provides that a lawyer shall not charge or collect an excessive fee. In determining same, the time involved is one of the factors to be considered. Rule 1.5 (a)(1). Thus, setting forth the time spent on each legal service rendered must be made.

CASE LAW

10. In determining an award of counsel fees actual time spent is a factor to be considered. *Rubinstein v. Rubinstein*, (37 A.D.2d 514).

11. Court cannot award *quantum meruit* for more than the amount billed. *Finkelstein v. Kins*, 124 A.D.2d 92.

12. Summary judgment on an account stated was denied where the client claimed to have orally objected. *Sandvoss v. Dunkelberger*, 112 A.D.2d 278.

13. Failure to show an account stated results in a fee determination by quantum

meruit considerations. *Perez v. Perez*, 154 A.D.2d 359.

14. Absent fraud, mistake or overreaching an account stated is conclusive on the parties. The court may not examine the reasonableness of the fee. *Rodkinson v. Haccker*, 248 N.Y. 3480.

15. Reasonableness of a fee is not a defense to an account stated. *Lapidus v. Elizabeth Street*, 92 A.D.3d 405.

16. Billing which is performed in a cursory manner and without showing how the total sought was computed is a basis to deny a motion for summary judgment on an account stated. *Katz v. Repko* - AT 9 & 10 NYLJ 12/21/92

17. It is not a defense that the litigant is unable to pay the fee. *Morrison-Kohen v. Ackerman*, 280 A.D.2d 355.

18. Summary judgment is granted where the billing shows the billable hours rendered on behalf of the client. *Wilson, Elser, Moskowitz, Edelman & Dicker, LLP., v. City of Mount Vernon*, 109 A.D.3d 537.

ATTORNEY FEES - QUANTUM MERUIT

19. The "letter of engagement" rule in New York law "requires attorneys to provide all clients with a written letter of engagement explaining the scope of legal services, the fees to be charged, billing practices to be followed, and the right to arbitrate a dispute." *Seth Rubenstein, P.C. v. Ganea*, 833 N.Y.S.2d 566, 570 (2d Dep't 2007) (citing N.Y. Comp. Codes R. & Regs. tit. 22, § 1215.1)

20. Section 1215.1, however, "contains no express penalty for noncompliance" and "was not [meant] to address abuses in the practice of law, but rather, to prevent

misunderstandings about fees ... between attorneys and clients." *Id.* Accordingly, New York courts have held that an attorney's noncompliance with section 1215.1 does not preclude the recovery of legal fees in *quantum meruit*. See, *Nabi v. Sells*, 892 N.Y.S.2d 41, 43 (1st Dep't 2009); *Nicoll & Davis LLP v. Ainetchi*, 859 N.Y.S.2d 368 (1st Dep't 2008) ("Plaintiff law firm's failure to comply with the rules on retainer agreements does not preclude it from suing to recover legal fees for services provided." (citation omitted)); *Seth Rubenstein*, 833 N.Y.S.2d at 570

21. "If the terms of a retainer agreement are not established, or if a client discharges an attorney without cause, the attorney may recover only in *quantum meruit* to the extent that the fair and reasonable value of legal services can be established."

22. In the absence of a written fee agreement, a client who has paid legal fees greater than the fair and reasonable value of legal services is entitled to a refund of the excess amount paid. *See, Cass & Sons v. Stag's Fuel Oil Co.*, 601 N.Y.S.2d 803 (2d Dep't 1993).

23. "In general, in order to determine what fee would be reasonable, the court uses a lodestar method, in which the hours reasonably spent by counsel, as determined by the Court, are multiplied by the reasonable hourly rate." *Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 841 (2d Cir. 1993) (internal quotation marks, alteration and citations omitted).

24. In determining the fair and reasonable value of legal fees, courts look to "such pertinent factors as the nature of the litigation, the difficulty of the case, the time spent, the amount of money involved, the results achieved and amounts customarily charged for similar services in the same locality." *Nabi*, 892 N.Y.S.2d at 44 (internal quotation marks

omitted).

25. The rule in the second circuit is that a party seeking an award of attorney fees must support that request with contemporaneous time records that show, "for each attorney, the date, the hours expended, and the nature of the work done." *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1154 (2d Cir.1983). (emphasis supplied)

26. "Under New York law, although attorneys' fees may be awarded in the absence of adequate contemporaneous time records, a court should not award the full amount requested." *Schafrann v. Karam*, No. 01 CIV. 0647(KNF), 2003 WL 289620, at *6 (S.D.N.Y. Feb. 10, 2003), *aff'd*, 81 Fed.Appx. 391 (2d Cir. 2003).*Mar Oil*, 982 F.2d at 841; *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1265 (2d Cir.1987)

27. The burden is on counsel to keep and present records from which the court may determine the nature of the work done, the need for it, and the amount of time reasonably required; where adequate contemporaneous records have not been kept, the court should not award the full amount requested."

28. However, even if contemporaneous records are not required under New York law, courts cannot rely on records that are admittedly speculative to set compensation. *Schafrann v. Karam; See, General Star Indemnity Co.*, 940 F.Supp. at 653

29. In fixing awards of counsel fees, the court should consider evidence of the time and skill required in the case, the complexity of the matter, the attorney's experience, ability and reputation, the client's benefit derived from the services, and the fee usually charged by attorneys for similar services (see, *Angotta v. Zelezny*, 112 A.D.3d 570, 975 N.Y.S.2d

893; *DeGregorio v. Bender*, 52 A.D.3d 645, 860 N.Y.S.2d 193; *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986, 825 N.Y.S.2d 80; *Padilla v. Sansivieri*, 31 A.D.3d 64, 67, 815 N.Y.S.2d 173)

30. The court rules imposing certain requirements upon attorneys who represent clients in domestic relations matters (see 22 N.Y.C.R.R. part 1400) were designed to address abuses in the practice of matrimonial law and to protect the public" (*Hovanec v. Hovanec*, 79 A.D.3d 816, 817, 912 N.Y.S.2d 442; *see Behrins & Behrins v. Sammarco*, 305 A.D.2d 346, 347, 759 N.Y.S.2d 151). The failure to substantially comply with those rules will preclude an attorney's recovery of unpaid legal fees (*see Hovanec v. Hovanec*, 79 A.D.3d at 817, 912 N.Y.S.2d 442; *see also, Behrins & Behrins v. Sammarco*, 305 A.D.2d at 347, 759 N.Y.S.2d 151).

31. In *Edelstein v. Greisman*, the Second Department found that the attorney involved sent sufficiently detailed invoices which demonstrated that substantial services were rendered (*see, Garr v. Kinberg*, 3 A.D.3d 322, 769 N.Y.S.2d 883; cf. *Flanagan v. Flanagan*, 267 A.D.2d 80, 81, 699 N.Y.S.2d 406). Moreover, the attorney presented evidence that the former client not only received and retained, without objection, the invoices for the legal services rendered, but also made a partial payment thereon, thereby ratifying them (*see, Johnner v. Mims*, 48 A.D.3d 1104, 1105, 850 N.Y.S.2d 786; *Matter of Winkelman v. Furey*, 281 A.D.2d at 908, 721 N.Y.S.2d 847; *see also Gross v. Gross*, 36 A.D.3d at 322, 830 N.Y.S.2d 166; *see generally Mintz & Gold, LLP., v. Hart,* 48 A.D.3d 526, 528, 852 N.Y.S.2d 248).

ATTORNEY DISCIPLINARY PROCEEDINGS AND BILLING

32. Both the First and Second Departments have issued Orders of Suspension as well as disbarment due to the charging and collection of excessive fees. *In the Matter of Robert H. Harris*, 259 A.D.2d 170 (2nd Dept., 1999); *Westchester County Bar Association v. St. John*, 43 A.D.2d 218 (2nd Dept., 1974); *In the Matter of Leonard Cousins*, 80 A.D.3d 99 (1st Dept., 2010).

33. It is a violation of the Professional Conduct Rules to change excessive fees. 22 N.Y.C.R.R. § 1200 Rule 1.5. (See full text annexed at pages 13 - 19)

McKinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, All Departments
Part 1400. Procedure for Attorneys in Domestic Relations Matters

N.Y.Ct.Rules, § 1400.3

§ 1400.3. Written Retainer Agreement

Currentness

An attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered. The agreement, and any amendment thereto, shall be signed by both client and attorney, and, in actions in Supreme Court, a copy of the signed agreement shall be filed with the court with the statement of net worth. Where substitution of counsel occurs after the filing of the net worth statement, a signed copy of the attorney's retainer agreement shall be filed with the court within 10 days of its execution. A copy of a signed amendment shall be filed within 15 days of signing. A duplicate copy of the filed agreement and any amendment shall be provided to the client. The agreement shall be subject to the provisions governing confidentiality contained in Domestic Relations Law, section 235(1). The agreement shall contain the following information:

RETAINER AGREEMENT

1. Names and addresses of the parties entering into the agreement;

2. Nature of the services to be rendered;

3. Amount of the advance retainer, if any, and what it is intended to cover;

4. Circumstances under which any portion of the advance retainer may be refunded. Should the attorney withdraw from the case or be discharged prior to the depletion of the advance retainer, the written retainer agreement shall provide how the attorney's fees and expenses are to be determined, and the remainder of the advance retainer shall be refunded to the client;

5. Client's right to cancel the agreement at any time; how the attorney's fee will be determined and paid should the client discharge the attorney at any time during the course of the representation;

6. How the attorney will be paid through the conclusion of the case after the retainer is depleted; whether the client may be asked to pay another lump sum;

7. Hourly rate of each person whose time may be charged to the client; any out-of-pocket disbursements for which the client will be required to reimburse the attorney. Any changes in such rates or fees shall be incorporated into a written agreement constituting an amendment to the original agreement, which must be signed by the client before it may take effect;

8. Any clause providing for a fee in addition to the agreed-upon rate, such as a reasonable minimum fee clause, must be defined in plain language and set forth the circumstances under which such fee may be incurred and how it will be calculated.

9. Frequency of itemized billing, which shall be at least every 60 days; the client may not be charged for time spent in discussion of the bills received;

10. Client's right to be provided with copies of correspondence and documents relating to the case, and to be kept apprised of the status of the case;

11. Whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary;

12. Under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court.

13. Should a dispute arise concerning the attorney's fee, the client may seek arbitration; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

McKinney's New York Rules of Court
State Rules of Court
Supreme Court, Appellate Division, All Departments
Part 1215. Written Letter of Engagement

N.Y.Ct.Rules, § 1215.1

§ 1215.1. Requirements

Currentness

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) Explanation of the scope of the legal services to be provided;

(2) Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

N. Y. Ct. Rules, § 1215.1, NY R A DIV LET ENGAGEMENT § 1215.1

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Appendix
Rules of Professional Conduct [eff. April 1, 2009. As Amended to September 15, 2015.] (Refs & Annos)
Client-Lawyer Relationship

Rules of Prof. Con., Rule 1.5 McK.Consol.Laws, Book 29 App.

Rule 1.5. Fees and Division of Fees

Currentness

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may 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 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 by 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) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or 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. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating 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, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing 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) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language

and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

Comment

[1] Paragraph (a) requires that lawyers not charge fees that are excessive or illegal under the circumstances. The factors specified in paragraphs (a)(1) through (a)(8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. In this situation, whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3. As noted in Comment [8] to Rule 5.1, nothing in that Rule alters the personal duty of each lawyer in a firm to abide by these Rules and in some situations, other Rules may impose upon a supervising lawyer a duty to ensure that the books and records of a firm are accurate. *See* Rule 1.15(j).

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. *See* 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the excessiveness standard of paragraph (a). In determining whether a particular contingent fee is excessive, or whether it is excessive to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may regulate the type or amount of the fee that may be charged.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(e). 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 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(i). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made if its 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. In matters in

litigation, the court's approval for the lawyer's withdrawal may be required. *See* Rule 1.16(d). It is proper, however, 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.

[5A] The New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a "Statement of Client's Rights." *See* 22 N.Y.C.R.R. § 1210.1. Paragraph (e) requires a lawyer in a domestic relations matter, as defined in Rule 1.0(g), to provide a prospective client with the "Statement of Client's Rights and Responsibilities," as further set forth in 22 N.Y.C.R.R. § 1400.2, at the initial conference and, in any event, prior to the signing of a written retainer agreement.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained or upon obtaining child custody or visitation. This provision also precludes a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders. *See* Rule 1.0(g) (defining "domestic relations matter" to include an action to enforce such a judgment).

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not affiliated 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. Paragraph (g) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole in a writing given to the client. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Contingent fee arrangements must comply with paragraph (c). Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. *See* Rule 5.1. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. *See* Rule 1.1.

[8] Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes

that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

[9] A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The New York courts have established a procedure for resolution of fee disputes through arbitration and the lawyer must comply with the procedure when it is mandatory. Even when it is voluntary, the lawyer should conscientiously consider submitting to it.

Notes of Decisions (304)

Rules of Prof. Con., Rule 1.5 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 1.5
Current with amendments through March 1, 2016.

End of Document

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ADMITTED:

- Admitted to New York State Bar in February 1981

COMMITTEES/
ASSOCIATIONS:

- Member of Suffolk County Bar Association
- Member of Nassau County Bar Association
- Member of Suffolk County Matrimonial Bar Association
- Member of Matrimonial and Family Law Committee of the Suffolk County Bar Association
- 2007 to 2012 - Suffolk County Bar Association Committee for Volunteerism in the Courts
- 2005 to present - Serves on the Suffolk County Judiciary Screening Committee
- 2003-2005 President of Suffolk County Matrimonial Bar Association
- Former member of Board of Directors of the Suffolk County Matrimonial Bar Association for 20+ years
- 1999-2001 Co-Chair of the Matrimonial and Family Law Committee of the Suffolk County Bar Association
- 1999 - Served on the Committee on Courts
- Served on Judge Marion T. McNulty's *ad hoc* Committee regarding the matrimonial part of the Suffolk County Supreme Court
- Thompson Reuters - Super Lawyer - Family Law
- Officer Suffolk County Academy of Law

APPOINTMENTS

- Appointed as a Referee to hear and report on various matrimonial issues
- Appointed as a Referee to oversee discovery in Matrimonial actions.
- Suffolk County Calm Project

LECTURES:

- 20+ lectures on behalf of the Suffolk County Academy of Law regarding various matrimonial issues
- Guest Lecturer at Touro College Jacob D. Fuchsberg Law Center (Family Law Class)

- Lecture for the Suffolk County Bar Association Matrimonial and Family Law Committee
- Three (3) times honored by the Suffolk County Bar Association as the Pro Bono attorney of the month
- Serves as a Matrimonial mentor for the Suffolk County Bar Association
- Lecture for the Huntington Lawyers Club 2011 (new matrimonial legislation)