

27 NCAC 02 RULE 1.05 FEES

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive 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) When the lawyer has not regularly represented the client, 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.

(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) a contingent fee for representing a defendant in a criminal case; however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or
- (2) a contingent fee in a civil case in which such a fee is prohibited by law.

(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.

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

- (1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and
- (2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

(g) A lawyer shall not enter into an arrangement for, charge, or collect anything of value for responding to an inquiry by a disciplinary authority regarding allegations of professional misconduct by the lawyer, for responding to a Client Security Fund claim alleging wrongful conduct by the lawyer, or for responding to and participating in the resolution of a petition for resolution of a disputed fee filed against the lawyer.

COMMENT

Appropriate Fees and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are not clearly excessive under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must not be clearly excessive. A lawyer may seek reimbursement for expenses for in-house services, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, an understanding will have ordinarily evolved 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, a written understanding as to fees and expenses should be promptly established. Generally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing 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 standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable 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 require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

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(d). This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, provided 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). However, a fee paid in property instead of money may 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] Once a fee agreement has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interests regardless of whether the lawyer has struck an unfavorable bargain. An attorney may seek to renegotiate the fee agreement in light of changed circumstances or for other good cause, but the attorney may not abandon or threaten to abandon the client to cut the attorney's losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement. If a dispute later arises concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer.

[6] 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.

Prohibited Contingent Fees

[7] 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 to be obtained. This provision does not preclude 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 because such contracts do not implicate the same policy concerns.

Division of Fee

[8] 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. Paragraph (e) 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 addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. A lawyer may divide a fee with an out-of-state lawyer who refers a matter to the lawyer if the conditions of paragraph (e) are satisfied. Contingent fee agreements must be in a writing signed by the client and

must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[9] Paragraph (e) 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.

Disputes over Fees

[10] Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory when a client requests resolution of a disputed fee. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. In making reasonable efforts to advise the client of the existence of the fee dispute resolution program, it is preferable to address a written communication to the client at the client's last known address. If the address of the client is unknown, the lawyer should use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

[11] If fee dispute resolution is requested by a client, the lawyer must participate in the resolution process in good faith. The State Bar program of fee dispute resolution uses mediation to resolve fee disputes as an alternative to litigation. The lawyer must cooperate with the person who is charged with investigating the dispute and with the person(s) appointed to mediate the dispute. Further information on the fee dispute resolution program can be found at 27 N.C.A.C. 1D, .0700, et. seq. The lawyer should fully set forth his or her position and support that position by appropriate documentation.

[12] A lawyer may petition a tribunal for a legal fee if allowed by applicable law or, subject to the requirements for fee dispute resolution set forth in Rule 1.5(f), may bring an action against a client to collect a fee. The tribunal's determination of the merit of the petition or the claim is reached by an application of law to fact and not by the application of this Rule. Therefore, a tribunal's reduction or denial of a petition or claim for a fee is not evidence that the fee request violates this Rule and is not admissible in a disciplinary proceeding brought under this Rule.

[13] Lawyers have a professional obligation to respond to inquiries by disciplinary authorities regarding allegations of their own professional misconduct, to respond to Client Security Fund claims alleging wrongful conduct by the lawyer, and to respond to and participate in good faith in the fee dispute resolution process. It is improper for a lawyer to charge a client for the time expended on these professional obligations because they are not legal services that a lawyer provides to a client, but rather they advance the interests of the public and the profession.

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