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Quality of Life/Ethics Track – Session 2

Alternative Fee Agreements

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About the Presenters...

Dean R. Dietrich, a shareholder with Weld Riley, S.C., has represented clients in the areas of lawyer ethics and professional responsibility for more than 45 years. He has represented attorneys in matters before the Wisconsin Supreme Court and the Office of Lawyer Regulation and consults with law firms and lawyers regarding compliance with the Rules of Professional Conduct. Dean has served as Chair of the State Bar Committee on Professional Ethics in addition to past service on the Committee appointed by the Wisconsin Supreme Court to review changes to the Wisconsin Rules of Professional Conduct for Attorneys. Dean currently serves as Past President of the State Bar of Wisconsin. He is a member of the ABA's Center for Professional Responsibility and the Association of Professional Responsibility Lawyers. He is a graduate of Marquette University Law School.

Timothy J. Pierce has been Ethics Counsel for the State Bar of Wisconsin since 2004. He received his undergraduate degree from the University of Wisconsin–Madison and his law degree, cum laude, from the University of Wisconsin Law School. Mr. Pierce was previously a Deputy Director at the Office of Lawyer Regulation in Milwaukee and Madison. He has also been employed as the Ethics Administrator for Milbank, Hadley, Tweed & McCloy, in New York, and as an Assistant State Public Defender in Racine. He is a member of the State Bar of Wisconsin. He is a frequent speaker on matters of professional ethics and has given hundreds of CLE presentations to a wide variety of groups on professional responsibility law. He serves as reporter for the State Bar's Committee on Professional Ethics and writes the monthly "Ethical Dilemmas" column for the State Bar of Wisconsin. He has also taught Professional Responsibilities at the University of Wisconsin Law School since 2011 and currently serves as a Volunteer Subject Matter Expert for the MPRE.

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SCR 20:1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee 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)(1) 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 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 as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be $1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney's fees, is more than $1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

(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 par. (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 a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

(f) Except as provided in SCR 20:1.5(g), unearned fees and funds advanced by a client or 3rd party for payment of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to SCR 20:1.5(h). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred.

WISCONSIN COMMENT

SCR 20:1.5(f) Advances for fees and costs.

Lawyers are obligated to hold advanced fee payments in trust until earned, or use the alternative protection for advanced fees as set forth in SCR 20:1.5(g). Additional requirements for advanced fees are identified in SCR 20:1.0(ag). Sometimes the lawyer may receive advanced fee payments from 3rd parties. In such cases, the lawyer must follow the requirements of SCR 20:1.8(f). In addition, the lawyer should establish, upon receipt or prior to receipt of the advanced fee payment from a 3rd party, whether any potential refund of unearned fees will be paid to the client or 3rd-party payor. This may be done through agreement of the parties or by the lawyer informing the client and 3rd-party payor

of the lawyer's policy regarding such refunds. Lawyers also receive cost advances from clients or 3rd parties. Since January 1, 1987, the supreme court has required cost advances to be held in trust. Prior to that date, the applicable trust account rule, SCR 20.50(1), specifically excluded such advances from the funds that the supreme court required lawyers to hold in trust accounts. However, by order dated March 21, 1986, the supreme court amended SCR 20.50(1) as follows: "All funds of clients paid to a lawyer or law firm~~, other than advances for costs and expenses,~~ shall be deposited in one or more identifiable trust accounts as provided in sub. (3) maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm may be deposited in such an account except as follows . . . ." This requirement is specifically addressed in SCR 20:1.5(f).

(g) A lawyer who accepts advanced payments of fees may deposit the funds in the lawyer's business account, provided that review of the lawyer's fee by a court of competent jurisdiction is available in the proceeding to which the fee relates, or provided that the lawyer complies with each of the following requirements:

(1) Upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client a notice in writing containing all of the following information:

a. The amount of the advanced payment.

b. The basis or rate of the lawyer's fee.

c. Any expenses for which the client will be responsible.

d. The lawyer's obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation.

e. The lawyer's obligation to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of the dispute.

f. The ability of the client to file a claim with the Wisconsin Lawyers' Fund for Client Protection if the lawyer fails to provide a refund of unearned advanced fees.

(2) Upon termination of the representation, the lawyer shall deliver to the client in writing all of the following:

a. A final accounting, or an accounting from the date of the lawyer's most recent statement to the end of the representation, regarding the client's advanced fee payment.

b. A refund of any unearned advanced fees and costs.

c. Notice that, if the client disputes the amount of the fee and wants that dispute to be submitted to binding arbitration, the client must provide written notice of the dispute to the lawyer within 30 days of the mailing of the accounting.

d. Notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client within 30 days after receiving notice of the dispute from the client, the lawyer shall submit the dispute to binding arbitration.

(3) Upon timely receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and if the dispute is not resolved, the lawyer shall submit the dispute to binding arbitration with the State Bar Fee Arbitration Program or a similar local bar association program within 30 days of the lawyer's receipt of the written notice of dispute from the client.

(4) Upon receipt of an arbitration award requiring the lawyer to make a payment to the client, the lawyer shall pay the arbitration award within 30 days, unless the client fails to agree to be bound by the award of the arbitrator.

WISCONSIN COMMENT

SCR 20:1.5(g) Alternative protection for advanced fees.

SCR 20:1.5(g) allows lawyers to deposit advanced fees into the lawyer's business account, as an alternative to SCR 20:1.5(f). The provision regarding court review applies to a lawyer's fees in proceedings in which the lawyer's fee is subject to review at the request of the parties or the court, such as bankruptcy, formal probate, and proceedings in which a guardian ad litem's fee may be subject to judicial review. In any proceeding in which the lawyer's fee must be challenged in a separate action, the lawyer must either deposit advanced fees in trust or use the alternative protections for advanced fees in this subsection. The lawyer's fee remains subject to the requirement of reasonableness under SCR 20:1.5(a) as well as the requirement that unearned fees be refunded upon termination of the representation under SCR 20:1.16(d). A lawyer must comply either with SCR 20:1.5(f) or SCR 20:1.5(g), and a lawyer's failure to do so is professional misconduct and grounds for discipline. The writing required under SCR 20:1.5(g)(1) must contain language informing the client that the lawyer is obligated to refund any unearned advanced fee at the end of the representation, that the lawyer will submit any dispute regarding a refund to binding arbitration, such as the programs run by the State Bar of Wisconsin and the Milwaukee Bar Association, within 30 days of receiving a request for refund, and that the lawyer is obligated to comply with an arbitration award within 30 days of the award. The client is not obligated to arbitrate the fee dispute and may elect another forum in which to resolve the dispute. The writing must also inform the client of the opportunity to file a claim in the event an unearned advanced fee is not refunded, and should provide the address of the Wisconsin Lawyers' Fund for Client Protection.

If the client's fees have been paid by one other than the client, then the lawyer's responsibilities are governed by SCR 20:1.8(f). If there is a dispute as to the ownership of any refund of unearned advanced fees paid by one other than the client, the unearned fees should be treated as trust property pursuant to SCR 20:1.15(e)(3).

SCR 20:1.5(g) applies only to advanced fees for legal services. Cost advances must be held in the lawyer's trust account pursuant to SCR 20:1.15 (b) (1) and SCR 20:1.15 (b) (6).

Advanced fees deposited into the lawyer's business account pursuant to this subsection may be paid by credit card, debit card, prepaid or other types of payment cards, or an electronic transfer of funds. A cost advance cannot be paid by credit card, debit card, prepaid or other types of payment cards, or an electronic transfer of funds under this section. Cost advances are subject to SCR 20:1.15(b)(1) and SCR 20:1.15(b)(6).

(h)(1) At least five business days before the date on which a disbursement is made from a trust account for the purpose of paying fees, with the exception of contingent fees or fees paid pursuant to court order, a lawyer shall transmit to the client in writing all of the following:

a. An itemized bill or other accounting showing the services rendered.

b. Notice of the amount owed and the anticipated date of the withdrawal.

c. A statement of the balance of the client's funds in the lawyer's trust account after the withdrawal.

(2) The lawyer may withdraw earned fees on the date that the invoice is transmitted to the client, provided that the lawyer has given prior notice to the client in writing that earned fees will be withdrawn on the date that the invoice is transmitted. The invoice shall include each of the elements required under SCR 20:1.5(h)(1).

(3) If a client makes a particularized and reasonable objection to the disbursement described in SCR 20:1.5(h)(1), the disputed portion shall remain in the trust account until the dispute is resolved. If the client makes a particularized and reasonable objection to a disbursement described in SCR 20:1.5(h)(1) or (2) within 30 days after the funds have been withdrawn, the disputed portion shall be returned to the trust account until the dispute is resolved, unless the lawyer reasonably believes that the client's objections do not present a basis to hold funds in trust or return funds to the trust account under SCR 20:1.5(h). The lawyer will be presumed to have a reasonable basis for declining to return funds to trust if the disbursement was made with the client's informed consent, in writing. The lawyer shall promptly advise the client in writing of the lawyer's position regarding the fee and make reasonable efforts to clarify and address the client's objections.

WISCONSIN COMMENT

SCR 20:1.5(h) Withdrawal of non-contingent fees from trust account.

SCR 20:1.5(h) applies to attorney fees, other than contingent fees. It does not apply to filing fees, expert witness fees, subpoena fees, and other costs and expenses that a lawyer may incur on behalf of a client in the course of a representation. In addition, this section does not require contingent fees to remain in the trust account or to be returned to the trust account if a client objects to the disbursement of the contingent fee, provided that the contingent fee arrangement is documented by a written fee agreement, as required by SCR 20:1.5(c). While

a client may dispute the reasonableness of a lawyer's contingent fee, such disputes are subject to SCR 20:1.5(a), not to this subsection. A client's objection under SCR 20:1.5(h)(3) must offer a specific and reasonable basis for the fee dispute in order to trigger the lawyer's obligation to keep funds in the lawyer's trust account or return funds to the lawyer's trust account. A generalized objection to the overall amount of the fees or a client's unilateral desire to abrogate the terms of a fee agreement should not ordinarily be considered sufficient to trigger the lawyer's obligation. A lawyer may resolve a dispute over fees by offering to participate and abide by the decision of a fee arbitration program. In addition, a lawyer may bring an action for declaratory judgment pursuant to § 806.04, Wis. Stats. to resolve a dispute between the lawyer and a client regarding funds held in trust by the lawyer. The court of appeals suggested employment of that method to resolve a dispute between a client and a 3rd party over funds held in trust by the lawyer. See, Riegleman v. Krieg, 2004 WI App 85, 271 Wis. 2d 798, 679 N.W.2d 857.

Additionally, when a lawyer's fees are subject to final approval by a court, such as fees paid to a guardian ad litem or lawyer's fees in formal probate matters, objections to disbursements by clients or 3rd party payors are properly brought before the court having jurisdiction over the matter. A lawyer should hold disputed funds in trust until such time as the appropriate court resolves the dispute.

WISCONSIN COMMITTEE COMMENT

Paragraph (b) differs from the Model Rule in requiring that fee and expense information usually must be communicated to the client in writing, unless the total cost of representation will be $1000 or less. In instances when a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference on the periodic billing statement provided to the client within a reasonable time after the basis or rate of the fee or expenses has been changed. The communication to the client through the billing statement should clearly indicate that a change in the basis or rate of the fee or expenses has occurred along with an indication of the new basis or rate of the fee or expenses. A lawyer should advise the client at the time of commencement of representation of the likelihood of a periodic change in the basis or rate of the fee or expenses that will be charged to the client.

In addition, paragraph (b) differs from the Model Rule in requiring that the purpose and effect of any retainer or advance fee paid to the lawyer shall be communicated in writing and that a lawyer shall promptly respond to a client's request for information concerning fees and expenses. The lawyer should inform the client of the purpose and effect of any retainer or advance fee. Specifically, the lawyer should identify whether any portion, and if so what portion, of the fee is a retainer. A retainer is a fee that a lawyer charges the client not for specific services to be performed but to ensure the lawyer's availability whenever the client may need legal services. These fees become the property of the lawyer when received and may not be deposited into the lawyer's trust account. In addition, they are subject to SCR 20:1.15 and SCR 20:1.16. Retainers are to be distinguished from an "advanced fee" which is paid for future services and earned only as services are performed. Advanced fees are subject to SCR 20:1.5, SCR 20:1.15, and SCR 20:1.16. See also State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-93-4 (1993).

Paragraph (d) preserves the more explicit statement of limitations on contingent fees that has been part of Wisconsin law since the original adoption of the Rules of Professional Conduct in the state.

Paragraph (e) differs from the Model Rule in several respects. The division of a fee "based on" rather than "in proportion to" the services performed clarifies that fee divisions need not consist of a percentage calculation. The rule also recognizes that lawyers who formerly practiced together may divide a fee pursuant to a separation or retirement agreement between them. In addition, the standards governing referral arrangements are made more explicit.

Dispute Over Fees

Arbitration provides an expeditious, inexpensive method for lawyers and clients to resolve disputes regarding fees. It also avoids litigation that might further exacerbate the relationship. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. See also ABA Comment [9].

Fee Estimates

Compliance with the following guidelines is a desirable practice: (a) the lawyer providing to the client, no later than a reasonable time after commencing the representation, a written estimate of the fees that the lawyer will charge the client as a result of the representation; (b) if, at any time and from time to time during the course of the representation, the fee estimate originally provided becomes substantially inaccurate, the lawyer timely providing a revised written estimate or revised written estimates to the client; (c) the client accepting the representation following provision of the estimate or estimates; and (d) the lawyer charging fees reasonably consistent with the estimate or estimates given.

ABA COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable 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 be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, 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, 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. 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, 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 reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, 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). 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). 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] 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

[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. 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

[7] 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. 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.

[8] 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

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Wisconsin Ethics Opinion E-09-03: Communications Concerning Attorneys' Fees and Expenses

Revised April 17, 2020

Synopsis:

In every representation, a lawyer must inform the client of the scope of the representation, the basis or rate of the lawyer's fee and any expenses for which the client will be responsible. This communication should be sufficient to enable the client to readily determine the matter, or nature of an on-going lawyer-client relationship, the method by which the lawyer's fee will be calculated and the types of costs and expenses for which the client will be responsible. This communication must be in writing whenever it is reasonably foreseeable that the total cost to the client will exceed $1000 and agreements to limit the scope of the representation must usually be in writing. Contingent fee agreements, however, must always be in writing and signed by the client. The initial communication with the client should also inform the client if the lawyer intends to charge a reasonable rate of interest on delinquent balances and whether the lawyer anticipates that the lawyer's rates may increase during the course of the representation. This opinion supersedes E-91-2, which is hereby withdrawn.

OPINION

The initial correspondence sent to a client after consultation about representation is an important communication about the lawyer and the lawyer's services. In addition to fulfilling the lawyer's obligations under the Rules of Professional Conduct (the "Rules"), the communication can be used to establish a successful working relationship between the lawyer and the client. Accordingly, careful consideration should be given to the content of the initial communication.

This opinion discusses the parts SCR 20:1.5 which set forth a lawyer's obligations in communicating with a client concerning fees and expenses.[1] The Rule sets forth the information that must be communicated to a client with respect to a lawyer's fees and describes the circumstances in which information may be conveyed orally or must be conveyed in writing or in

[1] The provisions of SCR 20:1.5 that govern how a lawyer handles fee payments, such as SCR 20:1.5(f), which requires lawyers to place advanced fees in trust, and SCR 20:1.5(g), which permits a lawyer to place advanced fees in an operating account if the lawyer complies with the alternative protection provisions, are beyond the scope of this opinion.

a writing signed by the client. Other rules, such as SCR 20:1.0 and SCR 20:1.2, which contain important definitions, are relevant and will be discussed herein.

I. Information that Must be Communicated to the Client.

SCR 20:1.5(b)(1) requires that: (1) the scope of the representation; (2) the basis or rate of the fee; and (3) the expenses for which the client will be responsible be communicated to the client before or within a reasonable time after commencing the representation. The only exception to this requirement **in SCR 20:1.5** is when the lawyer will charge a regularly represented client on the same basis or rate as in the past. Each of the required elements of the communication the lawyer must convey to the client merits further discussion.

A. Scope of the Representation.

The communication to the client concerning the scope of the representation should be a clear description of the services and matter for which the lawyer has been retained. The Rule does not explicitly require a particular degree of specificity. The Committee believes, however, that the Rule requires a lawyer to provide enough detail to enable the client to identify the particular matter involved. In many cases, the description of the scope of a representation may fulfill this requirement while being brief. Accordingly, a description such as, "Legal representation in connection with contract dispute with party X concerning delivery of widgets " or, "Legal representation in connection with automobile accident in X county on or about date Y" should be sufficient for straight forward matters. An estate planning matter could be described as, "Preparation of Will" or more generally as, "Preparation of estate plan."

Such a brief description, however, may not be possible when a lawyer's relationship with a client is not limited to a single discrete matter. If there is not a particular matter or case which can be easily identified, the lawyer should focus on providing as clear a description of the lawyer-client relationship as possible. Again, this description may be fairly brief and meet the requirements of the Rule. So, for example, if the lawyer is retained to handle general representation of a business client, the description could state, for example, "Business-related matters as may arise from time to time and as requested by you." Or a description of may consist of "Legal advice and services in connection with business matters as requested by you."

While the Committee believes that fairly brief descriptions may usually suffice to fulfill a lawyer's obligations under SCR 20:1.5(b)(1), lawyers may wish to provide greater detail, particularly with respect to services not within the scope of the representation. Engagement letters are contracts with clients, and ambiguities will be construed against the lawyer/drafter, and thus lawyers should carefully consider whether the language reflects the actual intent of the parties. If, for example, a lawyer intends to provide general transactional, but not litigation, services to a business client, or a lawyer may wish to agree to represent a client on a criminal charge at trial, but not on any possible appeal, such exclusions should be included in the description of the engagement. Care should also be taken to avoid descriptions that might imply

a future obligation to monitor the client's estate plan, for example, "General Estate Planning", unless that is what is intended.

SCR 20:1.2(c) permits a lawyer to limit the scope of representation if the limitation is "reasonable under the circumstances and the client gives informed consent. The client's informed consent must be in writing except as set forth in SCR 20:1.2(c)(1)."[2] When undertaking a limited scope representation, it is particularly important for the lawyer to clearly communicate to the client the limits of the representation. In most circumstances, in a limited scope representation it will be necessary for the lawyer to inform the client what services the lawyer will not provide to the client. This is because the representation is often limited in a manner that varies from what a client might typically expect, and this information must be communicated to the client. For example, "legal representation through negotiation and sentencing (but not including trial) in connection with pending OWI charge." Even when an oral communication concerning fees and costs is permitted, a lawyer should be careful to observe the requirements of SCR 20:1.2(c) that client informed consent to limited scope representation be in writing in most circumstances.

B. The Basis or Rate of the Fee.

SCR 20:1.5 provides no explanation as to the detail that must be included in a description of the basis or rate of the lawyer's fee. The Committee believes that the Rule requires the information to be sufficient to enable the client to understand how the fee will be calculated, and that it should be communicated in a clear and easily-understood manner. The basis or rate of the fee might be a specified hourly charge, a flat fee, a percentage of the amount recovered or a description of a set of factors on which the fee will be based. *See Restatement (Third) of The Law Governing Lawyers*, § 38, comment b (2001).

In setting the basis or rate of the fee, a lawyer must comply with SCR 20:1.5(a), which prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee or an unreasonable amount for expenses. SCR 20:1.5(a) provides that the factors to be considered in determining the reasonableness of the fee 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 exceptions to the requirement that the clients informed consent be in writing are set forth in SCR 20:1.2(c)(1) as follows: "The client's informed consent need not be given in writing if: a. the representation of the client consists solely of telephone consultation; b. the representation is provided by a lawyer employed by or participating in a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; c. the court appoints the lawyer for a limited purpose that is set forth in the appointment order; d. the representation is provided by the state public defender pursuant to Ch. 977, stats., including representation provided by a private attorney pursuant to an appointment by the state public defender; or e. the representation is provided to an existing client pursuant to an existing lawyer-client relationship.

(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 the 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."[3]

The ABA Comments[4] caution that, "[a] lawyer should not exploit the fee arrangement based primarily on hourly charges by using wasteful procedures." SCR 20:1.5, ABA Comment [5]. Fees that the Wisconsin Supreme Court has ruled to be unreasonable include fees that exceed a statutorily permitted fee (*In re Estate of Konopka*, 175 Wis. 2d 100, 498 N.W.2d 853 (Ct. App. 1993)), fees that were inflated to make up for fees lost when the client successfully challenged a previous billing (*In re Glesner*, 2000 WI 18, 233 Wis. 2d 35, 606 N.W.2d 173), and fees charged for retrieving the clients' file to answer inquiries when they filed a grievance against the lawyer (*In re Kitchen*, 2004 WI 83, 273 Wis. 2d 279, 682 N.W.2d 780).

1. Anticipated changes in the basis or rate of the fee.

The Wisconsin Committee Comment accompanying SCR 20:1.5 states that "[a] lawyer should advise the client at the time of commencement of representation of the likelihood of a periodic change in the basis or rate of the fee or expenses that will be charged to the client." Not disclosing, for example, that hourly rates may be adjusted annually may run afoul of SCR 20:1.5(b)(1)'s requirement that the client be informed of the basis of the rate or fee.

As discussed below, changes in the basis or rate of the fee also must be communicated to the client when they actually occur (*see* Section VI.A, *infra).*

2. Interest charges.

The rules do not prohibit a lawyer from charging a reasonable rate of interest on outstanding balances for fees or costs. If the lawyer intends to charge interest on unpaid balances, that information must be part of the written communication to the client regarding fees or must be clearly communicated to the client at the beginning of the representation if a written communication is not required. A lawyer who imposes interest charges absent prior notification to the client runs the risk of being found to have violated SCR 20:1.5(b)(1), concerning

[3] If the representation contemplates a division of a fee between lawyers who are not in the same firm, SCR 20:1.5(e) comes into play. The requirements of that section are beyond the scope of this Opinion.

[4] SCR 20:1.5 has both a Wisconsin Committee Comment and an ABA Comment,

communication as to the basis or rate of the fee, and to have charged an unreasonable fee in violation of SCR 20:1.5(a).[5] *See* Wisconsin Ethics Op. E-90-4.

C. Expenses for which the Client will be Responsible.

If the client will be charged for photocopying costs, court reporter fees, filing fees and the like, the communication at the outset of the representation must inform the client of that fact. The rule does not require that the specific amount of the costs that will be charged to the client (i.e., X¢/page for photocopying) be identified in advance, but that information should be provided if known.[6]

SCR 20:1.5(a) prohibits a lawyer from charging or collecting an unreasonable amount for expenses. The ABA Comment accompanying SCR 20:1.5 states that a lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges. According to the comment, this may be done "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." SCR 20:1.5, ABA Comment [1]. Marking up expenses, such as fees for photocopying, with the intention to use such expenses as a source of profit for the lawyer, is not permitted. See ABA Formal Ethics Op. 93-379 (1993).

II. Requirement of a Written Communication.

Whether the information the lawyer must provide the client regarding the scope of the representation, fees and expenses may be communicated orally or whether it must be communicated in writing depends on the amount of the fee and expenses that are involved and whether or not the fee is contingent on the outcome of the matter.[7]

[5] It is also unlikely that the lawyer would be able to collect interest charges unless such charges were part of the original engagement agreement. See *Ziolkowski v. Great Lakes Dart Manufacturing, Inc.*, 2011 WI App. 11, 794 N.W.2d 253.

[6] The absence of a requirement that the specific amount for various expenses be disclosed in advance reflects the fact that many types of expenses, such as expert witness fees, cannot be known in advance.

[7] Lawyers must also remain aware of the requirement for written confirmation of agreements to limit the scope of representation pursuant to SCR 20:1.2(c).

A. Representation not Involving a Contingent Fee.

1. Matters for which it is reasonably foreseeable that the total cost of the representation will be greater than $1,000.

A written communication to the client *is* required if it is "reasonably foreseeable" that the total cost of representation to the client, including attorney's fees, will be more than $1,000. SCR 20:1.5(b)(1).[8]

2. Matters for which it is reasonably foreseeable that the total cost of the representation to the client will be $1,000 or less.

If it is reasonably foreseeable that the total cost of the representation will be $1,000 or less, the communication to the client regarding the scope of the representation, fees and expenses need not be in writing. Thus, a lawyer who intends to charge $500 for a simple matter still must inform the client of the scope of the representation, the basis or rate of the fee, and any expenses for which the client will be responsible, but may do so orally. A written communication conveying the same information would, of course, also comply with the Rule.[9]

What if the total cost of the representation was anticipated to be $1,000 or less at the outset of the representation, but then exceeds $1,000 during the course of representation? SCR 20:1.5 does not explicitly address that scenario. The Rule's reference to what is "reasonably foreseeable," arguably implies that the appropriate reference point is the commencement of the representation. On the other hand, once the cost exceeds $1,000, it is certainly foreseeable that the total cost will be even higher than that by the time the representation is concluded. Further, the clear intent of the Rule is to encourage, and in most cases require, lawyers to provide information with respect to fees and costs to clients in writing. Accordingly, in the opinion of the Committee, compliance with the Rule would require a written communication concerning fees and expenses at such time that the lawyer anticipates the total cost to exceed $1,000, regardless of whether this occurred at the commencement of the representation or while the representation is in progress.

[8] The term "total cost" refers to fees charged by the lawyer or firm, costs billed by the lawyer or firm to the client and costs for which the client will be directly responsible.

[9] As the ABA Comment points out: "A written statement concerning the terms of the engagement reduces the possibility of misunderstanding." SCR 20:1.5, ABA Comment [2].

B. Representation Involving a Contingent Fee.

Pursuant to SCR 20:1.5(c), a contingent fee agreement must be in a writing signed by the client and must state:

(1) "[T]he 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;"
(2) "litigation and other expenses to be deducted from the recovery;" and
(3) "whether such expenses are to be deducted before or after the contingent fee is calculated."
(4) The agreement also "must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party." SCR 20:1.5(c).

In accordance with SCR 20:1.5(b)(1), the contingent fee agreement must also explain the scope of the representation. This is particularly important if the lawyer's representation is limited, for example, to handling the matter through settlement or trial, but not on appeal.

When the contingent fee matter is concluded, SCR 20:1.5(c) requires the lawyer to provide the client with a written statement:

(1) "[S]tating the outcome of the matter;" and
(2) "if there is a recovery, showing the remittance to the client and the method of its determination."

Note that SCR 20:1.5(d) prohibits a lawyer from entering into a contingent fee agreement in certain types of actions affecting the family or when representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

III. Communication with Regularly Represented Clients.

SCR 20:1.5(b)(1) does not require a communication with the client about the scope of the representation or the basis or rate of the fee and the expenses for which the client is responsible if the lawyer will be charging "a regularly represented client on the same basis or rate as in the past." Neither the rule nor the comments define "regularly represented client." The ABA Comment, however, states that "[w]hen 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." SCR 20:1.5, ABA Comment [2]. This suggests that sporadic or infrequent representation that is unlikely to have produced such an understanding will not constitute "regular representation." It further suggests that the question does not necessarily turn on the number of matters or contacts within a certain time period, but rather on the nature of the relationship between the lawyer and the client.

The question the lawyer should consider is whether it is reasonable for the lawyer to conclude that the client understands that the client will be billed on the same basis as in the past. The answer to this question depends on the context. Clients with differing levels of sophistication in dealing with lawyers, for example, may have differing conclusions regarding the concept of "regular" representation. The lawyer should be sensitive to this when deciding whether the basis or rate of the fee should be communicated to the client when additional representation is undertaken.

IV. Timing of the Communication.

SCR 20:1.5(b)(1) requires that the communication concerning the scope of the representation, the basis or rate of the fee, and the expenses for which the client will be responsible be communicated to the client "before or within a reasonable time after commencing the representation." A lawyer accordingly may start working for the client and may provide the client with the written communication concerning fees within a reasonable time thereafter. What constitutes a "reasonable time" after the representation has begun will depend on the circumstance. SCR 20:1.5 contemplates, however, that the client be advised of important information concerning the representation before the matter proceeds very far and therefore should be done as soon as reasonably practical. In this way, the client will not be inconvenienced unnecessarily if the client decides to hire a different lawyer after considering the information. *See Restatement (Third) of The Law Governing Lawyers*, § 38, comment b (2001).

V. What Constitutes a Writing?

When information concerning fees and expenses must be communicated "in writing," how may this be accomplished? SCR 20:1.0(q) defines a "writing" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, Photostating, photography, audio or video recording and email." Thus, a writing required by SCR 20:1.5 need not be in the form of a "fee agreement" (indeed, the rule does not use that term), but could be something as simple as an email, a letter or memorandum, or as suggested by the ABA Comment, "a copy of the lawyer's customary fee arrangements." SCR 20:1.5, ABA Comment [2]. Arguably, a voicemail message falls within the definition of a "writing," although using a voicemail message as a "writing" undercuts the benefits of documentation and retention contemplated by the rule.

VI. Other Information that Must be Communicated in Writing.

A. Changes in the Basis or Rate of the Fee.

Regardless of whether the initial communication concerning fees was required to be in writing, SCR 20:1.5(b)(1) requires that any changes in the basis or rate of the fee or expenses be communicated to the client in writing. There are no exceptions to this requirement. Thus, even in the case of a regularly represented client as to whom no communication regarding fees and expenses was required upon the commencement of additional representation, information

concerning a change in the basis or rate of the fee (for example, an increase in hourly rates) must be communicated to the client in writing. The Wisconsin Committee Comment to SCR 20:1.5 explains this requirement as it relates to a regularly represented client:

> In instances when a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference on the periodic billing statement provided to the client within a reasonable time after the basis or rate of the fee or expenses has been changed. The communication to the client through the billing statement should clearly indicate that the change in the basis or rate of the fee or expenses has occurred along with an indication of the new basis or rate of the fee or expenses.

The Wisconsin Committee Comment thus makes it clear that a change in rates does not necessarily require a separate written notification to the client, but it does require at least a clear statement on a bill sent to the client notifying the client of the change and indicating the new basis or rate of the fee or expenses.

B. Purpose and Effect of any Retainer or Advance Fee.

SCR 20:1.5(b)(2) states that if the total cost of representation to the client, including attorney's fees, is more than $1,000, the "purpose and effect" of any retainer or advance fee that is paid to the lawyer shall be communicated to the client in writing. According to the Wisconsin Committee Comment accompanying SCR 20:1.5, "the lawyer should identify whether any portion, and if so what portion, of the fee is a retainer." A "retainer" is defined in SCR 20:1.0(mm) as:

> [A]n amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of the client, whether designated a "retainer," "general retainer," "engagement retainer," "reservation fee," "availability fee," or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d).

"Advanced fee" is defined in SCR 20:1.0(ag) as:

> [A]n amount paid to a lawyer in contemplation of future services, which will be earned at an agreed-upon basis, whether hourly, flat, or other basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an

advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(e)(4)h, SCR 20:1.15(g), and SCR 20:1.16(d).

VII. When Must the Writing be Signed by the Client?

SCR 20:1.5 does not require the client's signature on a writing which communicates the information required by SCR 20:1.5(b)(1) (the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible). Contingent fee agreements, however, must be signed by the client. A writing signed by the client is also required in certain situations involving a division of fees between lawyers who are not in the same firm. *See* SCR 20:1.5(e). Pursuant to SCR 20:1.0(q), a "signed" writing includes "an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing."

VIII. Responding to a Client's Request for Information Concerning Fees and Expenses.

SCR 20:1.5(b)(3) states that "[a] lawyer shall promptly respond to a client's request for information concerning fees and expenses."

In summary, a good working relationship with a client requires proper communication concerning the fees and expenses for which the client will be responsible. SCR 20:1.5 is designed to ensure that this communication occurs.

Wisconsin Formal Ethics Opinion E-91-2 is hereby withdrawn.

Revised Wisconsin Ethics Opinion E-93-4: Nonrefundable Retainers and Advanced Fees

Amended March 23, 2015

Synopsis

Lawyers may charge clients advanced fees, which SCR 20:1.0(ag) defines as an amount paid to a lawyer in contemplation of future services. SCR 20:1.0(ag) subjects advanced fees to the requirements of SCR 20:1.5 and SCR 20:1.16(d). Lawyers may also charge availability retainers to clients. SCR 20:1.5(b)(2) requires that the purpose and effect of any retainer be communicated to the client in writing when the total cost to the client of the representation is more than $1000. SCR 20:1.0(mm) prohibits lawyers from billing against retainers for fees or costs at any time, and subjects retainers to the requirements of SCR 20:1.5 and SCR 20:1.16(d). Because both advanced fees and retainers must be earned as required by SCR 20:1.16(d), and unforeseen circumstances may prevent such fees from being earned, a lawyer may not describe such fees as "nonrefundable" in communications with clients, including fee agreements.

Introduction

In Ethics Opinion E-93-4, the State Bar's Standing Committee on Professional Ethics (the "Committee") addressed whether a Wisconsin lawyer could ethically deem a client's advance payment of fees to be nonrefundable. The Opinion was issued in 1993, and in 2007, Wisconsin's Rules of Professional Conduct for Attorneys (the "Rules") were amended. As part of those amendments, the Rules governing lawyer's fees were significantly changed and consequently, the Committee deemed it necessary to revisit that prior opinion.

In the previous version of this Opinion, the Committee opined that nonrefundable lawyer fees were not *per se* unethical. That opinion, however, addressed particularly the nonrefundability of "retainers," stating as follows:

> A true nonrefundable retainer is a fee that a lawyer charges the client not necessarily for specific services to be performed but, for example, to ensure the lawyer's availability whenever the client may need legal services. These fees become the property of the lawyer when received and may not be deposited into the lawyer's trust account. In addition, they are presumed to be nonrefundable, provided that they meet the ''reasonable'' standard of SCR 20:1.5. Such retainers are to be distinguished from an ''advance'' which generally is considered to be earned only as services are performed, and which must be deposited into the lawyer's trust account. E-86-9. These funds do not belong to the lawyer and must be returned if not earned. SCR 20:1.16(d) expressly provides that any ''advance payment of fee that has not been earned'' must be returned to the client upon termination of the representation.

Thus, the Committee distinguished between "retainers," which could be deemed nonrefundable under certain circumstances, and "advances," which could not.

When the Rules were amended in 2007, the newly created SCR 20:1.0 was adopted. This Rule contained various definitions, two of which are of particular importance for this subject. First, SCR 20:1.0(ag) defines advanced fees and reads as follows:

> "Advanced fee" denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed−upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15 (b) (4) or (4m), SCR 20:1.15(e) (4) h., SCR 20:1.15 (g), and SCR 20:1.16 (d).

Second, SCR 20:1.0(mm) defines "retainer" and states:

> "Retainer" denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a "retainer," "general retainer," "engagement retainer," "reservation fee," "availability fee," or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16 (d).

Thus, under Wisconsin's Rules, a "retainer" is a payment made to a lawyer for the sole purpose of securing the lawyer's agreement to be available to perform legal services for the client should the need arise, but does not, and in fact *may* not, constitute payment for such legal services. An "advanced fee," by contrast, is a payment, in any form, made to a lawyer now for specific legal services to be performed in the future.

To illustrate the distinction between the terms, consider the following situation: Individual believes that he is under investigation by governmental authorities and believes that the investigation may result in charges being issued. In the event such charges are issued, Individual wants to ensure that Lawyer, an experienced and well-respected litigator, is available to represent Individual, but does not wish to be represented by Lawyer in connection with the investigation. Individual pays Lawyer a retainer, which causes Lawyer to regard Individual as a client and avoid conflicts, thereby ensuring that if charges are issued, Lawyer will be able to undertake representation of Individual. Lawyer performs no legal services for Individual while the investigation is pending. When charges are issued, Lawyer charges Individual an advanced fee for the legal services that Lawyer anticipates providing in defense of Individual. Lawyer then represents Individual in connection with the charges. Note that SCR 20:1.0(mm) prohibits applying the retainer towards the amount of the advanced fees.

On the facts above, is it appropriate, given Wisconsin's current Rules of Professional Conduct to term either the availability retainer[1] or advanced fee "nonrefundable?"

Discussion

Both availability retainers and advanced fees are, by their definitions, fees and subject to the requirements of SCR 20:1.5[2]. Moreover, both retainers and advanced fees are also, by their definitions, subject to the requirements of SCR 20:1.16(d), which provides as follows:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Thus, both availability retainers and advanced fees must be earned by the lawyer or returned upon termination.

Determining whether an advanced fee is earned is relatively straightforward: the lawyer earns an advanced fee by performing the legal services for the client for which the advanced fees are intended to constitute payment. If the lawyer does not or cannot perform the legal services for which the advanced fee constitutes payment, the lawyer must refund the unearned portion of the advanced fee.

Availability retainers, however, cannot constitute payment for legal services at any time.[3] Therefore, the analysis of the application of SCR 20:1.16(d) is less straightforward. Availability retainers do constitute payment, but only for the availability of the lawyer to perform services in the event they are needed rather than the actual services. Therefore, a lawyer earns a retainer by actually being available to the client as agreed upon. Considering again the example above, Lawyer first charges Individual a retainer and earns that retainer by being available to represent Individual if and when charges are issued. If, however, shortly after accepting the matter, Lawyer discovers that she has a conflict that would prevent Lawyer from representing Individual if charges are issued, the Lawyer is unable to ensure availability to Individual and must refund the retainer paid by the individual because Lawyer has not earned the retainer.

The fact that both retainers and advanced fees are subject to the requirements of SCR 20:1.16(d) means that the lawyer's ability keep either type of payment is contingent upon future events. In the case of advanced fees, the lawyer must provide legal services to earn the advanced fees, In the case of an availability retainer, the lawyer must be available to the client as agreed upon. A lawyer may be prevented from fulfilling either obligation (providing legal services or remaining available) by unforeseen changes in circumstances, such as conflicts, loss of license or death or incapacity of the lawyer.

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[1] For purposes of this Opinion, the terms "availability retainer" and "retainer" are synonymous.

[2] "A retainer is a fee that a lawyer charges the client not for specific services to be performed but to ensure the lawyer's availability whenever the client may need legal services." Wisconsin Committee Comment to SCR 20:1.5.

[3] See SCR 20:1.0(mm).

In dealing with current and prospective clients, lawyers must be truthful. This stems from the lawyer's obligation under SCR 20:8.4(c) not to engage in any conduct involving dishonesty, deceit or misrepresentation. Misrepresentation is defined by SCR 20:1.0(h) as follows:

> "Misrepresentation" denotes communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist.

Lawyers are also prohibited by SCR 20:7.1(a) from engaging in misleading communications about their services.

Based on the forgoing, the Committee does not believe that it would be accurate to term either an availability retainer or advanced fee as nonrefundable. In the view of the Committee, a reasonable person would interpret the term "nonrefundable" to mean that the person would not be entitled to a refund under any circumstances. As discussed above however, circumstances may arise that would prohibit the lawyer from fulfilling the obligations necessary to earn either the retainer or advanced fee. Therefore to use the term "nonrefundable" in connection with either advanced fees or retainers is a misleading communication about the lawyer's services in violation of SCR 20:7.1(a) and thus prohibited. Depending upon circumstances, use the of the term "nonrefundable" may also violate SCR 20:8.4(c).

The Committee also notes that use of the term "nonrefundable" does not affect the analysis of whether a lawyer is entitled to keep an advanced fee or availability retainer. As discussed above, in order to keep such payments, lawyers must demonstrate that they are earned, and the determination of whether such payments are earned is not affected by whether they are described as "nonrefundable" in an engagement letter. This is illustrated by Wisconsin disciplinary actions (initiated since the adoption of the new Rule), where lawyers were required to refund advanced fee payments notwithstanding that they were described by the lawyers as "nonrefundable."[4]

Lastly, the Committee notes that SCR 20:1.0(mm) states that a retainer becomes the property of the lawyer upon receipt, but that retainers are subject to the requirements of SCR 20:1.6(d). Therefore, the requirement that such fees be earned is explicit, and the fact that lawyers may have a property interest in availability retainers does not alter the analysis as to whether the use of the term "nonrefundable" is appropriate.[5]

Other Considerations

When a lawyer agrees to accept an availability retainer from a prospective client, the lawyer should bear in mind additional considerations. When a lawyer accepts such a retainer, the lawyer must treat the client as a currently represented client, even though the lawyer is not actively providing legal services at the time. From this flows all the obligations that a lawyer owes to any client, such as avoiding impermissible conflicts, as required by SCR 20:1.7, and observing the duty of confidentiality, as required

[4] See e.g. *Public Reprimand of John Anthony Ward,* 2012-OLR-2; Private Reprimand 2008-05.

[5] The fact that retainers become the property of the lawyer upon receipt does allow the lawyer to place availability retainers in the lawyer's business, rather than trust, account.

by SCR 20:1.6. The lawyer must also observe the obligations under SCR 20:1.5(b) to communicate the purpose and effect of any retainer, and such communication must be in writing if the amount of the retainer is over $1000. Finally, retainers, like any type of lawyer fee must be reasonable, as required by SCR 20:1.5(a).

E-95-4 Lawyer self-help in enforcing fee agreement with clients

Question

Assuming that a lawyer and client have entered a fee agreement that complies with SCR 20:1.5 and that the client has failed to remain current in payments of the lawyer's fee, may the lawyer use the following self-help remedies to collect the fee: 1) continue the representation but withhold some or all services (e.g., postpone a final hearing on a divorce) until satisfactory payment arrangements are made; 2) withdraw from representation; and 3) if the lawyer withdraws, retain the client's file until satisfactory payment arrangements are made?

Opinion

Opinion E-80-8 addressed some of the issues presented in the question, but the Committee on Professional Ethics believes that these issues should be revisited given the subsequent adoption of the Wisconsin Rules of Professional Conduct. Opinion E-80-8 is hereby superseded.

The Rules of Professional Conduct and related law demand that lawyers provide high quality legal services consistent with the objectives of the representation. It is highly offensive to the letter and spirit of the Rules for lawyers to withhold appropriate services in a continuing lawyer-client relationship in order to pressure the client into meeting fee obligations owed to the lawyer. For example, the duties of competence, imposed by SCR 20:1.1, and diligence, imposed by SCR 20:1.3, leave no room for intentionally diminished services by the lawyer. The conflict of interest provisions in SCR 20:1.7(b) expressly require the avoidance of harm to clients caused by conflicts between the client's interests and the lawyer's interests. As long as the representation continues, the lawyer owes the client the duty to exert her best efforts in the client's interests consistent with the nature of the representation agreed upon.

Although lawyers are prohibited from withholding services from a continuing client in order to pressure the client into paying the lawyer's fee, the lawyer need not continue indefinitely in the representation if the client has breached fee

obligations. As a general matter, SCR 20:1.16(b)(4) permits a lawyer to withdraw from representation if the client ''fails substantially'' to fulfill a fee obligation to the lawyer and the client has been given a ''reasonable warning'' that the lawyer will withdraw unless the obligation is fulfilled. Two significant limitations, however, operate upon this right to withdraw. First, if a court or other tribunal orders the lawyer to continue in the representation, withdrawal is not permitted. *See* SCR 20:1.16(c). Second, upon withdrawing from representation for nonpayment of a fee, a lawyer is required by SCR 20:1.16(d) to ''take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, [and] surrendering papers and property to which the client is entitled.''

If the lawyer-client relationship is terminated, the Rules of Professional Conduct permit the lawyer to ''retain papers relating to the client only to the extent permitted by other law.'' SCR 20:1.16(d). The so-called ''retaining lien'' has not been expressly recognized in Wisconsin and, therefore, any claim by a lawyer that there is, under Wisconsin law, a general right to retain client papers to secure payment of a fee is tenuous, at best. *See generally* ABA, Annotated Model Rules of Professional Conduct at 283–84 (2d ed. 1992); 45 Wis. Bar Bull. 34 (April 1973). Even though Wisconsin law has not recognized a general retaining lien for lawyers, it may be permissible in very limited circumstances to retain some client-related papers as a matter of contract or other law. For example, if a client hires a lawyer for the sole purpose of preparing a document, such as a form contract for a business or articles of incorporation, and fails to pay the agreed upon fee for the document, it may be permissible to retain the contracted-for document until the fee is paid. This, however, would be a more limited right than the retaining lien recognized in some jurisdictions. *See also* E-82-7 relating to providing copies of files to clients.

Ethics Op EF-10-02.doc

Wisconsin Formal Ethics Opinion EF-10-02: Ethical Responsibility of Lawyers When Referral Fees are Received

October 27, 2010

Synopsis: *When a lawyer refers a matter to another lawyer in return for a referral fee, each lawyer assumes certain ethical responsibilities. The referring lawyer is obligated to obtain the client's informed consent to discuss the possible referral with another lawyer, must refer matters only to competent counsel, must obtain the client's signed consent in writing to the terms of the referral, must monitor the progress of the matter and must remain available to the client. These duties stem from the fact that the referring lawyer maintains a lawyer-client relationship with the client throughout the course of the matter. The receiving lawyer is obligated to cooperate with the referring lawyer in fulfilling these duties. Ethics Opinion E-00-01 is withdrawn.*

Opinion

Introduction

In Ethics Opinion E-00-01, the State Bar's Standing Committee of Professional Ethics (the "Committee") discussed the respective responsibilities of lawyers in matters in which a referral fee was paid by one lawyer to another. In a typical referral fee matter, a lawyer is approached by a prospective client seeking representation on a matter that the lawyer does not wish to undertake, but the lawyer knows another lawyer who would be willing and able to undertake the representation. The lawyer will then, with the client's permission, refer the client to the other lawyer, who agrees to pay the referring lawyer an agreed upon portion of the fee in return for the referral. Referral fees are common in personal injury matters, in which the receiving lawyer typically agrees to pay the referring lawyer an agreed upon percentage of the final contingent fee.

A referral fee is distinguished from a division of fees in which the lawyers involved each work on the matter and the client receives one bill representing the fees of all lawyers involved, in that a lawyer receiving a referral fee normally performs little if any substantive legal work on the matter. This opinion is limited to a discussion of referral fees and will not address ethical responsibilities in other fee sharing arrangements.

Shared Responsibility

Under Wisconsin's Rules of Professional Conduct for Attorneys (the "Rules") in effect at the time E-00-01 was issued, SCR 20:1.5(e) imposed "joint responsibility" for the representation on both the referring and the receiving lawyers, and that opinion focused on explaining the

requirements of "joint responsibility" under the prior Rule. When Wisconsin's new Rules were adopted in 2007, SCR 20:1.5(e) was revised to read as follows:

> *(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:*
>
> *(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or*
>
> *(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or*
>
> *(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.*

Thus, the requirement under the previous Rule that both lawyers assume "joint responsibility for the representation" has been replaced with the requirement that each lawyer "assumes the same responsibility for the representation as if the lawyers were partners in the same firm." The question then is whether the new Rule imposes a different standard of ethical responsibility on lawyers.

The Wisconsin Committee Comment to SCR 20:1.5 provides no guidance on this issue. However, ABA Comment, paragraph [7] provides as follows:

> *[7] 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. 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.

ABA Model Rule 1.5(e)(1), which governs referral fees under the ABA Model Rules and which the above Comment is intended to explain, still mandates that lawyers assume "joint responsibility" for the matter when a referral fee is paid.[1] Thus, the phrase "joint responsibility" was originally intended to impose the same ethical responsibility as if the lawyers were partners in the same firm. Therefore, the current SCR 20:1.5(e)(3) does not, in the opinion of the Committee, impose a different standard of ethical responsibility on lawyers than the previous Rule.

SCR 20:5.1 defines the ethical responsibilities of partners in the same firm and provides as follows:

SCR 20:5.1 Responsibilities of partners, managers, and supervisory lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

SCR 20:5.1 thus requires that partners must make reasonable efforts to ensure that measures are in place to assure compliance with the Rules and imposes responsibility upon partners for another lawyer's misconduct if they direct or order that misconduct or are aware of the conduct and fail to take reasonable remedial measures in a timely fashion.

In Ethics Opinion E-00-01, the Committee discussed the responsibilities of referring and receiving lawyers in light of SCR 20:5.1 as follows:

[1] The Comments are not adopted by the court but are published to provide guidance interpreting the Rules. See Wisconsin Supreme Court Rules Order 04-07.

Referring attorney must maintain contact with the progress of a matter. *The Professional Ethics Committee opines that when a lawyer refers a matter to a lawyer not in the same law firm under the fee sharing arrangement permitted by SCR 20:1.5(e)(3), the referring lawyer need not be involved in the day-to-day substantive handling of the matter including such activities as making tactical decisions regarding the representation or providing the legal services necessary to achieve the objective of the representation.*

However, the referring lawyer in assuming joint responsibility for the representation must maintain contact with the progress of the matter in the following regards.

First, the referring lawyer must remain sufficiently aware of the performance of the lawyer to whom the matter was referred to ascertain if that lawyer's handling of the matter conforms to the Rules of Professional Conduct. This may be achieved by periodically reviewing the status of the matter with that lawyer, the client or both. It also requires being available to the client regarding any concerns of the client that the lawyer to whom the matter has been referred is handling the matter in conformity with the Rules. This is not to say that the referring lawyer is the final arbiter of whether the lawyer to whom the matter is referred is complying with the Rules, such as acting competently. See SCR 20:1.1 However, it does involve the informed professional judgment of the referring lawyer being available to the client and acting on the client's behalf. It must be remembered that in such a referral arrangement, the referring lawyer still maintains an attorney-client relationship with the client. It is the ongoing protection of the client's interests by the referring lawyer that justifies the referring lawyer receiving a fee that is beyond the proportion of the services actually provided by that lawyer.

Second, the referring lawyer has the supervisory duty to refer legal matters only to lawyers who are competent to handle the matter in question. In this regard, a lawyer referring a matter to another lawyer, especially in circumstances in which the referring lawyer may have a financial stake in the referral, must select that lawyer solely for that lawyer's ability to provide the legal services that the client needs and not because that lawyer may be willing to enter into a fee sharing arrangement with the referring lawyer.

Third, the referring lawyer must assume financial responsibility for the matter though this may be secondary to the financial responsibility assumed by the lawyer to whom the matter was referred. Typically, financial responsibility will involve the responsibility for paying or advancing payment of costs associated with the handling of the matter (for example, court costs, expert fees, discovery costs, and so on). Whether this involves advancing costs or the assumption of responsibility for paying costs by the responsible lawyers is a matter for agreement with the client subject to the Rules of Professional Conduct. See SCR 20:1.8(a), (e) and (j).

The committee also opines that "joint responsibility for the representation" implies that both the referring lawyer and the lawyer to whom the matter was referred must reach a common understanding of their respective joint responsibilities as well as their individual responsibilities to the client. This understanding is fundamental to the proper exercise of

their respective obligations to the client. The client should be informed of that common understanding, preferably in writing. See SCR 20:1.4.

The Committee now reaffirms this analysis and opines that it is applicable to the current Rule. The Committee also takes the opportunity to expand upon this prior analysis. E-00-01 did not address explicitly the responsibilities of the referring lawyer should concerns arise with respect to the conduct of the receiving lawyer. For example, what are the responsibilities of a referring lawyer if a receiving lawyer becomes unable to act, whether through illness, suspension or other reasons?

As noted above, when matters are referred, it is often contemplated that the referring lawyer will perform little or no substantive legal work on the matter. Further, it is common for lawyers to refer matters to other lawyers which are outside the referring lawyer's area of expertise. Thus an estate planning lawyer, with no trial experience may properly refer a personal injury matter to an experienced trial lawyer. Lawyers also commonly refer matters when the referring lawyer lacks the resources of the receiving lawyer or firm. These practices are not inappropriate and such situations do not preclude a lawyer from receiving a referral fee. Given, however, that the referring lawyer has the same responsibility for the matter as if he or she were partners with the receiving lawyer, the referring lawyer has a responsibility to act under SCR 20:5.1(c)(2) if necessary to mitigate or correct the adverse consequences of misconduct of the receiving lawyer.

Shared responsibility does not require the referring lawyer to have the same resources, expertise or experience as the receiving lawyer. However, shared responsibility does require that the referring lawyer must be able to step in, if circumstances require, and take reasonable actions to protect the interests of the client. It must again be emphasized that the client remains the client of the referring lawyer in such a situation.

Thus, if the receiving lawyer in a litigated matter becomes unable to act due to illness, the referring lawyer must be prepared, if necessary, to enter an appearance, request adjournments or take other measures to protect the client and assist the client in locating other counsel if necessary. The referring lawyer is not necessarily required to attain the same level of competence to act in the matter as the receiving lawyer, and need not, for example, be capable of assuming sole responsibility for a complex litigation matter. The referring lawyer must, however, be prepared and competent to undertake limited actions such as seeking adjournments, assisting the client in seeking new counsel and dealing with opposing counsel should unusual circumstances so require.

With respect to the requirement of shared financial responsibility for the matter, it should be noted that the respective degree of financial responsibility of both the referring and receiving lawyer is the subject of agreement between the lawyers and the client. Lawyers may agree with a client that the client will be responsible for all costs and must pay those costs in advance, or lawyers may agree to advance costs or make repayment of advanced costs subject to the outcome of the matter [see SCR 20:1.8(e)]. The requirement of shared financial responsibility for the

matter simply requires that both the referring and receiving lawyers reach an agreement as to respective responsibility for costs with the client and abide by that agreement.

Requirement of Client Consent in Writing

SCR 20:1.5(e)(3) also requires that the lawyer inform the client of the terms of the referral, including the share that each lawyer will receive and whether the overall fee will increase as a result of the referral and that the client consent, in writing, to those terms.

With respect to this requirement, the Committee first notes that a "signed writing," as defined by SCR 20:1.0(q), can include an acknowledged e-mail or other electronic recording. Thus, the lawyer has options beyond paper and pen to fulfill the requirement of signed written consent. Second, in the opinion of the Committee, informing the client of the terms of the referral arrangement includes informing the client explicitly that the referring lawyer maintains a lawyer-client relationship with the client and therefore remains ethically and financially responsible for the matter and will be available to the client throughout the matter. The client should also be informed in writing of the respective, agreed-upon responsibilities for costs assumed by each lawyer. This is in addition to the requirement that the client be informed of the share of the fee that each lawyer will receive and whether the overall fee will increase. Normally this responsibility falls on the referring lawyer, although both lawyers are responsible for ensuring that the requirements of SCR 20:1.5(e)(3) are met. Third, as discussed above, the client should be informed of the understanding between the two lawyers as to their respective responsibilities for the matter. Finally, because client consent is required for the referral, the written consent of the client must be obtained upon or prior to the referral.

Confidentiality

When considering the referral of a matter, the lawyer must be mindful of his or her obligations under SCR 20:1.6, which requires lawyers to keep confidential all information relating to the representation of a client unless the client gives informed consent. This requires that that the lawyer wishing to discuss a possible referral with a lawyer in another firm must first obtain the client's informed consent prior to contacting the other lawyer to discuss the possible referral.

Conflicts and other considerations

The referring lawyer maintains a lawyer-client relationship with the client throughout the matter, and the existence of this lawyer-client relationship prohibits a lawyer from receiving a referral fee (or seeking to receive such a fee) whenever such a lawyer-client relationship cannot be established or maintained. Thus, if the referring lawyer would have a conflict of interest in accepting the matter, the lawyer may not receive a referral fee in the matter. Some conflicts,

however, are waivable and a lawyer may receive a referral fee if the client's signed informed consent to the conflict is obtained. See SCR 20:1.7(b). In such a situation, the requirement that the lawyer obtain the client's informed consent in a writing signed by the client is in addition to the requirement that the lawyer obtain the client signed consent in writing to the referral of the matter.

Other situations which prohibit a lawyer from forming or maintaining a lawyer-client relationship and thus preclude the lawyer from receiving a referral fee include if the lawyer's license is under suspension (for either disciplinary or administrative reasons), the lawyer's license is on inactive status or the lawyer is otherwise unable to act as a lawyer in the matter. As discussed above, the referring lawyer must remain capable of stepping in to protect the client's interests should such actions become necessary, and thus must be able to legally and ethically represent the client in the matter.

Sharing of Legal Liability

The Rules do not establish standards for civil liability of lawyers (See Preamble, paragraph [20]). In E-00-01 the Committee did, however, discuss shared legal liability in referral matters as follows:

> *The question of the legal liability of a referring lawyer for the manner in which the client's matter is handled to completion is a question of law. However, the committee notes that the requirements of joint responsibility imply an active concern and attention on the part of the referring lawyer for the competent handling of the matter to completion. The referring lawyer is still the client's lawyer, even though the lawyer to whom the matter is referred will usually be the lawyer responsible on a day-to-day basis for the handling of the matter. The duty of joint responsibility imports a serious responsibility as a lawyer and is not a mere hand off of the case to another lawyer to handle in his or her own unfettered discretion. This opinion earlier noted the Comments to SCR 20:1.5 that relate the duty of joint responsibility for a referring lawyer to the responsibility of a partner or a lawyer having supervisory authority of another lawyer in a law firm. See SCR 20:5.1. In a law firm, that responsibility is one of vicarious liability unless that liability is adjusted by the implementation and operation of limited liability law. See SCR 20:5.7.*

The Committee hereby reaffirms this portion of E-00-01 and, while noting that a violation of SCR 20:1.5(e)(3) does not *ipso facto* establish liability of any lawyer, urges referring lawyers to be mindful of all responsibilities which are attendant to a lawyer-client relationship

Summary

In summary, lawyers who seek to receive or agree to pay a referral fee assume the following ethical responsibilities:

- When considering the possible referral of a matter in return for a fee, the lawyer must first discuss the matter with the client and obtain the client's informed consent to contact the potential receiving lawyer.
- The referring lawyer has a duty to refer matters only to lawyers who the referring lawyer reasonably believes are competent to handle the matter.
- The referring lawyer must obtain the client's consent in a writing signed by the client, to the terms of the referral.
- The referring lawyer retains a lawyer-client relationship with the client, and so has a responsibility to monitor the progress of the case and remain available to the client This may be achieved by regular, periodic contacts with the receiving lawyer, the client or both.
- Should the referring lawyer become aware of unethical or otherwise improper conduct by the receiving lawyer, or if there is reason to believe that the receiving lawyer is not providing competent representation to the client, the referring lawyer must take reasonable steps to address the problems.
- The referring lawyer maintains financial responsibility for the representation.
- The receiving lawyer is obligated to cooperate with the referring lawyer in fulfilling these responsibilities.

E-00-01 is hereby withdrawn

STATE BAR OF WISCONSIN

The Wisconsin Supreme Court supervises the practice of law in Wisconsin. In doing so, it has established rules governing lawyer conduct, the Rules of Professional Conduct for Attorneys.

As a State Bar member, you have access to guidance and help in resolving questions regarding Wisconsin's Rules of Professional Conduct for Attorneys.

There are a number of ways in which you can receive ethics guidance through the State Bar.

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Alternative Fee Agreements

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Agenda

-Differences Between Fees and Costs
-Advanced, Hourly & Flat Fees
-Contingent Fee
-Retainer
-Nonrefundable Retainers and Advanced Fees
-Referral Fees

3

Differences Between Fees and Costs

4

Basics of SCR 20:1.5

SCR 20:1.5 Fees.

(a) Must be **reasonable**.

(b) (1) Scope of representation and basis for fee must be communicated and if likely to be **$1000 or less**, the communication may be **oral** or in **writing**.

(b)(2) If **more than $1000**, the purpose and effect of any **retainer** or **advance fee** paid to the lawyer must be communicated in **writing**.

(b)(3) **Lawyers must promptly respond to a client's request for information concerning fees and expenses**.

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At the end of Representation: 20:1.16(d)

(d) the lawyer **must refund** any advance payment of fee or expense that has not been earned or incurred.

6

Trust Account Requirements

- SCR 20:1.15(b)(1) **-** "A lawyer shall hold in trust, separate from the lawyer's own property, ***that property of clients and 3rd parties that is in the lawyer's possession in connection with a representation.*** All funds of clients and 3rd parties paid to a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable trust accounts." (**Emphasis Added)**.

7

Advanced Fees vs. Advanced Costs

SCR 20:1.5(f) - "Except as provided in SCR 20:1.5(g), unearned fees and funds advanced by a client or 3rd party for payment of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to SCR 20:1.5(h). ***Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred***." **(Emphasis Added).**

8

Funds Which Must be Placed in Trust Accounts Include:

Advanced Fees for legal services

- Both hourly and flat fee advances must be held in trust unless the requirements of SCR 20:1.5(g), Alternative Protection for Advanced Fees, are followed.

Cost Advances

- Filing Fees
- Other Advanced Costs Relating to a Representation

Funds in which the lawyer, the client and/or a 3rd party claim an interest

- Settlement proceeds (Personal Injury & Divorce)
- Collected or garnished funds
- Real estate escrows and closing proceeds
- Probate or Guardianship Estate Funds

Source: Office of Lawyer Regulation – Trust Account Manual

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In brief, the **Alternative Protection for Advanced Fees requirements** include the following components:

- Upon receiving an advanced fee, the lawyer must provide written notice to the client of the obligation to refund unearned fees, the availability of fee arbitration, and the availability of reimbursement by the Wisconsin Lawyers' Fund for Client Protection, as well as other information relating to the rate of the fee and the anticipated expenses.

- Upon termination of the representation, the lawyer must account for any fees not previously accounted for and promptly refund any unearned fees. The lawyer must also notify the client that, if the client disputes the fee and wants to arbitrate that dispute, the client must provide the lawyer with written notice of such dispute within 30 days of the lawyer's mailing the accounting.

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- Upon receipt of timely notice that a client disputes the fee, the lawyer must either resolve the dispute or submit it to binding arbitration within 30 days, provided the client agrees to arbitration.
- Upon receiving notice of an arbitration award in the client's favor, the lawyer must pay that award within 30 days.

Source: SCR 20:1.5(g)

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Sample Language – Alternative Protection for Advanced Fees

Client agrees to pay $_____.00 on execution of this Agreement as an advanced fee for legal services of Attorney, and $_____.00 as an initial advance against costs to be incurred in this matter. Advanced costs will be placed in Attorney's trust account and disbursed as costs are actually incurred. Advanced fees will not be placed in Attorney's trust account. Advanced fees will be placed in Attorney's business account and the advanced fee sum of $_____ will serve as advanced payments for ___ hours of legal services in this matter. After Attorney has provided ____ hours of legal services for Client, Attorney will provide client with a written accounting of such hours. Attorney is obligated to refund any unearned fees at the conclusion of the representation. Client hereby consents to Attorney placing advanced fees in Attorney's business account.

Source: New Trust Account Rules: Lawyer Fees and Fee Agreements

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Sample Language Continued – Alternative Protection for Advanced Fees

At the conclusion of the representation, Attorney will provide Client with a written accounting of all fees and costs incurred in the matter, or an accounting of fees and costs incurred from the date of last billing statement sent to Client, and a refund of any advanced fees that have not been earned or advanced costs that have not been used. If Client disputes Attorney's determination as to what amount, if any, must be refunded to Client, Client must provide Attorney with written notice of the dispute within 30 days from the date of the final accounting. If the dispute cannot be resolved within 30 days, Attorney will submit the dispute to binding fee arbitration through the State Bar of Wisconsin Fee Arbitration Program. The State Bar's Fee Arbitration Program may be contacted c/o State Bar of Wisconsin, P.O. Box 7158, Madison, WI 53707-7158, or by phone at (800) 728-7788. [Lawyers in Milwaukee County should provide contact information for the Milwaukee Bar Association fee arbitration program.] Client is not required by this agreement to participate in fee arbitration and may pursue a dispute of Attorney's fees in other appropriate forums. Further, if Attorney fails to refund unearned fees, abide by a fee arbitration award, or abide by a final decision of a court with respect to unearned fees, Client may file a claim with the Wisconsin Lawyers Fund for Client Protection to recover such amount. The Wisconsin Lawyers Fund for Client Protection may be contacted c/o State Bar of Wisconsin, P.O. Box 7158, Madison, WI 53707-7158, or by phone at (800) 728-7788.

Source: New Trust Account Rules: Lawyer Fees and Fee Agreements

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Advanced, Hourly & Flat Fees

14

Advanced Fee – Effective July 1, 2023

(ag) "Advanced fee" denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat, or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), ~~SCR 20:1.15(f) (3) b.4~~, and SCR 20:1.16(d). (Acknowledging the elimination of the E-Banking Trust Account).

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Flat Fee – Effective July 1, 2023

(dm) "Flat fee" denotes a fixed amount paid to a lawyer for specific, agreed-upon services, or for a fixed, agreed-upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed-upon stage in the representation. A flat fee, sometimes referred to as "unit billing," is not an advance against the lawyer's hourly rate and may not be billed against at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), ~~SCR 20:1.15(f) (3) b.4.~~, and SCR 20:1.16(d). Notwithstanding that lawyers have a property interest upon receipt of flat fees, such fees can be earned only by the provision of legal services.

Acknowledging the elimination of the E-Banking Trust Account requirement option and clarifying that flat fees, while becoming the property of the lawyer upon receipt, still need to be earned before they belong to the attorney.

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Advanced & Hourly Fees

SCR 20:1.0(ag) – **"Advanced fee" denotes an amount paid to a lawyer in contemplation of future services**, which will be earned at an agreed-upon basis, ***whether hourly, flat, or another basis***. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), and SCR 20:1.16(d). (**Emphasis added**).

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Advanced & Hourly Fees – Explanation

Advanced Fee – Again, a situation where the client pays a lawyer an advanced fee for contemplation of legal services. Advanced fee payments included hourly, flat fees or another basis (discussed later in the presentation). The advanced fee does not and cannot include costs, but rather solely covers the attorney's fee (legal services).

Example – Client engages lawyer to represent client in a disorderly conduct case. Client pays attorney with a $3,000 check at the start of the matter, which will be earned by lawyer at the rate of $200.00 per hour of the attorney's billed time. Same factual situation, except parties agree to a flat fee of $3,000 for representation through trial. Each are examples of advanced fees that must be put into a trust account unless Alternative Protection for Advanced Fees requirements are met.

Hourly Fee – Agreed upon hourly rate fee charged by the attorney for legal services (see above – first example). Again, not flat or fixed, and does not and cannot cover costs.

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Flat Fee – Explanation

Common Misconception – A common misconception regarding "flat fees becom[ing] the property of the lawyer upon receipt" is that a lawyer owns the money and can deposit the funds in their business account. Property of the lawyer upon receipt does not mean the lawyer owns the funds. The client owns the funds until earned by the lawyer. Accordingly, the flat fee must be handled as an advanced fee.

Example – Client engages lawyer to represent client at an initial appearance in a disorderly conduct case and pays a flat fee check of $500 up front. Lawyer must deposit flat fee into trust account, unless Alternative Protection for Advanced Fees requirements are met. **Note:** Lawyer typically bills $250 per hour, and unexpectedly spends 5 hours representing client for the initial appearance. Lawyer may recover only the flat fee amount of $500.

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Advanced, Hourly, & Flat Fees – Similarities

Written or oral expression of fees for matters $1000 or less –SCR 20:1.5(b)(1) requires notification to client in a writing or orally when contemplated attorney's will be $1000 or less. Any changes in rate of fee or expenses must be communicated in writing. **Note:** OLR will request fee agreements in grievance cases, so even though you may not be required to have a writing, you should strongly considering have one.

Applicability of Supreme Court Rules – Advanced, Hourly, & Flat Fees are subject to the requirements of SCR 20:1.5, including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), and SCR 20:1.16(d).

Does Not & Cannot Include Costs – Advanced, hourly, and flat fees are just for fees and do not cover the costs of representation.

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Sample Language – Flat Fee

Client agrees to pay a flat fee of $ _____ for this service. That fee, upon payment, becomes the property of the law firm and will be deposited in Attorney's trust account. Upon completion of the agreed upon services, Attorney will provide client with an accounting and withdraw the earned fees from trust. Client hereby agrees that Attorney may withdraw the earned fees from trust on the date the accounting is provided or mailed to Client.

Source: State Bar of Wisconsin Ethics – Sample Forms

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SCR 20:1.5(h)(1) Disbursing fees when earned- the "Five Day Rule"

At least 5 days before drawing funds from a trust account to pay fees, the lawyer must send:

An itemized bill

Notice of amount owed and date of withdrawal

Notice of the balance of the client's funds left after the withdrawal

[**doesn't apply to contingent fees**]

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SCR 20:1.5(h)(2) Disbursing fees on day invoice is transmitted to client

Lawyer may withdraw earned fees on the date that the client is sent bill, provided:

Lawyer has given prior notice to client in writing that fees will be taken on the same day as the billing

Invoice must include all the elements of the "Five Day Rule" notice under SCR 20:1.5(h)(1)

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If Client Objects to Disbursement:

Before the 5 day period – **don't disburse until resolved.**

Within 30 days after withdrawal:

You must return the disputed portion to your trust account UNLESS you believe that the objections are not a basis to hold funds or return funds to trust---

The lawyer is presumed to have a reasonable basis for refusing to return funds to trust if the disbursement was made with the client's written, informed consent.

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SCR 20:1.5(h)(3)-
The good news and the "to do list"

Lawyer presumed to have a reasonable basis for declining to return funds to the trust account….IF disbursement made with the client's consent in writing.

If an objection is made the lawyer must promptly advise the client in writing of the lawyer's position regarding the fee.

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Cost Advances:

SCR 20:1.5(f) Advanced COSTS to be held in trust <u>until</u> the costs are incurred; BUT

A lawyer may disburse funds to pay client costs or expense when payment is due (but the client account must have the funds to cover the payment!) – SCR 20:1.15(e)(1)

Lawyer is NOT required to send an invoice before paying an expense that has been advanced – SCR 20:1.5(h)(1) does not apply!

If a client requests information concerning an expense, the lawyer must respond promptly – SCR 20:1.5(b)(3)

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Contingent Fee

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Contingent Fee

SCR 20:1.5(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 par. (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.

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Contingent Fee Cont'd

SCR 20:1.5(c) – 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.

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Contingent Fee – Prohibited In Certain Actions

SCR 20:1.5(d) – A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

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Contingent Fee – Key Features

Signed Writing – A contingent fee agreement shall be in a writing signed by the client.

Details Required in Signed Writing – 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. Must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

Prohibited in Certain Actions – In any action affecting the family, except for the collection of past due amounts of support or maintenance or property division AND in a criminal case or any proceeding that could result in deprivation of liberty.

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Contingent Fee – Key Features

Upon Conclusion of a Contingent Fee Matter – Per SCR 20:1.5(c), 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. However, contingent fees are not subject to the "five-days prior notice" and other fee withdrawal requirements of SCR 20:1.5(h)(1).

Example – A lawyer represents a personal injury plaintiff on a one-third contingent fee basis. Settlement is reached for $100,000, and per the settlement agreement the plaintiff agrees to be responsible for resolving all third-party claims (including all claims for medical bills and attorney's fees and costs). The defendant's insurer sends one check for the agreed-upon settlement amount made payable to just the attorney.

In this situation: (1) the lawyer has an obligation to deposit the check into the lawyer's trust account (regardless of whether the check specifies "trust account" on it); and (2) the lawyer must provide a written statement to the client, showing the net remittance to the client, and how the other amounts (attorney's fees, attorney's expenses, and medical bill payments) were calculated and paid out of the gross settlement payment.

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Retainer

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Retainer (A retainer is not an advanced fee.)

SCR 20:1.0(mm) “Retainer" denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a "retainer," "general retainer," "engagement retainer," "reservation fee," "availability fee," or any other characterization. **This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point.** A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d). (**Emphasis added.**)

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Retainers vs. Advanced Fees

Clients and lawyers often confuse retainers with advanced fees – Remember, retainers are not and cannot be for the future payment of attorneys' fees, but rather are money paid to ensure attorneys' services are available. The money becomes the property of the attorney upon receipt, subject to the requirements of SCR 20:1.5 (reasonableness, writing requirements, and response to client's request for information) and SCR 20:1.16(d) (failing to protect client's interests upon termination of representation and failing to return unearned retainer).

Reasonableness of Fees – *See* SCR 20:1.5(1 – 8), Comment [1] & published cases.

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Retainer Example

Client wants to ensure the services of a top criminal defense attorney in the state would be available to provide services in the event the client needs criminal representation. Lawyer agrees to availability and a reasonable retainer amount of $500 per month that will continue until terminated by the client. Retainer to begin the following month and client cuts lawyer a check for $500.

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Retainer Analysis

- A retainer is not an advance for future legal fees or costs; instead, a retainer secures the availability of the lawyer to provide future services. Must not be put into a lawyer's trust account. A "retainer" is still subject to the reasonableness requirements of SCR 20:1.5(a) [Fees] and the refunding requirements of SCR 20:1.16(d) [Declining or terminating representation].
- NOTE: A "retainer" may be considered unearned under certain circumstances. While not an exhaustive list of such circumstances, the following are examples of situations in which a "retainer" could potentially be considered unearned: the lawyer is required to withdraw from the representation due to a conflict of interest, a health problem, a breakdown in the attorney-client relationship or the client's termination of the lawyer's services, or the lawyer or client dies prior to the conclusion of the representation.

Source: Wisconsin Ethics Opinion E-93-4

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Nonrefundable Retainers and Advanced Fees

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Revised Wisconsin Ethics Opinion E-93-4: Nonrefundable Retainers and Advanced Fees

- "Lawyers may charge clients advanced fees, which SCR 20:1.0(ag) defines as an amount paid to a lawyer in contemplation of future services. SCR 20:1.0(ag) subjects advanced fees to the requirements of SCR 20:1.5 and SCR 20:1.16(d).
- Lawyers may also charge availability retainers to clients. SCR 20:1.5(b)(2) requires that the purpose and effect of any retainer be communicated to the client in writing when the total cost to the client of the representation is more than $1000. SCR 20:1.0(mm) prohibits lawyers from billing against retainers for fees or costs at any time, and subjects retainers to the requirements of SCR 20:1.5 and SCR 20:1.16(d).
- Because both advanced fees and retainers must be earned as required by SCR 20:1.16(d), and unforeseen circumstances may prevent such fees from being earned, a lawyer may not describe such fees as 'nonrefundable' in communications with clients, including fee agreements."

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- "In dealing with current and prospective clients, lawyers must be truthful. This stems from the lawyer's obligation under SCR 20:8.4(c) not to engage in any conduct involving dishonesty, deceit or misrepresentation.
  - Misrepresentation is defined by SCR 20:1.0(h) as follows: 'Misrepresentation' denotes communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist.
- Lawyers are also prohibited by SCR 20:7.1(a) from engaging in misleading communications about their services.
- Based on the forgoing, the Committee does not believe that it would be accurate to term either an availability retainer or advanced fee as nonrefundable."

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Revised Wisconsin Ethics Opinion E-93-4: Nonrefundable Retainers and Advanced Fees - Example

"Individual believes that he is under investigation by governmental authorities and believes that the investigation may result in charges being issued. In the event such charges are issued, Individual wants to ensure that Lawyer, an experienced and well-respected litigator, is available to represent Individual, but does not wish to be represented by Lawyer in connection with the investigation. Individual pays Lawyer a retainer, which causes Lawyer to regard Individual as a client and avoid conflicts, thereby ensuring that if charges are issued, Lawyer will be able to undertake representation of Individual. Lawyer performs no legal services for Individual while the investigation is pending. When charges are issued, Lawyer charges Individual an advanced fee for the legal services that Lawyer anticipates providing in defense of Individual. Lawyer then represents Individual in connection with the charges. Note that SCR 20:1.0(mm) prohibits applying the retainer towards the amount of the advanced fees."

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Summary

Do Not Describe Retainers or Advanced Fees as "Nonrefundable" - It's not accurate to describe those fees as nonrefundable, and could lead to an ethics complaint for misrepresentation and ultimately failing to return money to the client.

Contact Ethics Hotline for Advice - If you are in a situation where you are unsure the amount of money you should refund to the client when nonrefundable retainers or advances fees are being disputed, contact the Ethics Hotline (800-254-9154) for free advice.

Review Current Retainers and Engagement Letters – Take a look at the current writings that you provide to your clients. Ensure proper classifications for retainers, advanced fees, and another other type of agreement you commonly use in your law practice.

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Fees and Surcharges on Legal Fees & Costs

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Overview of Adding Credit Card Fees to Client Bills – Prior to July 1, 2023

- Simply put, Wisconsin Supreme Court Rules only prohibit attorneys from adding credit card fees to client bills for payments processed through the **E-Banking Trust Account**, unless an exception applies.
- If you are not required to place the client payment into an E-Banking Trust Account and can instead route the payment through your operating account or All-in-One Trust Account, Wisconsin Supreme Court Rules do not prohibit you from adding credit card fees to client bills, provided: the client agrees in advance, the passing-on of fees does not violate the terms of service for the issuer, and the practice complies with any relevant state and federal laws and regulations.
- Sources: E-Banking Account, Operating Account, & Alternative to E-Banking Trust Account.

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Overview of Adding Credit Card Fees to Client Bills – Effective July 1, 2023

A **Comment** to Supreme Court Rule 20:1.15 (f) (1) is created to read:

- **Costs associated with electronic payments**
  Electronic payment systems, such as credit cards, routinely impose charges on vendors when a customer pays for goods or services. That charge may be deducted directly from the customer's payment. Vendors who accept credit cards routinely credit the customer with the full amount of the payment and absorb the charges. Before holding a client responsible for these charges, a lawyer should disclose this practice to the client in advance, and assure that the client understands and consents to the charges. This disclosure should be in writing if necessary to comply with SCR 20:1.5(b). In addition, the lawyer should ensure that holding the client responsible for transaction costs does not violate the terms of service of the payment system provider or other law.
- Essentially, the new rule permits adding of fees to client bills, provided the client understands and consents to the charges and the charges do not violate contractual or other laws.

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Common Scenarios That Are Not Allowed – Prior to July 1, 2023

- Using a business account as a "pass-through account" to process electronic payments that are required to be placed into an E-Banking Trust Account or an All-In-One Trust Account, and then placing those funds into a traditional IOLTA account.
- Placing a payment from a client that includes advanced fees that are subject to the alternative protection provisions of SCR 20:1.5(g) and advanced costs into a business account, by assuming incidental advanced costs do not need to be placed into trust.
- Electronically transferring funds from the traditional IOLTA account.

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Common Scenario Allowed – Effective July 1, 2023

- You may use a business account as a temporary "pass-through account" for credit card or electronic funds transfer payments of advanced legal fees and expenses payments, so long as such funds are transferred promptly, and no later than two business days following receipt, into a client trust account (unless lawyer has any reason to suspect the funds will not be successfully transferred within two business days of receipt).
- Note the new change applies only to advanced legal fees or advanced costs paid by credit card or electronic funds transfer.
- Effective July 1, 2023, electronically transferring funds from the traditional IOLTA account is permitted.

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Referral Fees

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Shifting Gears to Referral Fees

- Difference between Reciprocal Referral Agreement (nothing of value exchanged – unless exception applies) and Division of Labor (referral fees are received).
- Key part is understanding the differences and making sure that you comply with Supreme Court Rules regarding these type of arrangements.

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SCR 20:1.5(e) applies where there is a division of fees between attorneys who are not in the same firm.

"[e] division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client."

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Wisconsin Formal Ethics Opinion EF-10-02: Ethical Responsibility of Lawyers When Referral Fees are Received

- "ABA Model Rule 1.5(e)(3), which governs true referral fees under the ABA Model Rules … mandates that lawyers assume **'joint responsibility'** for the matter when a referral fee is paid." (Emphasis Added)
- The committee also opines that "joint responsibility for the representation" implies that both the referring lawyer and the lawyer to whom the matter was referred must reach a common understanding of their respective joint responsibilities as well as their individual responsibilities to the client.
- Referring attorney must maintain contact with the progress of a matter. In addition, the referring lawyer
  1. must refer legal matters only to lawyers who are competent to handle the matter in question;
  2. must remain sufficiently aware of the performance of the lawyer to whom the matter was referred to ascertain if that lawyer's handling of the matter conforms to the Rules of Professional Conduct; and
  3. must assume financial responsibility for the matter though this may be secondary to the financial responsibility assumed by the lawyer to whom the matter was referred.

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Reciprocal Referral Agreement With Another Lawyer or Nonlawyer SCR 20:7.2(b)(4)
SCR 20:7.2(b) – A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(1) pay the reasonable cost of advertisements or communications permitted by this rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with SCR 20:1.17; and

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(4) refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral arrangement is not exclusive;

(ii) the client gives informed consent;

(iii) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(iv) information relating to representation of a client is protected as required by SCR 20:1.6.

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Stated Differently: Things You Can Do

1. Pay the reasonable costs of advertisements or communications;
2. Pay usual charges of a legal services plan on not-for-profit or qualified lawyer referral services;
3. Pay for a law practice pursuant to SCR 20:1.17;
4. Refer clients to lawyer or nonlawyer pursuant to a reciprocal referral agreement, provided:
   a. The reciprocal referral agreement is not exclusive;
   b. Client gives informed consent;
   c. No interference with professional judgment of lawyer; and
   d. Information relating to representation is protected by SCR 20:1.6.

Practice Tip: If you want to avoid requirements of Part 4, do not enter into a reciprocal referral agreement.

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What's the Difference Between Referral Agreement & Division of Fees?

- The Reciprocal Referral Agreement Rule (SCR 20:7.2(b)) specifically prohibits the exchange of value for recommending the attorney's service, unless an exception applies.

- The Division of Fees between Lawyers Not in the Same Firm (SCR 20:1.5(e) specifically allows for division of fees, if the total fee is reasonable, in three specific limited circumstances:
  1. The division is based on services rendered, the client must be advised of and does not object to the participation of all lawyers involved, and the client is informed if the fee will increase as a result; or
  2. The lawyers previously practiced together and payment pursuant to separation agreement; or
  3. The division is pursuant to a referral agreement in which each lawyer assumes ethical responsibility for the matter, the client is informed of the arrangement and each share, whether the overall fee will increase, and client consents in a writing signed by the client.

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STATE BAR OF WISCONSIN

The Wisconsin Supreme Court supervises the practice of law in Wisconsin. In doing so, it has established rules governing lawyer conduct, the Rules of Professional Conduct for Attorneys.

As a State Bar member, you have access to guidance and help in resolving questions regarding Wisconsin's Rules of Professional Conduct for Attorneys.

There are a number of ways in which you can receive ethics guidance through the State Bar.

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Questions

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