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Fees: Contract Or Fiduciary Duty?

►§2.01 FEE CONTRACTS

Generally (but not always) clients and lawyers are free to bargain for any kind of fee (hourly, flat, contingent, or a blend of any or all of these)[1], and for this reason, lawyers' fees are subject to contract law.[2] But because clients repose trust in lawyers and because nearly every fee a lawyer charges involves some personal economic conflict of interest, fees also are subject to quasi-fiduciary limitations imposed by professional codes [§11.04] and case law [§11.06]. These obligations impose an objective standard of reasonableness on every fee and expense you agree to or in fact collect.[3]

►Red Flag► Do not assume that you are free to contract for or collect any fee or reimbursement the market or your client will bear. Doing so can result in both the loss of your ability to collect all or part of the fee [§12.07], as well as professional discipline [§9.02]. So be aware of the limitations imposed on lawyer fee contracts listed in §§2.02–2.13 below.

►§2.02 REASONABLE FEES AND EXPENSES

►§2.02(a) The Initial Agreement?

Do my engagement letters really need to address fees and expenses? What a nuisance!

If you want to collect your fee and you don't want to engage in elaborate cost accounting, you should address expenses in your engagement letter. The ABA Ethics Committee issued a well-received opinion that requires lawyers to disclose the basis on which the client is to be billed for both professional time and any other charges.[4] Even in jurisdictions where a written fee contract is not required, in most representations it is difficult to imagine how you can convey this information without a writing. With respect to expenses, the ABA Opinion provided that lawyers had a choice. Either the client agrees to pay the lawyer X¢ for photocopying and $Y for incoming faxes or the lawyer is required to figure out the cost of these services to the lawyer and charge the client no more than that amount. In other words, without client agreement, the opinion concluded that expenses were not to become a profit center for the law firm. As a result, the best practice is to prepare a written expense disclosure statement that details for each new client the basis on which you will charge for these services. That statement can be an attachment to your engagement letter [§1.04], and can simply list the categories of anticipated expenses and disbursements and the basis on which you will charge for each.

►§2.02(b) The Outsourcing Advantage?

I need help, fast. This simple case turned into a discovery disaster. But I just realized that I can hire one of those outsourcing firms in Bangalore that specialize in

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[1] Mark A. Robertson and James A. Calloway, *Winning Alternatives to the Billable Hour: Strategies that Work* (ABA Law Practice Management 2008).
[2] *Restatement of the Law Third, The Law Governing Lawyers* § 18 (ALI 2000). (Hereinafter "RLGL").
[3] ABA Model Rule of Professional Conduct 1.5(a) (2009) (Hereinafter "MODEL RULE(S)"); RLGL § 34.
[4] ABA Formal Op. 93-379, Billing for Professional Fees, Disbursements and Other Expenses.

document review. They charge less than I pay my associates. A lot less. What a windfall for our firm!

Well, you've solved one problem, and picked up two others. First, you must properly supervise the outsourcing firm's work. That means giving it the same degree of supervision and scrutiny you would inhouse. Remember you are ultimately responsible to your client and to the court for proper administration of the discovery process. How are you going to do that? That firm is halfway around the world. And they don't know our law of privilege or work product. Think about it.

Your second problem is how you will bill your client for the outsourcing costs.

I'll bill them our regular hourly rate for associates. That's why it's such a good idea.

Not so fast. You need to tell your client what you are doing, the rate at which you will bill, and assert that you are entitled to the higher rate for supervision, overhead and responsibility. If your client agrees to your rate rather than the outsourcing's firm's actual rate, you may charge it, but only if your client explicitly agrees, and only if your rate is otherwise reasonable.[5]

►§2.02(c) Fiduciary Limitations On Contract

The fiduciary duty a lawyer assumes when agreeing to represent a client does not attach until the client-lawyer relationship is established. However, because clients often repose trust in lawyers before this official starting point (assuming that point is clear), professional codes [§11.04] and cases [§11.06] where judges set, supervise, or decide disputed fees impose four different obligations that limit a lawyer's ability to charge whatever he or she chooses.

First, every fee agreement and collection of fees and expenses is subject to an objective standard of reasonableness, measured by the range of reasonable fees other reasonable lawyers would charge for the same or similar representation.[6] Courts look to the same factors lawyers do: The time, labor and skill involved, the fee customarily charged by similarly situated lawyers, the amount involved and results obtained, limitations put on a lawyer's time or acceptance of other employment, and the kind of fee, fixed or contingent. With respect to disbursements and expenses, it is perfectly proper to agree in advance on the fees that you will charge for such services (e.g., 15¢/page for photocopies; $200/hr. for electronic research). In the absence of such an explicit agreement, you may bill only the actual cost of these services.[7] If you bill more, you have turned the provision of these services into a "profit center" in violation of Model Rule 1.5's reasonableness requirement.

►Red Flag► If another lawyer would consider it unreasonable to charge the fee or expense you anticipate, that lawyer could be the source of expert testimony [§12.08] in a later disciplinary action or fee dispute should the client object. And client challenges to fee

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[5] ABA Formal Op. 08-451, Lawyer's Obligation When Outsourcing Legal and Nonlegal Support Services.

[6]; RLGL §34.

[7] ABA Formal Op. 00-420, Surcharge To Client for Use of Contract Lawyer (If contract lawyer is billed as an expense, in absence of contrary understanding, the client may be charged only the direct cost of the lawyer. If contract lawyer billed as legal services or fees, a surcharge may be added without client consent, as long as rate charged is reasonable).

arrangements—whether warranted or not—are not an infrequent occurrence.

Second, statutes and rules of professional conduct [§11.04] require special and specific writing obligations for many fee agreements. All contingent fee arrangements, for example, require a written agreement,[8] and many jurisdictions regulate the amount of the contingency or require specific language in engagement agreements.[9] In a number of jurisdictions, as the chart in §2.03 indicates, *all* fee contracts must be reduced to a written format.[10]

Third, some fee contracts are not permitted at all in certain circumstances. For example, most jurisdictions do not allow contingent fees in divorce or dissolution matters or in criminal cases [§2.08]. Nonrefundable "retainers" may not be allowed at all [§2.10].

Fourth, because clients can fire lawyers at any time for any reason, most courts hold that when this occurs, lawyers lose their right to a contract fee and can recover only in quantum meruit [§2.11].[11] If your client fires you "for cause," total or partial fee forfeiture also becomes a real possibility [§9.10].

►Red Flag► You should reduce all fee agreements to a writing and keep track of billable hours in all representations. If you do not complete the matter, the burden of proof will be on you to establish the basis for quantum meruit, which a court may well decide should be measured by the "lodestar": Reasonable number of hours times a reasonable hourly rate.

►§2.03 STATE RULES REQUIRING WRITTEN FEE AGREEMENTS

	Contingent Fees:	**Other Fees:**
ABA Model Rules	1.5(c): Writing Required	1.5(b): The scope of 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, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall be communicated to the client.
Alabama	1.5(c): Writing Required	1.5(b): Writing Preferred
Alaska	1.5(c): Writing Required	1.5(b): Writing Required if fee >$500; writing must be consistent with Rule 1.4(c).
Arizona	1.5(c): Writing Required	1.5(b): Writing Preferred
Arkansas	1.5(c): Writing Required	1.5(b): Writing Preferred

[8] MODEL RULE 1.5(c).
[9] Cal. Bus. & Prof'l Code §6146 (2009) (Actions against health care providers); Fla. Rule 1.5(f); N.Y. Judiciary Law §474-a (2009) (Contingent Fees in Medical, Dental and Podiatric Malpractice Actions).
[10] Alaska, Colo., Conn., D.C., N.J., Pa., R.I., and Utah Rule 1.5(b), Cal. Bus. & Prof'l Code §6148 (all fees over $1,000), N.Y. 1.5(e) (all domestic relations fees).
[11] RLGL § 40.