

Paralegal Division
Ethics CLE
January 9, 2021

**CASE STUDY ON THE IMPORTANCE OF A
FEE AGREEMENT**

Fee Agreement Essentials

The Importance of Your Fee Agreement

Client Identity

The Scope of the Representation

The Rate and Basis of Fee

Issues of Withdrawal from the Representation

Resolving Disputes

Completing the Representation

Fee Agreement

Client Identity

The Importance of Your Fee Agreement

Goal: Clearly identify who is/are your client/s, and who is/are not.

Risks: Failure to properly identify the client increases risks of:

- Unintended clients;
- Malpractice exposure;
- Future conflicts of interest misidentification.

Common Issues:

- Who pays you;
- Confidentiality;
- Oversight.

Fee Agreement

Client Identity

The Importance of Your Fee Agreement

•16-108: CONFLICT OF INTEREST

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required

Fee Agreement

The Scope of Representation

The single most important thing a lawyer does with a fee agreement

The Importance of Your Fee Agreement

- - What will you do (limited, clear and unambiguous);
 - When will you do it (duty to act triggered only upon occurrence of specific event);
 - Who will do it (if specific lawyers are identified they'd better do the work; if using co-counsel get specific consent);
 - What you aren't doing (e.g. appeals)
 - When you're finished - The fee agreement should specify the milestone that will mark the "natural" end of the representation.
- Recite representations that prospective clients make during initial consultations.

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Fee Agreement

The Scope of Representation

The single most important thing a lawyer does with a fee agreement

The Importance of Your Fee Agreement

•**NMRA 16-105 COMMENT [2]**, "Generally 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... "

•**Goal:** To establish the purpose of the representation, or the legal matter that the lawyer agrees to handle for the client, and those services that the lawyer agrees to undertake.

•**Risks:** Failure to properly define the scope of the representation increases risks of:

- Responsibility for more work than bargained for;
- Ongoing attorney-client relationship;
- Malpractice exposure from ambiguity;
- Future conflicts of interest misidentification;
- Failure to protect an interest as expected by the client or as discernible from the scope language.

Fee Agreement

The Rate and Basis of Fee

The Importance of Your Fee Agreement

- **MRPC 16-105 COMMENT [2]**, "In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established."

- "... 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."

- **Goal - Clearly communicate the "basis", "rate", or "total"**

- "'Rate' connotes a numerical calculation, such as time multiplied by hourly rate, or the percentage in a contingent fee agreement. 'Basis or' connotes a method of fee determination other than a 'rate,' such as a flat fee, or a retrospective value-based bill, or fee in a customary amount." William J. Wernz, Minnesota Legal Ethics, 235-36 (4th ed. 2014).

The Importance of Your Fee Agreement

Fee Agreement

The Rate and Basis of Fee

•Common Issues

- What type of fee will you charge;
 - Flat, hourly, contingent, hybrid, reverse contingent
- Do you require an advance fee;
 - IOLTA of other Trust Account, evergreen or minimum balance
- Flat fee availability during pendency of representation;
- Contingent fee notification requirements;

- Division of fee;
 - Division is in proportion to services OR each lawyer assumes joint responsibility, client agree to association in writing; the total fee is reasonable.

•Risks

- Co-counsel/contract lawyers - specific notification to client;
- *Trying* to charge an unreasonable fee - MRPC 1.5(a) "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee..." - *In re Lober*, 241 P.3d 81 (Kan. 2010) -ATTEMPTED to charge \$40,000 to file motion to set aside guilty plea.

The Importance of Your Fee Agreement

Fee Agreement

The Rate and Basis of Fee

•ABA Formal Opinion 93-379

- Charging travel time to one client while working on another client's matter and charging for that also;
- Billing client at original rate for document or work product previously produced for prior a client;
- Billing in-house costs at more than actual expense incurred by lawyer without client consultation;

•Expenses to consider including:

- charges for expert witnesses, investigators and stenographers;
- transcriptions, photocopying costs and messenger services;
- travel expenses and meals;
- computer-assisted research; and typing/printing charges.

ABA Section of Business Law Task Force on Lawyer Business Ethics, Statement of Principles in Billing for Disbursements and Other Charges, 51 Bus. Law 1303 (1996).

Fee Agreement

The Rate and Basis of Fee

The Importance of Your Fee Agreement

- Billing Questions:

- "If you have any questions concerning the... invoice, you agree to contact the finance manager... within ten (10) days... If you do not...you will be deemed to have agreed that the invoice is accurate and valid, and to have waived any claims as to the accuracy or sufficiency of the work performed on your behalf."

- "You agree to pay all...fees, including those of [firm] proceeding pro se, relating to collection of amounts due under this agreement ... [including] any complaints caused by client relating to the services performed by [firm] before any agency, department, court or branch of any government, or any bar association which renders a decision favorable to [firm]."

Fee Agreement Issues of Withdrawal & Termination of Representation

NMRA 16-116 (A): DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in 16-116 (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) **the lawyer is discharged.**

The Importance of Your Fee Agreement

Fee Agreement

Issues of Withdrawal & Termination of Representation

The Importance of Your Fee Agreement

- Courts have found just cause:
 - when a client threatens to commit perjury;
 - when a client accuses the attorney of dishonesty;
 - when the client reports the attorney to a bar disciplinary board;
 - refusal to pay fees that are rightly owed to the attorney;
 - **refusal to communicate or a total breakdown in communication between the attorney and client caused by the client;**
 - or employment of other counsel by the client with whom the first attorney cannot cordially cooperate;

Fee Agreement

Resolving Disputes

(Or Not)

The Importance of Your Fee Agreement

- **Agreement** - "ARBITRATION CLAUSE: Should any dispute arise, Client and Attorney agree to submit their dispute to arbitration."
- **Court** - "At a minimum, the attorney should inform his client that arbitration will constitute a waiver of important rights, including, the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits."
- In affidavits describing the circumstances surrounding negotiation of the fee agreement [lawyer] claimed each paragraph was reviewed with and explained to [client]. [Client] said the defendants never discussed anything about arbitration with him.
- *Castillo v Arrieta*, 2016 BL 28927, N.M. Ct. App., No. 34,108, (2/2/16).

The Importance of Your Fee Agreement

Fee Agreement Completing the Representation

•Common Issues

- Review fee for reasonableness;
- If money held in trust, balance and remit;
- Contingent Fee - Written Statement per Rule 16-105 (D);
- Determine if client has objected to any aspect of the representation and how the objections were resolved – reporting to the malpractice carrier?
- Review Scope of Representation and confirm work performed on matter met scope;
- Determine whether any other recoveries or client actions became apparent during the representation or during client consultations, confirm that client was properly advised about them and that firm responsibility was disclaimed;
- Confirm Closing letter has been sent;
- Store file for period of time set out in Agreement.

Authority:

1. This Court has exclusive jurisdiction and authority to protect persons who are the subject of guardianship and conservatorship proceedings, including the ultimate authority and duty to ensure that actions taken by A. served the interests of PP. *In the Matter of Guardianship of C.G.*, 2020-NMCA-023 ¶ 64 citing NMSA 1978 § 45-5-402 &, 402.1.
2. NMSA 1978 § 45-5-402 & 402.1: Court has the duty and authority to review the fee agreement and strike the unconscionable provisions
3. The decision whether to grant or deny a request for attorney fees rests within the sound discretion of the district court. *Cobb v. Gammon*, 2017-NMCA-022, ¶ 60; *see also Garcia v. Jeantette*, 2004-NMCA-004, ¶ 15.

Authority:

4. Since a guardian and conservator had been in place 2014, A. had a duty to consult with and to secure consent from PP's guardian or conservator for his legal actions as if they were his clients.

Restatement (Third) of Lawyers § 24.

5. The court may award those fees that are reasonable and necessary for the prosecution of the suit. Courts cannot award attorney fees for matters collateral to the prosecution of the suit. *Thompson Drilling, Inc. v. Romig*, 1987-NMSC-039

6. Fee agreements cannot be commercially unreasonable, inherently one-sided, against the public policy. *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 21; ¶ 22 (quoting *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 20).

Authority:

7. Under New Mexico law, the following factors determine the reasonableness of attorneys' fees:

- a. the time and labor required, the novelty and difficulty of the questions involved and the skill required to perform the legal service properly;
- b. the fee customarily charged in the locality for similar legal services;
- c. the amount involved and the results obtained;
- d. the time limitations imposed by the client or by the circumstances;
- e. the nature and length of the professional relationship with the client;
- f. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- g. whether the fee is fixed or contingent.

Lenz v. Chalamidas, 1989-NMSC-067, ¶ 19;
NMRA 16-105